

Law of Dishonoring of Cheque in Pakistan and India

Zafar Iqbal Kalanauri

Meaning of Negotiable Instrument

The word negotiable means 'transferable by delivery', and word instrument means 'a written document by which a right is created in favour of some person. Thus, the term "negotiable instrument" means "a written document transferable by delivery". Negotiable instruments are documents for making payments, the ownership of which may be transferred from one person to another many times before the final payment is made. Goods / services are bought or sold for cash as well as on credit. Common practice of business people is to use certain documents as means of payment. Some of these documents are called Negotiable Instruments.

According to Section 13 (1) of the Negotiable Instruments Act 1881¹, "A negotiable instrument means a promissory note, bill of exchange, or cheque payable either to order or to bearer".

"A negotiable instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees" [Section 13(2)].

According to Section of the Negotiable Instruments Act means "A negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer."

Types of Negotiable Instruments

There are two types of Negotiable Instruments:

1. Instruments Negotiable by Statute:

The Negotiable Instruments Act mentions only three kinds of negotiable instruments (Section 13). These are:

- a) Promissory Notes
- b) Bills of Exchange, and
- c) Cheques

2. Instruments Negotiable by Custom or Usage:

There are certain other instruments which have acquired the character of negotiability by the usage or custom of trade. For example: Exchequer bills, Bank notes, Share warrants, Circular notes, Bearer debentures, Dividend warrants, Share certificates with blank

¹ S.13. "Negotiable instrument".(I) A negotiable instrument means a promissory note, bill of exchange or cheque payable either, to order or to bearer.

Explanation (I). A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting, transfer or indicating an intention that it shall not be transferable.

Explanation (II). A promissory note, bill of exchange or cheque is payable to bearer which, is expressed to be so payable or on which the only or last endorsement is an endorsement in blank.

Explanation (III). A promissory note, bill of exchange or cheque, either originally or by endorsement, is expressed, to be payable to the order of a specified person, and not to him or his order it is nevertheless payable to him or his order at his option.

(2) A negotiable instrument may be made payable to two more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees

transfer deeds, Promissory notes, Hundies etc. The Section 17 of the Transfer of Property Act, 1882 speaks of “instruments which are for the time being, by law of custom, negotiable” implying thereby that the courts in Pakistan may follow the practice of English courts in extending the character of Negotiable instruments Act. Thus in Pakistan the Promissory Note, Hundies and Railway receipts etc. have been held to be negotiable instruments by usage or custom of trade.

Cheque

According to Section 6² of the Act³, A cheque is “a bill of exchange drawn on a specified bank and not expressed to be payable otherwise than on demand”. A cheque is also, therefore, a bill of exchange with two additional qualification:

- ▶ It is always drawn on a specified banker.
- ▶ It is always payable on demand.

Special Benefits of Bill of Exchange

- ▶ A bill of exchange is a double secured instrument.
- ▶ In case of immediate requirement, a Bill may be discounted with a bank.

Essential Elements of a Cheque

- ▶ In writing
- ▶ Express Order to Pay
- ▶ Definite and Unconditional Order
- ▶ Signed by the Drawer
- ▶ Order to Pay Certain Sum
- ▶ Order to Pay Money Only
- ▶ Certain Three Parties
- ▶ Drawn upon a Specified Banker
- ▶ Payable on Demand

A cheque must be signed by the person giving the order. If the order is not signed by him, it is not a valid bill. Hence, where the signature of the drawer is forged or where it is signed on behalf of the drawer or by a person having no authority, it will not be considered signed by the drawer.

The cheque must be in writing which includes print. Legally a cheque may be drawn in pencil but in view of the ease with which alteration could be made, a banker would be justified in returning such a document. The cheque must be an order i.e. imperative in terms and not a mere request. The cheque must be an unconditional order i.e. the order to pay must not be subject to any condition.

² 6. "Cheque". A "cheque" is a bill of exchange drawn on a specified banker and not expressed payable otherwise than on demand.

(*) By one of his many customers.

³

The Negotiable Instruments Act, 1881

Parties to a Cheque

▶ **Drawer:**

Drawer is the person who draws the cheque.

▶ **Drawee:**

Drawee is the drawer's banker on whom the cheque has been drawn.

▶ **Payee:**

Payee is the person who is entitled to receive the payment of a cheque.

Types of a Cheque⁴

⁴ CHAPTER XIV SPECIAL PROVISIONS RELATING TO CHEQUES

122 A. Revocation of banker's authority. ---The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by-

- (1) countermand of payment;
- (2) notice of the customer's death;
- (3) notice of adjudication of the customer as an insolvent.

123. Cheque crossed generally.---Where a cheque bears across its face an addition of the words "and company" or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words "not negotiable", that addition shall be deemed a crossing and the cheque shall be deemed to be crossed generally.

123 A. Cheque crossed "account payee". (1) Where a cheque crossed generally bears across its face an addition of the word "account payee" between the two parallel transverse line constituting the general crossing, the cheque, besides being crossed generally, is said to be crossed "account payee".

(2) Where a cheque is crossed "account payee"---

- (a) it shall cease to be negotiable; and
- (b) it shall be the duty of the banker collecting payment of the cheque to credit the proceeds thereof only to the account of the payee named in the cheque.

124. Cheque crossed specially. --- Where a cheque bears across its face an addition of the name of a banker either, with or without the words "not negotiable", that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker.

125. Crossing after issue. --- Where a cheque is uncrossed, the holder may cross it generally or specially.

Where a cheque is crossed generally, the holder may cross specially.

Where a cheque is crossed generally or specially the holder may add the words "not negotiable".

Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker, his agent, for collection.

When an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection he may cross it specially to himself.

125 A. Crossing a material part of a cheque. -- A crossing authorized by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate, or, except as authorized by this Act, to add to or alter, the crossing.

126. Payment of cheque crossed generally. ---Where a cheque is-crossed generally, the banker on whom it is drawn shall to pay it otherwise than to a banker.

Payment of cheque crossed specially.

Where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than: to the banker to whom it is crossed, or his agent for collection.

127. Payment of cheque crossed specially more than once.--Where a cheque is crossed specially to more than one banker, except when crossed to an agent for the purpose of collection, the banker on whom it is drawn shall refuse payment thereof.

128. Payment in the course of crossed cheque.--Where the banker on whom a crossed cheque is drawn in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed or his agent for collection, being a banker, the banker paying the cheque, and (in case such cheque has come to the hands of the payee) the drawer thereof, shall respectively be entitled to the same rights, and be placed in the same position in all respects, as they would respectively be entitled to and placed in if the amount of the cheque had been paid to and received by the true owner thereof.

