

CHAPTER- THREE

DISHONOUR OF NEGOTIABLE INSTRUMENTS

I. INTRODUCTION

A promissory note, bill of exchange or cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same.¹ It has been noted above that dishonour by non-acceptance could be only of a bill of exchange, but dishonour by non-payment could be of any negotiable instrument including a bill of exchange. When presentment for payment is made and the maker, acceptor or drawee, as the case may be, makes default in making the payment, there is dishonour of the instrument.

Dishonour is of two kinds:

- (1) Dishonour of a bill of exchange by non-acceptance.
- (2) Dishonour of a promissory note, bill of exchange or cheque by non-payment.

II. DISHONOUR BY NON-ACCEPTANCE:

Since presentment for acceptance is required only of a bill of exchange, it is only the bill of exchange which could be dishonoured by non-acceptance. Section 91 provides that the dishonour of a bill of exchange, by non-acceptance, may take place in any of the following ways:-

- (A) When a bill of exchange is presented for acceptance and the drawee or the drawees makes default in acceptance. When there are several drawees even if one of them makes a default in acceptance the bill is deemed to be

¹ Section 92.

dishonoured, unless these several drawees are partners.² Ordinarily, when there are a number of drawees all of them must accept the same, but when the drawees are partners acceptance by one of them means acceptance by all. If the drawee does not accept within 48 hours of the presentment of the bill of him, the bill is deemed to be dishonoured because the drawee is entitled to only 48 hours time (exclusive of public holidays) to consider whether he will accept or not.³

- (B) Where presentment for acceptance is excused and the bill is not accepted, for example, if the drawee cannot, after a reasonable search, be found, the bill is dishonoured.⁴
- (C) Where the drawee is incompetent to contract, the bill is treated to be dishonoured. According to section 26, a person capable of entering into a contract can accept a bill and a person who is not competent to contract cannot make any acceptance. Since a person incompetent cannot contract to make any acceptance, therefore, when such a person is the drawee, the bill is deemed to be dishonoured by non-acceptance.
- (D) When the drawee makes a qualified acceptance, the holder may treat the bill of exchange having been dishonoured. It is expected that the drawee will make an unqualified acceptance. If the drawee makes a qualified acceptance and the holder agrees to that all those parties who do not consent to such an acceptance are discharged from their liability towards the holder.⁵ It is, therefore, in the interest of the holder that when there is a qualified acceptance by the drawee he should consider the bill to be dishonoured. Examples of qualified acceptance are accepting to pay a

² See Sections 33 and 34.

³ Section 63.

⁴ Section 61, Para 2.

⁵ Section 86.

different sum, or to pay subject to fulfillment of condition, or to pay at a different place than stated by the drawer in the bill of exchange.

III. DISHONOUR BY NON-PAYMENT:

A promissory note, bill of exchange or cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same.⁶ It has been noted above that dishonour by non-acceptance could be only of a bill of exchange, but dishonour by non-payment could be of any negotiable instrument including a bill of exchange. When presentment for payment is made and the maker, acceptor or drawee, as the case may be, makes default in making the payment, there is dishonour of the instrument. Apart from that there are certain circumstances when presentment for payment is excused and the instrument is deemed to be dishonoured even without presentment.⁷ Thus, when the maker, acceptor or drawee intentionally prevents the presentment of the instrument, or cannot, after a reasonable search, be found, the instrument is deemed to be dishonoured even without presentment.

IV. DISHONOUR OF CHEQUE-

With the advancement and progress of society and the increase of commerce and various activities of trade, the transaction of money between human beings became complex and the ancient law givers were also forced by the circumstances to evolve new rules and regulations to regulate the transaction of money. The present day economies of the world which are functioning beyond the international boundaries are relying to a very great extent on the mechanism of the Negotiable Instruments such as cheques and bank drafts and also the oriental bill of exchange prevalent in India and known as *Hundies*. Since business activities have increased, the attempt to commit crimes and indulge in activities for making easy money has also

⁶ Section 92.

⁷ See Section 76.

increased. Thus besides civil law, an important development both, in internal and external trade is the growth of crimes and we find that banking transactions and banking business is every day being confronted with criminal actions and this has led to an increase in the number of criminal cases relating to or concerned with the Banking transactions.

Whenever a cheque is dishonoured, the legal machinery relating to the dishonour of a cheque comes into motion. What is dishonour has first to be considered and for this we have to refer to Section 92 and 93 of the Negotiable Instruments Act, 1881. Section 92 reads as under:

“Dishonour by non payment- A promissory note, bill of exchange or cheque is said to be dishonoured by non payment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same.”

Thus if on presentation the banker does not pay then dishonour takes place and the holder acquires at once the right of recourse against the drawer and the other parties on the cheque.

V. CAUSES OF DISHONOUR OF A CHEQUE

There are some reasons of dishonour of cheques, which are being discussed below: -

A. Refer to Drawer –

In Thomson’s Dictionary of Banking it is stated that the answer put upon a cheque by the drawee banker when dishonouring a cheque in certain circumstances. The most usual circumstance is where the drawer has no available funds for payment or has exceeded any arrangement for accommodation. The use of the phrase is not confined to this case, however, it is the proper answer to put on a cheque which is being returned on account of service of a garnishee order; it is likewise properly used where a cheque is returned on account of the drawer being involved in bankruptcy proceedings.

Although **London Joint Stock Bank v. Macmillan & Arthur**,⁸ it was suggested by Lord Shaw that “Refer to drawer” could be used in cases where there were any reasonable grounds for suspecting that the cheque had been tampered with, such an answer would rarely be given in practice for any reasons other than those given above.

In **Flach v. London & South Western Bank Ltd.**⁹ Mr. Justice Scrutton said that the words “Refer to Drawer” in their ordinary meaning amounted to a statement by the bank: “We are not paying; go back to the drawer and ask why” or else “go back to the drawer and ask him to pay”.

It is doubtful whether the unjustified use of the phrase, however, will involve a banker in an action for libel, in addition to that for breach of contract. Where a non-trading customer is concerned he has to prove loss to get more than nominal damages for breach of contract, but not for libel. A trading customer can obtain substantial damages without proving specific damages, although by doing so he can increase the amount awarded.

In **Frost v. London Joint Stock Bank**,¹⁰ the general rule was laid down that where words are not obviously defamatory it is not what they might convey to a particular class of persons that is the test, but what they would naturally suggest to a person of average intelligence. The better view is that the words “Refer to Drawer” are not libellous. This is still the law although doubts have been expressed in the light of evidence likely to be tendered.

Thus, it generally means to convey to the holder that he should refer to the drawer for payment, that is the bank has not sufficient funds at drawer’s disposal to honour the cheque.

⁸ (1918) AC 777

⁹ (1915) 31 TLR 334

¹⁰ (1906) 22 TLR 760

According to *A Dictionary of International Banking* by Dr. S. Ramalingam the drawee bank uses the words when it returns a cheque because the drawer has insufficient funds in his account to meet it.

A reference to *Cheques in Law and Practice* by M.S. Parthasarathy, 3rd Edition, shows that in banking parlance the reason “refer to drawer” when cheques are returned unpaid is used generally for returning the cheques for want of funds in the drawer’s account or because of service of garnishee order.

