CHAPTER III
CHEQUE – DEFINITION, ESSENTIALS
AND DISHONOUR THEREOF

3.1 Definition of a Cheque

The Negotiable Instruments Act, 1881 defines the ‘Cheque’ as under:

A ‘cheque’ is a bill of exchange drawn on a specified Banker and not expressed to be payable otherwise than on demand.¹

The above provision has been substituted by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act 2002, as under:

A ‘cheque’ is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.

A ‘bill of exchange’ is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument. It will be thus seen that cheque is a special kind of bill of exchange in the sense that it is drawn in the name of a specified Banker.²

Black’s Law Dictionary defines cheque as a draft drawn upon a bank and payable on demand signed by the maker or drawer, containing an unconditional promise to pay a sum certain in money to the order of the payee.³

¹ See Section 6.
² See Section 5.
Mitra’s Legal and Commercial Dictionary defines cheque as a bill of exchange drawn on a banker, payable on demand. A bearer cheque is one expressed to be payable to a particular person or bearer, an order cheque is one which is expressed to be so payable, or which is expressed to be payable to a particular person or body and does not contain words prohibiting transfer or indicating an Intention that it should not be transferable.\textsuperscript{4}

Venkataramaiya’s Law Lexicon Dictionary defines cheque as bill of exchange drawn on a specified banker and not expressed to be payable otherwise then on demand.\textsuperscript{5}

Jowitt’s Dictionary of English Law defines cheque as –

“Cheque [Persian Shah-mat, the king is dead, chemate; hence check meaning to stop, control, verify; check or cheque was applied to slips of paper of which a piece was torn off to serve as a counterfoil or tally] A cheque is a bill of Exchange (q.v.) drawn on a bank, payable.\textsuperscript{6}

Wharton’s Law Lexicon defines it as –

“Cheque- An order addressed to a banker requesting him to pay to (a) the person therein mentioned, or his order, or (b) the person therein mentioned, or the bearer of the cheque, the sum of money therein mentioned; defined in the Bill of Exchange Act, 1882, Sec. 73 by which such provisions of that Act as are applicable to a bill of exchange payable on demand apply also to a cheque as a bill of exchange drawn on a banker payable on demand.\textsuperscript{7}

\textsuperscript{4} 2\textsuperscript{nd} Edn. 1976 by A.R Biwas, at 130-131.
\textsuperscript{5} 2\textsuperscript{nd} Edn. 1978, Vol. 2, at 122.
\textsuperscript{6} 2\textsuperscript{nd} Edn. 1977, by John Burke, at 330.
\textsuperscript{7} 14\textsuperscript{th} Edn. 3\textsuperscript{rd} Indian Reprint 1996, at 186.
Cheque, also spelled CHEQUE, bill of exchange drawn on a bank and payable on demand; it has become the chief form of money in the domestic commerce of developed countries. As a written order to pay money, it may be transferred from one person to another by endorsement and delivery or in certain cases, by delivery alone. Negotiability can be qualified by appropriate words, as with restrictive endorsements, or by the check form itself.\(^8\)

New Standard Encyclopaedia defines cheque as a written order to a bank to pay money. It is a convenient and safe means of transferring money, and provides a permanent record and receipt for each transaction. Any person or firm having money on deposit in a checking account in a bank may write a check on that bank. In some cases, money may be transferred from one checking account to another without writing a check; the transactions accomplished by computer.\(^9\)

Thomson’s Dictionary of Banking, defines Cheque as – CHEQUE (Formerly written “check”). The word is derived from the French ‘Eches’, Chess. The Chequers placed at the doors of public houses are intended to represent Chessboards and originally denoted that the game of Chess was played in those houses. Similar tables were employed in reckoning money, and hence came the expression “to check an account”; and the Government office where the public accounts were kept was called the “Exchequer”. Another explanation is that the word ‘Cheque’ arose from the consecutive numbers, which were placed upon the forms to act as a check or means of verification. In the United States the word “check” is used at the present day. Cheques first came into use about 1780.\(^10\)

\(^10\) 12\(^{th}\) Edn. at 313 (1974).
A cheque differs from a bill in multiple ways: it does not require acceptance; it is drawn upon a specified banker; the banker may be protected if it pays a cheque bearing a forged endorsement; the drawer is the person liable to pay it and the drawer, as a rule, is not discharged of his liability by delay in presentation for payment. The intention behind issuance of a cheque is that it be paid at an early date.\textsuperscript{11}

3.2 Method of Drawing a Cheque

To open a banking account, a person deposits a minimum prescribed sum of money in a bank. The bank issues him a cheque-book with blank cheque forms, and provides him with a means of maintaining a record of the cheques he writes and the amount of money he still has on deposit. The bank gives him a receipt for each new deposit and sends him a statement periodically showing a complete record of all transactions. All honoured cheques (checks that have been cashed by the bank) are returned with the statement, providing the depositor with proof that payment was received. The bank usually levies a small service charge on every account, and perhaps also a charge for each cheque written.\textsuperscript{12}

To make out a cheque, the depositor scribes the date, the name of the payee (the person or firm who is to receive the money) and the amount. He then signs his name on the cheque. Before encashing the cheque the payee must endorse it by signing his name on the back. He then either deposits it in a bank or exchanges it for cash by giving the cheque to a bank, currency exchange, business firm, financial institution, broker or individual. The new owner can endorse the cheque to someone else or can deposit it in a bank for being encashed. When a cheque reaches a bank, it is forwarded through a clearing-house back to the bank on which it was drawn. After making sure the depositor’s signature is genuine, this bank in turn pays the presenting


\textsuperscript{12} Ibid.
bank through the clearing-house.\textsuperscript{13}

Money on current account is just like any other debt, it is repayable on demand; if a customer comes and asks for his money, he is entitled to have it without the formality of drawing a cheque. In such a case, however, the customer would have to give a receipt. But the regular and ordinary method of withdrawing money from a current account is by means of a cheque. A depositor may withdraw money from his deposit account by signing a form of receipt.\textsuperscript{14}

Indelible pencils are not much desirable articles for drawing cheques. A cheque written in ordinary pencil should not ordinarily be paid without personal reference to the drawer, as the banker cannot possibly tell whether or not it has been altered or forged. It is much desired that all cheques should be written in ink. Typewritten cheques are too easily altered, and their use is discouraged as far as possible. A cheque written upon a plain sheet of paper, provided it is in proper form, is sufficient. Cheques of such description should, however, never be drawn except in cases of extreme necessity or urgency.

A customer’s cheque must be unambiguous and must be \textit{ex facie} in such a condition as not to arouse any reasonable suspicion. But it follows from that it is the duty of the customer, should his own business or other requirements prevent him from personally presenting it, to take care to frame and fill up his cheque in such a manner that when it passes out of his (the customer’s) hands it will not be so left that before presentation, alterations, interpolations, etc., can be readily made upon it without giving reasonable ground for suspicion to the banker that they did not form part of the original body of the cheque when signed. To neglect this duty of carefulness is a negligence cognisable by law. The consequences of such negligence fall alone upon the party guilty of it – namely, the customer.\textsuperscript{15}

\subsection*{3.3 Essentials of a Cheque}
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\textsuperscript{13} Ibid.
\textsuperscript{14} Sir John Paget in the Gilbert Lectures 1916 (No.1), quoted in \textit{Canadian Banking Practice}, 1921.
Cheque is by far one of the important negotiable instruments. It is frequently used by the people and business community in the course of their personal and business transactions. The essential requisites of cheque are as under:\(^{16}\):

A) **Must be in Writing** –

The cheque may be scribed by hand by using ink or ballpoint pen, typed or it may even be printed. However the customer should not make use of pencil to fill up the cheque form. Even though other columns may be permitted to be filled up in hand or printed or typed, the signatures should be made in ink by the drawer.

B) **Must be Unconditional** –

The order to pay the amount must be absolute and unconditional. If any condition is imposed to pay the amount to the holder of the cheque then it will not be considered to be a valid cheque. A cheque made payable on the happening of some contingent event is void \textit{ab-initio}.

C) **Must be Drawn on a Specified Banker** –

For a cheque to be validly recognized under law it must be drawn on a specified banker. If there is no mention in the cheque about the banker it would not be a valid cheque. In addition to it, it must contain mention all the three parties i.e. Drawer, Drawee and Payee.

D) **Certain Sum of Money** –

It is one of the essential requirements of the cheque that it must be payable in terms of money and money only. If not in terms of money but some other quantifiable units then it will not be a valid one. Also the sum mentioned in it must be certain and quantified exactly.

E) **Certain Payee** –

The parties of the Cheque must be certain and not vague like “wife of Mr. Ashok”. There are three parties of the cheque i.e. Drawer,

\(^{16}\) \textit{Supra} Note 12, at 27.
Drawer and Payee. In a valid Cheque the names of all three must be certain and specific. It must contain an order, which must be unconditional.

F) Date –

A cheque must be signed by the drawer with date otherwise it would not be a valid cheque. The date on which the cheque is drawn must be specific because as per the guidelines of Reserve Bank of India, cheque is valid for presentment only within three months from the date on which it is drawn.

3.3.1 Aspect of Negotiability

In accordance with Section 5 and 6 of the Indian Negotiable Instruments Act, 1881, cheques are regarded as negotiable. A study of the cheque, thus, requires a study of the negotiable instrument. An instrument, to be negotiable must conform to the following requirements:

(i) It must be in writing and signed by the maker or drawer;

(ii) It must contain an unconditional promise or order to pay certain sum in money;

(iii) It must be payable on demand; or at a fixed or determinable future time;

(iv) It must be payable to order or to bearer; and

(v) Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.\(^{17}\)

Negotiable instrument is one the property in which is acquired by anyone who takes it bonafide and for value, notwithstanding any defect of title in the person from whom he took it, from which it follows that an instrument cannot be negotiable unless it is such and in such a state that the true owner could transfer the contract or

\(^{17}\) J.M. Rosenbery, *Dictionary of Banking and Finance*, at 57 (1982).
engagement contained therein by simple delivery of the instrument.  

3.3.1.1 Test of Negotiability

In order to ascertain the negotiability, whether it exists or not, certain tests can be applied. Negotiability means that a cheque is transferable. It may, therefore, be laid down as a safe rule that where an instrument is by the custom of trade transferable like cash by delivery, and is also capable of being sued upon by the person holding it pro tempore, then it is entitled to the name of a ‘negotiable instrument’, and the property in it passes to a bona-fide transferee for value, though the transfer may not have taken place in ‘market overt’. But that if either of the above requisites be wanting, i.e. if it be either not accustomably transferable, or though it be accustomably transferable, yet, if its nature be such as to render it incapable of being in suit by the party holding it pro tempore, it is not a negotiable instrument, not will delivery of it pass the property in it to a vendee, however, bona-fide if the transferor himself have not a good title to it and the transfer be made out of market overt.