129. Payment of crossed cheque out of due course. ---Any banker paying a cheque crossed generally otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom the same is crossed, or his agent for collection, being a banker, shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, added to or altered otherwise than as authorized by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability nor shall the payment be questioned, by reason of the cheque having been

Zafar Iqbal Kalanauri, Mediator & Advocate Supreme Court of Pakistan, Adjunct Faculty of Law at Lahore University of Management Sciences(L.U.M.S.),SAF Center, #3 -3rd Floor, 8-Fane Road Lahore 54000, Pakistan, Cell: (92) 300-4511823 & 314-4224411

E-mail: kalanauri@gmail.com ; Web: <http://www.zklawassociates.com>

- ▶ Bearer Cheque
- ▶ Cross Cheque
- ▶ Cheque Crossed Specially
- ▶ Restrictive Crossing (A/c Payee Only)

Crossing, Purpose and Impact

- ▶ Simple/ general crossing Sec.123
- ▶ Special crossing Sec.124
- ▶ Account Payee's only crossing Sec.123 A
- ▶ Not Negotiable crossing Sec.130
- ▶ Who can cross a cheque
- ▶ Who can cancel the crossing

Cheque crossed generally Sec. 123⁵

When a cheque bears across its face an addition of the words- and company- or any abbreviation thereof, between two parallel transverse lines or of two parallel transverse lines simply, either with or without the words, not negotiable that addition shall be deemed a crossing and the cheque shall be deemed to be crossed generally Sec. 123.

crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than, to a banker or, to the banker to whom the cheque is or was crossed, or to its agent for collection, being a banker, as the case may be.

130. Cheque bearing "not negotiable".---A person taking a cheque crossed generally or specially, bearing in either case the words "not negotiable," shall not have, and shall not be capable of giving, a better title to the cheque than that which the person from whom he took it had.

131. Subject to the provisions of this Act relating to cheque crossed "account payee", where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

Explanation: A banker receives payment of a crossed cheque for a customer within the meaning of this section notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

131 A. Application of Chapter to drafts. --- The provision of this Chapter shall apply to any draft, as defined in section 85 A, as if the, draft were a cheque.

131 B. Protection to banker crediting cheque crossed "account payee"---Where a cheque is delivered for collection to a banker does not at the time of such delivery appear to be crossed "account payee" or to have had a crossing account payee" which has been obliterated or altered, the banker, in good faith and without negligence collecting payment of the cheque and crediting the proceeds thereof to a customer shall not incur any liability by reason of the cheque having been crossed "account payee", or of such crossing having been or and of the proceeds of the cheque having been obliterated or altered and of the proceeds of the cheque having been credited to a person who is not the payee thereof.

131 C. Cheque not operating as assignment of funds. A cheque of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the banker.

⁵ 123. Cheque crossed generally.---Where a cheque bears across its face an addition of the words "and company" or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words "not negotiable", that addition shall be deemed a crossing and the cheque shall be deemed to be crossed generally.

Cheque crossed account payee Sec.123-A⁶

Where a cheque crossed generally bears across its face an addition of the words ,**account payee**, between the two parallel transverse lines constituting the general crossing , the cheque besides being crossed generally is said to be crossed **account payee**

Account payee crossing.

- ▶ It shall cease to be negotiable.
- ▶ It shall be the duty of the banker collecting payment of the cheque to credit the proceeds thereof only to the account of the payee named in the cheque.

Cheque crossed specially Sec.124⁷

Where a cheque bears across its face an addition of the name of a banker, either with or without the words , not negotiable, that addition shall be deemed to be crossed specially and to be crossed to that banker.

Not negotiable crossing Sec. 130⁸

A person taking a cheque crossed generally or specially bearing in either case the words , **not negotiable** shall not have and shall not be capable of giving better title to the cheque than that which the person from whom he took it had.

Negotiation Section-14

- ▶ When a Promissory Note, Bill of Exchange or Cheque is transferred to any person, so as to constitute that person the holder, the instrument is said to be negotiated.
- ▶ Negotiation means the transfer of an instrument in such a form that the transferee becomes a legal holder of it.
- ▶ If the instrument is payable to order it is negotiated by endorsement and delivery, if payable to bearer it is negotiated by mere delivery.

When Cheque ceases to be Negotiable

- ▶ When it contains words prohibiting the transfer or indicates the intention that it is not

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(2) Where a cheque is crossed "account payee"---

(a) it shall cease to be negotiable; and

(b) it shall be the duty of the banker collecting payment of the cheque to credit the proceeds thereof only to the account of the payee named in the cheque.

⁷ 124. Cheque crossed specially. --- Where a cheque bears across its face an addition of the name of a banker either, with or without the words "not negotiable, that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker.

⁸ 130. Cheque bearing "not negotiable".---A person taking a cheque crossed generally or specially, bearing in either case the words "not negotiable," shall not have, and shall not be capable of giving, a better title to the cheque than that which the person from whom he took it had.

transferable Section-13⁹.

- ▶ When crossed, Account Payee's only Section 123-A¹⁰.
- ▶ When it contains restrictive endorsement Section 50¹¹.
- ▶ When it is overdue Section 21-A¹².
- ▶ When it has been previously dishonored Section 59¹³.
- ▶ When an order cheque bears forged endorsement Section 29 B.

⁹ 13. "Negotiable instrument".(I) A negotiable instrument means a promissory note, bill of exchange or cheque payable either, to order or to bearer.

Explanation (I). --- A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting, transfer or indicating an intention that it shall not be transferable.

Explanation (II). A promissory note, bill of exchange or cheque is payable to bearer which, is expressed to be so payable or on which the only or last endorsement is an endorsement in blank.

Explanation (III), A promissory note, bill of exchange or cheque, either originally or by endorsement, is expressed, to be payable to the order of a specified person, and not to him or his order it is nevertheless payable to him or his order at his option.

(2) A negotiable instrument may be made payable to two more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees

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(2) Where a cheque is crossed "account payee"---

(a) it shall cease to be negotiable; and

(b) it shall be the duty of the banker collecting payment of the cheque to credit the proceeds thereof only to the account of the payee named in the cheque.

¹¹ 50. Effect of endorsement.---(1) Subject to the provisions of this Act relating to restrictive, conditional and qualified endorsement, the endorsement of a negotiable in followed by delivery transfers to the endorsee the property therein' with the right of further negotiation.

(2) An endorsement is restrictive which either--

(a) restricts or excludes the right to further negotiate the instrument, or

(b) constitutes the endorsee an agent of the endorser to endorse the instrument or to receive its contents for the endorser or for some other specified person.

Provided that the mere absence of words implying, right to negotiate does not make the endorsement restrictive.

Illustrations

B signs the following endorsements on different negotiable instruments payable to bearer-----

(a) "Pay the contents to C only." (b) "Pay C for any use." (c) "Pay C or order for the account of B." (d) "The within just be credited to C."

These endorsements exclude the right of further negotiation by C.

(e) "Pay C." (f) "Pay C value in account with the Oriental Bank." (g) "Pay the contents to C, being part of the consideration in a certain deed of assignment executed by C to the endorser and others.

These endorsements do not exclude the right of further negotiation by C.

¹² 21 A. When note or bill payable on demand is overdue.-A promissory note or bill of exchange payable on demand shall be, deemed to be overdue when it appears on the face of it to have in circulation for an unreasonable length of time.