In **Plunkett v. Barclays Bank Ltd**,¹¹ it has been held that the words “Refer to Drawer” were not libellous Scrutton J., saying on this point that in his opinion the words in their ordinary meaning amounted to a statement by the bank, “We are not paying; go back to the drawer and ask why”, or else, “Go back to the drawer and ask him to pay”. In *leading cases in the Law of Banking* by Chorley & Smart it is further said that in *Plunkett’s* case (supra) Du Parc J. adopted the view of Scrutton J. as to the libel issue before him, but as time passed it became increasingly unrealistic to expect contemporary opinion to agree and by 1950 the decisions of the Irish Supreme Court (not binding on English courts, but to be treated with respect) was not unexpected.¹² Three cheques were wrongly dishonoured with the answer, “Refer to Drawer”, two of the cheques bearing also the word “re-present”. A jury awarded £1 damages for breach of contract and £400 for libel, and this verdict was affirmed in the Supreme Court, where although two of the judges accepted the bank’s argument that the words were incapable of a defamatory meaning, the other two rejected it, and distinguished the **Flach v. London & South Western Bank Ltd**,¹³ decision on the grounds that there the dishonour was not in fact wrongful. So far as the position of Indian is concerned, we can safely say that the question of damages will arise only when the dishonour was wrongful and not otherwise. In his book *Banking Law*, Clive Hamblin has stated that where a cheque is returned by a bank marked “R.D.” or

¹¹ 1936 2 KB 107 : (1936) 1 All ER 653: 154 LT 465

¹² *Pyke v. Hibernian Bank Ltd.* (1950) IR 195

¹³ (1915) 31 TLR 334

“Refer to Drawer” and the cheque was drawn on an account which had sufficient funds to meet it, the bank may also be liable to an action in damages for libel, although this point has not been finally settled.

In the *Dictionary of Banking by Perry and Ryder*, 11th Edition “Refer to drawer” is described as under: -

“Refer to drawer”: The answer put upon a cheque by the drawer banker when dishonouring a cheque in certain circumstances. The most usual circumstance is where the drawer has no available funds for payment or has exceeded any arrangement for accommodation. The use of the phrase is not confined to this case, however, it is the proper answer to put on a cheque which is being returned on account of the service of a Garnishee Order, and it is likewise properly used when a cheque is returned on account of the drawer being involved in bankruptcy proceedings.”

If a cheque is returned with an endorsement “refer to drawer” it cannot be safely interpreted to mean any of the two reasons contemplated under the Act. This question was raised in **V.S. Krishnan v. Narayanan**¹⁴, bringing the decision of the King’s Bench in **Plunkett v. Barclays Bank Ltd**¹⁵, to the notice of the court it was said –

“The offence under section 138 of the Negotiable Instruments Act will be attracted only if the 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 for from the account by an agreement made with the bank. On facts, since the cheque had been returned

¹⁴ 1990 (1) MWN (Cr) Mad 75: 1990 LW (Cr) 66.

¹⁵ (1936) 2 KB 107: (1936) 1 All ER 653: 154 LT 465.

with an endorsement “refer to drawer”, the return was not either due to insufficient funds in the account to honour the cheque or because the amount shown in the cheque exceeded the arrangement and, therefore, even on this ground, no offence was made out.”

Some times it is also suggested that the reasons, “Exceeds Arrangement” or “Not arranged for” may lead to an unwarranted disclosure of the customer’s account and may amount to a libel. For this reason the term “Refer to Drawer” should be preferred.

Thus, on one hand the banks are to watch the interest of their customers and to ensure that the honest bank customers are not being harassed and on the other hand there must be a change in the attitude of the people towards the cheques, which should be given an increased acceptability. How can there be an increased acceptability without an honest intention on the part of the drawers that the cheque issued should be honoured on presentation. It should not be regarded as a “Scrap of Paper”. Its dishonour should be regarded as an economic offence and as the Scheme of the Act is, there is a sufficient corrective machinery and opportunity is given to the drawer to honour his commitments by a two fold action i.e. payment within the notice period. In fact full 60 days are given by the Act as corrective machinery.

So far the amended Negotiable Instruments Act is concerned, the words “Refer to Drawer” have been interpreted by the various High Courts. It was held by the Andhra Pradesh High Court¹⁶ that from the endorsement “Refer to Drawer” the complainant couldn’t draw an inference that the cheque was issued without funds and that in such a case offence under section 138 was not made.

In case a cheque is returned with the remarks “Refer to Drawer” then the proceeding cannot be quashed threshold without evidence.

¹⁶ Union Roadways v. Shah Raman Lal Satish Kumar, II (1992) BC 216: 76 Comp Cas (AP) 3151.

By the use of the phraseology the banker euphemistically by way of courtesy to his customer informs him that his bank account is not credit with money sufficient to honour the cheque and that it exceeds the amount arranged to be paid from that A/C by an arrangement made to the bank. This is to convey the reason in a most civilised manner and in a courteous way without hurting his feelings.

In other case **Jaya Lakshmi v. Rashida**,¹⁷ the Court held that the endorsement refer to drawer is a euphemistic way of informing the payee that the drawer of the cheque has got no amount to his credit to honour the cheque. Similarly in **Manohar v. Mahalingam**,¹⁸ Justice Padmini Jesudurai has held that the answer “Refer to Drawer” after adopted by the bankers’ could mean anything from shortage of funds to death or insolvency of the drawer and could also include insufficiency of funds. It is seen therefore, that the nomenclature of the return by itself would not be decisive of the cause of return. Reference may also be made to **M.M.Malik v. Prem Kumar Goyal**,¹⁹ decided by Punjab and Haryana High Court.

We can refer to the case **M.Shreemulu Reddy v. N.C. Ramasamy**,²⁰ in which it was held that whether endorsement “Refer to Drawer” made out an offence was a question of fact to be established on evidence and to establish that return of the cheque implied insufficiency of funds in the account. There had to be the appreciation of evidence. We can also refer to the case **V.S.Krishnan v. Narayanan**,²¹ where it was held that in banking parlance the reasons “Refer to Drawer” when cheques are returned unpaid is used generally for returning the cheque for want of funds in the drawer’s account or because of service of a garnishee order. This again is a matter of evidence. The bank would be able to justify before the Court the reasons for which the cheque was returned. Reference can also be made to a number of other cases such as

¹⁷ I (1992) BC 259: (Vol. 74) Comp Cas (Mad) 841: 1992(2) Crimes 5: 1993 Bank J 378: (1991) (2) MWN (CN) 202.

¹⁸ (1992) LW Cri 367

¹⁹ II (1991) BC 484: 1991 Cri L.J. 2594

²⁰ 79 CC (1994) 540: I (1993) BC 8

²¹ (1990) LW Cri 66: 1991 Cri J. 609

Dynamatic Forging India v. Nagarjuna Investments Trusts Ltd.,²² of the Andhra Pradesh High Court and **Voltas Ltd. v. Hiralal Agarwalla**,²³ wherein it was held that the endorsement “Refer to Drawer” is used by the Banks when the cheques are returned unpaid for want of funds in the drawer’s account.