When the holder of a negotiable instrument who is entitled to receive its payment, transfers the same to another person so that the transferee now becomes entitled to receive the payment thereof, the instrument is said to have been negotiated. When a promissory note, bill of exchange or a cheque is endorsed to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated. In other words negotiation means in simple words, a transfer of negotiable instrument from one person to another in accordance with the provisions of the Negotiable Instrument Act, so that the rights in an instrument are transferred from one person to another. It is necessary that the transfer of the instrument must have been effected with an intention to transfer the rights. If that intention does not exist, the rights would not be transferred. In the case of a bearer instrument, the rights can be transferred by mere delivery. If

such a delivery is made with an intention to transfer the rights the transferee would be entitled to receive the payment of the same. On the other hand, if that intention is grossly missing, such a right will not vest in the transferee.\textsuperscript{20}

### 3.3.1.2 How Is Negotiable Instrument Negotiated?

A negotiable instrument may be negotiated in two ways: (i) if the instrument is a bearer instrument, the rights in it can be transferred by mere delivery from one person to another. It is however, necessary that the delivery of the negotiable instrument must be made with an intention to transfer ownership, i.e. constitute the transferee as the holder of the instrument, as required by section 14\textsuperscript{21} (ii) If the instrument is an order one the rights in it can be transferred by endorsement and delivery.\textsuperscript{22}

As noted above an order instrument can be negotiated by endorsement of the same and then delivery thereof. The rights in the instrument are not transferred to the endorsee unless after making the endorsement the same has been delivered. If a person makes the endorsement of an instrument but before the same could be delivered to the endorsee the endorser expires, the legal representatives of the deceased person cannot negotiate the same by mere delivery thereof on account of the reason that the legal representative is not the agent of the deceased. He cannot complete the process of negotiation left incomplete by the deceased.\textsuperscript{23}

### 3.3.1.3 Vital Characteristics of Cheque

In the above perspective, the most essential feature of a cheque is that it can be transferred. The transfer can be effected either by way of mere delivery or by an endorsement coupled with delivery.

\textsuperscript{20} Supra Note 12, at 46.
\textsuperscript{21} Section 14 says when a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute the person the holder thereof, the instrument is said to be negotiated.
\textsuperscript{22} Supra Note 12, at 47.
\textsuperscript{23} Ibid.
Whenever, the procedure mentioned above is adopted, the ownership of the property bestowed in the instrument is transferred and further no other document is required to be executed for this purpose. On the other hand the other documents like shares and debentures are not negotiable, as the property in such documents is not transferred only by means of delivery.\(^\text{24}\)

The second vital characteristic of a cheque is that a holder in the course gets a valid title to it despite of any defect or shortcoming in the transferor’s title. Such a *bona-fide* transferee for value gets a comprehensive, independent and indefeasible title to the instrument and such person is known as the ‘holder in due course’ and he gets a title against the whole world i.e. *ad-rem*. In case this characteristic is missing then the whole machinery of trade would be disturbed as nobody would then accept a cheque if the transferee was made liable to make fishing enquiries about the titles of the transferor.\(^\text{25}\)

In law there exists a general rule *nemo dat quod non-habet* which means that no one can give what he does not have. However, so far as the Negotiable Instruments are concerned, they are an exception to this Rule. It has been very well pointed by Wills J. that the general rule of law is undoubtedly that no one can transfer a better title than he himself possesses: *nemo dat quod non habet*. To this there are some exceptions, one of which arises out of the rule of the law as much as to negotiable instruments. These being part of the currency, are subject to the same rule as money, and if such an instrument be transferred in good faith for value before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder. This rule, however, is only intended to favour transfers in the ordinary and usual manner, whereby a title is acquired according to the law merchant, and not a transfer which is valid (only) in equity according to the doctrine respecting the assignment of choses-in-action; and it is therefore clear

\(^{24}\) *Id.* at 52.

that in order to acquire the benefit of this rule the holder must, if it be payable to order, obtain an endorsement, and that he is affected by notice of a fraud received before he does so. Until he does so he is merely in the position of the assignee of an ordinary chose-in-action, and has no better title than his assignor.\textsuperscript{26}

There is, thus, a difference between the transfer of a negotiable instrument and that of ordinary goods and chattels. The general rule of law is that, where a person has obtained the property of another from one who is dealing with it without the authority of the owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property has authority to do so. If this can be shown a good title is acquired by personal estoppels against the true owner. There is an exception to the general rule, however, in the case of negotiable instruments any person in possession of these may convey a good title to them even when he is acting in fraud of the true owner, and although such owner has done nothing tending to mislead the person taking them.\textsuperscript{27}

This characteristic of a cheque is in complete variance to the legal position relating to transfer of a chose-in-action, i.e. the property which a person has not got in his actual possession but which he has a right to demand by a legal action and which he can assign to another. According to Section 130 of the Transfer of Property Act, 1882 such transfer is complete only after the execution of an instrument. It is necessary that a notice of assignment be given to the debtor or to the person against whom such a right is claimed. In the case of a negotiable instrument no prior notice of transfer is required and it is naturally presumed that the negotiable instrument is always supported by consideration. This characteristic of a cheque also yields another

\textsuperscript{26} Whistler v. Forster, (1863) 14 CB (NS) 248.
\textsuperscript{27} Lord Herschel, in London Joint Stock Bank v. Simmons, (1892) AC 201.
difference that a holder in due course is protected against any claim whereas an assignee, though he may part with full value and act in good faith, takes the actionable claim subject to all the liability.  

The last essential feature of a cheque on account of it being a negotiable instrument is that it has an inherent mechanism built in itself and it has a right of action infused within the same. The holder of a cheque has therefore, a right to sue thereon in his own name and he is not dependent upon title of any other person. Whenever a bona-fide holder for value without notice or, in short a holder in due course sues on the basis of an instrument, it is for the defendant to prove that the plaintiff is not entitled on the cheque on which the case is being instituted. It cannot be lost sight of that a cheque, which is negotiable, can be made not negotiable if the negotiation is prohibited. In case a cheque is crossed “not negotiable” or made payable only to the payee named therein “and not to his order or to bearer” such cheque is not negotiable. 

Cheque marked with the words “pay cash or order” does not come within the meaning of the Act and is not a negotiable instrument. There is no provision in the Act that the drawee is as such liable on the instrument, the only exception being under section 31 in the case of a drawee of a cheque having sufficient funds of the customer in his hands and even then the liability is only towards the drawer and not the payee. Where there is no acceptance no cause of action can be said to have arisen to the payee against the drawee.

3.3.2 Difference Between a Cheque and a Bill of Exchange

A cheque is no doubt essentially a bill of exchange, but it has certain peculiarities, which distinguish it from a bill of exchange. Some of the peculiarities were clearly stated in Ram Churun Mullick v. Luckmee Chand. A cheque is a peculiar sort of instrument, in many

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28 See Section 132 of the Transfer of Property Act, 1882.
29 Supra Note 12, at 62.
31 (1854) 9 Moore PC 64.
respects resembling a bill of exchange, but in some entirely different. A cheque does not require acceptance, in the ordinary course it is never accepted; it is not intended for circulation, it is given for immediate payment; it is not entitled to days of grace. A cheque has always to be made payable on demand, whereas an ordinary bill of exchange can be made payable after a fixed period. A future-dated cheque, being not payable on demand, may not be regarded as a cheque in the real sense of the word unless that date arrives and it becomes payable on demand.

A cheque is exempted from stamp-duty, but a promissory note as well as a bill of exchange attracts stamp duty under the Indian Stamp Act, 1899.\textsuperscript{32} There are many differences between cheque and a bill of exchange. Some of them are as under\textsuperscript{33}: -

A) The acceptance of drawee is not mandatorily required for payment of cheques, whereas the bill of exchange requires the acceptance of drawee before it is made liable for payment;

B) A banker is the only drawee in case of payment by cheque, while any person including a banker can be the drawee of a bill of exchange;

C) A cheque is payable immediately when the demand is made and without affording any days of grace but in a bill of exchange, the grace period of three days is given for its payment;

D) In case of bill of exchange, if it is not duly presented for payment or otherwise, the drawer is discharged, whereas in case of cheque, the drawer is discharged if the holder of cheque causes delay in taking payment or presenting it to banker for payment after the expiry of period prescribed by the banker from the date of its issue;

E) When a bill of exchange is dishonoured, due to non-payment,

\textsuperscript{32} Karuvilla v. Varkey, ILR (1969) 2 Ker 630.

\textsuperscript{33} Dr. Avtar Singh, Negotiable Instruments, at 28 (2016).
a notice to that effect should necessarily be given to all concerning parties, whereas it is not necessary in case of dishonour of a cheque. In case of dishonour of a cheque, notice is to be given only to the drawer thereof and none other;

F) A cheque has always to be made payable on demand whereas an ordinary bill of exchange can be made payable after a fixed period. A future dated cheque being not payable on demand may not be regarded as a cheque in the real sense of the word unless the date arrives and it becomes payable on demand.

### 3.3.3 Difference Between Draft and a Cheque

A draft is as much a bill of exchange as a cheque and there is hardly any difference between a dishonoured draft and a dishonoured cheque, which is issued by a bank on itself. The difference between the two consists basically in two aspects:

A) A draft can be drawn only by a bank on another bank and not by a private person as in the case of a cheque and;

B) A draft cannot be so easily countermanded as a cheque either by the person purchasing it or by the bank to which it is presented.

