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Legal Ramifications of – A New Category of Offence - Bouncing of Cheque

Dr. Siddh Nath[1]

I. Introduction:

According to Section 13 of the *Negotiable Instrument Act, 1881* a 'negotiable instrument' means 'promissory note', 'bill of exchange' and 'cheque' payable either on order or to bearer and a cheque is the most important and popular instrument out of three which is issued only by the bank in which the drawer has his account. Once the cheque is duly presented before the bank for payment then bank is generally bound to make payment. But occasionally in certain circumstances the bank refuses to make payment. When the banker to whom cheque is drawn fails and neglects to pay the amount according to the apparent tenor when it is presented to the bank on the due date, it is called dishonouring the cheque. The cheque on being dishonoured loses its negotiability[2]. Therefore, if a cheque is dishonoured then it has been made necessary to give notice to the drawer with regard to the dishonour of cheque but it is not necessary to be noted and protested by public notary like a promissory note and bill of exchange[3]. A cheque may be dishonoured by a bank on various grounds some of which, as collected from the State Bank of India, are : (i) Effects not yet cleared please present again, (ii) Not arranged for, (iii) Payee's endorsement required, (iv) Payees endorsement irregular, (v) Refer to drawer, (vi) Drawer's signature differs, (vii) Endorsement required bank's guarantee, (viii) Alteration requires full signature, (ix) Cheque is post dated, (x) Cheque is out of date, (xi) Amount in words and figures differs, (xii) Crossed cheque; must be presented through a bank, (xiii) No advice, (xiv) Payment stopped by the drawer, (xv) Payees separate discharge to the bank required, (xvi) Not drawn on us, (xvii) Insufficient fund, and (xviii) (any other reason) .....The bank is ordinarily not held liable for the non-payment or dishonouring the cheque for the reasons stated above and the drawer of the cheque may be made liable to the payee or the holder in due course of the cheque in case the cheque is dishonoured due to the fault or negligence the drawer. In most of the cases such liability of the drawer is generally of civil nature except in certain circumstances he could be held liable under *Indian Penal Code, 1860* for the offences regarding the dishonour of cheque. However, in 1988 an attempt was made by the Indian Parliament by making provisions in the *Negotiable Instruments Act, 1881*, itself to make the drawer criminally liable in the case of dishonour of cheque by the bank due to 'insufficient

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1 Associate Professor, Faculty of Law, University of Allahabad, Allahabad.

2 Sukanraj Khimraja v. N. Raja Gopalan, (1989) I LW 401.

3 Negotiable Instrument Act, 1881, Sections 99 & 100.

funds' or for the 'want of sufficient funds' in the account of the drawer. In common parlance, when the cheque is dishonoured due to the insufficiency of funds / for want of sufficient funds in the account of the drawer, such dishonour is known as 'bouncing of cheque'. Now such dishonor of cheque i.e. the bouncing of cheque, has also been made an offence and thus, in addition to the imposition of civil liability, criminal liability is also imposed upon the drawer by the insertion of a new Chapter 17 (Section 138 to 142) in the *Negotiable Instrument Act, 1881* by the *Banking Public Financial Institutions and Negotiable Instrument Laws (Amendment) Act, 1988* (66 of 1988) which came into force on 01 Apr, 1989. Further by the *Negotiable instruments (Amendment and miscellaneous Provisions) Act, 2002*, which came into force on 06 Feb 2003, some more sections (Section 143 to 147) had been added in this Chapter. Now such dishonour of cheque / bouncing of cheque can result into an imprisonment for a tern which may extend to two years or with the fine which may extend to twice of the amount of cheque or with both. In this article, a modest attempt has been made to examine the various ramifications of the bouncing of a cheque, i.e., 'when a cheque is returned by the bank unpaid either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank'.