In **A.D. Circle Pvt. Ltd. v. Shri Shanker**,²⁴ before the Delhi High Court held that where the cheque had been returned with the remarks “Refer to Drawer” complaint was dismissed. However, the High Court held that close scrutiny of record and evidence shows that the cheque was dishonoured for insufficiency of funds and the offence was committed.

A Division Bench of the Kerala High Court has held that such endorsements as “Refer to Drawer”, “Account Closed” and “Payment has been stopped” etc. have the effect of proving that the cheque has been bounced and if the bouncing was on account of insufficiency of funds, then an offence under Section 138 of the Negotiable Instruments Act has been made out²⁵. Similarly in **A.D. Circle Pvt. v. Sri Shanker**,²⁶ Hon’ble Mr. Justice Mohd. Shamim of the Delhi High Court has held that the remark “Refer to Drawer” is not a ground for dismissing the complaint. In this case the complainant had examined the clerk of Indian Overseas Bank who had stated in unequivocal terms that in a sum of Rs. 527.43 only was in the account of the company, which was not sufficient to honour the cheque drawn by the company. There are a number of other cases as well to which a reference can be made and which clearly establish that “Refer to Drawer” means insufficiency of funds. “Refer to Drawer” is only a courteous way normally adopted by Banker to show its inability to honour the cheque for want of funds. If the Petitioner Company had the arrangement or credit in its account with the bank, he can show this fact to the Trial Court, in the absence of which “Refer to Drawer” means “Insufficiency of funds”.

²² 79 CC 583

²³ (1991) 71 CC 275 Cri: 1 (1991) BC 620

²⁴ II (1992) BC 525: 76 Comp Cas Delhi 764

²⁵ Thomas Verghese v. Jerome, (1992) BC 224(DB): 1992 Cri. LJ 308: 76 Comp Cas (Kerala) 684

²⁶ II (1992) BC 525: 76 Comp Cas Delhi 764

Refer to Drawer in their ordinary meaning amounted to a statement by the Bank- “We are not paying, go back to the drawer and ask him why”.²⁷

Refer to Drawer means cheque has been returned for want of funds.²⁸

Similarly the Trial Court had dismissed the complaint on the ground that the term “Refer to Drawer” is vague and does not disclose insufficiency of funds. The High Court held that the Learned Magistrate should have given the Petitioner to lead pre-charge evidence to prove that cheque was returned for paucity of funds.²⁹ In **Dada Silk Mills and others v. Indian Overseas Bank and another**,³⁰ it has been held by the Gujarat High Court that the endorsement refer to drawer, necessarily in banking parlance means that “the cheque has been returned for want of funds in the account of the drawer of the cheque.”

B. Exceeds arrangement –

It is generally meant to convey that the drawer has credit limit but the amount exceeds the drawing power. Not arranged means no overdraft facility exceeding the limit already sanctioned or overdraft facility not sanctioned.

C. Effects not cleared –

According to *Thomson’s Dictionary of Banking*, owing to the exigencies of business, the bankers usually credit articles paid in for collection to a customer’s account, before clearance thereof. In some cases items are entered in the ledger and statement as “Cash”; in other cases they are indicated by symbols.

In **Capital and Counties Bank v. Gordon**³¹ Lord Lindley said, “It must never be forgotten that the moment a banker places money to his customer’s credit, the customer is entitled to draw upon it unless something occurs to deprive him of that right”. Bankers, however, caution their customers by a notice in the pass book or

²⁷ M.M.Malik v. Prem Kumar Goyal, II (1991) BC 484: 1991 Cri L.J. 2594

²⁸ Syed Rasool & Sons v. Aildas & Co., 1992 Cri L.J. 4048: 1993(II) Crimes 550: (1993) 78 Comp Cas. 738

²⁹ Prof. Veda Vyasa v. Satija Builders & Financiers Ltd., II (1992) BC 146

³⁰ (1995) 82 Comp. Cas 35

³¹ (1903) AC 240

elsewhere to the effect that the right is reserved to postpone payment of cheques drawn against uncleared effects which may have been credited to the account and presumably this precaution saves them from the above ruling. In other case of **Underwood Ltd. v. Barclays Banks**³² in a lower court, however, it was said: “Though the cheques were in fact credited to the customer’s account before they were cleared the customer was not informed of this, and I can see nothing to prevent the bank from declining to honour a cheque if the payment is against which it was drawn had not been cleared.”

If there is an agreement express or implied such as would arise out of a course of business to pay against uncleared effects, a banker would be bound to honour cheques drawn against such effects and he cannot arbitrarily and without notice withdraw such facilities.

It is generally meant to convey that the drawer has paid the cheques or bills, which are in course of collection but their proceeds are not available for meeting the cheque.

According to *A Dictionary of Bank* by F.E. Perry, the total of cheques collected for a customer, which is credited to his account on the day he pays them in. The proceeds remain uncleared for three days, or five if a week end intervenes. During this time the bank is presenting the cheques to the paying banks through the clearinghouse. If they are unpaid they should be received back through the post on the morning of the forth (or sixth) day. (Town clearing cheques are cleared more quickly.) Whether or not the customer is allowed to draw against the proceeds of these cheques before they are cleared is a question of fact in each case, but the banker does not have to pay against uncleared effects unless he so wishes. If he does so, however, he may encourage the customer to think that similar concessions may be made on future occasions, and an implied permission may be construed.

³² (1924) 1 KB 775

D. Full Cover not Received –

It is generally meant to convey adequate funds to honour the cheque or has not given adequate security to cover the over draft which might be created by paying the cheque.

E. Not Provided for –

An answer sometimes written by a banker on a cheque, which is being returned unpaid for the reason that the drawer has failed to provide funds to meet it. A better answer in these circumstances is “Refer to Drawer”.

F. Not Sufficient-

When the funds in a customer’s account are insufficient to meet a cheque, which has been presented to the banker through the clearing or otherwise, the cheque, on being returned unpaid, is sometimes marked with the words “not sufficient”, or “not sufficient funds”. The answer “Refer to drawer” is preferable.

G. Present Again –

According to Thomson’s *Dictionary of Banking*, these words are sometimes written by a banker upon a cheque, which is returned unpaid because of insufficient funds in the customer’s account to meet it. It is not, however, by itself a correct answer to give, as it does not afford any explanation why the cheque has been returned. The best answer to write upon a dishonoured cheque is “Refer to Drawer”.

Sometimes the words are joined with another answer, as “Refer to Drawer – Present again”, “Not sufficient- Present again”. No doubt the words “Present again” are used with the idea of minimising the risk of injury to the drawer’s credit by returning the cheque, but it is perhaps questionable whether they are altogether prudent words to use.

The banker to whom a cheque is returned with a request “Present again” advises his customer of the dishonour of the cheque and arranges for it to be represented.

In **Baker v. Australia and New Zealand Bank Ltd**³³ these words “Present again” were held to be capable of defamatory meaning. It is thought that the decision would be followed here.