¹³ negotiable in who has acquired it after dishonour, whether by non-acceptance or non-payment, with n thereof, or after maturity, has only as against the other parties, the rights thereon of his transferor and is subject to the equities to which the transferor was subject at the time of acquisition by such holder.

Accommodation note or bill --- Provided that any person who, in good faith and for consideration, becoming the holder, after maturity of a promissory note or bill of exchange made, drawn or accepted without consideration for the purpose of enabling some party thereto to raise money thereon, may recover the amount of the note or bill from any prior party.

Illustration

The acceptor of a bill of exchange, when he accepted it, deposited with the drawer certain goods as a collateral security for the payment of the bill, with power to the drawer to sell the goods and apply the proceeds in discharge of the bill if it were not paid at maturity. The bill not having been paid at maturity, the drawer sold the goods and retained the proceeds, but endorsed the bill to A. A's title is subject to the same objection as the drawer's title.

Zafar Iqbal Kalanauri, Mediator & Advocate Supreme Court of Pakistan, Adjunct Faculty of Law at Lahore University of Management Sciences(L.U.M.S.),SAF Center, #3 -3rd Floor, 8-Fane Road Lahore 54000, Pakistan, Cell: (92) 300-4511823 & 314-4224411

E-mail: kalanauri@gmail.com ; Web: <http://www.zklawassociates.com>

Difference between ‘Defective Title’ Section 58 and ‘No Title’ Section 29 B

Defective Title Section 58¹⁴

- ▶ A person is said to have the defective title if he has found a cheque lost by someone else, or has obtained a cheque or draft by means of an offence or a fraud for some unlawful consideration.

“No Title” Section 29-B¹⁵

- ▶ A person is said to have ‘no title’ when he is in possession of a cheque or draft on which the drawer’s or endorser’s signature has been forged.
- ▶ For a forged or unauthorized endorsement is wholly inoperative and no one can get any rights through or under a forged signature.

Defective / No titles

- ▶ The important distinction between defective title and no title is that the former can be cured through the process of negotiation i.e. where an innocent transferee honestly takes a cheque or draft under strict conditions such a transferee gets paramount rights and is known as holder in due course.

Sections dealing with Cheque payment

- ▶ Section -10 Payment in due course¹⁶.
- ▶ Section -85 Cheque payable to order¹⁷.
- ▶ Section 85 (1) protection against forged endorsement to paying banker.
- ▶ Section 85 (2) payment of bearer cheque.
- ▶ Section 128¹⁸ payment of a crossed cheque.

¹⁴ 58. Defective title.---When a promissory note, bill of exchange or cheque has been lost or has been obtained from any maker, drawer, acceptor or holder thereof by means of an offence or fraud, or for an unlawful consideration, neither the person who finds or so obtains the instrument nor any possessor or endorsee who claims through such person is entitled to receive the amount due thereon from such maker, drawer, acceptor or holder, unless such possessor or endorsee is, or some person through whom he claims was, a holder thereof in due course.

¹⁵ 29 B. Forged or unauthorized signature.--- Subject to the provisions of this Act, where a signature on a promissory note, bill of exchange or cheque is forged or placed thereon without the authority of the person whose signature it purports to be, the forged, or unauthorized signature is wholly inoperative, and no right to retain the instrument or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the instrument is precluded from setting up the forgery or want of authority: Provided that nothing in this section shall effect the ratification of an unauthorized signature not amounting to a forgery.

¹⁶ 10. "Payment in due course."--- "Payment in due course" means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.

¹⁷ 85. Cheque payable to order. (1) Where a cheque payable to order purports to be endorsed by or on behalf of the payee, the drawee is discharged by payment in due course.

(2) Where a cheque is originally expressed to be payable to bearer, the drawee is discharged by payment in due to the bearer thereof, notwithstanding any endorsement whether in full or in blank appearing thereon, and notwithstanding that any such endorsement purports to restrict or exclude further negotiation.

¹⁸128. Payment in the course of crossed cheque.--Where the banker on whom a crossed cheque is drawn in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed or his agent for collection, being a banker, the banker paying the cheque, and (in case such cheque has come to the hands of the payee) the drawer thereof, shall respectively be entitled

Zafar Iqbal Kalanauri, Mediator & Advocate Supreme Court of Pakistan, Adjunct Faculty of Law at Lahore University of Management Sciences(L.U.M.S.),SAF Center, #3 -3rd Floor, 8-Fane Road Lahore 54000, Pakistan, Cell: (92) 300-4511823 & 314-4224411

E-mail: kalanauri@gmail.com ; Web: <http://www.zklawassociates.com>

Scrutiny of cheque

Cheques are to be paid with the following conditions.

- ▶ Cheque should be drawn in proper form
- ▶ The drawer has not stopped payment of cheque.
- ▶ The banker has not received the notice of the customer's death.
- ▶ Customer has not been adjudicated as insolvent by a competent court of law
- ▶ The banker has not received the Garnishee Order (court order, directing to pay money not to the debtor but to a third party) against that account.

“Holder” of Promissory Note

- ▶ The “Holder” of promissory note, bill of exchange or cheque means the payee or endorsee who is in possession of it or the bearer thereof but does not include beneficial owner claiming through a *benamidar*.

Holder in due course. Section-9¹⁹

- ▶ Holder in due course means any person who **for consideration becomes the possessor of a promissory note, bill of exchange or cheque if payable to bearer or the payee or endorser** thereof, if **payable to order**, before it becomes overdue without notice that the title of the person from whom he derived his own title was defective.

Payment in Due Course

Section-10²⁰

- ▶ Payment in due course means payment in accordance with the **apparent meaning** of the instrument in **good faith** and **without negligence to any person in possession** thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.

Check List for Holder in Due Course.

- ▶ Examine the instrument to ensure that it is in negotiable form i.e. it does not contain words prohibiting transfer or indicating the intention that it is not transferable.

to the same rights, and be placed in the same position in all respects, as they would respectively be entitled to and placed in if the amount of the cheque had been paid to and received by the true owner thereof.

¹⁹ 9. "Holder in due course."--- "Holder in due course" means any person who for consideration becomes the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or endorsee thereof, if payable to order, before it became overdue, without notice that the title of the person from whom he derived his own title was defective.

Explanation. ---For the purposes of this section the title of a person to a promissory note, bill of exchange or cheque is defective when he is not entitled to receive the amount due thereon by reason of the provisions of section 58.

²⁰ 10. "Payment in due course."--- "Payment in due course" 'means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.

- ▶ Not crossed, Account Payee.
- ▶ Not restrictively endorsed.
- ▶ Not overdue/stale (out of date).
- ▶ No evidence of previous dishonor.
- ▶ Not tainted by forgery.

Transferee to examine following conditions.

- ▶ To accept the instrument in good faith.
- ▶ For value/ consideration.
- ▶ Without notice of any defect in the title of the transferor.

Holder in Due Course.