II. Dishonour or Bouncing of Cheque – Declared as an Offence:

The recently inserted Chapter 17 of the *Negotiable Instruments Act, 1881*(hereinafter as to the *Act of 1881*) entitled 'Of Penalties in case of Dishonour of Certain Cheques for Insufficiency of Funds in the Accounts' contains ten Sections - Sections 138 to Sections 147. section 138 provides that where a cheque is drawn for the discharge of any debt or legal liability and it is returned unpaid by the bank due to the insufficiency of funds in the drawer's account or the amount of the cheque exceeds the amount to be arranged by the bank and the drawer fails to pay the amount of the dishonoured cheque within the time prescribed by law then the drawer will be criminally liable exposed to punishment or fine or both.

III. Requisites for the Criminal Liability of the Drawer in Case of the Bouncing of Cheque:

As has been pointed out in the beginning, there may be several reasons for dishonouring a cheque but in every case the drawer has not been made criminally liable. The newly inserted Section 138 of the *Act of 1881* makes the drawer criminally liable only when the cheque is 'bounced' which means the cheque is returned / dishonoured by the bank due to insufficient funds in the drawer's account. A complaint made under Section 138 of the *Act of 1881*, must comply with the following requisites:

III. I. The cheque was drawn from the account of the drawer for discharging the whole or in part of any debt or other liability which presupposes that the debt was a legally enforceable one,

III. II. Cheque should be presented by the payee or the holder in due course of the cheque to the drawer's bank within six months from the date on which the cheque was drawn or within the period of its validity, whichever is earlier,

III. III. Cheque was returned / dishonoured unpaid on account of the 'insufficiency of funds' in the drawer's account or which 'exceeds the amount arranged to be paid in that account',

III. IV. The payee or the holder in due course of the cheque must issue notice within 15 days of the date of receipt of the information from the bank regarding the dishonour,

III. V. The drawer has failed to make payment within 15 days from the date of the receipt of the notice sent by the payee or the holder in due course, and

III. VI. The complaint must be filed by the payee or the holder in due course of the cheque within one month after the expiry of 15 days from the date of the receipt of the notice by the drawer unless specifically permitted by the court on its satisfaction regarding the sufficient cause of the delay.

It emerges from the above that for a dishonoured / bounced cheque, the drawer will be liable for conviction under Section 138 of the *Act of 1881* only if the demand made by the payee or the holder in due course of the cheque is not satisfied by the drawer within 15 days of the receipt of the notice; however, this is without prejudice to any other provisions of the Act. If the amount of the cheque is paid within the above period or before the complaint is filed, the legal liability under Section 138 ceases and for the recovery of other demands as compensation, costs, and interest etc., a civil proceeding will lie. Therefore, if in a notice any other sum is indicated in addition to the said amount, the notice cannot be defaulted[4]. Let us elaborate some of the above stated requisites.

IV. Cheque Issued for a Legally Enforceable Debt or Liability:

The first and most important requisite for filing a complaint under section 138 of the *Act of 1881* is that the dishonoured / bounced cheque must be issued for the discharge of 'legally enforceable debt or liability'. In this connection, the presumption of law is that, unless it is rebutted, the dishonoured / bounced cheque had been issued for the discharge of a legally enforceable debt or liability. It may be mentioned that a cheque can be issued bearing the current date, future date

4 Suman Sethi v. Ajay K. Churiwal, AIR 2000 SC 828.

(known as post-dated) or may be undated. If a post-dated cheque is issued, it should also be presented for payment within six months from the date of containing it as issuing date. Post- dated cheque is deemed to have been drawn on the date it bears and six months period for the purposes of Section 138 would be reckoned from that date[5].

A cheque should not be issued for a larger amount than the amount which is legally to be discharged whether cheque is post - dated or not. In case the cheque is issued for a larger amount than the sum legally due, a complaint under Section 138 is not maintainable in case the cheque is dishonoured / bounced. However, if the excess amount is in the form of interest to be accrued in future then the liability would arise. For example, in a case when the dishonoured / bounced cheque of Rs. One lac was issued by the accused for the discharge of liability of Rs. Eighty Thousand and it was proved by the document on record that cheque was for the transaction which had taken place two years back and the accused had agreed to bear interest on principal amount which amounted to Rs. Twenty Thousand, the complaint was held maintainable[6].

