AMBIGUITY IN THE NEW SECTION 145(2) ADDED TO THE AMENDED NEGOTIABLE INSTRUMENTS ACT 2002

By

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"*The man who discovered the brilliant idea of Negotiable paper had done at least as much for the commercial world as Christopher Columbus or Francis Drake as done for the science of cartography or Sir Isaac Newton and Prof. Albert Einstein have done for Physics and Astro Physics respectively - Law of Negotiable Instruments by Dr. P.W. Rage.*"

1. The Negotiable Instruments Law was enacted to protect the interest of drawees of cheques in Trade and Commerce, providing authenticity to the Instrument of credit-called "Cheque".

2. The spread of banking culture grew in the society but in a snail's pace. The hurdles could be traced to lack of confidence of people in the system as a means for effecting their monetary transactions of payment through "cheques" - a safe media to handle.

3. The Instruments of credit called "the cheque system originated from the British and it plays a vital role in the commercial transactions.

4. In the absence of a system called cheque an Instrument of credit, the Trade and Commercial activities could be effected, inasmuch as the trading community to carry with them a spade of currency notes is impracticable and risky. To get over the difficulty the trading community needed an Instrument of credit easily convertible and work as a legal instrument and vouchsafe the transaction and negotiate between trading parties.

5. The trading community adopted and started their activities of making payments through cheques. It grew to such an extent that the people started issuing cheques without having sufficient funds in their accounts in the Banks and that there was no stringent measure to curb such malpractices.

6. The Indian Law took a leaf out of the English Law in making a law called Negotiable Instruments Law.

7. In the absence of any effective legal provision to curb such malpractice of issuing cheques that could bounce back and to punish such people, the trading community needed a law that could augment their commercial transactions.

   Even in the Indian Penal Code, there is only one provision in Section 420 read with Section 415.

   Mens rea is an essential ingredient of any offence under the Penal Code.

   If the ingredient of the offence of cheating under IPC is not spelt, a dishonour of cheque attracts only a civil liability and the only way out for

the payee is to file a civil suit for the recovery of the amount of the bounced cheque. A civil litigation for the recovery of the amount of the bounced cheque would consume more time and it may not give relief to the victims of the fraud committed by the drawer of the cheque.

To tide over the crisis, the Government of India introduced a bill called "Banking, Financial Institutions and Negotiable Instruments Laws (Amendment) Bill, 1988 and placed it in the Lok Sabha on 5-9-1988 and it was passed on 2-12-1988.

The amended Act came into force on 1-4-1989. (*Vide* Ministry of Finance - Department of Economic Affairs of banking Division Notification 5 234 (E) dated 28-3-1989 - published in the Gazette of India Extraordinary Part 2 Section 3(ii) dated 28-3-1989).

8. The object of the Act was to legalize the transactions and the Instruments of credit could pass through from one hand to the other, without much difficulty.

9. The introduction of Negotiable Instruments owes its origin to the bartering system prevalent in the bygone society.

According to the amended Act, a drawer is liable for penalties in respect of cheques that bounce due to insufficiency of funds in the account or it exceeds arrangements.

A new Chapter XVII consisting of Sections 138 to 142 were added to the Negotiable Instruments Act, 1881 and clause 4 of the bill passed on 2-12-1988 provides the main ingredient Section 138 to the NI Act. The provisions of Section 138 of NI Act are covered in the Entries of 45 and 46 of 7th Schedule List I - Union List under Article 246 of the Constitution of India. These entries refer to Banking (Entry 45) and bills of exchange, bonds, **cheques**, promissory notes and other like instruments (Entry 46). These provisions are not in contravention of Article 14 of the Constitution of India.

The ushering of a new Chapter XVII breathed a new life into the NI Act, which was hitherto not having any provision to curb the malpractice of issuing cheques without having sufficient funds in the account which resulted in irreparable loss to the payee.

