

OFFENCE OF DISHONORING OF CHEQUE AND THE REQUIRED STANDARD OF PROOF

INTRODUCTION

Dishonoring of cheque primarily gives rise to a civil liability as prescribed in the Negotiable Instrument Act, 1881. Pakistan and India made dishonoring of cheque an offence in order to encourage confidence of the business community. The object of criminalizing civil liability is “time and again the Apex Court has held that the object of bringing Section 138 on the statute book is to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments”¹. In Pakistan, a specific section has been enacted and inserted in the Pakistan Penal Code, 1860 through Criminal Law (Amendment) Ordinance, 2002 to deal with the criminal liability flowing from dishonoring of cheque while in India, the corresponding amendments were made in the Indian Negotiable Instrument Act, 1881 through two amendments and for this purpose, Sections 138 to 142, Chapter XVII, were inserted in the Negotiable Instruments Act, 1881 by an Amending Act No: 66 of 1988 and Sections 143 to 147 by Act No: 55 of 2002. Thus, in Pakistan Negotiable Instrument Act, 1881 governs only civil liability while in India it governs civil as well as criminal liabilities.

This article is meant to analyze and assess the newly introduced offence as well as to discover as to how both the countries dealt with the miseries of the victims of this offence. The answers to questions formulated above are very important because the amendment in law or its replacement by a new law must not be without a purpose. The crimes of this particular offence are on rise. Four months figures taken from Police Station Mingora, Swat KPK will show the escalating trend.

S. No.	Month	FIRs
1.	September 2014	09
2.	October 2014	17
3.	November 2014	12
4.	December 2014	06

1. *Kusum Ingots & Alloys Ltd vs Pennar Peterson Securities Ltd*, (AIR 2000 SC 954)

JURISDICTION OF PAKISTAN, OFFENCE U/S 489-F:

The newly inserted section of law defines the offence of dishonestly issuing a cheque as under:

489-F. Dishonestly issuing a cheque.--Whoever dishonestly issues a cheque towards re-payment of a loan or fulfillment of an obligation which is dishonoured on presentation, shall be punishable with imprisonment which may extend to three years, or with fine, or with both, unless he can establish, for which the burden of proof shall rest on him, that he had made arrangements with his bank to ensure that the cheque would be honoured and that the bank was at fault in not honouring the cheque.

INGREDIENTS OF THE OFFENCE U/S 489 PPC:

- 1- Issuance of cheque;
- 2- Such issuance was with dishonest intention;
- 3- The purpose of issuance of cheque should be;
 - i- To repay a loan; or
 - ii- To fulfill an obligation
- 4- On presentation, the cheque is dishonoured.²

This new introduction in the criminal jurisprudence of Pakistan faced an anomaly in 2005 when the Hon'able Lahore High Court, Lahore discarded it from the statute books. Reference may be made to "Mian HUSNAIN AHMAD HYDER Vs STATION HOUSE OFFICER"³ but this precedent was overruled subsequently in "MUHAMMAD KHAN Vs MAGISTRATE SECTION 30, PINDI GHEB, DISTRICT ATTOCK"⁴.

2. *Muhammad Sultan Vs the State, 2010 SCMR 806*

3. *2005 YLR 1565*

4. *PLD 2009 Lah 401*

DEFENCE OF THE ACCUSED U/S 489-F:

The above law also provides a ground of defence to be taken by the accused. This statutory defence which the accused is bound to prove is that he had made arrangements with his bank for honouring of the cheque but the bank was at fault in not honouring the cheque. The accused may or may not take this defence but even then the prosecution will have to prove the above four ingredients. The defence being taken and proved will only relieve him from conviction even if the above four ingredients stands proved.

COGNIZANCE, BAIL, QUANTUM OF PUNISHMENT AND MODE OF TRIAL U/S 489-F:

Per schedule II of the Criminal Procedure Code, 1898 the offence under section 489-F PPC is cognizable and not bailable. It carries punishment of either description for 3 years or with fine or with both. The trial to be conducted against the accused will be a regular trial and not a summary trial.

