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CONTENTS

Sr. No.	TITLE & NAME OF THE AUTHOR (S)	Page No.
1.	SYNERGIES IN BUSINESS VALUATION <i>DR. REVATHI IYER</i>	1
2.	A STUDY ON THE VARIOUS ISSUES OF TRAINING OF ASSAM POLICE PERSONNEL <i>DR. SANJIB RAJ & DR. AJANTA B. RAJKONWAR</i>	5
3.	A STUDY OF GREEN BANKING INITIATIVES IN SELECTED PUBLIC AND PRIVATE SECTOR BANKS IN INDIA <i>KARTHIK & DR. D.V. HONAGANAVAR</i>	11
4.	STUDY OF CO-OPERATION IN ECONOMIC DEVELOPMENT AND PROCEDURE OF SELF HELP GROUPS IN CHHATTISGARH STATE <i>RANJIT KUMAR & DR. OP CHANDRAKAR</i>	15
5.	OCTAPACE CULTURE: A PREDICTOR OF FACULTY PERFORMANCE <i>SUVARNA LAPALIKAR & DR. KAMLESH BHANDARI</i>	18
6.	INFRASTRUCTURE MANAGEMENT IN IT PARKS WITH SPECIAL REFERENCE TO TECHNOPARK, TRIVANDRUM <i>R. JOLLY ROSALIND SILVA & DR. A. MORARJI</i>	22
7.	A DESCRIPTIVE STUDY ON REASONS FOR EMPLOYEE ATTRITION BEHAVIOR IN HOTELS AND RESTAURANTS OF LUCKNOW CITY: OWNERS/ MANAGERS PERSPECTIVE <i>DR. GAURAV PANDE & LEON CHUNG</i>	25
8.	PURCHASING BEHAVIOUR OF RURAL CONSUMERS IN SOUTH INDIA WITH REFERENCE TO FMCG <i>DR. K. VENKATA JANARDHAN RAO & SRIVALLI J</i>	30
9.	PRICE BEHAVIOUR OF GOLD AND SILVER AT MCX WITH SPECIAL REFERENCE TO GOODWILL COMMODITIES, PUDUCHERRY <i>R. MENAHA & DR. S. POUGAJENDY</i>	33
10.	CONSTRUCTION OF OPTIMAL EQUITY PORTFOLIO WITH APPLICATION OF SHARPE SINGLE INDEX MODEL: A COMPARATIVE STUDY ON FMCG AND AUTO SECTORS <i>T. MALLIKHARJUNARAO & DR. S. ANITHADEVI</i>	37
11.	ADVERTISEMENTS SHOWING CHILDREN: AN ETHICAL PERSPECTIVE <i>DR. D. MEHTA & DR. NAVEEN K MEHTA</i>	44
12.	THE EFFECTS OF HUMAN RESOURCE OUTSOURCING ON ORGANISATIONAL PERFORMANCE (A CASE STUDY OF POST BANK KENYA LTD.) <i>CLIFFORD G. MACHOGU, JOHN WEKESA WANJALA, RICHARD JUMA OTIENO & JAMES KIBE</i>	47
13.	AN EXTENDED STUDY ON THE OFFENCES UNDER NEGOTIABLE INSTRUMENTS ACT WITH SPECIAL REFERENCE TO CHEQUE BOUNCING <i>DR. I. FRANCIS GNANASEKAR & S.M.MOHAMED MISKEEN</i>	52
14.	CRITICAL EVALUATION OF THE RECRUITMENT PROCESS OF BUSINESS DEVELOPMENT EXECUTIVE AT PRIVATE SECTOR BANK, PUNE <i>SHIKHA SINDHU & NATASHAA KAUL</i>	55
15.	DEVIATIONS OF INVESTMENT INSTRUMENTS PORTFOLIO FROM IRDA GUIDELINES IN LIFE INSURANCE <i>MONA JINDAL</i>	60
16.	DEMONETIZATION AND ITS IMPACT <i>DR. YASHODA</i>	65
17.	PROFITABILITY AND LIQUIDITY RATIOS ANALYSIS: AN EMPIRICAL STUDY OF PANYAM CEMENTS & MINERAL INDUSTRIES LTD. <i>B R MURTHY, M KALPANA. & S PURNACHANDRA RAO</i>	67
18.	MARINE TRADE MEDIATOR'S SATISFACTION TOWARDS PRIVATE CONTAINER FREIGHT STATION SERVICES IN TUTICORIN <i>SENTHIL KUMAR S & DR. JEBA PRIYA</i>	70
19.	A STUDY ON SATISFACTION OF BANKING CUSTOMERS TOWARDS ONLINE SERVICES <i>HELNA K PAUL, NOUFAL C K & FASNA P P</i>	77
20.	FINANCIAL INCLUSION Vs. FINANCIAL EXCLUSION: AN OVERVIEW <i>LAVANYA K.N.</i>	80
	REQUEST FOR FEEDBACK & DISCLAIMER	82