As far as the undated cheque is concerned, it is also valid only for six months from the date filled up by the holder as issuing date. On the other hand, if the cheque has not been handed over with the intention of making it as an instrument of immediate negotiation to discharge a subsisting liability or debt, it does not come in the purview of Section 138[7]. On this point, a case decided by the Madras High Court[8] may be cited as an illustration in which one party to the contract had obtained a signed undated cheque for Rs. 35 lacs as security. As dispute arose between the parties, the cheque was then utilized by the complainant to resort to Section 138 in a date convenient to him. But it was proved that no debt existed in that contract at the time of presenting the cheque for payment. Therefore, the complaint filed under Section 138 was held as not maintainable. It is not necessary that complainant should be a money lender. Where the main source of income of the complainant was his salary and not interest amount he had earned on moneys which he advanced to his friends, who were in need of money, it was held that the amount in question lent to the accused through his friends is legally recoverable[9]. A complaint is still maintainable under Section 138 of the *Act of 1881* whether the cheque was drawn by the business firm or not[10].

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5 Sivlingam v. A. V. Chandraiyar, (1996) 86 Comp Cas 167. (Now the validity of a post dated cheque is 3 months)

6 P. V. Karnippa v. P. N.Suprasidhan, (2002) Cri L J 4803.

7 M\s Balaji Seafoods Exports (India) Ltd. V. Mac Industries, (2001) Bank CLR 564

8 *Ibid*, at pp.568, 569.

9 Ratakonda Raghu Naidu v. Kolta Sivram Prasad, ii (2004) BC 269 (AP).

10 Babu v. Suresh, (2004) 21 AI C 411 (Ker)

V. Presumption of Law in Favour of Payee as to the Existence of Debt or Other Liability:

It is required by Section 138 of the *Act of 1881* that the cheque must have been drawn for the discharge, in whole or in part, of any debt or other liability. In order to make the drawer liable, Section 139 declares a presumption of law in favour of the payee or the holder in due course of the dishonoured / bounced cheque that he has received the cheque for the discharge of a legal debt or liability. It means that the cheque was issued for the discharge of an antecedent liability and that presumption can be rebutted only by the person who has drawn the cheque. The aforesaid presumption is in favour of the holder of cheque. It is not mentioned in the section that the said presumption would operate only against the drawer. After all a presumption is only for casting the burden of proof as to who should advance evidence in the case. It is open to the accused to adduce evidence to rebut the said presumption. In a prosecution where both the drawer company and its office bearers are arrayed as accused and if the drawer company does not choose to adduce any rebuttal evidence it is open to the other office bearers to adduce such rebuttal evidence. If that be so, even in a case where the drawer company is not made an accused but the office bearers of the company alone are made the accused, such office bearers accused are well within their rights to adduce rebuttal evidence to establish that the company did not issue the cheque towards any antecedent liability[11]. In another case, it was alleged that a cheque was drawn by the accused to discharge the sum borrowed by him from the complainant and it was dishonoured but the admission of the accused was that he had signed a blank cheque and given the same to the father in law of the complainant who did not return the cheque even though the entire sum was paid. It was held that the burden of proof shifted on the accused that he had issued cheque to the father in law and not to the complainant. In the absence of such proof, conviction of accused was held proper[12]. Hence, where the cheque is in the possession of the complainant, presumption under Section 139 of the *Act of 1881* could be drawn that complainant had discharged his initial burden of proving the existing of an enforceable debt and burden to prove that the said cheque was not issued against a legally enforceable debt is shifted on the accused. Consequently, the acquittal of accused has been held not proper in the absence of rebuttal of presumption by him[13]. Generally, the bank on whom cheque is issued cannot be the payee or holder in due course unless the cheque has been drawn in favor of the bank or the bank has become the holder in due course[14].

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11 Anil Hada v. Indian Acrylic, Ltd. AIR 2000 SC 145.