H. Payment Stopped by Drawer –

One of the reasons on account of which the Banker can refuse to make the payment of a cheque is that the drawer has stopped the payment. The customer has the right to give notice his Bankers to stop payment of a cheque which he has issued. The notice should be in writing and should give accurate particulars of the cheque and should be signed by the drawer. According to *Thomson Dictionary of Banking*, in case a Bank passes a cheque after a ‘Stop Order’ has been received, he shall be liable for so doing. It is necessary, therefore, to warn each Branch where the cheque may be presented, of the notice, which has been received. A notice should be placed in the Customer Account in the ledger, so that any one referring to the account may at once observed particulars of the ‘Stop Order’. A red colour slip may be inserted in the ledger, so that there is no mistake. As for different branches of a bank, in case notice is given to one branch, it shall not be deemed a notice to the other branches as well. In **London Provincial South Western Bank Ltd. v. Buszard**,³⁴ it was held by the Court that notice to one branch was not notice to the other branch. The question arises as to who should give such notice. Usually, it is the drawer of a cheque who is the only person who is authorised to stop payment of it but very often the Bankers receives notice from a payee of a cheque that it has been lost or stolen. Where notice is received from the payee, he should be requested to inform the drawer at once, so that the latter may instruct the Bankers to stop payment. If the cheque is presented before such instructions are at hand, the Banker will exercise its discretion before honouring it. Similarly, in those cases where a cheque is signed by several person and is lost, a notice to one of them, i.e. one executor, one trustee, secretary, etc., is usually

³³ (1958) NZLR 907

³⁴ (1918) 35 TLR 142; 63 SJ 246; 3 LDB 204

acted upon by a bank. Where the account is in several names and the lost cheque is signed by only one of the account holders or by one partner, a notice from any of the holder or partner is a sufficient authority to a Bank as justification to stop payment of the cheque. In case the drawer so lies, at a later stage, he can cancel his order to stop payment but it should be done in writing and be signed by him.

The discussion relating to stop payment has assumed importance in view of the amendment to the Negotiable Instruments Law (Amendment) Act, 1988 (66 of 1988) and the Negotiable Instruments (Amendment and Miscellaneous Provisions Bill, 2002(Bill No. 55 of 2002). We have already seen that by the fact that the dishonour of the cheque can result in penal consequences in case the cheque is returned on account of the reasons that it exceeds arrangement made by the drawer with the Bank. Section 138 of the Amended Act deals with such cases. In **Abdul Samod v. Satya Narayana Mahavir**,³⁵ a complaint had been filed under Section 138 and the case of the respondent was that he had stopped the payment of the cheque on account of civil litigation pending between the parties. Hon'ble Mr. Justice A.P. Chowdhry analysed Section 138 of the Negotiable Instruments Act and he stated that there were 5 ingredients of the section which must be fulfilled, which are as under: -

- i) the cheque is drawn on a bank for the discharge of any legally enforceable debt or other liability;
- ii) the cheque is returned by the bank unpaid;
- iii) the cheque is returned unpaid because the amount available in that account is insufficient for making the payment of the cheque;
- iv) the payee gives a notice to the drawer claiming the amount within 15 days (now 30 days as per Amendment 2002) of the receipt of the information by the bank; and
- v) the drawer fails to make payment within 15 days (now 30 days as per Amendment 2002) of the receipt of notice.

³⁵ PLR 1990(2) 269: II (1990) BC 380

In this particular case, the contention of the respondent was that the cheque had been returned on account of stop payment instructions and not on account of insufficiency of funds and thus all the ingredients of the section were not available. According to Section 138 it was only when the cheque had bounced on account of inadequate balance in the account that a complaint was maintainable if the said ground was not available, then the complaint was not maintainable and the Hon'ble High Court held that there was no justification to let the proceedings continue.

After the passing of the Banking, the Negotiable Instruments Law (Amendment) Act, 1988 (66 of 1988) and the Negotiable Instruments (Amendment and Miscellaneous Provisions Bill, 2002 (Bill No. 55 of 2002) the people who issue cheques knowingly well that cheque is not going to be honoured on presentation, try to create circumstances in which the banks return the cheque with such endorsements as "Stop payment", "Refer to Drawer" and "A/c closed". This is with a view to escape from the criminal liability. The question arises whether the offence under the Act shall be committed in case the cheque issued by a person bounces on account of such reasons. There have been decisions of the various High Courts and the preponderance of the view of the said judicial decisions in that in case a cheque is returned dishonoured with such remarks and if it can be proved that there was also the insufficiency of funds in the account or that the amount of the cheque issued by drawer of the cheque had exceeded the arrangement made, then irrespective of such action of the drawer, it would constitute an offence under the Amended Act. The necessary condition, however, is that there must be an averment in the petitioner to the effect that the cheque had bounced on account of insufficiency of funds and on account of the amount of the cheque having exceeded the arrangement made by the drawer. The Kerala High Court in **Calcutta Sanitary Waters v. Jacob**³⁶ has held that in case the payment was countermanded, then it was without an offence.

³⁶ I (1991) BC 512: 1991(1) KLT 269

Similarly, in **Mrs. R. Jayalakshmi v. Mrs. Rashida**,³⁷ it was held that if a cheque was returned with an endorsement “Refer to Drawer” and “payment countermanded by the drawer” then it was not an offence. In **Mrs. Rama Gupta v. Brakeman’s Home Products Limited Patiala**,³⁸ it has been held that if a cheque is returned with the remarks “Payment stopped” then there is no offence.

There are a number of other cases as well, in which it is stated that as the payments of the cheques were stopped, there was no question of commission of any offence and no offence was involved in the matter. We can also refer to the decision of a single Judge³⁹ in which reliance was placed on the decision of the Karnataka High Court⁴⁰ it was held that when the payment of the cheques in question was stopped by the respondent, there was no question of facts constituting an offence punishable under Section 138 of the Negotiable Instruments Act. All these judgements have been examined in judgement of the High Court of Judicature of Bombay at Aurangabad in Criminal Application No. 1073 to 1076 of 1992 in Shri Prithvi Raj S/o Amba Lal Patel v. Sh. Bhupendra S/o Shri Jasu Bahi Patel. In these four appeals Hon’ble Mr. Justice M.S. Vaidya in his judgement dated 06.01.94 examined all the important judgements relating to the stop payment instructions and also referred to the Division Bench Judgement of the Bombay High Court.⁴¹

A reference also made to the judgement⁴² in which it was held that the offence under the section cannot depend on the endorsement made by the banker while returning the cheque. Irrespective of the endorsement made by the banker, if it is established that in fact the cheque was returned unpaid either because of the account of the money to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank, the offence will be

³⁷ I (1992) BC 259: 1991(1) Crimes 5.

³⁸ II (1992) BC 75: II (1992) CCR 1484

³⁹ Om Parkash Bhojraj Maniyar v. Swati Girish Bhide, 1992 Mah L.J. 302: 1992(3) Crimes 306

⁴⁰ G.F. Hunasi Katti Math v. State of Karnataka, I (1991) BC 438: 1991 (1) Crimes 227

⁴¹ Rakesh Nemkumar Porwal v. Narayan Dhondu Joglekar, 1993 Cri L.J. 680: II (1992) BC 402: 1992 CCR 2711: 1993(78) Comp. Cas 822.