C) If a person requires money to be remitted from one place to another through a bank by way of a draft, it will be the relationship of not merely creditor and debtor as between the customer and the bank but also a relationship of *cestui que* trust and trustee. If the purchaser of the draft cancels it before it is delivered to the drawee and retains it in his own hands we can treat the bank which issued the draft as his debtor and when a creditor demands the amount from the bank, the bank would,

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34 Mohanlal Jagami Rice Atta Mills v. Ramlal Omkarmal Firm, AIR 1957 Assam 133.
thereby, be liable to satisfy the demand.\textsuperscript{35}

3.3.4 Holder and Holder in Due Course

Every instrument initially belongs to the payee and he is entitled to its possession. The payee can transfer it to any person in payment of his own debt. This transfer is known as ‘negotiation’. Negotiation takes place in two ways. A bearer instrument passes by simple delivery and the person to whom it is delivered becomes the holder. An order instrument, on the other hand, can be negotiated only by endorsement and delivery and the endorsee becomes the holder. Hence the holder means either the bearer or endorsee of an instrument. Accordingly Section 2 of the English Bills of Exchange Act, 1882, provides that “holder means the payee or endorsee of a bill or note who is in possession of it or the bearer thereof”. The definition contained in Section 8 is to the same effect, although expressed in different words. It says that holder means any person entitled in his own name to the possession of an instrument and to receive and recover the amount. Now, no one can be entitled to the possession of a bill or note unless he becomes either the bearer or endorsee thereof.\textsuperscript{36}

3.3.4.1 Holder Entitled In His Own Name

The holder must be entitled in his own name to the possession of the instrument. A person may be entitled to possession of the instrument although he does not have actual possession. The definition seems to suggest that the term holder means only a dejure holder and does not necessarily apply to a defacto holder. A person may be operation of law become the holder of a negotiable Instrument although he is not the bearer, payee or indorsee there of, the heir or legal representative of a deceased payee can claim as the holder.\textsuperscript{37}

The word ‘Holder’ has been defined in Section of the 8 of the

\textsuperscript{35} Ibid.
\textsuperscript{36} Dr. Avtar Singh, \textit{Negotiable Instruments}, at 39 (2016).
\textsuperscript{37} Ibid.
Negotiable Instruments Act as well as in Section 2 of English Bills of Exchange Act, 1882 as mentioned above. Reading these definitions conjunctively with section 78 of the Negotiable Instruments Act, holder means that a person to whom the payment should be made in order to discharge the maker or acceptor from all liabilities under the instrument is the holder of the instrument or he is accredited agent such as banker, acting as an agent for collection. A person who cannot claim and does not have right to recover the amount due on the instrument, is not the holder. Thus, a person who can sue in his name is a holder. He may be the payee or one who becomes entitled to it as endorsee or becomes the bearer of an instrument payable to the bearer. The most vital words in the section are ‘entitled in his own name’. Thus, the term ‘holder does not include a person who, though in possession of the instrument, has no right to recover the amount due thereon from the parties thereto. However, the assignee of such person is entitled to sue in his own name.38

A holder must have the right to receiver or recover the amount due on the instrument from the parties there to. To qualify as a holder, a person should have derived title to the instrument in a lawful manner. A plaintiff who is a benamidar or a trustee or guardian and has taken the instrument in his on name, is entitled to sue upon it. The beneficial owner of an instrument cannot bring a suit on it, if he is not the holder.39

3.3.4.2 Assignment of Negotiable Instruments

Negotiable instruments can be assigned under Section 130 of the Transfer of Property Act 1882. The assignee of a promissory note can, sue the maker for recovering the amount due on the note by virtue of his right under that Act. The assignee, however, takes the instrument, subject to the liabilities and equities to which the assignor was subject

to at the time of the assignment. An assignment of a promissory note at a partition to a member of a joint family does not amount to a transfer by act of parties but by operation of law, no document in support of the assignment is, therefore required under section 130 of the Transfer of Property Act 1882. Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.  

3.3.4.3 Holder in Due Course

The Negotiable Instruments Act, 1881 defines ‘Holder in Due Course’ as any person who for consideration became the possessor of the a promissory note, bill of exchange or cheque if payable to bearer, or the payee of endorsee thereof, if payable to order, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.  

3.3.4.3.1 Essential Requisites of a Holder In Due Course

In order to be labeled as a holder in due course, a person must show:

a) that he is the holder of the negotiable instrument,
b) he has obtained it for consideration,
c) he has obtained it before the maturity of the negotiable instrument, and
d) that he has obtained the negotiable instrument in good faith.

Until contrary is proved the holder of a negotiable instrument is presumed to be a holder in due course.  

In India it has been seen above the payee can also be a holder in due course but in England the payee of a negotiable instrument cannot be holder in due course as was decided by the house of Lords in Jones v. Waring and Gillow. If a person gets an instrument under a forged

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40 Muthuveeran v. Govindan, AIR 1961 Mad 518.
41 See Section 9.
42 See Section 118(g).
43 1926 AC 670; Lewis v. Clay, 14 T.L.R. 149.
endorsement, he cannot be called a holder in due course. A transferee under a forged endorsement gets no title to the instrument and if such a transferee has been able to get the amount of the instrument, he is bound to account for the same to the owner of the instrument.

Section 9 requires that to be a holder in due course a person must take the negotiable instrument before the amount due thereon became payable. Section 59 of the Negotiable Instruments Act also provides that a person taking a negotiable instrument after its maturity has the rights thereon of a transferor. It necessarily envisages that a person taking an instrument after maturity will not be a holder in due course and thus will not be capable of having a better title than that of the transferor.44

3.3.4.3.2 Instrument Must be Obtained for Consideration

A holder in due course must have obtained the instrument for consideration. The consideration must also be valid and lawful. If a person takes a negotiable instrument without consideration or where the consideration is unlawful he cannot be called a holder in due course. Holder in due course must take the negotiable instrument without having sufficient cause to believe that any defect exists or existed in the title of the person from whom he delivers his title. The condition requires that he should have acted in good faith and with reasonable caution.45

A conjunctive reading of sections 8, 9, 14 and 15 shows that a promissory note, bill of exchange or a cheque can be negotiated or transferred by making an endorsement either on the instrument or on a separate paper annexed thereto. The transferee of such instrument becomes the holder if that person is entitled in his own name to the possession thereof when it is transferred in his favour by making the necessary endorsement. The holder of a cheque becomes holder in due course only when he has become the possessor thereof for

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44 Supra Note 37.
45 Ibid.
consideration without knowing that any defect existed in the title of the person from whom he derived the title. No one can sue on a negotiable instrument as a holder unless he is named therein as the payee or unless he becomes entitled to it as endorsee or bearer.\textsuperscript{46}

\textbf{3.3.4.3.3 Identity of the Drawer Need Not be Proved}

In the case of \textit{Mathew George v. Jacob}\textsuperscript{47} the Kerala High Court held that complainant need not prove identity of accused. A reading of section 138 would clearly indicate that as and when cheque signed in discharge of a legally enforceable debt is dishonoured, the offence under section 138 of the Act comes into existence. Further, as per section 139 of the act, there is a presumption in favour of the holder of the cheque. It is the burden of the complainant to prove that the cheque was signed by the drawer in discharge of a legally enforceable debt. If such burden is proved, the presumption under section 139 of the Act comes into force in favour of the complainant. In such circumstances, the identity of the signatory of a negotiable instrument does not arise. Further, as per section 9 of the Act, a complaint can be filed by a person who is holder in due course of a negotiable instrument like the cheque.\textsuperscript{48}

When a private complaint is filed before the court, the court is expected to make an enquiry under section 202, Cr.P.C. only with regard to the offence alleged and not with regard to the identity of the accused who committed the offence. In the above circumstances, identity of the signatory of a cheque is not a question to be considered by the Trial Court.\textsuperscript{49}

\textbf{3.3.5 Endorsement}

When the maker or holder of a negotiable instruments signs the same otherwise than as maker, for the purpose of negotiating the same, on the back or face thereof, or on a slip of paper annexed there to or so

\textsuperscript{46} \textit{Munaluri Narayanamoorthi v. Dwadasi Vumamaheswaran}, AIR 1930 Mad 197.
\textsuperscript{47}(2006)1 KLT 126.
\textsuperscript{48} \textit{Ibid.}
\textsuperscript{49} \textit{Ibid.}
signs for the same purpose a stamped paper intended to be completed as negotiable instrument, he is said to endorse the same, and is thereby called the “endorser.” The endorsement therefore means signatures of the person which are generally made at the back of the instrument, for the purpose of transfer of rights consisted therein to another person. An endorsement is completed by the delivery of the instrument to the endorsee. Thus where a person endorses an instrument to another and keeps it in his papers where it is found after his death and delivered to the endorsee, the latter gets no right on the instrument.  

3.3.5.1 Types of Endorsements

A. Endorsement in Blank

If the endorser signs his name only, the endorsement is said to be “in blank”, and if he adds a direction to pay the amount mentioned in the instrument to, or the order of, a specified person, the endorsement is said to be “in full “and the person so specified is called the “endorsee” of the instrument. Where the endorser signs only his name on the back of the instrument for the purpose of negotiating it that is an endorsement “in blank”. The effect of a blank endorsement is to convert the order instrument into bearer. For all purposes of negotiation it becomes a bearer instrument. It may be negotiated by simple delivery and the bearer is entitled to its payment.  

It remains so until the endorsement in blank is converted by the holder into endorsement in full a subsequent endorsement in full will not have the effect of converting the instrument into “order”. All subsequent endorsements will be needless and forgery of a redundant endorsement will not affect the title of any subsequent party. Where a cheque is originally payable to bearer, any endorsement in blank or in full or of restrictive nature will not destroy its bearer character and the banker will be discharged from his liability by payment to the bearer. A bearer instrument means one which is expressed to be payable to bearer or on which the only or the last endorsement is in blank.  

50 Supra Note 37.
an endorsement in blank is subsequently followed by an endorsement in full, the endorser in full will be liable to his immediate endorsee and parties deriving title from him but not to others. When an endorsement in blank is followed by an endorsement in full, it is called conversion of endorsement in blank into endorsement in full.\textsuperscript{52}

An instrument which is endorsed in blank becomes payable to bearer and transferable by simple delivery. No further endorsement is necessary. If any such endorsement in blank or in full is inserted, it remains redundant and inoperative and has no effect. When the payee of a bill of exchange has made an endorsement in blank, no subsequent endorsee can restrain its negotiability by a special endorsement. The endorser could have transferred the instrument by delivery and, therefore, his liability is reckoned as that of a transferor by delivery. Endorsement makes the endorser liable to the person to whom he endorsed the instrument in full and also to such other persons who derive title from such endorsee in full, subsequently.\textsuperscript{53}

B. Endorsement in Full

If the endorser puts his signatures by adding a direction to pay the amount mentioned in the instrument to, or the order of, a specified person, the endorsement is said to be “in full” and the person so specified in the endorsement is called the “endorsee” of the instrument. The usual form of course, is to add the words “or order” after the name of the endorsee, but as no form is prescribed, any words will do so long as they clearly show the endorser’s intention.\textsuperscript{54} Where neutral words like “made over” or “assign” are used, the intention of the parties would have to be looked into to see whether endorsement or assignment was intended. If the words used are equivalent to a direction to pay, it would amount to an endorsement within the meaning of section 16.\textsuperscript{55}

A person procured a loan for his two sons and, having received a

\textsuperscript{52} Ibid.
\textsuperscript{53} Ibid.
\textsuperscript{54} Babu v. Budho, ILR 1935 Oudh 264.
\textsuperscript{55} Ibid.
bill of exchange duly accepted by them for the amount, he signed his own name across the back and forwarded it to the lender. The sons became bankrupt and the father and the lender having died, there was no exact evidence why the father put his name of the bill. His representatives were held to be not liable, for he was not an acceptor. The court said that the character in which the father did become a party to the bill was both in fact and law that of an endorsement. The effect of an endorsement in full is that the instrument can be paid only to the endorsee and can be further negotiated only by his endorsement. The instrument retains its order character.

