

A Critical Analysis of the Provision Negotiable Instrument Act in India

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Abstract-The initial draft of the Negotiable Instruments Act was prepared in 1866 by the 3rd India Law Commission and presented in the Council in December 1867 before being sent to a Select Committee. Despite this, it had to go through several iterations of modification and redrafting due to resistance. A new Law Commission was established in 1880 after the Secretary of State directed its referral. The Select Committee ultimately agreed with the majority of its recommendations. To govern the exchange of Negotiable Instruments such as "Promissory Notes," "Bill of Exchange," and "Cheques," the draught was presented in the Council and approved as the Negotiable Instruments Act, 1881 ("NI Act") on 09 December 1881 and came into effect on 01 March 1882.¹

Introduction

Easy monetary transactions are made possible with the introduction of cheques. As compared to a wad of cash, a cheque is significantly more convenient to transport. It has been a huge boon to business and commerce. Yet, the issue of bounced cheques emerged with the cheque system. Cheques were being written without the purpose of being cashed. As a result, both trade values and trust in business fell. It was necessary to take action to stop this. There was a pressing need for the enactment of legislation that might guarantee the bearer of the Negotiable Instrument the respect due to such an instrument, so that trade may thrive. Before 1988, no law would effectively prevent individuals from writing cheques if they did not have enough money in their account or penalise them if the bank did not honour the cheque and it was returned unpaid. A legal claim may be filed by the holder to get the money back, but it would take a long time.²

To close any remaining gaps, the law was amended in 2002 with "the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act." A total of five additional sections, numbers 143 through 147, were added to the parent Act, and they all refer to different parts of it. The goal of NI Act is to instil a feeling of responsibility in those engaged in business transactions, and the fact that failure to uphold a legal obligation might now result in criminal charges under the law's revised provisions is intended to achieve this end.

Not content with this solution, the government in the Lok Sabha approved "the Negotiable Instruments (Amendment) Act, 2015" to further address the issue. Dishonour of cheques due to insufficient cash, etc., is a crime covered by section 138 of the NI Act. The jurisdictional requirements for trying a

¹ Goel, Shivam, "The Negotiable Instruments Act, 1881: Critical Analysis (November 10, 2016)." Available at SSRN: <https://ssrn.com/abstract=2867355>

² "Critical Analysis of Section-138 of Negotiable Instruments Act" <<https://legalserviceindia.com/legal/article-1558-critical-analysis-of-section-138-of-negotiable-instruments-act.html>>

dishonour of cheque offence have been established in a number of prior instances. The courts are overwhelmed with the thousands upon thousands of cases that have been filed but have yet to be heard.

The problems that the payee or the lender of the money faced in submitting the proceedings under section 138 of the Act have led to a considerable number of cases being stopped, and it has been recommended to clearly define the jurisdiction for the crime under section 138 of the Act. This ordinance has been introduced to define the geographical jurisdiction for considering instances of dishonour of cheques to guarantee justice while also protecting the interests of the complainant. With the passage of the “Negotiable Instruments (Amendment) Act, of 2017,” the Lok Sabha made an effort to decrease the backlog of cheque dishonour cases in the Indian judicial system. The purpose of the Act is to prevent persons from using delay tactics to avoid cashing cheques that they have written. If passed by lawmakers, it would protect the integrity of cheque transactions by preventing anyone from purposefully dragging out the legal process via the use of appeals and stays of proceedings.³

Historical Developments

Authors of introductory texts often exclude any mention of the possible ancient origins of Negotiable Instruments. Since the money that bills of trade represent did not come into existence until much later and because the art of writing did not exist in prehistoric cultures, it stands to reason that such a system could not have been used by their ancestors. It became essential to have a common medium of exchange and a representation of property of a readily convertible type when the barter system, which primitive and uncivilised civilizations used to conduct business, proved to be cumbersome. Money may have started as something as simple as cowrie shells, brass or copper rings, but once its value was recognised, it was never forgotten. As civilization spread, nobler metals replaced lower ones, and now gold and silver are widely used as mediums of trade around the globe. Because of improvements in transportation and communication, international trade accelerated, and countries vied for dominance.⁴

Among ancient civilizations, the Phoenicians, Greeks, and Carthaginians stood out as the most prominent trading powers. Many thieves, both at sea and on land, preyed on merchants transporting precious metals and other valuables through the dangerous trade routes. Money alone couldn't solve all the problems that arose from all the different kinds of business deals, so over the course of centuries, the concept of exchange arose: a merchant in one country would write a letter of credit, commonly known as a bill of exchange, to his debtor, a merchant in another country, instructing the debtor to pay the money owed to a third party who would then deliver the money to the debtor. So, the original meaning of a bill of exchange was an order to pay a trade debt and the system of such bills allowed for the easy and risk-free payment of debts owed by one nation to another without the need to transport physical currency.