⁴² Thomas Varghese v. P. Jerome, 1992 Cri L.J. 308

established. The endorsement made by the banker while returning the cheque cannot be the decisive factor.

In both the judgements it was contended that what was relevant for the purpose of determining whether or not an offence under Section 138 of the Negotiable Instruments Act was disclosed and whether or not the drawer of the cheque had arranged for payment or had made the payment of the amount covered by the cheque within the period of 15 days prescribed under the said section and not the reason for which the cheques were dishonoured by the Bank. The Bombay High Court held that judgement given by the single in the judgement of **Om Parkash Bhojraj Maniyar v. Swati Girish Bhide**,⁴³ in which the case of **G.F. Hunasi Katti Math v. State of Karnataka**,⁴⁴ and the decision in case of **Mrs. R. Jayalakshmi v. Mrs. Rashida**,⁴⁵ provided to honour an interpretation which was narrow and deserved to be set aside. It was a construction of the section where the judges had failed to take into accounts the objects and reasons behind the amendment. The decision of division bench of the Kerala High Court⁴⁶ was specific in observing that where the cheque issued by the drawer was dishonoured by the bank and returned to the drawer with the endorsement that “Payment stopped” by the drawer and in the complaint the complainant had specifically stated that the accused had no amount in his account with the bank for honouring cheque and that mischievously and maliciously issued an instruction to the bankers to stop the payment, the complaint for an offence under section 138 of the Negotiable Instruments Act cannot be quashed on the ground that the amount of money standing to the credit of the account of the drawer was insufficient to honour the cheque or that it exceeds the account arranged to be paid from that account by an agreement made with the bank. This is in fact the correct view of the matter. Since there has been conflicting opinions by the different High Courts and also because the

⁴³ 1992 Mah. L.J. 302:1992(3) Crimes 306

⁴⁴ I (1991) BC 438: 1991(1) Crimes 227

⁴⁵ I (1992) BC 259: 1991(1) Crimes 5.

⁴⁶ Thomas Varghese v. Jerome, 1992 Cri L.J. 308

fact that divergent opinions have been given by the different High Court the matter was finally decided by the Hon'ble Supreme Court of India in *Bhupendra v. Prithvi Raj*.

It is worth while to refer to report judgement on the subject by the Gujarat High Court namely the judgements in **Dada Silk Mills and others**,⁴⁷ (Supra) where the Gujarat High Court has held that in the light of Specific Scheme of Section 138 of the Negotiable Instruments ACT, 1881 the return of the cheque by the banker with any of the endorsements, "Refer to Drawer", "Insufficiency of funds", "Funds not arranged" or "Account closed" ultimately connotes dishonour of the cheque on account of fault on the part of the person who has issued the cheque in not providing sufficient funds or in not arranging for the funds or in closing the Account. We should keep in mind the fact that in the scheme of the Act the legislature has provided an opportunity to the drawer to explain the endorsement made by the banker, and it is always open to the drawer of the cheque to explain and establish that dishonouring of the cheque was not referable to insufficiency of funds or his not making provision of necessary funds. The object of the legislature while introducing Chapter XVII in the Act cannot be allowed to be frustrated.

Similarly we can refer to another case decided by the Madras High Court in **V.Armugham v. M.K.Ponnusamy**,⁴⁸ it was held that where a cheque issued by the petitioner was returned unpaid with endorsement.

I. Account closed –

In **Om Parkash Maniyar v. Swati Girish Bhide**⁴⁹ held that the endorsement 'Account Closed' cannot afford a ground for taking penal action under the Act. Except the two ground i.e. the insufficiency of the funds or, because the cheque exceeds the amount arranged to be paid there is no third eventuality contemplated

⁴⁷ (1995) 82 Comp Cas. 35 Guj.

⁴⁸ (1995) 82 Comp Cas.296

⁴⁹ 1992 Mah. LJ 302: 1992(3) Crimes 306

under the Act. The maxim '*Expresum Facit Sessari Licitum*' means that express mention of one thing implies the exclusion of the other.

Hon'ble Mr. Justice K.T. Thomas of Kerala High Court observed in **Japahari v. Priya**,⁵⁰ held that the contention for attracting penal liability for the offence under Section 138 of the Act the account must have been alive at the time of presentation of the cheque is unsound. If the contention gains acceptance it could open a safe escape route for those who fraudulently issue cheques and close the account immediately thereafter to deprive the payees of the cheque proceeds. It would thus defeat the very object of innovation made through Act No. 66 of 1988 by which Section 138 and its allied provisions were inserted in the Act. Closing the account is one the modes by which a drawer can render his account inadequate to honour the cheque issued by him. I am of the view that the drawer of the cheque who closes his account with the bank before the cheque reaches the bank for presentation, is actually causing insufficiency of money 'standing to the credit of that account'.

VI CONSEQUENCES OF DISHONOUR -

There are two points relating to the consequences of the dishonour of the cheques. The first is that by dishonour of the cheque the negotiability of a cheque is lost. In **Sukanraja Khimraja, a firm of Merchants, Bombay v. N. Rajagopalan**,⁵¹ the facts were that after the dishonouring of a cheque, the payee (M) endorsed it to (R) for valuable consideration. (R) Demanded payment of the amount as per the cheque from defendants,(namely the firm which issued the cheque and its partners), and they having neglected to pay, the suit was filed. The Trial Court decreed the suit and it was affirmed on appeal. In the Letter Patent Appeal it was contended for the appellants-defendants 1 and 2 ,that the crucial point involved was, whether the alleged cheque was negotiable after being dishonoured, and whether the endorsee (M) who filed the

⁵⁰ 1(1994) BC 642

⁵¹ 1989 1 LW 401

suit could be a holder in due course as defined in Section 9 of the Negotiable Instruments Act.

It was held that the plaintiff as the brother of (M), was fully aware that the cheque had been dishonoured, and the endorsement in his favour was only after the Bank returned it. Therefore, Ex. A-1 had lost its negotiability. Hence, he cannot be a holder in due course. This essential characteristics having not been comprehended and more so, when the cheque had never been thereafter presented to the Bank for encashment, the suit as laid, could not have been decreed at all.

The second aspect is relating to the question of limitation. In the case it was held that in the event of a post dated cheque given on the date of loan in repayment of debt, being dishonoured, there is no payment at all either on the part of the debt or the whole of it with the result that the debt in question continues to exist and hence, limitation could not be counted from the date when the cheque was dishonoured but from the date of the loan.⁵²

VII OBJECTS AND REASONS :-

However, through the Banking Laws (Amendment) Act, 1985 (81 of 1985), the various provisions of which were brought into force on different dates in 1985 and 1986 but The Negotiable Instruments Act, 1881 was further amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 wherein the new Chapter No. XVII relating to The Banking Laws was incorporated specifically with a view to encourage the culture of use of cheques and enhancing the acceptability of cheques in settled of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers.