The new Chapter XVII in the NI Act provides a clause (Clause 4 of the bill). It is stated therein that the drawer of the cheque when, he issues it and in the event of its bouncing due to insufficient funds shall deemed to have committed an offence and after due process he shall be punished with imprisonment for a term which may extend to one year **(now two years)** or with fine twice the amount of the cheques or with both. Section 138 of NI Act is a penal provision, the commission of which offence entails conviction on proof of the guilt in a duly conducted criminal proceedings. The prosecution proceeding can be initiated not for the recovery of the amount covered by the cheque but for bringing the offender to penal liability- *BSI Ltd.* ***v*** *Gift Holdings (P)* AIR 2000 SC 926 = 2000 Cr. LJ.1424 (Sc)

What is an offence to constitute under Section 138 of NI Act.

The word 'offence has been defined in Section 3(38) of the General Clauses Act as meaning any act or omission made punishable by law. In a prosecution for dishonour of cheque under Section 138 of NI Act omission to honour his own cheque by payment on demand on receipt of notice from the payee and after cheque is returned the drawer of the cheque is liable for criminal action and his

default is an offence under Section 138 of NI Act.

The main ingredients of the offence under Section 138 of NI Act.

In order to invoke Section 138 a complainant has to prove the fulfilment of the following ingredients.

1. The cheque is presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

2. The payee or the holder in due course of the cheque makes a demand within 15 days (now 30 days) from the receipt of information from the bank of its dishonour due to insufficient funds or exceeds payments for the payment of the bounced cheque by giving a notice in writing to the drawer of the bounced cheque.

3. The drawer of the bounced cheque fails to pay to the holder in due course of the cheque within 15 days of the receipt of the notice from the payee or the holder in due course.

Mere dishonour of the bounced cheque is not sufficient to constitute an offence under Section 138 of NI Act. It is to be followed by failure of the drawer of the bounced cheque to make payment despite receipt of notice.

The failure to make payment after receipt of the notice is the crux of the offence under Section 138 of N1 Act.

The Section 139 of NI Act is on presumption in favour of the holder in due course of the cheque.

The Section 140 of NI Act deals with defense by the drawer of cheque which is not allowed in any prosecution under Section 138 of NI Act and Section 141 deals with offences committed by companies.

The Section 142 deals with COGNIZANCE of offence.

Of late, it was felt in general by all concerned that the existing provisions (Sections 138 to 142 in the NI Act) found DEFICIENT to deal with dishonour of cheques.

The cases/complaints filed under Section 138 of NI Act were reported to be pending in various Courts in the country and these provisions could not meet the requirements of the payees/holders in due course of cheques. The punishment provided and the compensation to be granted are inadequate and many Courts felt that the procedure found to be cumbersome and the Courts were unable to dispose of such cases expeditiously in a time frame in view of the bottle-necks in the procedure.

The Government of India felt to constitute a Working Group to study and review Section 138 of NI Act and suggest ways and means to achieve the purpose of Section 138 of NI Act.

The recommendations of the Working Group along with other representations from various institutions and organizations were examined by the Government in consultation with the Reserve Bank of India and other legal experts, and a Bill, namely, the Negotiable Instruments (Amendment) Bill, 2001 was introduced in the Lok Sabha on 24th July, 2001. The Bill was referred to Standing Committee on Finance which made certain recommendations in its report submitted to Lok Sabha in November, 2001.

Keeping in view the recommendations of the Standing Committee on Finance and other representations it was decided by the Government to bring out *inter alia*, some of the important amendments in the Negotiable Instruments Act, 1881 are-

- To increase the punishment as prescribed under the Act from **one year to two years;**
- To increase the period for issue of notice by the payee to the drawer from **15 days to 30 days;**
- To provide discretion to the Court to waive the period of one month, which has been prescribed for taking cognizance of the case under the Act;
- To prescribe procedure for dispensing with preliminary evidence of the complainant;
- To provide for summary trial of the cases under the Act with a view to speeding up disposal of cases;
- To make the offences under the Act compoundable;
- To provide that the Magistrate trying an offence shall have power to pass sentence of imprisonment for a term exceeding one year and amount of fine exceeding five thousand rupees;

A Random Scrutiny of the New Provisions.

