

# INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

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Volume 7 | Issue 3

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2024

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# Recovery of Debt under Negotiable Instruments Act: Whether Boon or Bane?

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## ABSTRACT

*The current paper examines the effectiveness of Negotiable Instruments in dealing with recovery of the debt and so also examines the procedures involved in the recovery of debt under negotiable instruments act. Each examines how stage wise complaint under negotiable instruments takes place. It also examines various judicial precedents laid down and traces down why and how the requirement arose for enactment of negotiable instruments act.*

In 1991 India was facing severe economic crisis and at that time, the then Finance Minister Manmohan Singh liberalized the economy to bring in foreign investment and promote investor sentiments. Slow recovery of the commercial debt from the defaulting purchasers discouraged the companies, whose capital i.e. money got stuck and they started suffering from financial crisis.

Negotiable instruments act provides for imprisonment and compensation upto two times for dishonour of negotiable instruments<sup>3</sup> i.e. cheque, promissory note and demand draft. Though at first blink the said enactments were thought to be sufficient to deal with the needs of the Companies and promote commercial transactions but with opening of economy and increase in number of companies, the courts started becoming over burdened and the disposal of the cases started to be slower.

Hon'ble Chief Justice of India at that time in his speech on 26.11.2021 at the Inaugural Ceremony of the Constitution Day Celebration organised by Registry of Supreme Court of India has stated that "Pendency in lower judiciary is particularly alarming .It calls for a multi prolonged approach involving all the stake holders."

That the Negotiable Instruments Act, 1881 was enacted to ensure that the negotiable instruments find their value. That the cheque, bill of exchange and promissory note have been defined under the enactment to be included in the definition of negotiable instruments. While a person who

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<sup>3</sup> S.138 of negotiable instruments Act,1881

made cheque was said to be drawer and the person who was the receiver of the cheque is called drawee.

That the act was enacted to provide authenticity to negotiable instruments. That section 139 of the Act provides as under:-

Presumption in favor of holder.—It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

That Hon'ble Supreme Court in *Rangappa vs Sri Mohan* (2010 11 SCC 441) has held:-

14. In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in *Krishna Janardhan Bhat* (supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested.

Thus, Hon'ble Supreme Court has clearly held that the presumption under the act is of legally enforceable debt and that the presumption under the said enactment is rebuttable presumption and is based on preponderance of probability.

To bring more credibility to the act and to help in expeditious disposal of the the complaint even the act was amended to provide for interim compensation:-

143A. Power to direct interim compensation.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Court trying an offence under section 138 may order the drawer of the cheque to pay interim compensation to the complainant—

(a) in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint; and

(b) in any other case, upon framing of charge.

(2) The interim compensation under sub-section (1) shall not exceed twenty per cent. of the amount of the cheque.

(3) The interim compensation shall be paid within sixty days from the date of the order under sub- section (1), or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque.

(4) If the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

(5) The interim compensation payable under this section may be recovered as if it were a fine under section 421 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) The amount of fine imposed under section 138 or the amount of compensation awarded under section 357 of the Code of Criminal Procedure, 1973 (2 of 1974), shall be reduced by the amount paid or recovered as interim compensation under this section.]

Thus it can be seen that interim compensation was provided under the act to help expedite recovery of money. Now Hon'ble Supreme Court in **RAKESH RANJAN SHRIVASTAVA VERSUS THE STATE OF JHARKHAND & ANR 2024 LiveLaw (SC) 235** has held that :- Finding force in the Appellant/accused submission, the Supreme Court held that the word 'may' used in Section 143A (1) shouldn't be construed as 'shall', and the payment of interim compensation to the complainant isn't mandatory but directory in nature.

Hon'ble Supreme Court has thus held that the interim compensation payable is directory in nature and not compulsory. But the same applies only during the trial and during the appeal it is mandatory to deposit interim compensation.

The basic procedure of negotiable instruments lies in the fact that court has to be satisfied that there is prima facie case made out. For issuance of process outside the jurisdiction of the court it has to further satisfy itself about case being made out means he to postpone the issuance of process by enquiring whether case is made out or not and has to follow section 202 of Criminal Procedure Code.