Hence, initially, a bill of exchange was used to transfer trade debts between people in other nations; but, after the benefits of this method were apparent, it was used for obligations incurred via inland

³ Akhavan, P., and Jafari, M., (2006), “Critical success factors of knowledge management implementation at a national level,” *The journal of information and knowledge management systems* 36(1): 52-66.

⁴ “History of the Legislation | Negotiable Instruments Act, 1881 | Law Commission of India Reports | Law Library | AdvocateKhoj”

<<https://www.advocatekhoj.com/library/lawreports/negotiableinstruments/1.php?Title=Negotiable%20Instruments%20Act,%201881&STitle=History%20of%20the%20Legislation>>

commerce and then for debts incurred by individuals as well. In the early phases of their development, trust was bred by scrupulously fulfilling the duties arising under such instruments, and from that confidence developed the unusual use to which such instruments are presently put. Now, the securities are essentially credit instruments that may be quickly converted into cash and traded freely between buyers and sellers. Since the ever-increasing demand for currency could not be satisfied by a simple increase in coinage, these credit instruments gradually took on the role of the money that they represented. As a result, the negotiable instrument became widely used by businesspeople as a practical alternative to currency.⁵

“The ease and flexibility with which money may be transferred make it stand out among other forms of property. One who accepts it in the course of business need only look as far as the face of the coin and the possession of the person from whom he gets it to determine the true owner. To fulfil its role, a representation of money must have these characteristics, and a negotiable paper does so admirably.”⁶

Characteristics of Negotiable Instruments⁷

Certainty: Money without baggage is a negotiable tool. A negotiable document must be written in as few words as necessary while yet conveying the intended meaning of the contract. A negotiable instrument must not have any flaws that would prevent it from being used normally. A negotiable instrument must also be a promise to pay a certain (i.e., definite or set) dollar amount (money only and nothing else).

Independent Title: No one is allowed to transfer property with a more robust title than he himself has. Unfortunately, this idea is not applicable to any documents that may be negotiated. If the transferor gained the negotiable instrument dishonestly but the transferee obtains it in good faith (bona fide) for value, then the transferee will be regarded to have good title to the instrument. Nevertheless, this only applies if the transferor obtained the instrument dishonestly.

Presumptions: All negotiable instruments must comply with the presumptions set out in “Section 118 and Section 119 of the NI ACT.”

Right to Sue: The payee of a transferred negotiable instrument is not obligated to notify the drawer, who is responsible for making and honouring payments on the instrument, of the transfer.

Transferability: Any number of times up to the instrument's maturity date, a negotiable instrument may be transferred to another party. When an instrument is "payable to bearer," it may be delivered by hand and will be accepted. But if it says "payable to order," it may be sent via endorsement and delivery.

Promissory Note (“Section 4 Of The Negotiable Instruments Act, 1881”)

- Under the Act, the definition of a promissory note is applicable regardless of whether or not the instrument may be negotiated.

⁵ “Frequently Asked Questions on Negotiable Instruments Act” <<https://www.lawfinderlive.com/bts4/NEGO-IA.htm>>

⁶ Ibid

⁷ “Characteristics of Negotiable Instruments” (Jagranjosh.com, November 12, 2014)

<<https://www.jagranjosh.com/general-knowledge/characteristics-of-negotiable-instruments-1415788255-1>>

- A negotiable instrument is “any instrument in writing (other than a bank note or currency note) containing an unconditional undertaking signed by the maker, to pay a specified sum of money only to, or to the order of, a specified person, or to the bearer thereof,” as defined by Section 4 of the NI Act.
- It must be in writing, with an official signature and postmark;
- There has to be some kind of payment agreement in place; debt recognition alone is not sufficient;
- It can't depend on anything else;
- This agreement must specify that monetary compensation will be paid in whole and in full alone;
- Both the creator and the payee of a promissory note must be truthful;
- Payment is due immediately or on a certain date in the future;
- The amount due is fixed.

Bill-Of-Exchange (“Section 5 Of The Negotiable Instruments Act, 1881”)

- A bill of exchange involves the drawer, the drawee, and the payee; these are the three parties engaged in the transaction.
- It has to be written down, correctly signed and acknowledged by the drawee, and it needs to be properly stamped;
- There has to be a purchase order in place;
- It can't have any conditions attached to it;
- Both the sum and the people involved need to be established.