The holder of an instrument endorsed in blank may, by adding the name of a person before the endorser’s signature, convert the endorsement into full. The holder does not thereby incur any liability as an endorser. This right is given to the holder by the provision in section 49. The holder does not himself sign, but only adds the name of a person before an endorsement in blank. The holder may then transfer the instrument to the person whose name he so specified but will not incur the liability of an endorser.

C. Effect of Endorsement and Restrictive Endorsement

The endorsement of a negotiable instrument followed by delivery transfers to the endorsee the property therein with right of further negotiation; but the endorsement may, by express words, restrict or include such right, or may merely constitute the endorsee an agent to endorse the instrument or to receive its contents for the endorser, or for some other specified person. One of the effects of an endorsement which has been completed by delivery is that the property in the instrument passes to the endorsee and he gets the right of further endorsement. But when this right of further negotiation is, by express words in the endorsement restricted or taken, away, that is called

56 Sivarama Krishan v. M. Kunthu, ILR 33 Mad 134.
57 Ibid.
58 Supra Note 37, at 90.
“restrictive” endorsement.\textsuperscript{59}

The endorser may altogether exclude the right of further negotiation or only restrict it or may merely constitute the endorsee an agent to endorse the instrument, or to receive its contents for the endorser or for some other specified person. The effect of a restrictive endorsement is that the endorsee gets the right to receive the payment when due and sue the parties for it, but he cannot further negotiate the instrument except as authorized by the endorser. The endorsee is constituted merely as an agent for collection and the endorser remains the real owner of the instrument. An endorsement for collection does not as between the endorser and endorsee, pass the property in the bill to the endorsee, though it puts him in a position to make a title for a subsequent holder in due course.\textsuperscript{60}

A restrictive endorsement has to be distinguished from conditional delivery. Where the endorsement is without any restriction, but while delivering the instrument to the endorsee an agreement is obtained from him that he will not cash or transfer it unless a condition is fulfilled, there, if the endorsee transfers further without fulfilling the condition, the transferee may get a good right if he acts in good faith. In the case of a restrictive endorsement, the restriction upon transfer being apparent upon the endorsement, any further transferee will take the instrument subject to the restriction.\textsuperscript{61}

\textbf{D. Endorsement Sans Recourse}

The endorser of a negotiable instrument may, by express words in the endorsement, exclude his own liability thereon or make such liability or the right of the endorsee to receive the amount due thereon depend upon the happening of a specified event, although such event may never happen. Where an endorser so excludes his liability and after words become the holder of the instrument, all intermediate

\textsuperscript{59} Ibid.
\textsuperscript{60} 
\textsuperscript{61} 

\textsuperscript{61} Supra Note 37, at 91.
endorsers are liable to him.\textsuperscript{62}

If the endorser does not want to incur any liability as endorser, he can insert a stipulation in his endorsement negative or limiting his liability. A person who was not a party to a cheque, at the request of the payee wrote his name on the back thereof, adding the words “sans recourse” it was held that an endorser has a right to negate his liability by suitable words.\textsuperscript{63} When an endorser of this kind becomes the holder of the instrument in his own right, all intermediate endorsers are liable to him.

\textbf{E. Conditional Endorsement}

The endorser can also insert some sort of a condition in his endorsement. He may, say that “Pay X or order on his marriage” or on the arrival of a ship”. A condition of this kind does not affect the position of the party who has to pay the instrument on its maturity. He may pay to the endorsee and will be discharged from liability whether the condition has been fulfilled or not. But as between the endorser and endorsee the condition is operative. If the endorsee obtains the payment without the condition being fulfilled he will hold the same in trust for the endorser.\textsuperscript{64}

A conditional endorsement can be distinguished from a conditional delivery. In conditional delivery no mention of the condition is made in the endorsement or any where else on the instrument. The condition is separately stipulated upon.\textsuperscript{65}

\textbf{F. Partial Endorsement}

No writing on a negotiable instrument is valid for the purpose of negotiation if such writing purports to transfer only a part of the amount appearing to be due on the instrument; but where such amount has been partly paid, a note to that effect may be endorsed on the

\footnotesize{\textsuperscript{62} Ibid.  
\textsuperscript{63} Wakefield v. Alexander & Co.,(1901) 17 TLR 217.  
\textsuperscript{64} Supra Note 37, at 98.  
\textsuperscript{65} Ibid.}
instrument, which may then be negotiated for the balance.\footnote{Ibid.}

An instrument cannot be endorsed for a part of its amount only.\footnote{Hawkins v. Cardy (1699) 1 Ld Raym 360:91 ER1137.} If the instrument is for Rs 100 it can not be endorsed for Rs 50 only. But if the amount due has already been partly paid, a note to that effect may be endorsed on the instrument and it may then be negotiated for the balance where an instrument has been partly paid but the fact of part payment is not entered on it, and, if it is endorsed to a bona fide holder, it will be an instrument of full value in his hand.\footnote{Shaik Md. Hussain v. M. Reddaiah, (1979) 1 Andh RLT 25.}

The transfer of an instrument to two different persons will mean part transfer in favour of one and part in favour of the other. It will also be in operative under section 56. Such persons, however, become joint owners of the instrument and may recover as joint payees what ever may be their mutual rights.

3.3.6 Negotiation of Dishonored or Overdue Instruments

An instrument retains it negotiability in the real sense of the word with its characteristic of conferring title upon a bona fide holder for value only during the period of its currency. The currency of an instrument comes to an end when it reaches its maturity or is dishonored earlier either by way of non-acceptance or by non-payment. There after it is no more negotiable and any person acquiring it with knowledge of its dishonor or maturity gets no better rights than those of his transferor. The maturity of an instrument can be examined from its face particularly when it is payable after a fixed period of time so far as demand instruments are concerned. Maturity varies with the nature of the document. A promissory note payable on demand remains current until it is presented and dishonored.\footnote{Borough v. White, (1825) 4 B&C 325:107ER:107ER 1080.}

A cheque is always payable on demand and remains current only for a short period after issue. Where an instrument has been dishonored before it reaches its maturity and the fact of dishonor is apparent on its
face, no one can become its holder in due course there after. But if the fact of dishonor is not noted in the instrument and it is transferred to a person who did not know, he will acquire a good title to the instrument. Where an instrument is already over due according to its own apparent tenor, a transferee of it will acquire no better title than that of the transferor not with standing that he may have taken the instrument bona fide and for a valuable consideration.  

An overdue or dishonored instrument carries with it all its blemishes. In a case a note was issued without consideration and though it was given by the payee to his endorsee for consideration, it being already overdue at the time, it was held that the endorsee was also affected by the want of consideration. Where a person takes a note a long time after it is overdue, he takes it subject to all the equities by which it is affected. In another case a note was endorsed after it was due, and that is a suspicious circumstance, from which the law infers that the party taking the note had knowledge of some infirmity in the title of the holder, the endorsee then takes it subject to all the objections to which it was liable in the hands of the person from whom he took it where an instrument is delivered to a person for a special purpose only and not for negotiation and he ignoring that restriction, transfers it to another while it was overdue, the transferee would be affected by the restriction.

Instruments remain negotiable till they are discharged by payment or by some other satisfaction. A bill of exchange is negotiable and infinitum until it has been paid by, or discharged on behalf of the acceptor. Section 60 provides that an instrument may be negotiated until payment or satisfaction at or after maturity, but not after such payment or satisfaction. The consequence is that where an instrument has reached its maturity, but has not been paid, it remains negotiable. It can still be transferred, though, of course the transferee being not a
holder in due course, will be affected by any shortcoming in the title of
his transferor. The title of the transferee will be valid and he will be
entitled to recover payment. Thus it is not the maturity, but the fact of
actual payment at or after maturity, which puts an end to the
negotiability of an instrument. Even payment will not end the life of an
instrument if it is not a payment “at or after maturity”. Where payment
is made before maturity, the instrument remains valid for further
negotiation till the time the fact of payment is noted on it or it is
withdrawn, cancelled or destroyed.74

3.4 Dishonour of Cheque

Advancement and progress of society and concomitant increase
of commerce and various activities of trade, lead to increased
complexity in transaction of money between human beings and the
ancient law givers were also forced by the circumstances to evolve new
rules for regulating such monetary transactions. The present day
economies of the world which are functioning beyond the international
boundaries without being inhibited by territorial limits are relying to a
very great extent on the mechanism of negotiable instruments such as
cheques and bank drafts. Since business activities have increased, the
attempt to commit crimes and indulge in activities for making easy
money has also accelerated. Thus besides civil law, an important
development both, in internal and external trade is the growth of
criminality and we find that banking business is every day being
confronted with criminal actions which has led to an increase in the
number of criminal cases pertaining to banking transactions.75

Whenever a cheque is dishonoured, the legal machinery
pertaining to the dishonour of a cheque comes into motion. 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

74 Ibid.
Thus if on presentation the banker does not pay the cheque amount then dishonour takes place and the holder acquires at once the right of recourse against the drawer and the other parties on the cheque.\(^7\)

### 3.4.1 Ingredients of Liability Under Section 138

In order to constitute the offence punishable under section 138 of the Act, the following ingredients are mandatory:

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.

D) The payee has given a notice to the drawer claiming the amount within 30 days of the receipt of the information by the bank.

E) The drawer has failed to pay the cheque amount within 15 days from the date of receipt of notice.\(^7\)

### 3.4.1.1 Meaning of Debt

Debt means something owed to another, a liability, an obligation. A chose in action which is capable of being assigned by the creditor to some other person. The assignment must be in writing and must apply to the whole of the debt.\(^7\)

Debt means something which one person is bound to pay to or perform for another. It means an obligation and the state of owing

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\(^7\) See Section 138.

\(^7\) Dictionary of Banking by F.E. Perry, at 56 (2008).
something to another, as to be in debt. It must be an existing debt and not a contingent debt. It must be a debt accrued and not a debt in future.\textsuperscript{79}

Debtor means one who owes money, or is under some obligation to another.

### 3.4.1.2 Meaning of Liability

The word liability is defined in the Explanation to section 46 of the Presidency Towns Insolvency Act, 1909. Liability means the state of being liable. It means something for which a man is liable and includes pecuniary liability or limited liability. Payment for taxes, house rents may amount to enforceable liability. \textit{The Law Lexicon}\textsuperscript{80} states:

“Liability: A broad term; it may be employed as meaning the state of being liable, that for which one is responsible or liable; obligation is general; that condition of affairs which given rise to an obligation to do a particular thing to be enforced by action; responsibility; legal responsibility. In other words, the condition of one who is subject to a charge or duty which may be judicially enforced.”