⁵² Arjuna Lal Dhanji Rathod v. Dayaram Premji Padhiar, AIR 1971 Pat. 278

Further, the main object of Section 138 was to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Despite civil remedy, Section 138 intended to prevent 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 induces 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. Once such a cheque against insufficient funds has been drawn and issued to the payee and the payee has presented the cheque and thereafter, if any instructions are issued to the bank for non-payment amounts to dishonour of cheque and it comes within the meaning of Section 138. If, after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment and yet the payee or holder in due course presents the cheque to the bank for payment and when it is returned on instructions, Section 138 does not attract the banking laws were last amended through the Banking Laws (Amendment) Act, 1985 (81 of 1985), the various provisions of which were brought into force on different dates in 1985 and 1986. Since then, in the course of administering various laws relating to banks and public financial institutions, a need has arisen for some further amendments to the Negotiable Instruments Act, 1881, to achieve the following objectives :

- i) “to revise the rate of interest from the present level of the six per cent to eighteen per cent annum payable on a negotiable instrument from the due date in case no rate of interest is specified, or payable to an endorser from the date of payment on a negotiable instrument on its dishonour with a view to discouraging the withholding of payment on negotiable instruments on due dates;
- ii) to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the

arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers.

The Supreme Court⁵³ and Bombay High Court⁵⁴ have observed as follows :-
 “The object of Section 138 to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Despite civil remedy, Section 138 intended to prevent 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 induces 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. Once such a cheque against insufficient funds has been drawn and issued to the payee and the payee has presented the cheque and 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. If, after the cheque is issued to the payee or to the holder in due course presents the cheque to the bank for payment and when it is returned on instructions, Section 138 does not attract.”

VIII INGREDIENTS OF LIABILITY UNDER SECTION 138 OF NEGOTIABLE INSTRUMENTS ACT, 1881

The ingredients of liability under the section have been stated in terms of the following points:

- A) the cheque is drawn on a bank for the discharge of any legally enforceable debt or other liability.
- B) The cheque is returned by the bank unpaid .
- C) The cheque is returned unpaid because the amount available in the drawer's account is insufficient for paying the cheque.

⁵³ Electronics Trade & Technology Development Corpn Ltd. v. Indian Technologists & Engineers Electronics Pvt. Ltd.

⁵⁴ Mayri Pulse Mills v. Union of India, (1996) 86 Comp Cas 121 Bom.

- D) The payee has given a notice to the drawer claiming the amount within 15 days of the receipt of the information by the bank.
- E) The drawer has failed to pay within 15 days from the date of receipt of notice.

IX CONSTITUTIONAL VALIDITY OF SECTION 138 OF N.I.ACT, 1881

The validity of section of 138 of the Negotiable Instruments was challenged before the Maharashtra High Court⁵⁵ contending therein that the provisions of this section are violative of Article of 14 of the Constitution of India. The Court examined the matter in detail taking into consideration the facts of the case and various articles of the Indian Constitution and observed that the importance of banking section in the developing economy could not be under-rated. It is not necessary for the purpose of this case to peep into the history of the development of law, whether it is the Bills of Exchange Act of England of the year 1882, the Cheque Act, 1957, and various other statutory exercises.

Further, it is the larger public interest that commercial transaction maintain the speed and tempo and that a swift sale or a prompt purpose, is not unduly impeded by suspicions always hovering round that part of promise to be performed in future. The issue of a cheque carries with it assumptions which could regulate the normal functioning of an honest citizen. At a period of time when multitudinous persons and institutions press into services, devices and facilities available under the Negotiable Instruments Act, it may be necessary to ensure that those who issue such vital documents, do not adopt a casual or careless attitude which could block the free flow of trade. It is in the light of the experience, which the State had, that the enactment has been attempted. Court is unable to detect any legal infirmity or constitutional incompetence.

Furthermore, no attempt has been made out as to show how Article 20 of the Constitution can be attracted to such a situation. The statute, therefore, cannot be

⁵⁵ Narayanadas Bhagwandas Partani v. Union of India, 1993 Mah LJ 1229

struck down, merely because the petitioners desire to see its collapse. Entry Nos 45 and 46 respectively, refer to banking. Bills of Exchange, Promissory Notes and other instruments. The impugned provisions, would come well within the larger ambit of the entries. It is connected with negotiable instrument, which clearly come with the aforesaid entries dealing with legislative power.

Court is unable to see any provision in arbitrariness or infraction of Article 14 of the Constitution. Those who deal in negotiable instruments are not to resort to sharp practices. A time consuming civil litigation may not give immediate or adequate remedy to the victims of an illegal act or a dishonest move. The Parliament could then make a provision with sufficient teeth, as to strongly deal with the ruffians in the trading area, or the unscrupulous elements who play foul with negotiable instrument.

Following this, the Bombay High Court held subsequently in **Mayri Pulse Mills v. Union of India**⁵⁶ and **Tarun Kumar Bose v. Union of India** as follows :-

“We have no hesitation in holding that Parliament had power and competence to enact Chapter XVI under Entries 45 and 46 of List I in the 7th Schedule of the Constitution.” The court also observed that the mere fact that the new sections impose absolute liability dispensing with the doctrine of *mens rea* does not render the provisions invalid. The provision in Section 140 that it would not be a defence to show that the drawer had no reason to believe when he issued the cheque that it would be dishonoured was held to be valid.

The raising of the presumption that the drawer of the cheque is guilty till he proves the contrary is also not arbitrary because the presumption arises only after the basic requirements for the presumption to arise are proved.

⁵⁶ *ibid*

X. NATURE OF OFFENCE UNDER SECTION 138 OF N.I. ACT, 1881

The offence is not the drawing of the cheque. The offence takes place when a cheque is returned unpaid on the twin grounds as contained in Section 138 of the Negotiable Instruments Act, 1881. Thus, there is a retrospective operation. The Madras High Court has held that laws made justly and for the benefit of individuals and for the community as a whole may relate to time antecedent to their commencement. The conclusion would be that such prosecution is not hit by Article 20 (1) of the Constitution which provides that “no person shall be convicted of any offence except for violation of the law in force at the time of the commission of act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.”⁵⁷

The amendment had been introduced to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers.

The offence under Section 138 of the Act is a non-cognizable offence by virtue of Section 142 of the Act on account of the *non obstante* clause as comprised in Section 142 of the Act, the Magistrate receiving the complaint has to proceed straightway to take cognizance of the offence of a complaint being made to him in writing and that he cannot send the same for investigation to the police.⁵⁸ It was held by the Court that in a complaint case alleging commission of a non cognisable offence made in writing to a Magistrate or received in his Court, under Section 192 of the Code, it is incumbent upon him to immediately take cognizance and proceed to examine upon oath the complainant and his witnesses, if any, and a Magistrate cannot

⁵⁷ V.S. Krishnan v. V.S. Narayanan, 1990(1) MWN (Cri) Mad 75: 1990 LW (Cri) 66

⁵⁸ Cucusan Foils Private Co. Ltd. v. State (Delhi Administration), 1990(2) Recent Criminal Reports, 518

straightaway such a procedure is not warranted by law. In the present case, therefore, it has to be held that the concerned Magistrate erred in sending the copy of the complaint to the SHO for further investigation or enquiry and in not straightaway taking cognizance of the complaint and his witnesses.