STANDARD OF EVIDENCE:

The term “dishonestly” used in Section 489-F means either wrongful gain or wrongful loss as defined in Section 24 and 23 PPC. This term should not be considered subjectively but objectively. The issuance of cheque by the accused must be either to gain unlawfully or to cause loss to the complainant unlawfully. The mind of the accused needs also to be traced because the word “dishonestly” demands its tracing. The prosecution has to prove that the accused issued the cheque dishonestly and that the cheque was issued for the repayment of loan or fulfillment of obligation. Thus, it means that apart from the proof of dishonest intention, the liability of loan or obligation against the accused must be proved before proving the issuance of cheque because the cheque giving rise to a criminal liability against the accused must have been issued for one or both of the abovementioned purposes.⁵ Otherwise, mere issuing of cheque will not give rise to a criminal liability.⁶ Suppose “A” being under no liability to pay loan or fulfill an obligation issues a cheque to “B” (A’s servant) asking him to buy vegetables for him but the cheque stands dishonoured.

5. *Muhammad Ayub Vs Rana Abdul Rehman*, 2006 YLR 1852

6. *Iftikhar Akbar Vs the State*, 2008 MLD 159.

Whether this dishonoring constitutes an offence against “A”? Again suppose “A” (B’s friend) started a profitable business and asked B to invest Rs. 500000/ in his business so as to earn a like profit. B after being convinced issues a cheque to A but the cheque, on presentation, stands dishonored. Whether B issued the cheque under any liability or obligation? These examples show that the proof of loan or obligation is more important than the proof of issuance of cheque and its subsequent dishonoring. The section by itself does not lay down any presumption about the existence of loan or obligation on dishonoring of cheque.

JURISDICTION OF INDIA, SECTION 138 NIA, 1881:

As compared to section 489-F PPC, the Indian Negotiable Instrument Act, 1881 contains the following provision regarding dishonoring of cheque giving rise to a criminal liability:

AMENDING ACT NO: 66 OF 1988 (INSERTION OF SECTIONS 138 TO 142, CHAPTER XVII):

The above amending Act inserted the following sections in the Indian Negotiable Act, 1881:

Chapter XVII:

Penalties In Case Of Dishonour of Certain Cheques for Insufficiency of Funds In The Accounts.

- 138. Dishonor of cheque for insufficiency, etc., of funds in the accounts
- 139. Presumption in favor of holder
- 140. Defense which may not be allowed in any prosecution under section 138
- 141. Offences by companies
- 142. Cognizance of offences

138. DISHONOR OF CHEQUE FOR INSUFFICIENCY, ETC., OF FUNDS IN THE ACCOUNTS:

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honor the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall

without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:

PROVIDED that nothing contained in this section shall apply unless-

(a) the cheque has been 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.

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation: For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability.

INGREDIENTS OF THE OFFENCE U/S 138

The ingredients of the offence are as under:

- (I) that there is a legally enforceable debt;
- (II) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes legally enforceable debt ; and,
- (III) that the cheque so issued had been returned due to insufficiency of funds.⁷

7. *In Krishna JanardhanBhat vs. Dattatraya G. Hegde : AIR 2008 SC 1325.*

139. 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, or any debt or other liability.

140. DEFENSE WHICH MAY NOT BE ALLOWED IN ANY PROSECUTION UNDER SECTION 138

It shall not be a defense in a prosecution of an offence under section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonored on presentment for the reasons stated in that section.

141. OFFENCES BY COMPANIES:

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence: Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation. — For the purposes of this section,—

(a) “company” means anybody corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.

142. COGNIZANCE OF OFFENCES:

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause -of- action arises under clause (c) of the proviso to section 138;

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.

AMENDING ACT NO: 55 OF 2002:

Through this Act Sections 143 to 147 were inserted in the Indian Negotiable Instrument Act, 1881.

143. POWER OF COURT TO TRY CASES SUMMARILY:

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials: Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees: Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.

(2) The trial of a case under this section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion, unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing.

(3) Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint.

144. MODE OF SERVICE OF SUMMONS:

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), and for the purposes of this Chapter, a Magistrate issuing a summons to an accused or a witness may direct a copy of summons to be served at the place where such accused or witness ordinarily resides or carries on business or personally works; for gain, by speed post or by such courier services as are approved by a Court of Session.