### 3.4.1.3 Interpretation of Terms

It is submitted that the above mentioned terms should be interpreted within the limited meaning so as to include a legally enforceable debt or liability. Different Acts have given different definitions of these terms. Various meanings have been given under the Income Tax Act, 1961, Wealth Tax Act, 1957, Indian Contract Act, 1872 and so on. Similarly there may be various type of liabilities which may arise in different ways and they may exist real or contingent ones and may be legally enforceable or not. However, we are concerned only with a legally enforceable debt or liability as far as section 138 of

\textsuperscript{79} New Webster Dictionary, at 62 (2009).
\textsuperscript{80} By P.Ramanath Aiyar, at 212 (2010).
the Act is concerned. There are various debt which are not legally enforceable by law, like a debt due on a wagering contract is not backed by a lawful consideration. Similarly a payment made in a gratuitous manner is also not covered under Section 138 of the Negotiable Instruments Act, 1881.

### 3.4.2 Causes of Dishonour of a Cheque

The most common reasons for dishonour of a cheque are enumerated below:

#### 3.4.2.1 Refer to Drawer

In the *Dictionary of Banking by Perry and Ryder*,\(^8^1\) “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."

Although in *London Joint Stock Bank v. Macmillan & Arthur*,\(^8^2\) 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.

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\(^8^1\) 11\(^{th}\) Edn., at 211 (2008).
\(^8^2\) (1918) AC 777.
In *Flach v. London & South Western Bank Ltd.*, Mr. Justice Scrutoon 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*, 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.

In *Plunkett v. Barclays Bank Ltd.*, 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 Parcq J. adopted the view of

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83 (1915) 31 TLR 334.
84 *Ibid*.
85 (1906) 22 TLR 760.
86 1936 2 KB 107 : (1936) 1 All ER 653: 154 LT 465.
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. 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, decision on the grounds that there the dishonour was not in fact wrongful.

If a cheque is retuned 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, bringing the decision of the King’s Bench in Plunkett v. Barclays Bank Ltd, 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 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,

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88 (1915) 31 TLR 334.
89 1990 (1) MWN (Cr) Mad 75: 1990 LW (Cr) 66.
90 (1936) 2 KB 107: (1936) 1 All ER 653: 154 LT 465.
even on this ground, no offence was made out.”

At times it is also suggested that the reasons, “Not arranged for” or “Exceeds Arrangement” 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.

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 Court 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. 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 account 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 another case captioned as Jaya Lakshmi v. Rashida, 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, 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.

92 Ibid.
93 1992(2) Crimes 5.
We can also refer to the case *M. Shreemulu Reddy v. N.C. Ramasamy*,\(^9^5\) 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*,\(^9^6\) 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 *Dynamatic Forging India v. Nagarjuna Investments Trusts Ltd.*,\(^9^7\) of the Andhra Pradesh High Court and *Voltas Ltd. v. Hiralal Agarwalla*,\(^9^8\) 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*,\(^9^9\) 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 insufficient 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

\(^9^7\) 79 CC 583.
\(^9^9\) II (1992) BC 525: 76 Comp Cas Delhi 764.
Act has been made out.\textsuperscript{100}

3.4.2.2 Exceeds Arrangement
This term is commonly 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 is existing or overdraft facility not sanctioned.\textsuperscript{101}

3.4.2.3 Full Cover not Received
It is generally meant to show that adequate funds to honour the cheque do not exist or that the customer has not given adequate security to cover the overdraft which might be created by paying the cheque.\textsuperscript{102}

3.4.2.4 Effects not Cleared
It is 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. 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 or undo such facilities.\textsuperscript{103}

3.5.2.5 Not Sufficient or Funds Insufficient
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 usually marked with the words “not sufficient”, “insufficient funds” or “not sufficient funds”.\textsuperscript{104}

3.5.2.6 Not Provided for
An answer sometimes written by a banker on an instrument, which is being returned unpaid for the reason that the drawer has

\begin{footnotesize}
\begin{itemize}
\item[100] Thomas Verghese v. Jerome, 1992 Cri. LJ 308.
\item[101] Supra Note 76, at 101.
\item[102] Ibid.
\item[103] Ibid.
\item[104] Ibid.
\end{itemize}
\end{footnotesize}
failed to provide funds to meet the cheque amount. A better answer in these circumstances is “Refer to Drawer”. 105

3.5.2.7 Present Again

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 reasonable explanation why the cheque has been returned. 106

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 be used as the these words do not depict any clear reason for dishonour of the instrument.

3.5.2.8 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 an indefeasible right to give notice his bankers to stop payment of a cheque which he has issued. The notice should be in writing and should bear accurate particulars of the cheque and should be signed by the drawer. In case a Bank passes a cheque after such stop payment directions has been received, it shall be liable for so doing. 107

In London Provincial South Western Bank Ltd. v. Buszard, 108 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

105 Id. at 103.
106 Ibid.
107 Ibid.
108 (1918) 35 TLR 142: 63 SJ 246: 3 LDB 204.
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 persons and is lost, a notice to one of them, i.e. one executor, one trustee, secretary, etc., is usually 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 likes, at a later stage, he can cancel his order to stop payment but it should be done in writing and be signed by him.

After the Negotiable Instruments Amendment and Miscellaneous Provisions Bill, 2002 (Bill No. 55 of 2002), drawers who issue cheques knowingly well that cheque is not going to be honoured on presentation, try to create such like circumstances whereby 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 criminal liability. The question arises as to whether the offence under the section 138 shall be committed in case the cheque issued by a person is dishonoured on account of such reasons. The preponderance of the view of the said judicial decisions is that in case a cheque is retuned dishonoured with such remarks and if it can be proved that there was also 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 a specific averment in the complaint 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 person issuing the cheque.\textsuperscript{109}

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.\textsuperscript{110}

### 3.5.2.9 Account Closed

This term essentially means that on the day of the presentment of the cheque, the account of the drawer has been closed, thereby the cheque drawn on the said cheque cannot be encashed.

Hon’ble Kerala High Court observed 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. The drawer of the cheque who closes his

\textsuperscript{109} Supra Note 37, at 104.

\textsuperscript{110} (1995) 82 Comp Cas. 35 Guj.
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.  

**3.4.3 Issuance of Notice**

Clause (b) of the proviso of Section 138 states that the payee or the holder in due course of the cheque makes a demand by giving a notice within 15 days of the receipt of information by him regarding the dishonour of the cheque. Now the period of 15 days has been increased to that of 30 days by the Amendment Bill No. 55 of 2002. In this way this proviso stipulates –

A) The payee is the holder in due course.

B) A demand in made by giving a notice by the payee to the drawer.

C) The notice is given within a period of 15 days (now 30 days as per new provisions) from the date of receipt of the information about dishonour.

The provision of a notice in the Act has been enacted so as to give an opportunity to the person who has drawn the cheque to make the payment in case there is no *mala fide* on his part.  

**3.4.3.1 Written Form**

Clause (b) of proviso to Section 138 of the Negotiable Instruments Act, 1881 contemplates ‘notice in writing’. It does not say that is should mandatorily be sent by Registered Post or that it should be served by post. Section 27 of the General Clauses Act cannot be transposed into Section 138 of the Negotiable Instruments Act, where the ‘service by post’ is not contemplated and what is contemplated is ‘notice in writing’.  

**3.4.3.2 Proper Address**

The notice in writing is to be sent at the proper address of the

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112 See Section 138.
drawer, which may either be his residential address or the address of the place where he works for gain. Where the notice, which was sent to the accused, returned with endorsement ‘not found’ and the complainant immediately went to the business place of the accused to deliver notice, which was refused, it was held that notice sent at proper address amounts to constructive notice. This is a notice which was sent by the complainant by the Registered Post for the purpose of Section 138 of the Negotiable Instruments Act and which was returned with the endorsement ‘unclaimed’. This shall be sufficient service for the purpose of the Act and shall amount to a culpable default or deliberate evasion of the accused. This would constitute ‘receipt of notice’.114

3.4.3.3 Receipt of Notice

To constitute an offence under Section 138 of the Negotiable Instruments Act, 1881, the complainant is obliged to prove its ingredients which include the ‘receipt of notice’ by accused under clause (b). It is to be kept in mind that it not the ‘giving of notice’ which makes the offence, but is the ‘receipt’ of the notice by the drawer which gives cause of action to complainant to file the complaint within the statutory period.115

As per settled law that without taking peremptory action in exercise of his right under clause (b) of Section 138 of the Negotiable Instruments Act, 1881, the payee cannot go on presenting the cheque so as to enable him to exercise his right at any point of time during the validity of the cheque. But once he gives a notice under clause (b) of the proviso to Section 138 of the Act, he forfeits the right of presenting the cheque all over again, for, in the case of failure of drawer to pay the money within the stipulated time, the drawer would be liable for the offence and the cause of action for filing the complaint will arise with the period of one month for filing the complaint being required to be reckoned from the day immediately following the day on which the

period of fifteen days from the date of the notice by the drawer expires.\textsuperscript{116}

Statutory notice of demand must be a written one and not an oral notice. When the complainant brought fact of dishonour of cheque to notice of accused orally but on request by accused, complainant allowed three months time. On second presentation, cheque was again dishonoured. Statutory Notice after second dishonour by complainant was well within validity period then complaint filed after second dishonour within validity period was proper.\textsuperscript{117}

3.4.3.4 Constructive Service of Notice

It has been held that sub-Section (c) of Section 138 does not at all contemplate any constructive notice.\textsuperscript{118} If constructive notice has been contemplated under the said sub-Section by the Legislature, sufficient phraseology would have been utilised for such a purpose. The language used therein, namely, ‘receipt of the said notice’, unambiguously points out actual receipt of the notice. In the case in hand notice issued had not been actually served but it has been returned with a postal endorsement as ‘not found’. Such being the case, it cannot at all be stated that the provisions of sub-Section (c) of the said Section had been duly complied with and the non-compliance of the said provision is sufficient enough for the prosecution to be thrown back, stock and barrel.\textsuperscript{119}

Assuming for arguments that the provisions of sub-Section (c) of the said Section contemplates constructive notice, even then it cannot be stated that in the case on hand, there is a plausibility to come to the conclusion of the existence of such a constructive notice. It is not as if the notice has been returned as “refused to receive” and in such an eventuality, one can attribute knowledge on the part of the person responsible for the refusal of such a notice. In the case of a postal acknowledgement marked as ‘not found’, which is exactly the situation