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AN EXTENDED STUDY ON THE OFFENCES UNDER NEGOTIABLE INSTRUMENTS ACT WITH SPECIAL REFERENCE TO CHEQUE BOUNCING

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ABSTRACT

A legal fiction has been created by which, a civil wrong, viz., cheque bouncing (unpaid cheque) has been made a criminal offence, by an amendment, made in 1988 in the Negotiable Instruments Act 1881. Section 138 of the said Act mandates severe punishment of imprisonment up to two years or fine of double the amount of cheque amount or both., this is a penalty payable by the defaulter in addition to the debt payable. However, the law provides adequate protection to honest persons who inadvertently or negligently issued cheques without ensuring sufficient credit balance in his/her bank account. On the other hand, an unscrupulous person, who does not consider dishonour of cheque, is a dishonour to his credibility. In this article, the researcher have analysed and presented the important aspects of who one is legally competent persons to file a criminal complaint against the person of the offence one committed u/s 138 of the Act.

KEYWORDS

N.I. Act, dishonour of cheques.

INTRODUCTION

Negotiable Instruments Act 1881 (hereinafter mentioned as N.I. Act) was amended in 1988, and a new chapter XVII was included with new sections 138 to 142. The object and purpose of bringing new provisions in the Act was to make the persons dealing in commercial transactions work with a sense of responsibility and for that reason, under the amended provisions of law, a default on their part, would make them face criminal charges. The object and intention of the new provisions, in particular sections 138 to 142 of the N.I. Act, cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties.

Indian parliament has enacted the aforesaid provisions in order to restore the credibility of cheques as a trustworthy substitute for cash payment. The remedy available in civil courts is a long drawn process and an unscrupulous and litigant drawer would deliberately manipulate various pleas to defeat/delay the genuine claims of the creditor/lender.

The new provisions viz. section 138 to 142 of N.I. Act that make a civil wrong deemed to be a criminal offence, "*sans mensrea*" has been challenged as unconstitutional being violation of Articles 14, 19, 20 and 21 of the Constitution. This was rejected by the Hon'ble Delhi Court saying "only cheques have been chosen under the purview of section 138. This law has been necessitated because of the malpractices prevalent in our society. It may not be stated that the liberty of a person was being curtailed by an arbitrary procedure or that such a procedure was violative of Article 21 of the constitution." *Rajendra Steel Ltd., vs. Union of India (2000) 100 Comp. Cases 274 Delhi.* The law also provides compounding of offence u/s 147 of the N.I. Act, as a further concession to honest drawers.

After the amendment made in 1988, with effect from 01.04.1989, dishonour of cheque shall, subject to complying with the provisions of the act, be deemed to be a criminal offence u/s 138 of N.I. Act - which was only a civil wrong previously. When a cheque presented for payment is returned unpaid by the drawee bank for either of the following two specific reasons viz., (i) the amount of money standing to the credit of drawer's a/c is insufficient to honour the cheque or (ii) the cheque amount exceeds the amount arranged by the drawer to be paid from that account, by any arrangement with the drawee bank, like overdraft, the drawer shall be deemed to have committed an offence punishable with imprisonment which may extend to two years or with fine which may extend to twice the amount of the cheque or with both.

WHEN CAUSE OF ACTION ARISES TO FILE CRIMINAL COMPLAINT U/S 142 OF N.I. ACT

Law gives adequate safeguards to honest people who inadvertently or negligently issued cheques, without verifying the funds available in his or his company's bank account. Before initiating criminal prosecution u/s 142 of the N.I. Act, law mandates the complainant (i) to make a demand by giving a notice in writing to the drawer of the cheque to pay the cheque amount (ii) such notice shall be given within thirty (30) days of the receipt of information from the drawee bank- sec. 138 proviso (b). (iii) If, even after receiving the notice, the drawer fails to pay the cheque amount within fifteen (15) days from receipt of such notice, cause of action arises to set in motion of criminal proceedings before the competent court - proviso (c) to section 138 N.I. Act.