- ▶ The highest type of holder is the holder in due course, who has paramount right over a bill.
- ▶ To qualify as holder in due course , the holder must take possession of a cheque under strict conditions:
- ▶ The Instrument/cheque must be complete and regular on the face of it. Thus a person when taking an 'order' Instrument/cheque from a payee without the payee's endorsement could not be holder in due course.
- ▶ The cheque when negotiated must not be overdue. Which means it must not have been in circulation for an unreasonable length of time.
- ▶ The holder must take it without notice of previous dishonor, if any.
- ▶ He must be a holder for some consideration, i.e. he must give value for the instrument.
- ▶ A holder in due course must take instrument/cheque without notice of any defect in the title of the person from whom he took it.
- ▶ It must be noticed that in case the instrument is tainted with forgery, there cannot be holder in due course of such an instrument Section. 29 B²¹.
- ▶ The holder in due course has first of all the usual rights of holder as mentioned in Section 57 B²².
- ▶ To receive payment in due course.
- ▶ To negotiate the instrument further if he so desires, unless further negotiation is restricted.
- ▶ To sue in his own name to recover payment, if the instrument is dishonored.

²¹ 29 B. Forged or unauthorized signature.--- Subject to the provisions of this Act, where a signature on a promissory note, bill of exchange or cheque is forged or placed thereon without the authority of the person whose signature it purports to be, the forged, or unauthorized signature is wholly inoperative, and no right to retain the instrument or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the instrument is precluded from setting up the forgery or want of authority: Provided that nothing in this section shall effect the ratification of an unauthorized signature not amounting to a forgery.

²²57 B. Rights of holder. ---A holder may receive payment in due course under a negotiable instrument and further r in the manner provided by this Act; he may also sue on such instrument in his own name.

- ▶ In addition, he acquires the rights as mentioned in Section 53 A²³.
- ▶ He holds the instrument free from any defect of title of previous parties and free from any defenses available to the prior parties amongst themselves.
- ▶ He may enforce payment of the full amount of the instrument against all the parties liable thereon.

Endorsement. Section- 15²⁴

When the maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiation on the back or face thereof on a slip of paper annexed thereto, or so signs for the same purpose a stamp paper, intended to be completed as a negotiable instrument, he is said to endorse the same and is called the endorser.

Essentials of a valid Endorsement

- ▶ from the drawer It must be on the instrument, (back or face) or on along.
- ▶ It must be made by the drawer, payee or endorsee.
- ▶ It must be signed.
- ▶ It may contain mere signatures or signatures with instructions.
- ▶ It must be completed by delivery of the instrument.

The Endorser

- ▶ The payee when he negotiates an order cheque becomes the endorser.

Duties & Responsibilities

- ▶ He undertakes that if the cheque is dishonored and he is given notice of dishonor, he will compensate the holder or subsequent endorsees who is compelled to pay.

Rights of an Endorser

- ▶ He has a right to expect that it will be presented within reasonable time and if dishonored, notice of dishonor will be given to him failing which he will be discharge of his liability to the holder.
- ▶ If compelled to compensate the holder, he has the right to recover

Types of Endorsement.

- ▶ Blank or general.
- ▶ Full or special.
- ▶ Restrictive.
- ▶ Conditional.

²³ 53 A. Rights of holder in due course.---A holder in due course holds the negotiable instrument free from any defect of title of prior parties, and free from defences available to prior parties among themselves, and may enforce, payment of the instrument for the full amount thereof against all parties liable thereon.

²⁴ 15. Endorsement. --- When the maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiable, on the back or face thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to endorse the same, and is called the "endorser".

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- ▶ Sans recourse
- ▶ Partial.
- ▶ Facultative.

Special Rules of Evidence

Relevant Sections: 118 to 120²⁵

Presumptions as to

- ▶ Consideration
- ▶ Date
- ▶ Time of acceptance
- ▶ Time of transfer
- ▶ As to Stamp
- ▶ As to endorsement
- ▶ As to holder is holder in due course

Section 118 - Presumptions as to Negotiable Instruments

Until the contrary is proved, the following presumptions shall be made:

- (a) of consideration. - that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;
- (b) as to date. - that every negotiable instrument bearing a date was made or drawn on such date;
- (c) as to time of acceptance. - that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

²⁵ CHAPTER XIII SPECIAL RULES OF EVIDENCE

118. Presumptions as to negotiable instruments--- (a) Of consideration; (b) as to date; (c). as to time of acceptance; (d) as to time of transfer; (e) as to order of endorsements (1) as to stamp; (g) that holder is a holder in due course. ---Until the contrary is proved, the following presumptions shall be made, (a) that every negotiable instrument was made or drawn of consideration, and that every such instrument, when it has been accepted, endorsed negotiated or transferred, was accepted, endorsed negotiated or transferred for consideration: (b) that every negotiable instrument bearing a date was made or drawn on such date; (c) that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity; (d) that every transfer of a negotiable instrument was made before its maturity; that endorsements appearing upon a negotiable. (e) that endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon; (f) that a lost promissory note, bill of exchange or cheque was duly stamped; (g) that the holder of a negotiable instrument is a holder in due course, provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence of fraud,. or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him. 119. Presumption on proof of protest.--In a suit upon an instrument which has been dishonoured, the Court shall, on proof of the protest presume the fact, of dishonour, unless and until such fact is disproved. 120. Estoppels against denying original validity, of instrument- No maker of a promissory note, and no drawer of a bill of exchange or cheque, and no acceptor of a bill of exchange for the honour of the drawer shall, in a suit thereon by a holder in due course, be permitted to, deny the validity of the instrument as originally made or drawn.

(d) as to time of transfer. - that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of endorsements. - that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamp. - that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course. - that the holder of a negotiable instrument is a holder in due course;

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

To conclude we can say that, the negotiable instrument means a document in writing which creates a right in favour of some person and it is freely transferable by one person to another. The negotiable instrument act expressly recognizes only three instrument viz., a promissory note, bill of exchange and a cheque but it does not exclude any other instrument to be included therein provided that such instrument satisfies the characteristics of negotiability

Offence of Dishonoring of Cheque and the Required Standard of Proof

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 of India 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" *Kusum Ingots & Alloys Ltd Vs Pennar Peterson Securities Ltd*²⁶.

In Pakistan, a specific section has been enacted and inserted in the Pakistan Penal Code, 1860 through Criminal Law (Amendment) Ordinance, 2002²⁷ to deal with the

²⁶ (AIR 2000 SC 954).

²⁷ (AMENDMENT) ORDINANCE, 2002 ORDINANCE LXXXV OF 2002

An Ordinance, further to amend the Pakistan Penal Code, and the Code of Criminal Procedure, 1898

[Gazette of Pakistan, Extraordinary, Part-I, 25th October, 2002] F.No.2(1)/2002-Pub., dated 25-10-2002---

The following Ordinance promulgated by the President is hereby published, for general information:--

Whereas it is expedient further to amend the Pakistan Penal Code (Act XLV of 1860) and the Code of Criminal Procedure, 1898 (Act V of 1898) for the purposes hereinafter appearing;

And whereas the President is satisfied that circumstances exist which render it necessary to take immediate action;

Now, therefore, in pursuance of Proclamation of Emergency of the fourteenth day of October, 1999, and the Provisional Constitution Order No. 1 of 1999, read with the Provisional Constitution (Amendment) Order No.9 of 1999, and in exercise of all powers enabling him in that behalf, the President of the Islamic Republic of Pakistan is pleased to make and promulgate the following Ordinance:--

1. Short title and commencement. --- (1) This Ordinance may be called the Criminal Law (Amendment) Ordinance, 2002.

(2) It shall come into force at once.