A. Offence Committed by Companies –

In case a cheque issued by a Company is returned for the reasons mentioned in Section 138, the Company is responsible for the offence. Such person may be director, manager, secretary or other person of the company. However, according to the proviso in case such a person says that the offence was committed without his knowledge or that he exercised the due diligence he will not be liable for any punishment. To punish any person under this section it is necessary that the offence was committed with the consent or convenience of or due to the neglect of the director, the manager, secretary or other officer of the company. It may be a private or public company and according to the Explanation, it means that it may be body corporate and also include a firm and other association of person. Thus, the definition is an enlarged definition and legislature has tried to widen the scope of the definition. The term body corporate will include all companies incorporated in India or abroad, other foreign bodies corporate, public financial institutions, nationalised banks, cooperative societies formed and registered under various Cooperative Societies Acts of the States. Whereas the term association of individuals will include club, trust, H.U.F., etc. Not only the person who is in charge of and responsible to the company and drew the cheque which ultimately returned but the company also liable for the offence. We know that company cannot be punished with sentence of imprisonment but it is liable to financial indictment and the officer is liable to both. In this connection Buckley's Company Act 14th Edition can be referred:

“A Company can be guilty of acting with intent to deceive and making a statement which it knows to be false or to be indicted for conspiracy to defraud. It can also be guilty of and be fixed for

contempt of court. Notwithstanding its impersonal nature, it may sue for an injury done to its reputation in the way of its business by a libel, or a slander or by an imputation of insolvency, and may be sued for malicious prosecution, maintenance, infringement of copyright, molesting a person in the exercise of his calling or negligence and may be guilty of malicious libel.”

On account of the complex business attitude and the complicated position of law, in case a cheque is dishonoured, and a single, Director, issues such a cheque such a conduct without the backing of the position of Board of Directors cannot be regarded as an act of the Company. The law has not been changed. The only safeguard that has been taken in the Act is that any person who is liable to punishment shall not be liable in case he proves that the offence was committed without his knowledge and the onus to prove lies on the person in charge of and responsible to the Company who drew the cheque. He should prove either of the two circumstances namely that offence was committed without his knowledge or in the alternative that he exercised all the due diligence to prevent the commission of such an offence. The words used in the Section 141(1) are qualified by the words in the Section 141(2) and it is decided that in case it is proved that the offence has been committed with the consent or connivance of or is attributable to any neglect of the person as mentioned in the section the such person shall be liable to be proceeded against and punished accordingly.

Clause (a) of the Explanation provides that the company means anybody corporate and includes firm or other associations of individuals and clause (b) says that a director in relation to a firm means a partner in the firm. The section has been added to provide a wider scope and to include the other persons as well who may be responsible for the affairs of the company and who may be designated by other names in the Memorandum of Association of the Company. The term ‘other officer’ is a

term of wider connotation⁵⁹ that any person who is regularly employed as part of their business or occupation in conducting the affairs of the company may 'Officer of the company'.

According to Stroud's Judicial Dictionary 'Officer' means person under a contract of service; a servant of special status holding an appointment to an office which carries with it an authority to give directions to other servants. Thus, an officer is a distinct post, which means more than mere an employee. The powers are different from one company to other but normally the power who issue the cheque is given to an officer and not is in his background that the criminal offence be kept in mind.

In **C.B.S. Gramophone Records & Tape (India) Ltd. v. P.A. Noorudeen**,⁶⁰ it was held that so far as complaint by a company is concerned, an authorised person of the company can sign the complaint. The action of the Magistrate of returning the complaint that he is not the payee or holder in due course and hence he cannot file the complaint, is not sustainable. The representative is only representing the company. Hence, company is the complainant and not the representative.

In a case where the Managing Director of a Company issued his personal cheque to meet the liability of the company, which was dishonoured, then it was held that an offence had been committed by the company.⁶¹ Where the Director of the Company wanted the quashment of complaint against him on the ground that he was not in charge of business of the company and had not issued the cheque and the absence of a notice under section 138 to him, the complaint is bad in law. In the complaint the complaint had not even raised a little finger against a petitioner accused and as such complaint was not maintainable against him. When specific allegations have been due to the neglect of the accused, a complaint cannot be quashed. The Calcutta High Court followed the decision of **Shekar Gupta v. Subhas Chandra**

⁵⁹ Halsbury's Law of England, 4th ed. Vol 7 para 540

⁶⁰ 1992 Bank J. 522: 1992 (Vol 73) Comp Cas 494

⁶¹ Jagarlamundi Surya Prasad v. State of Andhra Pradesh I (1992) BC 120

Mondal,⁶² given by the Supreme Court in **Sheorathan Agarwal v. State of Madhya Pradesh**,⁶³ Similarly the Supreme Court in **U.P. Pollution Control Board v. Modi Distillery**⁶⁴ held that unless company is made an accused, the person who is in charge of and responsible to the company for the conduct of the business of the company cannot be made an accused⁶⁵

In **Smt. Sarda Agarwal v. Addl. Chief Metropolitan Magistrate**,⁶⁶ it has been held that the Directors along with Managing Director were summoned for offence. There was no allegation in the complaint that the applicant Directors were in charge of and responsible to the company. The cheque was issued by the Managing Director and it was held by the High Court that the complaint cannot be said to have made out an offence against the Directors if during the trial of the case the applicants were found in charge of or responsible to the company, the court would be at liberty to proceed against the said Directors. Thus we have to be guided by the specific provisions as laid down in the Act. In Sharda Agarwal's case so far as Directors of the company were concerned, the appointment letter creating the relationship between the complainant and company was signed by the Managing Director. The cheques were issued by the Managing Director and the bank draft had been prepared in the name of the company. The applicants had nothing to do with the dishonour of the cheques and there was no allegation in the complaint that the Directors i.e. applicants were in charge of and responsible for the conduct of the business of the company.

Similar provision as contained in Section 141 of the Negotiable Instruments Act as amended in contained in Section 278(b) of the Income- Tax Act, 1961. It has been held only the person who is in charge of affairs or responsible to the company for the conduct of the business of that company and company are liable for the

⁶² 1992(73) Comp Cas 590: 1992 Banker J.402

⁶³ 1984(4) SCC 352

⁶⁴ AIR 1988 SC 1128

⁶⁵ K. Krishnamurthy, M.D., M/s Surya Advertising (P) Ltd., Bangalore v. Arti Press, Swakashi, I (1992) BC 361

⁶⁶ III (1992) (1) Crimes 812: 1992 Cri LJ 1442

offences. In the said averment is not made against a person then he can be said to have committed an offence.⁶⁷

It has been held that when an offence is committed by a company every person who at the time the offence was committed, was in charge and responsible to the company for the conduct of the business shall be liable to be proceeded against and punished along with the company. The basic requirement would be that there must be some material to indicate that the petitioners were in charge and responsible for the conduct of the business of the company. If this was not proved and the documents accompanying the complaint were also silent in the matter then the complaint is bound to be cancelled and is liable to be dismissed. A civil liability as partners will not suffice to prosecute them.⁶⁸