12 L. Mohan v. V. Mohan Naidu, (2004) Cri LJ 3177

13 Babulal Nanimal Jain v. Khimji Ratanmadhia, (1999) Bank J. 58 (Bom).

14 Panjab National Bank v. Himgiri, (2004) BC 12 (P&H).

VI. Is the Endorsement by the Bank – 'Returned Due to Insufficient Funds' or Alike - Mandatory at the Time of Returning the Cheque Unpaid:

Section 138 was incorporated in the *Act of 1881* by the Legislature with a view 'to encourage the culture of use of cheques and enhancing the credibility of the instrument'[15]. The drawer of the cheque was sought to be made criminally liable in the case of bouncing of cheque due to insufficiency of funds in the account or for the reason that the amount of the cheque exceeded the arrangement made by the drawer with the bank. Generally, bank returning the cheque unpaid avoids making an endorsement like 'insufficient funds' or 'the amount exceeds the arrangement' because such endorsement depicts the financial position or soundness of the drawer and thus may adversely affect the reputation of the drawer. Therefore, even in such cases, the banks usually make an endorsement as 'Refer to Drawer'. A question arises that if the banker refrains to making an endorsement like 'insufficient funds' or 'the amount exceeds the arrangement' on the plea that such endorsements are derogatory to the drawer, would not the object of the legislation be defeated because it would be difficult to file a complaint under Section 138? It has been a question of dispute whether a complaint filed under Section 138 should be thrown out by the courts at the threshold of the banker's endorsement, while returning the cheque anything other than that the amount of money standing to credit of the account of the drawer is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank. It has been held by the courts that if the circumstances contemplated by Section 138 are made out, court has to examine whether the return of cheque is on the ground of insufficiency of funds belonging to the drawer or not and this can be done even without the reference to the endorsement made by the banker. Endorsement like:- 'refer to drawer', 'account closed', 'payment has been stopped' - made by the banker at the time of returning the cheque unpaid may be considered having the effect of proving that the cheque has been bounced and if the bouncing of cheque was on account of insufficiency of funds belonging to the drawer then the drawer will be subjecting himself to prosecution under Section 138[16]. However, it would have been better if a duty is imposed upon the banker to mention the correct reason for dishonouring the cheque and incase it is found that the cheque was returned due to the reason inviting action under Section 138 but some other reason is mentioned, then the bank should also be made liable for giving false information. However, such mandatory requirement would create another debate as to whether the bank is duty bound to protect the interest of his customer or the stranger (payee or the holder in due course of the cheque) and in case of conflict of interest, whose interest should be preferred. Perhaps for this, reason, the

15 Statement of Objects and Reasons of Amending Act, 2002, para 1

16 Thomas Barghese v. Jerome, (1992) 1 KLT 812. at 816.

Legislature has not made it mandatory upon the bank by Section 138 to mention the reason derogatory to the interest of the drawer and left the matter to be decided by the court on the basis of the evidence adduced.

VII. Consequences of Cheque being Returned Unpaid by the Reason of 'Stopping Payment':

For the commission of an offence under Section 138 of the *Act of 1881*, one of the ingredients is that the cheque must be returned unpaid for the reason that the amount available in that account is insufficient for making the payment of the cheque. As has been mentioned earlier, a cheque may be returned unpaid by the bank for various reasons and one of the reasons maybe that there is no fund in the account of which the cheque is drawn to enable the bank to make the payment. The parliament in its wisdom has confined the offence in reference to Section 138 only to bouncing of the cheque on the ground of inadequate balance in the account of the drawer. However, if the cheque is returned for other reasons, such as - stop the payment, closure of account, structural defects, etc. – then such dishonour has not been made an offence against the person drawing the cheque. This view is also supported by a case decided by the Panjab and Haryana High court - *Abdul Samad* v. *Satya Narayan Mehawar*[17]. The brief facts of the case were thus: The petitioner had been purchasing cotton from respondent for about a year and he issued 56 cheques in total out of which 21 cheques had been dishonoured. Thereafter, the amount due to the respondent was calculated and was found to be Rs. 29, 92,920 including interest up to 15 Aug 1991. Some amount was also found due to another company bringing the total amount Rs. 33, 58,554. In this connection, out of 56 cheques, 9 cheques were encashed, 26 cheques were returned while 21 cheques were retained by the respondent which included the three cheques in question. The respondent filed eight complaints against the petitioner in the court of Chief Metropolitan Magistrate, Bhatinda between 17 Jan. 1991 to 13 Jun 1991. On 3 September, 1991, a draft for Rs. 30 lacs was given to the respondent by the letter dated 27 Aug 1991 and in response thereof all pending cases pertaining to 21 cheques had been withdrawn. Respondent acknowledged the receipt of Rs. 30 lacs and agreed to return 21 cheques as per letter dated 3 September, 1991 including the cheques in question. The three cheques mentioned in the complaint by the respondent were issued on 24 Dec., 1990 and were dated 10 April, 1991 and were part of amount covered by payment of Rs. 30 lacs and no amount remained due to the respondent after payment of Rs. 30 lacs. The petitioners instructed to their banker not to make payment against the 21 cheques that were with the respondent, but with *mala fide* intention, respondent presented these cheques even though the respondent was well aware of the fact that these cheques were to be returned to petitioners in accordance with the agreement. In these circumstances the