\textsuperscript{116} Sadanandan Bhadran v. Madhavan Sunil Kumar, AIR 1998 SC 3043.
\textsuperscript{117} H.N.Haria v. A.J. Mavla, (2002) 1 Comp. LJ 143 (Karnataka).
\textsuperscript{118} R.M. Sundaram v. C.M. Ramraj, 283 Mad.
\textsuperscript{119} Ibid.
in the case on hand, it cannot be stated that there could have been any sort of willful evasion of such a notice, in as much as issuance of such a notice could not be put to the knowledge of the person to whom it was intended. Held therefore that it cannot be stated that the complaint had complied with the provisions of sub Section (c) of Section 138 of the Act and consequently, he has to face the music of dismal failure of his complaint being thrown out.\textsuperscript{120}

Provisions requiring notice to be given are generally construed liberally. In the context in which notice to the drawer is contemplated in clause (b) of the proviso of Section 138, a liberal interpretation is needed in favour of the person who is under the statutory obligation of giving notice since he is the loser in the transaction and it is for safeguarding his interest that the new provisions have been made. The giving of notice and receipt of notice are two different things but even so the court held that in the present context if the payee has despatched notice to the correct address of the drawer reasonably ahead of the expiry of 15 days, it would be sufficient to show that the notice has been received by the opposite party.\textsuperscript{121}

\textbf{3.4.3.5 Cause of Action}

The Allahabad High Court held that the cause of action under the proviso (b) and (c) of Section 138 of the Negotiable Instruments Act, for filing complaint cannot be said to arise merely on the cheque being dishonoured but will arise only after the giving of notice of demand of the amount of the cheque by payee or holder in due course of the cheque to the drawer of the cheque and coupled with the failure of the drawer of the cheque to pay the amount within 15 days of the date of service or receipt of the notice on or by him.\textsuperscript{122} Whereas the Madras High Court held that the mere presentation and dishonour do not create the cause of action. It is the notice, which gives the cause. There is no restriction on the number of times for presenting the cheque for payment. Accordingly, any one of those presentments, within the time

\textsuperscript{120} Ibid.
\textsuperscript{122} V.D.Agarwal v. 1\textsuperscript{st} Addl Munsif Magistrate, (1993) 11 LCD 1108 All.
limit of six months, may be chosen for given notice and launching prosecution.\textsuperscript{123} In this case it followed its earlier decision.\textsuperscript{36} In another case it held that the date of the issue of the cheque could be enquired at the trial.\textsuperscript{124}

A cheque can be presented by the payee or its holder in due course on different occasions but within the prescribed period of six months or the period of validity of the cheque whichever is earlier, further a clear stipulation that upon the dishonouring of the cheque for the first time, the payee has not taken any action as postulated in terms of provision (b) and (c) of provision to Section 138 of the Act.\textsuperscript{125}

Failure to file complaint on the dishonour of a cheque on the first occasion is not a bar for initiation of a prosecution subsequently, and successive dishonour of cheque on different occasions, of course, presented within its period of validity, will have to be construed as constituting separate cause of action for the initiation of prosecution. According to Sections 138 and 142(b) cause of action to file complaint arises on the expiry of notice demanding payment and not earlier.\textsuperscript{126}

3.5 Procedure for Filing of Complaint

The definition of a ‘complaint’ is not contained in The Negotiable Instruments Act itself. However, the term ‘complaint’ has been defined Code of Criminal Procedure, 1973 as under:\textsuperscript{127}

\begin{quote}
‘Complaint, means any allegation made orally or in writing to a Magistrate with a view to his taking action under this Code, that some person, whether known of unknown, has committed an offence, but does not include a police report.’
\end{quote}

Further the explanation appended to the above provision states that a report made by a police officer in a case which discloses, after investigation, the commission of a non cognizable offence shall be

\textsuperscript{123} K.Annakaldi Ammal v. K. Ethiraj, (1994) 80 Comp. Cas. 870 Mad.

\textsuperscript{124} K.V. Iyer v. Chitra & Co., (1990) 2 MWN (Cri) 47.


\textsuperscript{126} Ibid.

\textsuperscript{127} See Section 2(d).
deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant.\textsuperscript{128}

It is submitted that the complaint filed before the Magistrate should set out the allegations, which prima facie make out an offence under the Act stated therein. It should further be accompanied by a prayer therein to take cognizance of the said offence and to compel the accused by legal process to stand his trial under law. Under the statutory provisions of Section 138 of the Negotiable Instruments Act, the Court is empowered to take cognizance of such offence only if the complaint is preferred by the payee or the holder in due course of the cheque. In case of Company or Firm it will be filed by its authorized officer or representative.

3.5.1 Summary Trial

The Negotiable Instruments Act, post amendment by the legislature in the year 2001, specifically provides for all offences under the Chapter to be tried by Judicial Magistrate of First Class or Metropolitan Magistrate in accordance with the Summary Trial provisions of sections 262 to 265 of CrPC. It further provides that if at the commencement or during the course of summary trial, the Magistrate finds that nature of case was such that a sentence of imprisonment exceeding one year may have to be passed or for some other reason the Magistrate comes to conclusion that case should not be tried summarily, the Magistrate has to pass an order after hearing the parties, giving reasons as to why he wishes to try the case not in a summary manner but as a normal summon case. He shall recall witnesses who may have been examined and proceed with the case to hear it as a summon trial case.\textsuperscript{129}

However, the procedure so prescribed could not resolve the issues arising from the adversities to adopt the summary procedure. The absence of the parties for the hearing or the absence of the

\textsuperscript{128} Ibid.
\textsuperscript{129} See Section 143.
respective advocates, were highly detrimental to the objective behind prescribing a summary procedure to be followed in cases of dishonour of cheques. Subsequently, in the case of Rajesh Agarwal v. State and Others\textsuperscript{130}, the Hon'ble Delhi High Court prescribed certain guidelines with respect to the summary trial procedure which would be followed with respect to offences under section 138. The summary trial procedure to be followed for offences under section 138, would thus be as under:

- **Step I:** On the day complaint is presented, if the complaint is accompanied by affidavit of complainant, the concerned MM shall scrutinize the complaint & documents and if commission of offence is made out, take cognizance & direct issuance of summons of accused, against whom case is made out.

- **Step II:** If the accused appears, the MM shall ask him to furnish bail bond to ensure his appearance during trial and ask him to take notice u/s 251 Cr. P.C. and enter his plea of defence and fix the case for defense evidence, unless an application is made by an accused under section 145(2) of NI Act for recalling a witness for cross examination on plea of defence.

- **Step III:** If there is an application u/s 145(2) of NI Act for recalling a witness of complainant, the court shall decide the same, otherwise, it shall proceed to take defence evidence on record and allow cross examination of defence witnesses by complainant.

- **Step IV:** To hear arguments of both sides.

- **Step V:** To pass order/judgment.\textsuperscript{131}

3.5.2 Private Complaint

Clause (a) of Section 142 contemplates of filing of a private

\textsuperscript{130} (2010) ILR 6 Del 610.

\textsuperscript{131} Ibid.
complaint only. This section does not give any indication to refer such a private complaint filed by the payee or the holder in due course to the police for investigation under Section 156(3) of the Code of Criminal Procedure by the magistrate before whom such a complaint is filed.\textsuperscript{132}

The Andhra Pradesh High Court held that the cognizance of a complaint by a Magistrate on police complaint not to be valid.\textsuperscript{133} In another case the same High Court has held that the Magistrate has no power to refer to the matter to the police.\textsuperscript{134}

### 3.5.3 Bar under Other Statutes/Provisions

There exist special statues meant for protecting the interests of the creditors. Such statutes incorporate provisions to protect the assets in the hands of the debtor so that the same are not misapplied and may be available only for rateable distribution and not otherwise. These statutes generally bar or provide for stay of suits and other proceedings, so that no charge or encumbrance is created by these proceedings on the assets of the debtor. However it has been categorically opined in various judicial pronouncements that the proceedings under section 138 of the Act are not barred even by the exclusionary clauses contained in such special statutes.\textsuperscript{135}

Section 446 of the Companies Act 1956 which relates to liquidation of a company and provides for the stay of suits and other proceedings has been held, not to apply to proceedings under section 138, since the proceedings therein do not relate to the assets of the company.\textsuperscript{136}

It has been held that a company court in winding up proceedings would not have jurisdiction to stay criminal prosecution nor is its permission required to prosecute company for offences. The expression ‘legal proceedings’ must be read ejusdem generis with ‘suit’ and can

\textsuperscript{132} K.Mahadevan v. Y.Venkat, (1992) 3 ALT 634.


\textsuperscript{134} H.Mohan v. State of Karnataka, 1991(2) Crimes 93 (Kar).

\textsuperscript{135} Supra Note 37, at 212.

\textsuperscript{136} Pankaj Mahra v. State of Maharashtra, (2000) 1 Crimes 282 SC.
only mean civil proceedings, which have a bearing so far as winding up is concerned.\(^{137}\) Even where the complaint against company is suspended due to the winding up ordered by company court, the prosecution of the directors can continue since the prosecution of company is not sine qua non for the prosecution of the directors.\(^{138}\)

Section 22 of the Sick Industrial Companies (Special Provisions) Act 1985 makes provision for the ‘suspension of legal proceedings’ and provides that no ‘suit’ for recovery of money or enforcement of any security shall be instituted without the permission of the Board for Industrial and Financial Reconstruction. It has been held that the said section does not exclude criminal prosecution under Section 138 since the prosecution is neither for the recovery of money nor for the enforcement of any security but for bringing the offender to penal liability.\(^{139}\)

It has also been held that where the offence has already been complete before the company is declared sick by Board for Industrial and Financial Reconstruction, the proceedings under section 138 are not barred.\(^{140}\)

However, where the company is declared sick and directions under section 22A of the Sick Industrial Companies (Special Provisions) Act 1985 are issued to the company or its directors restraining them from disposing off the assets, except with the permission of the court before the cheque is presented for payment or before the expiry of the statutory period of 15 days of notice, then the offence under section 138 is not said to be completed.\(^{141}\)

In *B. Mohan Krishan v. Union of India*,\(^{142}\) the Andhra Pradesh High Court had held that prior permission of the Board for Industrial and Financial Reconstruction was not necessary to prosecute a

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\(^{142}\) (1996) 86 Comp. Cases 487.
company or its official under this provision, where the company had been declared sick under Section 15(1) of the Sick Industrial Companies (Special Provision) Act 1985 and Board for Industrial and Financial Reconstruction had drawn up a scheme for the companies reconstruction.

It has also been held that the criminal proceedings under section 138 are not barred by Section 29 of the Provincial Insolvency Act 1920, which provides for, stay of ‘Suit or other proceedings’ since the same applies to civil proceedings and not to criminal prosecution. Almost similar wordings in section 28 of the Presidency Town Insolvency Act 1909 have also been construed to the effect that it prohibits filing of suits and other proceedings against the insolvent’s property and not criminal cases and that offence under section 138 is a statutory offence and totally different.  