(2) Where an acknowledgment purporting to be signed by the accused or the witness or an endorsement purported to be made by any person authorized by the postal department or the courier services that the accused or the witness refused to take delivery of summons has been received, the Court issuing the summons may declare that the summons has been duly served.

145. EVIDENCE ON AFFIDAVIT:

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2) 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.

146. BANK'S SLIP PRIMA FACIE EVIDENCE OF CERTAIN FACTS:

The Court shall, in respect of every proceeding under this Chapter, on production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved.

147. OFFENCES TO BE COMPOUNDABLE:

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable."

COGNIZANCE, BAIL AND QUANTUM OF SENTENCE AND MODE OF TRIAL UNDER INI, 1881:

The offence under section 138 is non-cognizable and bailable. It carries punishment for a term which may extend to one year or with fine which may extend to twice the amount of the cheque or with both. Trial to be conducted against the accused will be a summary trial and not regular one.

“Complainant already submitted his affidavit during inquiry u/s 200 Cr.P.C in his examination in chief it is not necessary to again record his examination in chief.”⁸

STANDARD OF EVIDENCE:

The perusal of section 138 shows that it does not contain the word “dishonestly” like 489-F PPC. What does it mean? Being primarily a civil wrong but just to ensure and protect financial transaction, the mind of the accused does not need to be traced. The prosecution has to prove only the guilt with respect to the issuance of cheque, however, the purposes for which the cheque is to be issued are similar to a greater extent to those contained in section 489-F PPC. The proviso contains more beneficial provisions for both the payee or holder in due course, and the Drawer as well. Adherence to the proviso is intimation to the Drawer that the payee or holder in due course is going to prosecute him. Explanation defines the term “debt or liability” which terms mean legally enforceable debt or other liability of a like nature. The term “legally enforceable” is of a great significance in the explanation.

Section 139 is a very remarkable addition. This section raises a statutory presumption in favour of holder of the cheque. The holder of the cheque is to be presumed to have received the cheque for the discharge of debt or other liability. The implication of this presumption against the accused is that the prosecution will not have to prove the existence of liability of debt but only the ingredients of the offence. To put it short, it will be presumed that the bounced cheque was issued for the purposes mentioned in Section 138 INIA. This shifting of burden is technically known as evidential burden which the accused has to discharge by preponderance of probabilities. The legal burden to prove the ingredients of the offence never shifts and the prosecution will have to prove it beyond reasonable doubt. This presumption will absolve the prosecution from the proof of only debt or liability against the accused. Section 140 gives no weight even to the defence of the nature stated therein.

8. 2006 Cri.L.J. 208, 2005 Cri.L. J 1201 Bombay (FB), AIR 2004 SC 2890, AIR 2003 SC 4195, AIR 2001 SC 676, AIR 1968 SC 647

The cumulative effect of sections 139 and 140 is that in the trial the prosecution will not be burdened to prove the existence of debt or liability against the accused unless rebutted by the accused.

“It is obligatory on the courts to raise this presumption in every case where the factual basis for the raising of this presumption had been established. It introduced an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused.”⁹

“The Act raises two presumptions; firstly, in regard to the passing of consideration as contained in Section 118 (a) therein and, secondly, a presumption that the holder of cheque receiving the same of the nature referred to in Section 139 discharged in whole or in part any debt or other liability. Presumptions both under Sections 118 (a) and 139 are rebuttable in nature.”¹⁰

In *K. Prakashan v P.K Surenderan*, the Supreme Court of India laid down a very remarkable principle that burden of proof lying on accused required to be discharged by preponderance of probability while that lying on prosecution to be discharged by reasonable doubt.

There is a time limit for presentation of the cheque to the bank. Bouncing of cheque does not automatically give rise to a criminal liability because the payee or holder in due course is required to demand through notice the payment of the amount mentioned in the cheque. After receipt of notice the drawer is required to pay within 15 days to the payee the required amount. The proviso condones the act of issuance of cheque even for purposes of discharge of debt or other liability if the drawer pays the amount. The policy of the law is to compel the accused/drawer to make the payment to the payee without initiation of prosecution against him. This is a statutory compulsion emphasizing on implied reconciliation between the payee and the drawer, a very distinctive feature providing resolution of the civil cum criminal dispute in a civilized manner. The non-compliance of the mandate of the proviso will ensue prosecution. Clause (b) of section 142 of the INI, 1881 provides a period of limitation for filing a complaint. Under Section 146 INIA the Court has to presume dishonoring of cheque on production of bank's slip or memo having official mark of dishonoring on it.