2. Insertion of new section 489 F, Act XLV of 1860.---In the Pakistan Penal Code (XLV of 1860), after section 489 E, the following new section shall be inserted, namely:--

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 142²⁸, Chapter XVII, were inserted in

"489 F. Dishonestly issuing a cheque.--Whoever dishonestly issues a cheque towards repayment 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."

²⁸ 7[CHAPTER XVII

NOTARIES PUBLIC OF PENALTIES IN CASE OF DISHONOUR OF CERTAIN CHEQUES FOR INSUFFICIENCY OF FUNDS IN THE ACCOUNTS

138. Dishonour of cheque for insufficiency, etc., of funds in the account.

138 Dishonour of cheque for insufficiency, etc., of funds in the account. 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 honour 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 provision 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 purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

139 Presumption in favour of holder.

139. Presumption in favour 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.

140. Defence which may not be allowed in any prosecution under section 138.

140. Defence which may not be allowed in any prosecution under section 138. It shall not be a defence in a prosecution for an offence under section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that section.

141 Offences by companies.

141. (1) Offences by companies. 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.

(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.

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;

Zafar Iqbal Kalanauri, Mediator & Advocate Supreme Court of Pakistan, Adjunct Faculty of Law at Lahore University of Management Sciences (L.U.M.S.), SAF Center, #3 -3rd Floor, 8-Fane Road Lahore 54000, Pakistan, Cell: (92) 300-4511823 & 314-4224411

E-mail: kalanauri@gmail.com ; Web: <http://www.zklawassociates.com>

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.

Criminal offence u/s 489-F PPC Jurisdiction of Pakistan

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-F

- ▶ Issuance of cheque;
- ▶ Such issuance was with dishonest intention;
- ▶ The purpose of issuance of cheque should be;
 - To repay a loan; or
 - To fulfill an obligation
- ▶ On presentation, the cheque is dishonoured²⁹

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*"³⁰ but this precedent was overruled subsequently in "*Muhammad Khan Vs Magistrate Section 30, Pindi Gheb, District Attock*"³¹.

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

As 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

(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

²⁹ Muhammad Sultan Vs the State, 2010 SCMR 806

³⁰ 2005 YLR 1565

³¹ PLD 2009 Lah 401

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 purposes³². Otherwise, mere issuing of cheque will not give rise to a criminal liability³³. 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.

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.

Registration of F.I.R U/S 489(F) P.P.C.

The registration of F.I.R u/s 489-F PPC is not an automatic result of dishonoring of a cheque. Other factors have also to be taken into account such as the genuineness of the signatures on the cheque, and, in a commercial/trading/business matter, if there was any **stop payment** instruction from the drawer of a cheque to bank³⁴. The purpose and object of section-489-F PPC, it to curb the **fraudulent** and **dishonest** issuance of cheques to cause **dishonest gain** or to cause “**dishonest loss**”, or to “**defraud**” anybody. The word “**dishonest**” requires conscious examination. The term “**dishonestly**” is defined in section 24 of the P.P.C³⁵. The factum of dishonouring of a cheque on its own feet without substantiation of “**fraud**” is not enough for registration of First Information Report (FIR).

³² Muhammad Ayub Vs Rana Abdul Rehman (2006 YLR 1852)

³³ Iftikhar Akbar Vs the State, 2008 MLD 159.

³⁴ Syed Hasan Raza Vs Deedar Hussain Shah PLD 2008 Karachi 305. The Hon’ble Supreme Court of Pakistan has also held that the facts are to be probed into before registering F.I.R. under section 489-F PPC, and FIR not to be registered automatically. See also Shah Jehan Khetrani v. Sh. Mureed Hussain 2005 SCMR 306.

³⁵ Maj. (Rtd) Javed Inayat Khan Kiyani Vs The State, PLD 2006 Lahore 752.

“Mere issuance of a cheque which is subsequently dishonoured does not constitute an offence under Section-489-F PPC unless same is issued dishonestly and for the repayment of a loan or FIR discharging any obligation”³⁶. *“Whether cheque in dispute had been issued as a guarantor or towards repayment of a loan or fulfillment of an obligation required recording of evidence and it was the function of the court to decide whether there was some element of dishonesty on the part of the cheque”*³⁷.

The rationale of application and scope of section-489-F PPC does not call for a mechanical action immediately when cheque is returned by a banker, but is to be used only where, prima facie, the purpose of issuing the cheque was **dishonesty** pure and simple in the matter of payment of loan...Business transactions, genuine disputes and contractual obligations may not constitute an intention for the offence³⁸.

In the case of a writ petition filed for quashment of F.I.R registered under section 489-F PPC a *“Notice was placed petitioner to respondent [and] had explained circumstances in which cheque in dispute was issued... Even according to investigation carried out by police, petitioner/accused had been found prima facie innocent...Lodging of F.I.R was the result of ulterior motive which had been negated even during police investigation...Constitutional petition for quashing of F.I.R was allowed and F.I.R registered under section 489-F PPC was directed to be quashed”*³⁹.

It has also been held that, basically, section 489-F PPC gets attracted only in two situation or in other words has got two pre-requisites:-

- i) cheque has to be for repayment of loan;
- ii) it must be in fulfillment of an obligation;

*“Section-489-F PPC would only be relevant where in respect of a loan or non-fulfillment of an obligation, a cheque was issued and it got dishonoured in the way mentioned under said section...Section 489-F PPC would not be attracted for any other purpose...Corollary of that would be that cheques which were issued otherwise than for purpose of repayment of loans or fulfillment of obligation, would not be covered by definition of Section 489-F PPC... Applications asking for cancellation of bail were dismissed because none of those pertained to the purpose as defined...”*⁴⁰.

Stale cheque

Stale check is a cheque that is presented to be cashed or deposited at a bank six months or more after the date it was written.⁴¹

Cheque presented at the **paying bank** after a certain **period** (typically six **months**) of its **payment** date. A stale cheque is not an **invalid** cheque, but it may be **deemed** an ‘irregular’ **bill of exchange**. A **bank** may refuse to **honor** it unless its **drawer** reconfirms its payment either by inserting a new payment date or by **issuing** a new cheque. Also **called** stale dated cheque.

³⁶ Iftikhar Akbar Vs The State 2008 MLD 159

³⁷ Tahir Rashid Vs The State & 4-others, 2007 YLR 518

³⁸ Major Anwar-ul-Haq Vs The State, PLD 2005 Lahore 607.