In Bharat N. Mehta v. Mansi Finance (Chennai) Ltd. it has been held that the words ‘any suit or other proceedings’ in the insolvency Act do not refer to personal act committed by the accused committing offence and thus, proceedings under section 138 are not barred.

In Prudential Capital Market Ltd. v. State of Bihar, the Supreme Court held that there was no provision under the Reserve Bank of India Act 1934 which prohibited any criminal proceedings under other Acts to continue against Non-Banking Finance Companies. The Provision of Section 58E bars taking cognizance of offences commissioned under the said Act namely the Reserve Bank of India Act 1934. The power of company law Board under section 45QA of the Act does not in any manner take away the power of criminal court to continue with criminal proceedings.

In M/s S.R. Nagraj and Co. v. M/s Shri Ganesh Oil Mills, the

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144 (2000)1 Crimes 490.
145 (2000)102 Comp. Cases 442 SC.
provisions of Karnataka Agricultural Produce Marketing (Regulation) Act 1966 provided that suit or other proceedings for recovery of amount due shall not be filed, without obtaining sanction from the Market Committee. It was held that sanction was only required for disputes of Civil Nature and did not apply to criminal prosecution and thus, proceedings initiated under section 138 for the Act for dishonour of cheque were maintainable, without the requirement of any sanction.

3.6 Jurisdictional Aspect

Originally the Act was silent on the matter pertaining to the relevant jurisdiction with respect to filing of criminal complaint in case the offence of dishonour of the cheque is committed under Section 138. Since the Criminal courts are approached for filing of such complaints, the issue needs to be examined from the point of view of the Criminal Procedure Code, 1973.

Section 177 of CrPC provides that—
"Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed".

Section 178 provides that-
"(a) When it is uncertain in which of several local areas an offence was committed, or (b) Where an offence is committed partly in one local area and party in another, or (c) Where an offence is a continuing one, and continues to be committed in more local area has one, or (d) Where it consists of several acts done in different local areas, It may be inquired to or tried by a court having jurisdiction over any of such local areas."

The jurisdiction in respect of cheque bouncing cases is explained with reference to the landmark cases of K.Bhaskaran v. Sankaran Vaidhyan Balan and Anr147 and the later case of Dashrath Rupsingh

Rathod v. State of Maharashtra & Anr\textsuperscript{148}, while assessing the position before and after these judgements.

### 3.6.1 Legal Position Before "K.Bhaskaran" Case

In *P.K. Muraleedharan v. C.K.Pareed and Anr*\textsuperscript{149} Kerala High court opined that the place where the creditors resides or the place where the debtor resides cannot be said to be the place of payment unless there is any indication to that effect either expressly or impliedly. The cause of action as contemplated in section 142 of the Act arises at the place where the drawer of the cheque fails to make payment of the money. That can be the place where the Bank to which the cheque was issued is located. It can also be the place where the cheque was issued or delivered. The Court within whose jurisdiction any of the above mentioned places falls has therefore got jurisdiction to try the offence under Section 138 of the Act.

In *Jugal Kishore Arun v. V.A. Neelakandan*\textsuperscript{150} it was observed, that a prosecution for issuing of a cheque without sufficient funds in the Bank, will have to be instituted before the Court within whose jurisdiction the cheque was issued.

The High Court of Punjab and Haryana stated that as to the question of jurisdiction, it is to be considered that the issuance of the cheques and their dishonoring are only a part of cause of action; the offence was complete only when the petitioner failed to discharge their liability to the respondent-firm. For discharging a debt, it is the debtor who has to find out his creditor and since in the present case, the respondent, who is the creditor, has its office at Panchkula, the Court at Ambala had the territorial jurisdiction.\textsuperscript{151}

The High Court of Allahabad held that so far as territorial jurisdiction is concerned, the cause of action arises at a place where the cheque was drawn, or a place where the cheque was presented, or a

\textsuperscript{148} AIR 2014 SC 3519.

\textsuperscript{149} 1993(1) ALT (Cri) 424.

\textsuperscript{150} 1990 LW (Cri) 492.

\textsuperscript{151} *M/s. Essbee Food Specialties and Ors. v. M/s. Kapoor Brother*, 1992 (Suppl) MWN (Cri. 132).
place where the payee made a demand for payment of the money by giving a notice in writing to the drawer within the stipulated period and at a place where the drawer failed to make the payment within 15 days of the receipt of notice. 152

_In Rakesh Nemkumar Porwal v. Narayan Dhondu Joglekar and Anr.,153_ it was laid down that the anatomy of S. 138 comprises certain necessary components before the offence can be said to be complete, the last of them being the act of non-payment inspite of 15 days having elapsed after receipt of the final notice. It is true that the cheques may have been issued by the accused at his place of residence or business, the Bank on which it is drawn being often located at a second spot and inevitably the complainant or the payee has his place of residence or business at yet another location.

_In Gautham T.V.Centre v. Apex Agencies154_ High Court of Andhra Pradesh held that the Court within whose jurisdiction the cheque is given, or where the information of dishonour is received or where the office of the payee is situate, will have jurisdiction to try the offence.

_In Canbank Financial Services Ltd. v. Gitanjali Motors and Ors155_, the Delhi High Court held that the place where the cheque was given or handed over is relevant and the Courts within that area will have territorial jurisdiction. It was further stated that as per Section 179 when an act is an offence by reason of anything which has been done and of a consequence which has ensued the offence may be inquired into or tried by a court within those legal jurisdiction such thing has been done or such consequence has ensued. Payment of cheque against an account having sufficient funds to meet the liability under the cheque is one act while dishonor of the cheque is a consequence of such an act. Therefore as per Section 179 also the place where the cheque was given or handed over will have jurisdiction and the courts of that place will have jurisdiction to try the offence.

153 1993 Cri. LJ 680.
154 (1993) 1 Crimes 723 (AP).
155 1995 Cri. LJ 1272.
Likewise for purposes of Section 178(b) payment of cheque may be one part of an offence and dishonor of the cheque may be another part and, therefore, both places i.e. place where the cheque was handed over and the place where it was dishonored will have jurisdiction.

3.6.2 Position After 'K.Bhaskaran' Case

In K.Bhaskaran v. Sankaran Vaidhyan Balan and Anr156 the Court held that-

"The locality where the bank (which dishonored the cheque) is situated cannot be regarded as the sole criteria to determine the place of offence........A place, for that purpose, would depend upon a variety of factors. It can either be at the place where the drawer resides or at the place where the payee resides or at the place where either of them carries on business. Hence, the difficulty to fix up any particular locality as the place of occurrence for the offence under Section 138 of the Act."

Considering and reproducing the constituents of section 138 of NI Act and section 178(d) of the Code, the Court held that an offence under section 138 is complete only when the following ingredients are met: "(1) Drawing of the cheque, (2) Presentation of the cheque to the bank, (3) Returning the cheque unpaid by the drawee bank, (4) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice. It is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at 5 different localities. But concatenation of all the above five is a sine qua non for the completion of the offence under Section 138 of the Code. In this context a reference to Section 178(d) of the Code is useful. Thus it is clear, if the five different acts were done in five different localities

156 Supra Note 103.
any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the Act. In other words, the complainant can choose any one of those courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done.\(^{157}\)

*In Sunil Srivastava v. Shri Ashok Kalra*\(^{158}\) it was laid down that it is manifest from the law laid down in the aforementioned judgment that the cause of action for filing a complaint under Section 138 of the Act may also be at a place where the drawer of the cheque resided or the place where the payee resided for the place where either of them carried on business or the place where payment was to be made. The complaint can be filed before the court which has jurisdiction over any of these places. In the cited case a complaint under Section 138 was filed before a Magistrate at Adoor in Pathanamthitta District in Kerala. The accused challenged the territorial jurisdiction of the court of try the case. His contention was that the cheque was dishonoured at the bank of the Branch at Kayamkulam, situated in another District. he also denied the issue of cheque and also receipt of notice of demand. The later two objections were decided against the accused. On the first question the Supreme Court enunciated the law as reproduced above.

*In Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd.*,\(^ {159}\) the dishonoured cheque had been presented for encashment by the Complainant/holder in his bank within the statutory period of six months but by the time it reached the drawer's bank the aforementioned period of limitation had expired. The question before the Court was whether the bank within the postulation of Section 138 read with Sections 3 and 72 of the Act was the drawee bank or the collecting bank and this Court held that it was the former. It was observed that non-presentation of the cheque to the drawee bank within the period specified in the Section would absolve the person issuing the cheque of his criminal liability under Section 138 of the NI Act, who otherwise

\(^{157}\) Ibid.


\(^{159}\) (2001) 3 SCC 609.
may be liable to pay the cheque amount to the payee in a civil action initiated under the law. This decision clarifies that the place where a complainant may present the cheque for encashment would not confer or create territorial jurisdiction.

A slightly new dimension to law existing post K. Bhaskaran case was given in Harman Electronics Pvt. Ltd. v. National Panasonic India Pvt. Ltd. In this case Hon'ble Supreme Court examined the question of jurisdiction yet again under Section 138 of the Act. Appellant, was from Chandigarh and had issued a cheque which was returned dishonored, the cheque was issued in Chandigarh to the complainant where he had a branch and was actually present. Notice of payment for the dishonored cheque was issued from the head office of the complainant in Delhi to the accused office in Chandigarh. Due to failure on the part of the drawer a complaint was filed in Delhi. When the case came before the lower courts as well as high court, emphasis and reliance was laid down on 'K. Bhaskaran Case' and finally coming to a conclusion so as to that Delhi Court also have the 'jurisdiction'. The appellant/respondent contended that Chandigarh court had the jurisdiction to try the case but his contention was dismissed, finally, leading to an appeal to Supreme Court. Court held that the court derives its jurisdiction when a cause of action arises and jurisdiction can't be conferred on or for any act of omission on the part of the accused. Also held, issuance won’t but communication will give rise to cause of action. Hence, Delhi Court will not have jurisdiction to try the case. The court adjudged on 'whether a Delhi court would have jurisdiction merely on the ground that the statutory notice under section 138 was issued from Delhi'.

The Hon'ble Supreme Court held that:

A) A cause of action will not be triggered by issue of statutory notice but only receipt/acceptance of notice does.

160 (2009) 1 SCC 720.
B) Solely, the specific provisions of Section 138 will make or build an offence and the proviso is merely a condition required for taking cognizance.