Cheque (“section 6 of the negotiable instruments act, 1881”):

- A cheque involves the following parties: the drawer, the drawee bank, and the payee; the drawer is the one who writes the cheque.
- It has to be in writing, and the drawer has to put their signature on it;
- The recipient of the payment is always reliable;
- Always be prepared to make payment on demand;
- It must have a date; if it does not, then it is invalid, and the bank will not honour it;
- The whole amount must be expressed in both numerical and verbal form. According to Section 18 of the NI Act, if the amount promised or mandated for payment is not stated in the standard form used in writing, amount agreed upon or mandated to be paid must be set down in writing..

Anil Kumar Sawhney v. Gulshan Rai,⁸: Regarding “Section 5 and Section 6 of the Negotiable Instruments Act, 1881,” the Hon'ble Supreme Court of India guided in this matter.

The Supreme Court held as follows:

- A cheque with a future date on it is still considered a bill of exchange until that date. A cheque is not a cheque under the Act until the date printed on the cheque's face. If the cheque is dishonoured after that date, the exception in Section 138(a) applies.

⁸ (1993) 4 SCC 424

- A post-dated cheque is not valid for payment until the specified date. Until the date specified on the bill of exchange, it does not constitute a check for the purposes of Section 5 of the Act, which governs the use of bills of exchange as a mode of payment between two parties.
- A postdated cheque is ineffective since it cannot be cashed in at the bank. After the postdated check has become a cheque as of the date printed on the face of the cheque, only then will Section 138 of the Act apply.
- Post-dated cheques are just bills of exchange until they are due on demand, at which point they are simply cheques.

“Harman Electronics (P) Ltd. v. National Panasonic India (P) Ltd.,”⁹: There was a commercial deal made between the appellant and the complainant. The Appellant lived in Chandigarh and had a commercial presence there. Although the respondent-complainant also had an office in Chandigarh while having its headquarters in Delhi, the appellant's cheque, written out to the latter, was finally dishonoured there.

Once the cheque was returned unpaid, the complainant sent a notice to the appellant in New Delhi demanding payment; the notice was delivered to the appellant in Chandigarh. Since the appellant still hadn't paid 15 days after the notice was sent, the respondent-complainant filed a petition in Delhi seeking criminal charges. The court agreed and issued an arrest warrant for the appellant. Notwithstanding the appellant's best efforts, the court in Delhi was deemed to have jurisdiction over the matter since the respondent-complainant had served the appellant (accused person) with the process from inside the city, the office of the respondent-complainant was located in Delhi, and the respondent-complainant was conducting business in the city.

The Supreme Court concluded that a cheque dishonour in and of itself does not constitute an offence, but that it is one thing to establish that delivering a notice is a requirement for maintaining the complaint. The primary body of the clause describes the prohibited conduct. Nevertheless, the attached provision establishes additional requirements that must be completed before the court may take notice of the offence.

If the conditions for the formation of the crime set out in provisos (a), (b), and (c) annexed to Section 138 of the Act are to be applied with regard to the accused, then there is no question that a notification would eventually give rise to the cause of action for filing a complaint. These provisos are appended to Section 138. After receiving notice, the accused person may choose to disregard it, but doing so puts him in a dangerous position. Because of this, it is imperative that both aspects of the exemption to Section 138 be taken into consideration. Delivering a notice is what gives rise to a cause of action, not the act of issuing a notice.

Disposal of Negotiable Instrument Cases

In **“Dayawati v. Yogesh Kumar Gosain,”** the Delhi High Court deliberated on the question of **“whether a criminally compoundable crime under Section 138 may be handled through mediation.”**¹⁰ The Court concluded that a criminal court may send the complainant and the accused to ADR even if the statute does not specifically provide for this. The Code of Criminal Process, 1973 recognises and

⁹ (2009) 1 SCC 720

¹⁰ CRL.REF. No.1/2016

admits the possibility of a settlement without prescribing or restricting the method in which one may be achieved. So, according to “Section 320 of the Code of Criminal Procedure,” ADR processes like arbitration, mediation, or conciliation “recognised by Section 89 of the CPC, 1908” may be utilised to settle criminal matters.

In addition, it was stated that procedures under Section 138 of the 1881 Act are exceptional and more analogous to a civil wrong with criminal undertones than to a traditional criminal trial.¹¹ The Supreme Court of Canada, reflecting on why Chapter XVII of the Act includes Section 138, stated in “**Meters and Instruments (P) Ltd. v. Kanchan Mehta**”¹² that violating Section 138 of the Act is primarily a civil wrong, rather than a criminal one. The burden of evidence is on the defendant under Section 139, although the standard of proof is “preponderance of probability.” For most procedures under Chapter XVII of the Act, a summary trial is required, with the usual summary trial rules of the CrPC used with any appropriate amendments.