³⁹ Sheikh Mureed Hussain Vs S.H.O.etc. 2005 P.Cr.L.J 144

⁴⁰ Muhammad Ayub Vs Rana Abdul Rehman, 2006 YLR 1852 , Referred 2005 P.Cr.L J 1462 and 2006 P.Cr.L.J 157

⁴¹ Stale Check: One presented a long time, 6 months or more after the date of issue. Also known as a stale dated check.(Black’s Law Dictionary, 6th Edition)

The date when the cheque is presented to be cashed or deposited in a bank account is known as the payment date. Checks dated six months after this payment date do not have to be honored by a bank pursuant to the Uniform Commercial Code in the United States. This code is a set of laws adopted at the state level that governs financial contracts. The bank receiving a stale cheque can return the check to the paying bank marked unpaid, request a new cheque be issued or consult with the person who wrote the cheque.

Tannan's book "Banking Law and Practice in India" defines stale cheque(s) as under: --

"Stale Cheques.---It is also necessary for the paying banker to see that the cheque presented is not stale, or out of date. A cheque is said to be stale when it has been in circulation for an unreasonably long period. What is to be regarded as an unreasonably long period is determined by the nature of the instrument, the usage of trade, the practice prevalent among bankers and the circumstances of the particular case. "It was either a custom of the trade or nothing, (per Fare well, L.J., in Lloyds Bank v. Swiss Bank verein, 29 Times L.R. 219 at p.222). It is understood that bankers in India consider a cheque stale, when it has been outstanding for more than six months. There may be differences in practice in various parts of India. In the case of dividend warrants, however, the issuing companies which issue them usually do not honour them if they are presented more than three months after the dates of their issuance, unless they are subsequently revalidated by the companies concerned. It may be noted that in order to remove any ambiguity in this regard, where it is intended to limit the currency of a cheque, dividend warrant etc. to a period of less than six months, such instruments are usually marked, say "current for three months only". A stale cheque may also be honoured by the drawee bank, after getting it confirmed by the drawer.⁴²"

The "Stale Cheque" is also defined in "Hand Book of Banking Terms by Mr. Fazul Suleiman Kazi, as under: --

"Cheque presented on the counter of bank for encashment after the expiry date mentioned in the instrument. Stale Cheque is not accepted for payment. Cheque that runs out of its time that it has become outdated, if it has been with the holder for over six months. For payment such a cheque confirmation from drawer may be needed. Cheque becomes stale if it is in circulation over six months that is where the instrument is submitted at the counter or lodged after period of six months. Payment of such instrument is declined unless it is revalidated.⁴³"

The "Stale Cheque" is also defined in "Excellent Legal Words and Phrases" by Mian Muhammad Kakakhel as under: --

"Stale cheque.---A cheque that is not presented for payment within a reasonable period. Bankers make a rule of not cashing cheques six months or more old.⁴⁴"

In "Sheldon's Practice and Law of Banking (10th Edition) at page 7 the learned author stated that "it is necessary to distinguish between cheques termed out of date in Law for purposes of negotiation and those termed 'out of date' by banker's custom. As regards the latter, most bankers return cheques presented six or more months after date, marked "out of date", and require the drawer's confirmation before payment"⁴⁵.

M.L. Tannan in his book "Banking law and practice in India" has stated that "unless a cheque is presented within a reasonable time after the ostensible date of its issue, it should not be honoured. Generally, speaking a cheque presented more than six months after the ostensible date of its issue, is considered a stale one. Some banks in

⁴² "Banking Law and Practice in India" 18th Edition at page 269

⁴³ "Hand Book of Banking Terms" at pages 333-334 Edition 2004 by Mr. Fazul Suleiman Kazi

⁴⁴ "Excellent Legal Words and Phrases" at page No.4902 Volume III, Edition 1996 by Mian Muhammad Kakakhel

⁴⁵ "Sheldon's Practice and Law of Banking (10th Edition) at page 7

England honour cheques even if they are presented' within twelve months, but, both in England and in India a period of six months is allowed for presentation of cheques according to the practice of bankers,⁴⁶.

Section 84 subsections (1) and (2) of Indian Negotiable Instruments Act, 1881 provide as follows: --

Subsection (1), Section 84: When a cheque not duly presented and drawer damaged thereby.---(1) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or person on whose account it is drawn had the right, at the time when presentment ought to have been made, as between himself and the banker, to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of the banker to a larger amount than he would have been if such cheque had been paid.

Subsection (2), Section 84.---"In determining what a reasonable time is, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case".

It was held by the Kerala High Court. in the reported case of Kesavan Thankappan v. State of Kerala and another⁴⁷ by Mr. Justice K. A. Mohamed Shaft, as follows:--

"Offence and Prosecution---Cheque---Dishonour--Condition that cheque must be presented within six months of drawing or within period of validity whichever is earlier. Shorter period of validity contemplate---Cheque drawn on treasury bank and having three (3) months validity presented after three (3) months. No cause of action arises. Indian Negotiable Instruments Act, 1881, section 138."

It is further held that *"it is clear that the lower Court is perfectly justified in finding that the respondent is not guilty of the offence punishable under section 138 of the Negotiable Instruments Act and acquitting and setting him at liberty and absolutely no ground is made out in this appeal to interfere with those findings arrived at by the lower Court. Therefore, the judgment passed by the lower Court is confirmed and the appeal is dismissed"*.

Mr. Justice Eswara Prasad in case of Richard Samson Sherrat v. State of A.P.⁴⁸ has held that *"the cheque can be 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. Clause (a) of the proviso to section 138 does not laydown as to the number of times a cheque can be presented to the Bank. When the statute has not laid down any limitation on the number of times that a cheque may be presented within the period of six months or any shorter period, it will not be desirable to read into the said clause any such restriction as to the number of times a cheque may be presented"*.

A Division Bench of the Kerala High Court in the reported case of Mahadevan Sunail Kumar v. Bhadran⁴⁹ has held as follows: --

"It is clear that cause of action for filing the complaint may arise on several occasions and the payee or holder in due course is entitled to present the cheque at any time within a period of six months from the date on which it was to be drawn and for filing the complaint he should have served notice of such dishonour to the drawer, the payee or holder in due course can make a second presentation of the cheque and if other conditions are fulfilled, he can launch a complaint on the basis of the second dishonour of the cheque as the cheque would remain valid for a period of six months."

From the scheme of sections 138 and 142 of Indian Negotiable Instruments Act, 1881, it is thus seen that a cheque can be 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.

⁴⁶ "Banking law and practice in India" by M.L. Tannan (14th Edition) at page 131

⁴⁷ 1998 Company Cases 574 (Vol. 193)

⁴⁸ 1992 (1) An. WR 502

⁴⁹ 1991 (1) Kerala LJ 335

The cheque can be presented to the bank within the period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. During the validity period the cheque can be presented any number of times but the action by filing a complaint under section 138 read with section 142 can be taken only once.

It is common knowledge that in commercial practice a cheque may be presented any number of times within the period of its validity. The principle of *autrefois acquit* or *autre fois convict* will also come into play and the drawer of the cheque cannot be subjected to repeated prosecutions and convictions on the strength of one cheque"⁵⁰.