C) A sole issue of notice or presentation of cheque can’t give or provide the court with territorial jurisdiction to try offences under section 138 or it will unreasonably harass the drawer.\textsuperscript{161}

It is submitted that aforesaid Bhaskaran’s case had many unintended consequences. As per the case, the cheque bouncing case can be instituted either at locations, at the convenience of the payee as the cheque may be drawn at Location A, presented for payment and consequently dishonoured at Location B, and legal notice may be issued to the drawer of the cheque for payment of the cheque amount from his branch office located in Location C, as he may have several bank accounts in various places. This causes suffering to the drawer of the cheque, although gives flexibility to the payee of the cheque to choose the place where he was to file the cheque bouncing case. Sometimes, several cheques are issued at the same time by a person to the same payee, which are deliberately presented in different banks located at different places, and thereafter, cheque bouncing cases are filed at different places against the drawer of those cheques.

3.6.3 New Dimensions of Jurisdictional Law

After the K. Bhaskaran’s judgement it was felt at large that the law in its wide expansive amplitude allowed the complainant to rather rampantly abuse and misuse the law to result in hardship and adversity to the drawer, with relative ease. It gave the payee unrestricted power to the payee to single handedly confer jurisdiction on a place of his convenience, consequently, leading to harassment as the payer had, at times, no concern or relation with the distant places where the cheque was issued or which had no link to the transaction or drawer. The leniency thus, was the cause of much upheaval. Thus, the new

\textsuperscript{161} Ibid.
judgement by means of a strict approach sought to discourage the payer from misusing or carelessly issuing cheques. Due sympathy was thus shown or given to the drawer in *Dashrath Rupsingh Rathod v. State of Maharashtra & Anr*\(^{162}\).

In fact the Supreme Court in Dashrath Rathod’s case has observed rightly that –

"*Courts are enjoined to interpret the law so as to eradicate ambiguity or nebulousness, and to ensure that legal proceedings are not used as a device for harassment, even of an apparent transgressor of the law. Law's endeavour is to bring the culprit to book and to provide succour for the aggrieved party but not to harass the former through vexatious proceedings.*"\(^{163}\)

The court held that, the territorial jurisdiction according to section 138 or under the act should exclusively be determined and considered by place/location of the offence. The return of the cheque by the drawer bank only constitutes commission of offence under section 138. Hence, the courts within which drawer bank is located will only have the jurisdiction to try the case. The following points can be culled from the landmark judgment cited supra -

1. An offence under section 138 of the Act, will be considered committed as soon as the cheque drawn by the accused on an account maintained by him for the discharge of debt or liability is returned without honored, either due to insufficiency of funds of the said drawer's account or the amount exceeds the drawer's arrangement with the bank. But, the cause of action could be derived or triggered only when:

- if the dishonored cheque is presented to the drawee bank within 6 months from its issue.

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\(^{162}\) *Supra* Note 104.

\(^{163}\) *Ibid.*
• if the complainant demands for the questioned amount within 30 days of receipt of his intimation from the concerned bank.(bank which dishonored)

• if the drawer or the payer of the cheque has failed to pay the amount in question within 15 days of notice given by the complainant, payee or due holder of cheque.

2. The general rule stipulated under Section 177 of Cr.P.C applies to cases under Section 138 of the Negotiable Instruments Act. Prosecution in such cases can, therefore, be launched against the drawer of the cheque only before the Court within whose jurisdiction the dishonour takes place except in situations where the offence of dishonour of the cheque punishable under Section 138 is committed along with other offences in a single transaction within the meaning of Section 220(1) read with Section 184 of the Code of Criminal Procedure or is covered by the provisions of Section 182(1) read with Sections 184 and 220 thereof.

3. The court clearly addressed the term 'cause of action' and held that the facts constituting cause of action do not constitute the ingredients of the offence under Section 138 of the Act. And, once the cause of action is triggered in favor of the complainant, the jurisdiction of the court to try the case will be determined by the place where the cheque was returned dishonored.

4. In respect of pending cases it distinguished them into following categories and suggested actions as follows:

• Cases in which trial has commenced: Cases in which summoning and appearance of the accused has taken
place and recording of evidence has commenced will continue at the same court. These cases will be deemed to have been transferred from the court which had jurisdiction to the court where they are tried, as per the relaxation provided in public interest.

- Cases pending at the pre-summoning stage: All other complaints including those where the accused/respondent has not been properly served, cases in which summons have not been issued will be maintainable only at the place where the cheque stands dishonored.\textsuperscript{164}

3.6.4 Position after Dasrath Rathod’s Case

In \textit{Vinay Kumar Shailendra v Delhi High Court Legal Services Committee and Anr.},\textsuperscript{165} Supreme Court observed that the issue of a notice from Delhi or deposit of the cheque in a Delhi bank by the payee or receipt of the notice by the accused demanding payment in Delhi would not confer jurisdiction upon the Courts in Delhi. What is important is whether the drawee bank who dishonoured the cheque is situate within the jurisdiction of the Court taking cognizance.

In a case before the Bombay High Court, two cheques were issued, one before the Gandhinagar branch of the State Bank of India and one before the Bank of Maharashtra. The cheques being 'At par', i.e. multi-city cheques payable at par in all branches of the bank, were payable at all branches the abovementioned banks. Factually, the cheque deposited by the complainant in the branches of the banks at Kurla, Mumbai, the nearest available branch of the banks and were dishonored. So, the issue raised was that whether the complaint should be filed at Kurla or at Gandhinagar, as the cheques were payable at par across all the branches. It was held that by issuing cheques payable at all branches, the drawer is giving an option to get the cheques cleared.

\textsuperscript{164} \textit{Ibid.}
\textsuperscript{165} (2014)10 SCC 708.
from the nearest available branch of the bank and therefore the cause of action has arisen in the jurisdiction of the Metropolitan Magistrate, Kurla Court. The courts in Mumbai will have the jurisdiction to try the offence as the cheques were dishonoured in Mumbai.  

However, the above decision of the Bombay High Court was challenged in the Supreme Court vide a Special Leave Petition. This SLP was dismissed by the Supreme Court as withdrawn on 20 March 2015.

3.6.5 New Negotiable Instruments (Amendment) Bill, 2015

As per the researcher’s view, Apex Court’s ruling in Dashrath Rathod’s case only takes care of traditional method of cheque clearance. As per this method the cheque physically travels from the bank branch where it is presented to the drawee bank branch. The decision thus posed difficulties in the modern day cheque truncation system, where the cheque does not travel to drawee bank. Financial institutions and banks pronounced difficulty in coping with the situation.

It has been opined, in view of the rationale for changing the law with respect to jurisdiction under section 138 of the Negotiable Instruments Act, 1881 that -

"The proposed amendments to the Negotiable Instruments Act, 1881 ("The NI Act") are focused on clarifying the jurisdiction related issues for filing cases for offence committed under section 138 of the NI Act. The clarification of jurisdictional issues may be desirable from the equity point of view as this would be in the interests of the complainant and would also ensure a fair trial. The clarity on jurisdictional issue for trying the cases of cheque bouncing would increase the credibility of the cheque as a financial instrument. This would help

167 SLP (Criminal) No. 7251 of 2014.
the trade and commerce in general and allow the lending institution, including banks, to continue to extend financing to the economy, without the apprehension of the loan default on account of bouncing of a cheque.” 168

The Government proposed the Negotiable Instruments (Amendment) Bill, 2015 with a view to amending the Negotiable Instruments Act, 1882. Concerns had been raised by various stakeholders (creditors, industry associations, financial institutions, etc) expressing apprehensions that the Dasrath Rathod’s decision will offer undue protection to defaulters at the expense of the aggrieved complainant; and would ignore the current realities of cheque clearing with the introduction of CTS (Cheque Truncation System). In CTS cheque clearance happens only through scanned image in electronic form and cheques are not physically required to be presented to the issuing branch (drawee bank branch) but are settled between the service branches of the drawee and payee banks. 169

The amendment of 2015 inserted Section 142(2) in the Principal Act. The amendment reads as follows:

‘(2) The offence under Section 138 shall be inquired into and tried only by a court within whose local jurisdiction –

(a) If the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) If the cheque is presented for payment by the payee or holder in due course otherwise through his account, the branch of the drawee bank where the drawer maintains the account, is situate.

Explanation – For the purpose of clause (a), where

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the cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.\textsuperscript{170}

It also inserted a new Clause 142A, which provided that notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any judgment, decree, order or directions of any court, all cases arising out of Section 138 of the Act which were pending in any court, whether filed before it, or transferred to it, before the commencement of the Negotiable Instruments (Amendment) Act, 2015, shall be transferred to the court having jurisdiction under sub-section (2) of section 142 as if that sub-section had been in force at all material times. Where one and the same person has filed cases, in different jurisdictions, against one and the same drawer of cheque, then all such cases have to be transferred to the jurisdiction court of the bank branch of the payee, in which he has presented the cheque for payment, is situated. All complaints between the same parties are to be tried at one place irrespective of where the payee deposits the cheques.\textsuperscript{171}

3.7 Constitutional Validity of Section 138

The validity of section of 138 of the Negotiable Instruments was challenged before the Maharashtra High Court\textsuperscript{55} in Narayanadas Bhagwandas Partani v. Union of India,\textsuperscript{172} 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. Further, it

\textsuperscript{171} Ibid.
\textsuperscript{172} 1993 Mah LJ 1229.
is in the larger public interest that commercial transactions 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.\textsuperscript{173}

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 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.\textsuperscript{174}

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.\textsuperscript{175}

\textsuperscript{173} \textit{Ibid.}
\textsuperscript{174} \textit{Ibid.}
\textsuperscript{175} \textit{Ibid.}
The offence is not the drawing of the cheque. The offence takes places 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.”

3.8 Non-Cognizable Offence

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 sent the same for investigation to the police. It has been 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 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.

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176 V.S. Krishnan v. V.S. Narayanan, 1990(1) MWN (Cri) Mad 75.
177 Cucusan Foils Private Co. Ltd. v. State (Delhi Administration), 1990(2) RCR 518.
3.9 Stay of Proceedings

Where after the issue of notice to the drawer of the dishonour of his cheque he filed a civil suit denying his liability to pay and, therefore, contending that Section 138 was not attracted and obtained an interlocutory injunction restraining the payee of the cheque from proceeding under Section 138, the grant of the injunction was held to be illegal.178 The Supreme Court held that where a civil suit was pending at the time when criminal proceedings were launched for the dishonour of a cheque and the High Court stayed the civil proceedings under the apprehension that the defendant’s defences in the criminal case would become disclosed in advance, the approach of the High Court was not correct. The court noted that the defence in the criminal case had already been filed and therefore, nothing remained which deserved protection from disclosure.179

Civil and criminal proceedings are simultaneously possible. Hence, a complaint is not liable to be stayed pending the disposal of a civil suit. The court has opined that a civil suit cannot debar a criminal prosecution. The successful end of a civil suit cannot by itself amount to abuse of the process of the court.180

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