17 (1990) 2 BC 305.

complaint was filed with a view to extract payment not legally due from the petitioners offering threat and abuse of process of the court. Moreover, cheques were not dishonoured on the ground stated in the Section 138, i.e., insufficiency of funds or the amount exceeding the amount arranged to be paid from the account, and therefore no ground for an offence was made out. In the written reply filed by the respondent it was contended that the cheques were issued as part payment by petitioners and the payment of cheques was stopped with *mala fide* intention. The amount due to the respondent was more than Rs. 33 lacs. It was held that contention of the counsel appearing for the petitioner was well merited as it was evident that allegation so made in the complaint did not constitute the offence for which the proceedings are sought to be taken against the petitioners. On the other hand, Bombay and Allahabad High Courts were of the view that if due to instructions given by the drawer, payment is stopped and cheque is dishonoured then in such a case the drawer will be liable under Section 138 of the *Act of 188*[18]. The conflicting views of the High Courts have now been settled by the Supreme Court in the case of *M/s Electronics Trade Technology Development Corporation Limited, Secunderabad* v. *M/s India Technologist and Engineers Electronic Private Limited*[19]. In this case the allegation was made against the accused that a cheque was issued by him with the promise that the same will be honoured when presented. The cheque was however, dishonoured with the endorsement:

(i) referred to drawer;
(ii) Instructions for stopping payment;
(iii) Stamped exceeds arrangement.

It was evident from the memo of the bank that the said cheque was dishonoured by the bank for want of funds only. It was also alleged by the complainant that the accused with dishonest intention instructed the bank to stop payment and such instruction was given since he did not have sufficient funds in his bank account. The Supreme Court considered the question whether the dishonoring the cheque on the ground that instruction for stopping payment was given by the accused would bring such act within the mischief of Section 138 of the *Act of 1881* and decided that 'the object of bringing Section 138 on the statute appears to be to inculcate faith in the efficacy or banking operation and credibility in transaction business of negotiable instrument'. Despite of civil remedy, Section 138 is intended to prevent the dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induce the payee or holder in due course to act upon it. Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly. It is seen that once the cheque has been drawn and

18 Sangeeta Pandey v. State of U.P., 1 (1998) BC 225.(All); Rakesh Porwal v. Narayan Joglekar, (1997) 1 Bank CLR 481 (Bom).

19 AIR 1996 SC 2339.

issued to the payee and payee has presented the cheque and thereafter, if any instruction is issued to the bank for nonpayment and the cheque is returned to the payee with such an endorsement, it amounts to dishonour of cheque and it comes within the meaning of Section 138 of the *Act of 1881.*

Suppose after issuing the cheque to the payee or to the holder in due course a notice is issued to him, before it is presented for encashment, not to present the same for encashment but the payee or holder in due course still presents the cheque to the bank for payment. In such a case when the cheque was returned unpaid upon the instructions of the drawer of 'stop payment', then Section 138 of the *Act of 1881* is not attracted and the complaint is liable to be dismissed[20].