## **202. Postponement of issue of process.**

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192 may, if he thinks fit, [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] *[Inserted by Act 25 of 2005, Section 19 (w.e.f. 23-6-2006).]* postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding :Provided that no such direction for

investigation shall be made, -(a)where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or(b)where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.(2)In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath :Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.(3)If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Court on an officer-in-charge of a police station except the power to arrest without warrant.

That the Hon'ble Supreme Court in **Sunil Todi vs State of Gujarat (LL 2021 SC 706)** and held that the Magistrate has adverted to: (i) The complaint; (ii) The affidavit filed by the complainant; (iii) The evidence as per evidence list and; and (iv) The submissions of the complainant. The order passed by the Magistrate cannot be held to be invalid as betraying a non-application of mind, the court held.

Thus the court has explained what constitutes application of mind under section 202 of Criminal Procedure Code.

Now coming to the fact that negotiable instruments act is a complete enactment providing for punishment but it is still bound by provisions of Criminal procedure. That the process to be followed under negotiable instruments act is:-

- a. Filing of Complaint alongwith verification and evidence on affidavit.
  - b. Issuance of process
  - c. Service of notice
  - d. Issuance of Bailable warrant for non-appearance
  - e. Issuance of Non Bailable Warrant for non- appearance
  - f. Recording of plea
  - g. Evidence of Complainant
  - h. Recording of 313 Crpc of Accused and evidence
  - i. Argument of both the sides
  - j. Judgment
1. Filing of Complaint alongwith verification and evidence on affidavit.

Once the cheque gets dishonored it is necessary to send a notice to the accused requiring him to pay the due amount within 15 days from the notice. That if the accused fails to pay within 15 days from the receipt of notice then the complainant gets fresh cause of action to file complaint under section 138 of negotiable instruments act. 15 days are counted from either refusal, unclaimed, insufficient address, address not found and acceptance of service amongst other remarks. Thereafter complaint has to be filed within one month from the date of the remark. It is pertinent to note here that the word used in the section is one month and not 30 days or 31 days. So irrespective of the days of the month limitation starts from the next date of the remark and ends one day before the same date in next month. Therefore it is necessary to see the judgment of the honourable Supreme Court in *Saketh India Ltd. v. India Securities Limited*, (1999) 3 SCC 1 which has held that one day has to be excluded for counting the one month limitation period and therefore, excluding the day, the limitation period started from next day and the limitation period expired with the day in the succeeding month immediately preceding the day corresponding to the date upon which the period started. Thus it can be seen limitation starts from the next date and hence has to be calculated as such.

While filing the complaint it is necessary to file notice, cheque, return memo and without the same no complaint under 138 of negotiable instruments act is maintainable.

## 2. Issuance of process

That once the complaint is filed along with the documents the same is placed before the honourable Special Court And the honourable special court than applies its mind and issues process. While issuing process the honourable special court applies its mind makes a prima facie view and issues process against the accused.

Thereafter notice is issued to the accused who are then asked to appear before the honourable court and in the same notice are given option that they may compound the offence if they so wish to do.

## 3. Service of notice

The complainant has to serve notice to the accused through various modes including rpad, police station and bailiff. It is necessary for the accused to appear on receipt of such summons. That delivered, refused, unclaimed, door locked, addressee not found are deemed to be valid service.

## 4. Issuance of Bailable warrant for non-appearance

If despite delivery of service or deemed service the accused fails to appear then court may issue bailable warrant to secure the presence of the accused. It is necessary for police station having

the jurisdiction to serve the bailable warrant to secure the presence of the accused. On receipt of such bailable warrant it is necessary for the accused to come to the court to furnish bail and surety as directed by the Honourable Court.

#### 5. Recording of plea

That once the accused is present before the Hon'ble Court then plea is recorded and the accused may either plead guilty or not plead guilty. If the accused pleads guilty then the COURT may convict him and sentence him appropriately. If the accused pleads not guilty then after recording his plea the court may put the matter for evidence.