It was held in the case of *Ram Sarup v. Hardeo Prasad*⁵¹ by a Division Bench of Allahabad High Court comprising Mr. Justice Lindsay and Mr. Justice Kendall as follows:

"Under sections 9 and 19 of Negotiable Instruments Act (26 of 1981), Taking a Stale Cheque---Transferee not a holder for value---Suit by transferee against drawer must fail though he did not know the defect in his transferor's title."

A cheque is payable on demand and the amount becomes payable when the cheque is presented for payment to the drawee, and a holder after it is presented for payment is not a holder in due course.

Where plaintiff took a stale cheque in good faith for consideration without notice of dishonour and without having any reason to believe that there was any defect in the title of his transferor, who, however, was not a holder for value and the endorsement to him was fictitious".

It was held by the Division Bench of Allahabad High Court that *"plaintiff could not be regarded a "holder in due course" and his claim against the drawer must fail"*.

Mr. Justice Syed Haider Ali Pirzada in his reported judgment in the case titled: *Habib Bank Ltd. Vs Jamilur Rehman*⁵² that *"Cheque/draft not presented within six months of its issue would become out of date or stale. Suit based on out of date or stale cheque/draft cannot be decreed" and "defendant's revision against decree passed in a suit based on cheque which had become stale, High Court accepting revision, setting aside decree and dismissing suit"*.

It was also held in that judgment that "It is not in dispute that Bank Draft No. 09168466 for Rs.1,000 was issued on 17-1-1985 by Riyadh Bank. It is an admitted position that the same was presented for encashment after over one year. The petitioner returned the draft with endorsement on memo. "The cheque is out dated".

It was further held "that the petitioner-Bank pleaded practice in its written statement The Bank Officer appeared in the Witness Box and stated that it is their practice that the negotiable instruments lose their validity if they are not presented within six months from the date of issue. It appeared from the evidence of the Bank Officer of the petitioner that the Bank Draft was presented after a lapse of seventeen months and in Pakistan there is a practice that negotiable instruments should be presented within a reasonable time. Subsection (2) of section 84 of Negotiable Instrument Act provides that in determining what reasonable time is, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case".

In the case of "Griffiths v. Dalton (1940) 2 KB 264" the facts of the case are that the cheque was given to the plaintiff in August, 1931 and that time bore no date. Nothing was done with it until February, 1931, when the plaintiff filled in the date of the cheque February, 20, 1933. He then presented the cheque for payment at a Brighton Branch of the Midhand Bank, but it was dishonoured and he filed the suit and it was held as follows:--

"Although the cheque in the present case bore no date, the plaintiff, by section 20 of the Bill of Exchange Act, 1882 following what, I think, was the common law before the passing

⁵⁰ Law of Negotiable Instruments and dishonour cheques "by P.S. Narayana/Edition 1997, page 441

⁵¹ AIR 1928 Allahabad 68

⁵² 1994 MLD 271

of that Act, had a prima facie authority to fill in the date, but by the common law he was bound to do so within a reasonable time. The question what is a reasonable time is a question of fact, and on the facts of this case I am satisfied that the reasonable time had long since elapsed. There was therefore, no authority to fill in the date as it appeared on the discussed cheque and no liability on the bank to meet it. The claim on the cheque fails."

The principles laid down in the above case-law of Griffiths v. Dalton was endorsed and relied in the case of "Habib Bank Ltd. Vs Jamilur Rehman" as it was held by the His Lordship as follows:

"I am of the opinion that admittedly the Bank Draft was presented after seventeen months, the same had become out of date or stale and the petitioner had refused to pay the amount of Rs.1,000. The claim on the Bank Draft fails". It is further held that in the result, the revision petition succeeds, the judgment and decree dated 23-12-1988 passed by the learned Judge, Small Causes Court, Karachi are set aside. The suit stands dismissed. In the circumstances of the case the parties are directed to bear their own costs".

In his judgment regarding a quashing of an F.I.R. recorded under S.489-F, P.P.C by his Lordship Mr. Justice Salman Hamid in the case titled: Shafaqat Hussain Hashmi Vs The State⁵³ was pleased to hold that "Power of Magistrate to acquit accused at any stage---Presentation of stale cheque for encashment---Accused (applicant) had filed an application under S.249-A, Cr.P.C, before the Magistrate for acquittal from the charges raised by the F.I.R., but same was dismissed---Validity---Magistrate had missed out on the point that cheque presented for encashment was a stale cheque, as it had been presented for encashment beyond the period of six months from the date of its issue, and in circumstances it was bound to be dishonoured---Complainant (respondent) seemed to know well that the cheque would not be encashed but still presented it for payment, merely to bring a case against the accused under S.489-F, P.P.C---Dishonest intention of the accused was not patent or deducible from circumstances of the case---Charges brought against accused were found groundless, and resultantly proceedings against the accused arising from the F.I.R. were quashed".

Thus, it is observed that, it is only a practice to honour or dishonour the cheque having old date of more than six (6) months or any date of validity in Pakistan. To avoid this ambiguity and/or legal flaw, that there is no provisions of law or statute is existing in respect of "Stale Cheques", but it is only a practice. An amendment should be brought in section 84 of Negotiable Instruments Act, 1881, by insertion of subsection (4) in section 84 the word "reasonable time of it's issue" as mentioned in subsection (1) and reasonable time as narrated in subsection (2) above, means the time in limitation of six (6) months from the date of issue for the ordinary cheque(s) and time as well as limitation of three (3) months for treasury cheque(s) will be deemed to be "within a reasonable time of it's issue" and "reasonable time" for the purpose of the meanings as mentioned in subsections (1) and (2) above".

(ii) The "date of issue" means the date of execution which is mentioned in the cheque (ordinary or treasury) and if the cheque will be presented for encashment after the expiry and/or lapse of time and period of six (6) months in case of ordinary cheque and within three (3) months in case of treasury cheque, the banker and/or bank concerned is not under any obligation to encash the said cheque and the said cheque will be treated as invalid for the purpose of encashment and to be termed as "Stale Cheque".

Criminal And Civil Liability is Parallel & Simultaneous

It is submitted that criminal and civil liability ensuing from dishonoring of a cheque are separate, do not overlap rather go parallel simultaneously. A Civil Court cannot stop criminal investigation by issuing injunctive order. "...Alleged dishonoring of the relevant cheque had come about prior to issuance of any injunctive order by a civil court and, thus,

⁵³ 2012 M L D 1551

*the offence, if any, had already been committed before passing of injunctive order by the Civil Court... Lying of information before the police regarding commission of a cognizable offence could not be stopped by a Civil Court... No injunctive order could be passed against the law... No injunction could be granted by a Civil Court against criminal investigation or in criminal matter...'*⁵⁴.