VIII. Consequences of Cheque Being Returned Unpaid by the Reason of 'Closure of Account:

Here a question further arises that if a cheque is returned unpaid by the bank due to the closure of the account maintained by the drawer in the bank, will this attract an action under Section 138 of the *Act of 1881.* High courts have conflicting views on this point. Kerala and Gujarat High courts are of the view that if the cheque is returned unpaid by the bank due to the closure of account, it certainly comes within the preview of Section 138 of the *Act of 1881*[21]. However, the views of Delhi and Madras High Courts are contrary to the Kerala High Court[22]. The Kerala High Court[23] has been of the view that the expression 'the account maintained by him' in this section must necessarily mean to include that person who 'had closed the account maintained by him with the bank but retained unused cheque leaves without surrendering the same to the bank'. In such circumstance, the drawer must certainly be held 'as the person by whom the account was maintained, at least for the purpose of Section 138 of the *Act of 1881,* notwithstanding the fact that he had instructed to his bank to close the account. It was the duty of every bank and every customer to insist and ensure that unused cheque leaves were returned to the bank before the account maintained by the accountholder was closed. Only where that happened, it could be held that he has ceased to maintain the account with the bank. Until the unused cheque leaf are returned or the reason for the non -return is explained to the bank, must be held that such accountholder continues to maintain the account in the bank. As such a cheque issued by the drawer- accused on an account which he had maintained for the bank will continue to fall within the ambit of Section 138 of the *Act of 1881*, notwithstanding the fact that he had

20 Sangeeta Pandey v. State of U.P, 1(1998) BC 225 (All).

21 P. N. Salim v. P. Thomas, (2004) Cr. L.J. 3096. (Ker); Urban Co Operative Credit Society v. State of Gujarat, 2 (2004) B. C. 24 (Gujarat).

22 Pratap Singh Yadav v. Atal Bihari Pandey, (2003) Cr. L.J. 705 (Delhi) Prasannav.R. Vijayalaxmi, (1992) Cr. LJ 1233 (Mad).

23 P. N. Salim v. P. Thomas, (2004) Cr. L. .J 3096. (Ker).

closed the account before or after the date of issue of the cheque. The matter was further clarified by the Gujarat High Court which expressed the view that for holding the drawer of a bounced cheque liable under Section 138 of the *Act of 1881*, it is necessary that the cheque must have been drawn by the drawer on an account maintained by him on the date of issue of cheque. Even though thereafter before the presentation of the cheque for payment the drawer had instructed the bank to close the account and on that basis the bank had returned the cheque unpaid. The court further observed that if the cheque is issued after giving instructions to the bank to close the account then the dishonour of cheque would not come in the preview of Section 138 of the *Act of 1881*. In the instant case when the cheque was issued the account was already closed. Hence, there was no question of commission of offence under Section 138 of the *Act of 1881*[24]. On the other hand, expressing the contrary view, the Madras High Court has observed that if the account has been closed either after or before the issuing of cheque and has been returned unpaid by the bank the matter does not come within the preview of Section 138 of the *Act of 1881*[25].

IX. Consequences of Cheque being Returned Unpaid by Reason of Structural Defects in the Cheque:

If a cheque is returned unpaid by the bank due to some structural defect in the cheque such as defect in signature, over writing, defect in name, etc., such dishonour does not amount to be an offence punishable under Section 138 of the *Act of 1881*... For the application of this section, it is necessary that the cheque should be returned unpaid for the want of sufficient funds in the account of the drawer or the amount of the cheque exceeds the amount to be arranged by the bank for this purpose[26].