WHO CAN FILE CRIMINAL COMPLAINT U/S 142 OF N.I. ACT

Sec.142 of the N.I. Act reads: Cognizance of offences. – Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), -

- (a) No court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;
 - (b) Such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138: [Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period;]
- The following conditions shall be fulfilled for taking cognizance of the complaint:
- (i) the complaint must be made in writing clearly mentioning the offence committed u/s 138 and name of the person responsible for the offence. Mere bald allegation in the complaint is not sufficient.
 - (ii) the complaint is duly signed and verified only by the payee of the cheque or the holder in due course.,
 - (iii) the allegation made in the complaint shall make out a prima facie case warranting action u/s 142.,
 - (iv) the complaint is made within one month of the date on which cause of action accrued i.e on the expiry of fifteen days of receipt of notice, provided under proviso (c) to section 138.,
 - (v) the complaint is made in a court not inferior that of a Metropolitan Magistrate or a Judicial Magistrate of the first class.,

Filing of criminal complaint within the time stipulated in sec. 142 is very essential. When the grace period given in proviso (c) to sec. 138 expired on 13.03.2017, the complaint should be filed within a month i.e., on or before 12.04.2017.

WHETHER A POWER OF ATTORNEY OF THE PAYEE/HOLDER IN DUE COURSE, CAN FILE COMPLIANT U/S 142 OF N.I. ACT?

Law requires that a complaint for offence committed u/s 138 should be filed only by the payee or holder in due course. Where circumstances warrant a complaint can be filed u/s 142 before the competent Magistrate court by the power of attorney of the complainant, provided.,

- (i) "Filing of complaint petition under section 138 of the N.I. Act through power of attorney, holding proper authority, is perfectly legal and competent.,
- (ii) The power of attorney holder can depose and verify on oath before the court in order to prove the contents of the complaint provided, the power of attorney holder must have witnessed the transaction as an agent of the payee/ holder in due course or possesses knowledge regarding the said transaction.
- (iii) It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint. If the power of attorney holder has no knowledge of the transaction, he cannot depose or examined as a witness in the case – *Janaki Vasudeo Bhojwanivs Industrial Bank Ltd AIR 2005 SC 439*.
- (iv) In the light of section 145 of the N.I. Act it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under section 138 of the N.I Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the court, nor to examine the complainant or his witness upon oath for taking the decision whether or not to issue process on the complaint under section 138 of the N.I. Act.
- (v) The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself may be cancelled and be given to another." *A.C.Narayananv.State of Maharashtra SCC pp.808-809, para 33 cited in (2015)12 SCC 203 para 15 page 313*.
- (vi) The power of attorney cannot step into shoes of the complainant and depose on those fact which are not in his personal knowledge.
- (vii) The complaint made u/s 142 must be signed and verified by the complainant – not by the power of attorney., complaint signed and verified by the power of attorney cannot be regarded as valid and complete - *Anirudhan v. Philip Jacob 2006 CrL. L.J. 3866 Ker*.
- (viii) The power of attorney cannot file a complaint in his own name as if he was the complainant, but he can initiate criminal proceedings on behalf of the principal.

"Keeping in mind various situations like inability as a result of sickness, old age or death or staying abroad of the payee or holder in due course to appear and depose before the court in order to prove the complaint, it is permissible for the power- of - attorney holder or for the legal representative(s) to file a complaint and/or continue with the pending criminal complaint for and on behalf of payee or holder in due course. However, it is expected that such power-of-attorney holder or legal representative(s) should have knowledge about the transaction in question so as to able to bring on record the truth of the grievance/offence, otherwise, no criminal justice could be achieved in case payee or holder in due course, is unable to sign, appear or depose as complainant due to above quoted reasons. Keeping these aspects in mind, this Court had taken the view that if complaint is filed for and on behalf of payee or holder in due course, that is good enough compliance with Section 142 of the N.I Act." – *A.C.Narayanan V. State of Maharashtra (2015) 12 SCC Page 211 Para 26*.

WHETHER LEGAL HEIR OF PAYEE/HOLDER IN DUE COURSE CAN FILE THE COMPLAINT U/S 142 OF N.I. ACT?

If, during the pendency of the proceedings, the complainant died, his/her legal heirs can continue the prosecution with leave of court. When the payee/holder in due course is alive his/her legal heir can file the complaint only if the legal heir is authorised with a power of attorney. But if the drawer of the cheque is dead then the criminal proceedings get abated, drawer's legal representative cannot be proceeded against u/s 142 of N.I. Act. But the payee is not deprived of civil remedy against the legal heirs of the drawer died intestate.