*"Criminal case must be allowed to proceed on its own merits and merely because civil proceedings relating to same transaction had been instituted, it had never been considered to be a legal bar to the maintainability of criminal proceedings which could proceed concurrently because conviction for a criminal offence was altogether a different matter from the civil liability."*⁵⁵

It has been held that, *"criminal proceedings could not be held in abeyance in all circumstances during pendency of a civil suit... Criminal proceedings were not barred in the presence of civil proceedings and both proceedings could be carried out simultaneously... Civil Court had no jurisdiction to prevent presentation of a cheque for encashment, which was a negotiable instrument... Civil Court by its injunctive order had [only] directed the defendant accused not to receive money through illegal means and force... Presentation of valid cheque for encashment by no stretch of the argument could be termed as an attempt to receive money by illegal means or by force..."*⁵⁶.

Civil Remedy under Order-XXXVII Rules, 1 & 2 and criminal remedy under Section 489-F PPC *"... both these remedies being not overlapping could be simultaneously availed of by the person who had been conferred such remedies by law... Subsection-3 of section 522-A Cr.P.C provided that a civil suit was not barred even in the presence of said section... Exercise of right of filing of suit could not create any hindrance in the way of lodging F.I.R under Section 489-F PPC and vice versa... If different rights to commence proceedings of civil or criminal nature had sprung up with different results, those could be availed of differently and maxim that "a man should not be vexed twice, would not be applicable in such a case..."*⁵⁷.

Dishonest intention in issuing the cheque was sine qua non to attract the offence under S.489-F, P.P.C., which was to be established during course of evidence⁵⁸.

Element of dishonesty to constitute an offence under S.489-F, P.P.C. was the basic requirement in the case where cheque had been given for the adjustment/repayment of loan, and not in case where it was given as security. Cheque dishonoured in every eventuality could not constitute an offence under S.489-F, P.P.C.⁵⁹.

Offence under S.489-F, P.P.C. fell within non-prohibitory clause of subsection (i) of S.497, Cr.P.C., grant of bail had to be considered favourable as a rule and bail should be declined only in exceptional cases evidence, repeat the offence if released on bail or was previously convicted. Questions of existence of business relationship between the parties or of any contractual commitment giving rise to issuance of cheque and genuineness of signature and writing on the cheque called for further probe. Person was

⁵⁴ Aamir Shehzad v. The State PLD 2005 Lahore 568

⁵⁵ Seema Fareed v. The State 2008 SCMR 839

⁵⁶ Rehan Nasiq v. Station House Officer 2008 ULR 2505

⁵⁷ Muhammad Asif V. Muhammad Javed Akhtar 2006 MLD 1184.

⁵⁸ Muhammad Ashraf Choudhry Vs State 2014 YLR 1171

⁵⁹ Raza Khan Vs State 2014 YLR 90

presumed to be innocent unless proved guilty. Provision of S.489-F, P.P.C. was not intended by legislature to be used for recovery of amount (in dispute); same was designed to determine the guilt and award sentence, Order XXXVII, C.P.C. provided remedy for recovery of the amount⁶⁰.

Where complainant alleged that accused owed him a sum of money and paid the cheque in question, which was dishonoured on presentation. Accused contended that cheque in question had only been issued as security when both parties agreed to settle their dispute through arbitration. The August Supreme Court of Pakistan held that validity of issuance of cheque in question appeared to be connected with the arbitration accord. Investigation officer stated that cheque was issued by way of security rather than for discharge of liability. Prima facie circumstances indicated that cheque in question was not issued towards repayment of some outstanding loan or fulfilment of an existing obligation instead it had been issued to meet a possible future obligation, therefore, foundational elements of S.489-F, P.P.C. were prima facie missing. Pre-arrest bail of accused was confirmed in circumstances⁶¹.

“F.I.R. stated that dishonoured cheque was given by the accused to the complainant in the backdrop of a business deal of purchase of some crop, but there was no documentary evidence regarding the deal mentioned in the F.I.R. Dishonest intention of accused could validly be determined by the Trial Court after recording of evidence. Case of accused fell within S. 497(2), Cr.P.C and was one of further inquiry into his guilt. Accused was in jail for more than three months, without any progress in his trial and offence with which he was charged did not fall within prohibitory clause of S.497, Cr.P.C. Bail petition of accused was accepted and he was admitted to bail”⁶².

Jurisdiction of India, Section 138 Negotiable Instruments Act, 1881

As compared to section 489-F PPC, the Indian Negotiable Instrument Act, 1881 contains the provisions regarding dishonoring of cheque giving rise to a criminal liability⁶³.

⁶⁰ Muhammad Irfan Vs State 2015 PCrLJ 129, Babar Hussain Vs State 2014 YLR 1493, Rizwan Ali Khan Vs State 2014 YLR 567, Imtiaz Ali alias Bhola Vs State 2014 PCrLJ 424

⁶¹ Mian Allah Ditta Vs The State 2013 SCMR 51

⁶² Mushtaq Ahmed Vs State 2013 YLR 435 , Usman Tahir Vs State 2011 YLR 1248

⁶³ 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

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

Zafar Iqbal Kalanauri, Mediator & Advocate Supreme Court of Pakistan, Adjunct Faculty of Law at Lahore University of Management Sciences(L.U.M.S.),SAF Center, #3 -3rd Floor, 8-Fane Road Lahore 54000, Pakistan, Cell: (92) 300-4511823 & 314-4224411

E-mail: kalanauri@gmail.com ; Web: <http://www.zklawassociates.com>

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 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.

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:

Zafar Iqbal Kalanauri, Mediator & Advocate Supreme Court of Pakistan, Adjunct Faculty of Law at Lahore University of Management Sciences(L.U.M.S.),SAF Center, #3 -3rd Floor, 8-Fane Road Lahore 54000, Pakistan, Cell: (92) 300-4511823 & 314-4224411

E-mail: kalanauri@gmail.com ; Web: <http://www.zklawassociates.com>

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

(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 endeavor 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 a 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."

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 Indian Negotiable Instrument Act. 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.

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.”*⁶⁴

The Indian Negotiable Instrument 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.” *P. Venugopal vs. Madan P. Sarathi, (2009) 1 SCC 492 and K. Prakashan v. P.K.Surenderan (2008) 1 SCC 258.*

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 Indian Negotiable Instrument Act, 1881 provides a period of limitation for filing

⁶⁴ AIR 2001 Supreme Court 3897

a complaint. Under Section 146 Indian Negotiable Instrument Act the court has to presume dishonoring of cheque on production of bank's slip or memo having official mark of dishonoring on it.

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 Indian Negotiable Instrument Act is almost in the nature of civil wrong which has been given criminal over tone, 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 Indian Negotiable Instrument Act 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 nonexistence 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.⁶⁵

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.⁶⁶This distinction has also been a recognized tool in criminal jurisprudence of Pakistan. *Messrs.' Kamran Industries Vs The Collector of Customs (Exports) 11 The Floor, Customs House, Karachi*⁶⁷ and *Khyber Tea And Food Company, Peshawar Vs*

⁶⁵ Article 6(2) (ECHR)

⁶⁶ [2000] 2 AC 326

⁶⁷ PLD 1996 KAR 68

*Collector of Customs(Appeal), Peshawa*⁶⁸ 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-defense. The legal burden will then fall on the prosecution to prove beyond reasonable doubt that the defendant was not acting in self-defense. 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.

⁶⁸ 2013 PTD 327