X. Is the Offence Related to Bouncing of Cheque an Offence of 'Moral Turpitude?:

Section 138 of the *Act of 1881* was in fact incorporated in the *Negotiable Instrument Act, 1881* by the amendment made in the year 1988 with the objective to give more credibility to the cheque and not to cover the areas already covered within the jurisdiction of criminal courts by the offence of cheating. The question whether an offence would involve moral turpitude has to be decided on the facts of each case and every offence necessarily does not involve moral turpitude. So the question whether the act of issuing a cheque without sufficient funds in the account will involve moral turpitude has to be considered from the intention of the drawer of cheating. Section 138 of the *Act of 1881* is not exception to the said principle. A person some time may issue cheque knowing that there are

24 Urban Co Operative Credit Society v. State of Gujarat, 2 (2004) B.C. 24 (Guj).

25 S. Prasanne v. R. Vijayalaxmi, (1992) Crime LJ 1233 (Mad).

26 Babulal Nainmal Jain v. Khimji Ratansha, (1998) DCR 475 (Bom).

no sufficient funds in his account with the hope that he would be able to make arrangement with his bankers to honour the cheque as and when the cheque is presented by the payee but later on the drawer fails to make arrangement and cheque is dishonoured. This is not the case of involvement of moral turpitude because the drawer had no intention to cheat at the time of issuing the cheque. But if he issues the cheque with the intention that cheque could be returned unpaid on the ground that there were insufficient funds in his account, or he closes the account or stops the payment or issues fake cheque, etc, certainly his action will amount to be an offence of moral turpitude – cheating and would not come in the preview of Section 138 of the *Act of 1881*[27].

XI. Mandatory Requirement of Notice – A Condition Precedent - For Liability in Case of Bouncing of Cheque:

When a cheque is returned unpaid by the bank due to insufficient funds in the account of the drawer, i.e., the cheque is bounced, then it is mandatory for the payee or holder in due course of the bounced cheque to give notice to the drawer within 30 days from the receipt of the information given by the bank. If the drawer fails to make payment within 15 days from the receipt of the notice then only he has been made liable to be proceeded under Section 138 of the *Act of 1881*. But this section does not contemplate of issuing a demand notice mentioning 15 days' time for the drawer to pay the amount. The only obligation of the payee or holder in due course of the cheque is that he has to wait for 15 days after the receipt of the notice by the drawer for payment of the amount of the bounced cheque by the drawer. Considering the provisions of Sections 138 to 147 of the *Act of 1881*, The Andhra Pradesh High Court had no hesitation in holding that there was no obligation on the part of payee or holder in due course of the cheque to specifically mention in the notice issued to the drawer to pay the said amount within 15 days[28]. Same view had also been taken by the Karnataka High Court in *S. Samant* v. *M/s K. G. N. Traders*[29]. That unless and until notice is served either by payee or holder in due course of cheque, provision of Section 138 of the *Act of 1881* will not apply. Therefore, notice by the bank returning the cheque unpaid is not acceptable unless cheque has been endorsed to the bank[30]. The period for sending notice demanding payment is to be reckoned from the date of receipt of the information of dishonour on the last representation. It is the burden on the complainant to establish that notice is properly addressed, pre stamped and posted by registered post. No presumption could be drawn under mandatory provision of Section 138 proviso (b) and (c). If acknowledgment

27 C. Sashidhran Nair v. G. M. Operations State Bank of Travancore, (1996) Cri.LJ 4289 (Ker).

28 K. Murlidhar Rao v. state of A.P., 1 (1998) BC 290. at 292 293 (AP).

29 Samant v. M/s K.G.N.Traders, (1995) 1 All (India) CLR 148

30 Panjab National Bank v. Himgiri, (2004) BC 12(P&H).

attached with the notice is returned with the remark that the accused or witness had 'refused to take the notice', it means that notice have been served[31].

XII. When does Cause of Action Arise?

Consequent upon the failure of the drawer to pay the money within the period of 15 days as envisaged under clause (c) of proviso Section 138 of the *Act of 1881*, the liability of the drawer for being prosecuted for the offence of bouncing of cheque arises and the period for filing complaint under Section 142 is to be reckoned accordingly[32]. Therefore, The cause of action for filing complaint would arise after the completion of 15 days from the dates the drawer receive the notice and fails to pay the amount within the said period of 32 days. Payee cannot lodge a complaint after the completion of one month from the date on which cause of action arose, as there is a bar under clause (b) of Section 142[33]. But proviso attached to this section further provides that if petitioner satisfies the court that within time he was not able to file the complaint then court accepts the complaint even after expiry of one month[34]. Once a cause of action has arisen, the limitation would begin to run and it could not be stopped by presenting the cheque again so as to have a fresh cause of action and the fresh limitation[35]. It should be noted that there is no restriction regarding the number of times a cheque can be presented and that every presentation and dishonour gives rise to fresh cause of action for filing complaint. Nevertheless, it is still necessary that the presentation of cheque should be within the validity of the cheque otherwise holder cannot blame the drawer for nonpayment of the cheque[36].