WHETHER A COMPANY CAN FILE A COMPLAINT U/S 142 OF N.I. ACT.

A complaint for offence committed u/s 138 of N.I. Act can be filed only by the payee or holder in due course. If the payee is a company the complaint shall be filed in the name of the company duly verified and signed by the authorised person. A company is a legal person but not a living person. It can be represented by any person, a director, or employee, or manager provided he/she is duly authorised by the Board by proper resolution or by a power of attorney. The only condition for filing the complaint u/s 142 N.I. Act is that the complaint must be in the name of and by the payee or the holder in due course and there are prima facie material for maintaining the complaint. When this condition is satisfied the Magistrate cannot reject the complaint.

A complaint u/s 142 of N.I. Act must be filed only by a living person who is capable of making a physical presence in the Court. When the complaint u/s 142 is made in the name of a company it must necessarily be represented by a natural person. (*Associated Cement Co. Ltd., v. Keshavanand (1998) 1 SCC 687*)

Sec. 200 Criminal Procedure Code mandates examination of the complainant. If the complainant is a company, only the authorised person can represent the company. As a result,

"the company becomes a *de jure* complainant and it imposes or other representative representing it in the criminal proceedings becomes the *de facto* complainant" – *National Small Industries Corporation Ltd., v. State (2009) Cr. LJ 1299 SC*.

Board of Directors have full authority by proper resolution to nominate/authorise any employee, or director or manager to represent the company who is the payee in the criminal proceedings. But such person should have full knowledge about the transaction contemplated in section 138 of N.I. Act. But a director of the company alone, in his capacity as a director, cannot represent the company without proper resolution by the Board.

COMPLAINT FILED BY PARTNERSHIP FIRM

Explanation to section 141 of N.I. Act says " Company means any body corporate and includes a firm or other association of individuals.," Hence conditions apply to company for filing the complaint will apply to partnership firm also. A partnership firm can only file a complaint u/s 142 N.I. Act through authorised agent. A partner or Manager or an employee of the firm can file the complaint only representing the firm and not in his individual capacity. The complaint must be made in the name of the payee firm. When the firm is dissolved during the pendency of criminal suit filed u/s 142, the partner who has been authorised to file the complaint, can continue the proceedings with the leave of the court. *Negotiable Instruments Act, By Bashyam and Adiga, 19th Edition, page 996-997. KasargodeSelf Employees Financing Co v. State of Kerala (2009) Cr. LJ. 305 Ker*.

WHERE THE COMPLAINANT IS A PROPRIETARY CONCERN

If the payee or holder in due course is a proprietary concern, the complaint can be filed,

- i. by the proprietor of the proprietary concern, describing himself as the sole proprietor.,
- ii. the proprietary concern, describing that it is represented by the sole proprietor., and
- iii. the proprietor or the proprietary concern may also be represented by a power of attorney holder under a power of attorney executed by the sole proprietor. (*2015) 12 SCC 203 para 30 page 213*.

CONCLUSION

The averments made in the complaint filed u/s 142 of N.I. Act must be full and complete. The averments must disclose the name of the drawer who is the main accused, the cheque amount, fact that the cheque was presented within the validity period, date of dishonour intimation received by the payee, date of service of notice under proviso (b) to section 138, date on which cause of action arises proviso (c) to section 138, reason for dishonour i.e. for insufficient funds in drawee's bank account or account balance exceeded cheque amount. Dishonour of cheque for any other reason will not attract section 138 of the N.I. Act. If the drawer is a company or a firm or a society or an association or any other non-living person, name of the specific person responsible for the offence, and other ingredients

to be disclosed in the complaint providing that would give prima facie evidence to take cognizance of the offence by the court. The Hon'ble Kerala High Court quashed the complaint because one of the ingredients sufficient funds not available in the account of the drawer to honour the cheque, is not provided in the complaint - *Ashok and Another v. Vasudevan Moosad (1995)82 Comp. Case 665 ker. Page 670, para d & e.*

Notwithstanding, dishonour of cheque was made a criminal offence warranting imprisonment and fine, with effect from 01.04.1989, the incidence of dishonour of cheques did not come down. The Government of India has claimed that around 18 lakhs cases (in 2015) filed u/s 142 of N.I. Act are pending disposal in various Indian courts.

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