In order to deter occurrence of the malpractice of issuing cheques without having any credit balance in the account, the Government amended the provision in respect of punishment of imprisonment to be imposed, **from one year to two years. It is a welcome sign.**

Raising the period from 15 to 30 days for issuing legal notice is indeed a constructive amendment that eases the problem of delay in transit of legal notice sent through post by payee or the holder in due course of the bounced cheque.

The offence under Section 138 has been made a **compoundable** one. **It is again a welcome sign. The litigation is reduced to minimum.**

But the new Section 145(2) of the amended NI Act carries ambiguity in the amendment and has not saved the time of the Court and in fact added much more work on the Court. Filing affidavit is in addition to recording of sworn statement.

The suggestion to prescribe procedure for dispensing with preliminary evidence was not conceded to by the Government.

Sub-clause (2) of Section 145 of the amended NI Act reads:

> "The Court may, if it thinks fit and shall on the application of the prosecution or the accused summon and examine any person giving evidence on affidavit AS TO THE FACTS CONTAINED THEREIN"

In this regard, it is pertinent to refer to Order XIX, Rule 1 of amended CPC which came into effect from 1-7-2002.

Power to order any point to be proved by affidavit- Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable:

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, **an order shall not be made authorizing the evidence of such witness to be given by affidavit.** This clarifies that if a witness is produced for cross-examination, filing of an affidavit need not be insisted upon or if an affidavit is filed a witness need not to put to cross of facts that are proved by affidavit. The Section 145(2) of NI Act is therefore ambiguous.

The Government should have considered the recommendation of dispensing with preliminary evidence.

The Rule 3 under Order XIX says that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted.

Further the deponent deposes on oath and states in the affidavit which is administered by Magistrate under Section 139 of the amended CPC. Any Court may at any time for sufficient reasons order that **any particular facts or facts may be proved by affidavit** or that affidavit of any witness may be read at the hearing on such condition as the Court thinks reasonable.

It is therefore clear that the deponent of the affidavit need not be forced to answer questions **which are not relevant nor not within the knowledge of the deponent**. The same recommendation should have been considered for NI Act. There should not be any disparity.

Sections 151 and 152 of Indian Evidence Act come to the rescue of witness who is exposed to indecent and scandalous questions and to questions intended to insult or annoy the witness. This is generally noticed in the cross-examination of rape victims.

An extract of Sections 151 and 152 of Indian Evidence Act are reproduced below.

Sec. 151: Indecent and scandalous questions:

The Court may forbid any questions or inquiries which it regard as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Sec. 152: Questions intended to insult or annoy:

The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

The amended portions of CPC and the NI Act categorically reiterate that the deponent of affidavit need not answer questions which are not relevant nor not within his knowledge.

In order to remove anomaly in Section 145(2) of NI Act, it is suggested that recommendation made for dispensing with preliminary evidence be implemented by an amendment or to restrict examination of witness AS TO THE CONTENTS of the affidavit filed by the witness and administered by the Magistrate and the Courts should not allow cross of witness beyond the purview of Section 145(2) of NI Act in the light of Sections 151 and 152 of Indian Evidence Act.

SECTION 21 OF THE LEGAL SERVICES AUTHORITIES ACT 1987 - AMENDMENT SUGGESTED

By

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1. In terms of Section 21 of the Legal Services Authorities Act, 1987, Court fee once paid as a consequence of compromise or settlement arrived at by the Lok Adalats, shall be refunded in the manner provided under the Court Fees Act.

2. When the Court fee once paid is thus made refundable, judicial experience reaffirms my belief, that such a relief or benefit can be extended to the other categories, where the Court fee is to be payable in respect of suits instituted by