The offence committed under Section 138 of the *Act of 1881* is a compoundable offence and it is tried summarily on complaint filed before the metropolitan magistrate or judicial magistrate first class. The proceeding under this section should be concluded within six months from the date of filing complaint. Hence, if the offence committed under Section 138 is proved then drawer shall be punished with imprisonment which may be extended to two years or with fine which may be extended to twice the amount of the cheque or with both.

XIII. Conclusion:

To conclude it may be submitted that dishonour of cheque is generally a civil wrong and in such cases remedy is available by bringing a civil action for damages against the drawer under Section 30 of the *Negotiable Instruments*

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31 Suresh v. Manoj, (2003) 2 AIC 581. (MP).

32 Sadanandan Bhabran v. A. Sunil Kumar, AIR 1998 SC 3043.

33 V. N. Samant v. K.G.N.Traders, (1994) 3 Crime 725 (Karn).

34 Sadanandan Bhabran v. A. Sunil Kumar, AIR 1998 SC 3043.

35 Chahal Engineering and Construction Ltd. V. Berma Plywood Co, (1994) 1 Crime 845.

36 Mallappa Sangappa Desai v. Laxmanappa Vasappa, (1994) 3 Crime 707(Karn), section 415

Act, 1881. The summary procedure laid down in Order XXXVII of the Civil Procedure Code would also apply in that case. However, if the dishonour of a cheque is made with the intention to cheat the other, it amounts to be an offence under of the *Indian penal Code, 1860*(*IPC*). The procedure for civil action under the *Act of 1881* or prosecution under the *IPC* is, however, time consuming and notorious for the hassles and harassment associated with it. On the other hand, for successful prosecution under the *IPC* it is essential to establish the existence of *mens rea* on the part of the drawer, which may not be that easy by Section 138 of Negotiable Instrument Act, 1881 the bouncing of cheque has been made a new type of offence which is different from the traditional offence as described in the IPC because:

(i) The offence does not contain any ingredient of *mens rea* - in fact, raising of any defence of absence of such *mens rea* is barred in a prosecution for the offence of bouncing of a cheque by virtue of the express provisions of Section 140 of the *Act of 1881,* and

(ii) Prior to the initiation of a criminal action it gives an opportunity to the drawer-accused of the bounced cheque to make the payment of the bounced cheque within certain time. In other words, if a cheque is returned by the bank unpaid due to insufficient amount in the account of, or insufficient arrangements made with the bank by, the drawer, a notice is to be given to the drawer within 30 days from the date of the return of cheque unpaid and even then if the payment of the amount of the cheque is not made within 15 days on the receipt of the notice of such dishonour (bouncing), then only - after the expiry of 15 days - cause of action arises for filing a complaint for the offence committed under Section 138 of *Act of 1881.*

It is now settled that if the cheque is returned due to stop payment, it will come within the scope of section 138 if it is found that there was no sufficient funds in the drawer's account. Likewise, if the cheque is returned unpaid, due to closure of account, then also it amounts bouncing of cheque and comes in the preview of Section 138 of the *Act of 1881,* whether the account was closed either before or after the issue of cheque. However, if the cheque is returned unpaid due to structural defect in the cheque, it does not amount to bouncing of cheque and would not attract any action under Section 138 of the *Act of 1881* which has primarily been enacted to give more credibility to the cheque and not to cover the areas already within the jurisdiction of criminal court. Bouncing of cheque is not an offence of moral turpitude unless it involves the element of cheating. In other words, if the drawer fails to prove his bona fides, he would be held liable for the offence. The offence committed under Section 138 of the Act of 1881 is a compoundable offence.