9. *AIR 2001 SUPREME COURT 3897*.

10. *P. Venugopal vs. Madan P. Sarathi*, (2009) 1 SCC 492 and *K. Prakashan v. P.K. Surenderan* (2008) 1 SCC 258.

COMPARATIVE ANALYSIS:

Having analyzed the comparison, the Amending Acts in Pakistan and India penalized a civil liability but in different ways. “The offence u/s 138 of the INIA is almost in the nature of civil wrong which has been given criminal overtone, and imposition of fine payable as compensation is sufficient to meet the ends of justice”. In India the victims has the advantage of presumption though rebuttable as provided in section 139 while in Pakistan there is no such presumption. It can be said that presumption u/s 118 of Negotiable Instrument Act can be extended to dishonoring of cheque in Pakistan but the said presumption is basically meant to operate in civil matters by the legislatures and not for criminal matters. It is also a settled principle of law that penal statutes shall be strictly construed and if there is any ambiguity, the construction which is favorable to the accused should be adopted. The provisions of another statute cannot be imported to the penal statute because right to life and liberty guaranteed by the Constitution of Pakistan cannot be jeopardized on assumption. Indian amendments also provided a space to the drawer after dishonoring of cheque even under a penal provision for settlement of the civil cum criminal dispute but in Pakistan after dishonoring of cheque the drawer has no option but to face prosecution. The prosecution u/s 489-F will have to prove issuance of cheque, subsequent bouncing, existence of a loan or obligation as well as dishonesty of the accused, a cumbersome exercise, while the prosecution u/s 138 INA is relieved from such an exercise.

CONCLUSION:

Every offence, no doubt, presupposes the mutual existence of action and thought. Offence of dishonoring of cheque u/s 489-f requires the proof of both. The non existence of either will render the entire trial a fruitless exercise as is evident from “an act does not make a person guilty unless (their) mind is also guilty”. However, on face reading sections 138 read with section 139 seem to have turned the scale and reversed the long cherished principle “innocent unless proven guilty” but the logical deduction is otherwise. Keeping the distinction of legal burden and evidential burden in view, the statutory presumption of guilt against the accused does not violate human rights.¹¹

11. Article 6(2) (ECHR).

The evidential burden needs to be discharged by the accused through preponderance of probabilities while the legal burden has to be discharged by the prosecution beyond any shadow of doubt. In *R v DPP ex parte Kebilen*, the House of Lords laid down principles for scrutinizing the constitutionality of presumption of guilt to be operated against the accused.¹² This distinction has also been a recognised tool in criminal jurisprudence of Pakistan. *MEESSRs KAMRAN INDUSTRIES Vs THE COLLECTOR OF CUSTOMS (EXPORTS) 11 THE FLOOR, CUSTOMS HOUSE, KARACHI*¹³ and *KHYBER TEA and FOOD COMPANY, PESHAWAR Vs COLLECTOR OF CUSTOMS(APPEAL), PEHAWAR*¹⁴ contains this shifting of evidential burden. This presumption does not mean absolute negation of common law doctrine of innocence unless proved guilty but is the imposition of evidential burden on accused. Even the general law contained in the Pakistan Penal Code admits of such categorization. For example, if a person charged with murder pleads self-defense, the defendant must satisfy the evidential burden that there is some evidence suggesting self-defence. The legal burden will then fall on the prosecution to prove beyond reasonable doubt that the defendant was not acting in self-defence. To put it short, the presumption of innocence brings a balance where reverse onus gives the defendant to prove his innocence and to avoid mistaken conviction and, the prosecution carries a heavy burden of proof but not absolute. This balance always needs to be justified and proportionate.

12. [2000] 2 AC 326

13. *PLD 1996 KAR 68*

14. *2013 PTD 327*

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