In line with Section 258 of the CrPC, the case may be closed and the accused released if the court is convinced that the amount on the check, together with any imposed fees and interest, have been paid and there is no need to continue with the punitive portion of the case. Initially, compounding should be encouraged, but it's not out of the question later on as long as the parties agree on compensation. The provision serves mainly as a compensating function, and its penal component exists primarily to ensure the fulfilment of its compensatory promise.

It is required under the Act that trials for matters brought under Chapter XVII be conducted promptly. After taking into consideration the fact that the court is authorised by Section 357(3) of the Indian Penal Code to award suitable compensation in addition to the sentence of imprisonment if a default sentence is imposed in accordance with Section 64 of the Indian Penal Code, 1860, and with additional recovery powers authorised by “Section 431 of the IPC, 1860.”

In accordance with the “second proviso to Section 143 of the IPC, 1860,” the Magistrate has the authority to determine whether or not a fast trial is suitable given the potential need for a sentence of more than one year. By using this strategy, a sentence of incarceration for more than one year may not always be necessary.

As the slip provided by the bank is prima facie evidence of the dishonoured cheque, the Magistrate is exempt from the need they record any other preliminary evidence. Affidavits may be used to provide the evidence supporting the complaint, but only after the court has ruled on the matter and thoroughly investigated the person making the affidavit. The testimony included in this sort of document may be presented at any stage of the proceeding, including the trial itself. In the instances in which the IPC is required to apply the second proviso, there is an exemption. As a result of this, the plan is to proceed in a more succinct way from here on out.

Conclusion

¹¹ “Section 138 Of Negotiable Instruments Act: Overview - Financial Services - India” (Section 138 Of Negotiable Instruments Act: Overview - Financial Services - India, June 6, 2019) <<https://www.mondaq.com/india/financial-services/812822/section-138-of-negotiable-instruments-act-overview>>

¹² SPECIAL LEAVE PETITION (CRL.) NO.5451 OF 2017

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Before the present Negotiable Instrument Act came into force in India, the country followed the English Acts and Laws on the subject. This is because India is the birthplace of the original Negotiable Instruments Act. Using negotiable instruments in everyday life and business was not a novel concept in India during the period of British rule. The reason for this was because such devices, such as hundres, have been in widespread usage in India ever since the beginning of time. Even during the time of the Mughals, this rank existed. When the British administration was founded in India, a three-fold system was put into place, and Muslims were left to be controlled by their law.

As a result, the Europeans involved in this venture were subject to English law. In the absence of evidence of any particular use, the English Bill of Trade took precedence over any conflicting personal laws, such as Hindu or Muslim law. That was still the case even though there was no evidence of any particular use. After this, other English Acts and Laws dealing with negotiable contracts were enacted in India.

To cope with the issues that are associated with negotiable instruments, such acts and Statues were put into effect in India. The pieces of legislation were referred to as the English Bill of Exchange Act. The legislation is dependent on promissory notes and the Act of the Governor General in Council (Act V of 1866). In the year 1866, the Law Commission developed a Law to regulate the use of negotiating tools and the transactions that took place using them. Based on this act, the Indian Negotiable Instruments Act of 1881, also known as Act No. XXVI of 1881, was enacted and is now in effect across the whole of India's territory with the exception of the state of Jammu and Kashmir. The majority of this Act's foundation may be traced back to the ideas that were established in English commercial law. The most important goal of this Act was to eliminate the contradictions that existed before its implementation, particularly concerning the extent to which the law of negotiation may be applied to individuals who belonged to different groups.

According to the "213th Law Commission Report," the Indian judicial system is facing a significant backlog of cases, with check bounces accounting for about 20% of litigation-related complaints. Thus, the provisions that were only recently approved will breathe new life into the portions of the NI Act that are now dormant. Even though cases involving bounced cheques are considered to be penal and result in criminal violations, summary adjudication procedures are still in place, and the fact that the crime is amenable to bail has rendered these cases almost comparable to those involving civil matters. With this strategy, the introduction of additional limits would serve more as a preventative measure than an active one to guard against the use of fraudulent cheques. When substantial money is deposited by the persons who are being accused by the appellant if there is an appeal, The matter will finally be taken seriously by them. Although progress is being made, more must be done before situations involving bounced checks can be handled practically. and the true meaning of summary trials has to be communicated to the public. If this were to occur, the significance of making the dishonouring of a cheque a criminal offence would be significantly diminished.