If a person committing an offence under section 138 is a company every person who, at the time of the offence, was in charge of and was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence accordingly.⁶⁹ Similarly, it is a must that the company is also made an accused under Section 138 because unless the company is made an accused under section 138, the person who is in charge of and responsible to the company for the conduct of the business of the company, cannot be made an accused.⁷⁰

In case company is not prosecuted and prosecution proceedings start against person in charge or the office in charge, according to the ruling last reported by us a complaint against the company shall not be maintainable. The Calcutta High in **Dalip Kumar Jaiswal v. Debapriya Banerjee**⁷¹ held that the notice served upon the company is sufficient as the Director is not drawer of the cheque. It was also held that

⁶⁷ Puran Devi v. J.S. Kalra ITO (1988) 169 ITR 608 (P &H). & Basal Tools Company v. I.T.O. (1987) ITR 24 (P & H)

⁶⁸ R.Sekar v. S.P. Arjunaraja, I (1994) BC 648

⁶⁹ Oswal Ispat Udog v. Salem Steel Suppliers, I (1991) BC 559

⁷⁰ K.Krishnamurthy, M.D., M/s. Surya Advertising (P) Ltd., Bangalore v. M/s Arti Press, Sivakasi, I (1992) BC 361

⁷¹ I (1992) BC 403

no separate notice is required to be served upon to the petitioner- Director for prosecuting him along with company for the offence alleged to be committed by the company under Section 138 of the Negotiable Instruments Act. Whereas madras High Court in its judgement has held that unless the company made accused the person who is in charge of and responsible for the conduct of the business of the company cannot be held responsible.

Kerala High Court has held that prosecution proceedings against the person in charge or the officer in charge are maintainable instead of the company not being prosecuted against as an accused and further it held that either the company can be prosecuted or the person mentioned in sub-section (1) can be prosecuted or both can be prosecuted together in the same proceedings.

There is a conflict of opinion. It is appropriate here to refer to **The Company of the Management of the Baranagore Jute Factory v. State of West Bengal**,⁷² in which it was held:

- (i) The accused persons cannot be prosecuted without the leave of the appropriate court and there is only vicarious liability and for which the company cannot be prosecuted without the leave of the court under section 446 of the Companies Act;
- (ii) Even if the Criminal proceeding is initiated without the leave of the appropriate court, there is no bar under the law to obtain leave subsequently; and
- (iii) Leave will be necessary, however, the appointment made by the court place the appointee in a position of an officer of a court for any particular purpose of a delegate of the Court for the purpose of managing or dealing with an affair brought or placed under the control and supervision of the court making such appointment.

⁷² I (1992) BC 184

Punjab and Haryana High Court has held that complaint can proceed against Director without company being impleaded. The proof that the Director was In Charge and responsible to the company for conduct of its business is not dependent on oral evidence alone, documentary evidence may also have to be furnished and such evidence may be supplied only at the trial.⁷³ In an another case the same High Court held that whether in fact, petitioners directors were responsible to company for conduct of its business is a question of fact to be determined after evidence is led to that effect by parties.⁷⁴

B. Offences by the Firms or Association of Individuals

Section 141 of the Amended Negotiable Instruments Act provides for the offence by the companies. In clause (a) of the Explanation it is stated that the company means anybody corporate and includes a firm or other association of individuals. Clause (b) states that the director in relation to a firm means a partner in the firm. The question now arises as to what is the position of the firm in the matter of the Negotiable Instruments Act specially when the cheque is signed by the partner of a firm. There are a series of decided cases on the subject and one of them is being referred here⁷⁵ in which it was held that where a cheque is issued on behalf of a firm by a partner of the firm and the cheque is dishonoured and notice in terms of clause (b) of the proviso to Section 138 of the Act is issued to the firm, the firm is the drawer of the cheque and there is no question of issuing the notices to all the partners. It is sufficient that there is an averment in the complaint that all the partners of the firm were taking part in the running of the business of firm and all the partners are liable to be prosecuted against by virtue of sub-clause (1) of Section 141 of the Negotiable Instruments Act, 1881.

⁷³ T.P. Singh Kalra v. Star Wire Indian Ltd. (2001) 5 Comp. LJ 254 (P&H)

⁷⁴ Mrs. Manu Podar and another v. Ashwini Kumar and others, (2001) 5 Comp. LJ 261(P & H)

⁷⁵ Oswal Ispat Udyog v. Salem Steel Suppliers, I (1991) BC 559

Similarly in **ESSB Food Specialties v. Kapoor Brothers**,⁷⁶ it was held that in the case of an offence by a company or a firm in case a Managing Partner alone is issuing cheques on behalf of the firm and there is no allegation then the other partner cannot be made liable.

Punjab and Haryana High Court held that action under section 138 cannot be taken against a person who is a sleeping partner and who has not been shown to be in charge of business or affairs of the firm.⁷⁷

Whereas the Madras High Court had held that there is a basic and fundamental difference between a firm and proprietary concern. The complaint filed under section 138 against a proprietary concern is not maintainable in view of section 141 of the Negotiable Instruments Act.⁷⁸

In **P.M. Muthuraman v. M/s Shree Padmavathi Finance (Regd.)**⁷⁹ it was held that the sole proprietary concern is outside the purview of Explanation to section 141 i.e. it is not a company within the meaning of company as defined under Explanation to Section 141 of the Negotiable Instruments Act, thus, sole proprietary concern could not be made a party in the complaint apart from the sole proprietor.

XI. CONCLUDING REMARKS

The people who issue cheques knowingly well that cheque is not going to be honoured on presentation, try to create circumstances in which the banks return the cheque with such endorsements as “Stop payment”, “Refer to Drawer” and “A/c closed”. This is with a view to escape from the criminal liability. ‘Account Closed’ cannot afford a ground for taking penal action under the Act. Except the two ground i.e. the insufficiency of the funds or, because the cheque exceeds the amount arranged to be paid there is no third eventuality contemplated under the Act. Further, the main

⁷⁶ 1992 Cri. LJ 739: 1993(78) Comp. Cas. 570

⁷⁷ Amrit Rani v. M/s Malhotra Industries Corporation, I (1992) BC 262

⁷⁸ Sivasakthi Industries v. Arihand Metal Corporation, 1992(2) Crimes 374: (1992) 74 Comp. Cas Mad 749

⁷⁹ 1994(8)) Comp. Cas 656

object of Section 138 was to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Despite civil remedy,

The present day economies of the world which are functioning beyond the international boundaries are relying to a very great extent on the mechanism of the Negotiable Instruments such as cheques and bank drafts and also the oriental bill of exchange as the business activities have increased, the attempt to commit crimes and indulge in activities for making easy money has also increased. Thus besides civil law, an important development both, in internal and external trade is the growth of crimes and we find that banking transactions and banking business is every day being confronted with criminal actions and this has led to an increase in the number of criminal cases relating to or concerned with the Banking transactions. Whenever a cheque is dishonoured, the legal machinery relating to the dishonour of a cheque comes into motion. It is in the larger public interest that commercial transaction maintains the speed and tempo and that a swift sale or a prompt purpose, is not unduly impeded by suspicions always hovering round that part of promise to be performed in future. The issue of a cheque carries with it assumptions which could regulate the normal functioning of an honest citizen.