#### 6. Evidence of Complainant

The complainant may adduce evidence by examining himself and any other witness that he may require to further his case as maybe required. There shall be evidence in which the contents of the documents would have to be proved by the complainant before the court and thereafter the said documents will be exhibited by the court. Once the examination in chief is over the accused may take cross examination and would try to make the case of complainant and its witnesses unbelievable. That after the same the complainant may close his evidence and the stage for recording the evidence of the accused and any of its witnesses if required

#### 7. Recording of 313 Crpc of Accused and evidence

That after the evidence of the complainant is over accused is called upon to record statement under section 313 of criminal procedure Code. That under section 313 of criminal procedure code, court puts questions to the accused regarding the incriminating material against him and accused has to answer the same. Then the accused if he wishes so, may proceed to enter the witness box under section 315 of criminal procedure code wherein he will be subjected to examination in chief and cross examination. The accused may even bring his own witnesses to prove his innocence and that he has been falsely implicated in the case.

#### 8. Argument of both the sides

Thereafter the accused closes his evidence and the stage for arguments comes. Both the sides are you their respective sides of matters. While the complainant proves that the burden that is upon accused has not been shifted to him, the accused proves that by preponderance of probability that the burden has been discharged and that he is innocent and therefore he should be acquitted. The Court after recording and hearing both the sides proceeds to keep the matter for judgement.

#### 9. Judgment

The court may either convict or acquit the accused depending upon the facts of each case and guided by the legal principles and law laid by the Superior Court. If the court convicts the accused then the accused may apply for bail there and then and if he does not have any prior criminal antecedents and if the punishment is less than 3 years, the court can grant bail to the accused for the appeal. Where after the accused may apply for bail before the appellate court who may or may not grant bail depending upon circumstances of each case.

If the accused gets acquitted then the Court asks him to furnish bail bond where in he undertakes to appear before the appellate court if so required by the appellate court.

The Courts have to manage between both accused's right to fair trial and complaints right to speedy disposal of his case. In ensuring this the courts have to ensure that the principles of natural justice are followed and that equal and ample opportunities are given to both the sides to prove and disprove their case. This is in consonance with the fact and the constitutional principles that the accused is presumed to be innocent till proved guilty.

Provisions under negotiable instruments act have been enacted to ensure that the negotiable instruments get their due validity. Though sometimes the procedural takes a little bit of time but that the reason is not only because the opportunity of fairing has to be given to the accused but also because of the fact that the courts are overburdened and that the number of cases which a judge handles is very high in volume and therefore it is not humanly possible to speedily dispose of all the matters. Moreover not only it is because of the availability of less number of judges but it is also due to the other stakeholders of the legal system such as advocates who sometimes being themselves burdened are not able to argue all the cases at one day or are absent due to their own personal difficulties and so they have to seek adjournments. It is also due to the faults of the clients who are not in touch with their advocates. Sometimes even Convicts abscond and sometimes due to workload police officials are unable to serve warrant in time and therefore there is a delay in the proceedings. Negotiable instruments act is trying to achieve its purpose by speedily disposing of the matters but due to circumstances beyond control and practical difficulties in implementing act it sometimes become difficult to implement motto of the act.

In Re: EXPEDITIOUS TRIAL OF CASES UNDER SECTION 138 OF N.I. ACT 1881 (SUO MOTU WRIT PETITION (CRL.) NO.2 OF 2020 ) Hon'ble Supreme Court has held that:-

The reasons for the backlog of cases, according to the learned Amici Curiae, is that while there is a steady increase in the institution of complaints every year, the rate of disposal does not match the rate of institution of complaints. Delay in disposal of the complaints under Section 138 of the Act has been due to reasons which we shall deal with in this order. To reduce the

burden on the docket of the criminal courts, we recommend that a provision be made in the Act to the effect that a person can be tried in one trial for offences of the same kind under Section 138 in the space of 12 months, notwithstanding the restriction in Section 219 of the Code.

15. Offences that are committed as part of the same transaction can be tried jointly as per Section 220 of the Code. What is meant by “same transaction” is not defined anywhere in the Code. Indeed, it would always be difficult to define precisely what the expression means. Whether a transaction can be regarded as the same would necessarily depend upon the particular facts of each case and it seems to us to be a difficult task to undertake a definition of that which the Legislature has deliberately left undefined.

Thus it can be seen that negotiable instruments act is need of hour and is required to give validity to negotiable instruments and to help in keeping faith in negotiable instruments.

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