

SECTION 138 OF NEGOTIABLE INSTRUMENT ACT, 1881 AND NEED OF SPEEDY TRIAL: AN ANALYTICAL STUDY

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ABSTRACT

The present day economies of the world which are functioning beyond the international boundaries are relying to a very great extent on the mechanism of the negotiable instruments such as cheques and bank drafts and also the oriental bills of exchange prevalent in India, known as Hundis. Since cheques plays an important role in business transaction, dishonor of cheques threatens the credibility in transacting through cheque. Thus, the object of bringing section 138 on statue appears to be, to inculcate faith in the efficacy of banking operations and credibility in transacting business on Negotiable Instruments.

KEYWORDS: *Negotiable Instruments, Cheque, Section 138, Dishonour of Cheques.*

Introduction

Although it is known that the challenges the Indian judiciary faces are numerous, few (if any) details are known about the problem of delay in the Indian judicial system. Cases relating to the dishonour of cheques represent an identified, yet unexplored black hole in this ocean of cases. Section 138 of the Negotiable Instruments (NI) Act, 1881 deals with the offence of the dishonour of a cheque for insufficiency of funds in the account on which the cheque is drawn. According to the 213th Law Commission Report and several newspaper reports, there are between 38 and 40 lakh cheque bounce cases, choking the justice delivery system in the country, which makes it clear that this single category of cases constitutes a solid portion of all pending cases in the judicial system.

What is a Negotiable Instrument?

The law of negotiable instruments is not specie to India; it is a body of laws pertaining to commerce and commercial transactions worldwide. The term 'negotiable instrument' applies to any written statement given as security, usually for the payment of money, which may be transferred by endorsement or delivery, vesting in the party to whom it is transferred. One of these is a cheque, whose use (and misuse) is governed by Section 138 of the NI Act. The NI Act was passed into law more than 130 years ago in 1881. However, Chapter XVII, comprising Sections 138 to 142, dealing with the dishonour of cheques, was added to the NI Act much more recently, by an amendment in 1988.

Key Elements of Section 138

To constitute an offence under Section 138 of the NI Act, the following elements need to be fulfilled:

- A cheque should have been issued by the payer for the discharge of a debt or other liability.
- The cheque should have been presented or deposited by the payee within a period of six months from the date of drawing of the cheque or within the period of validity of the cheque, whichever is earlier.
- The payee should have issued a notice in writing to the payer within 30 days of receipt of information regarding the return of the cheque as unpaid from the bank.

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- The payer should have failed to pay the cheque amount within 15 days of receipt of the said notice from the payee.
- If the payer has not paid the cheque amount, the payee should have filed a complaint within one month from the date of expiry of the grace period of 15 days. The complaint should be filed before a Metropolitan Magistrate or a Judicial Magistrate of the First Class (The court may take cognizance of a complaint after the prescribed period if the payee provides a satisfactory reason for the delay).

Criminalization of Cheque Dishonour Cases

As far as the history of the NI Act goes, the criminalization of dishonour of cheques is a relatively recent addition. Prior to the insertion of Section 138, there were civil and alternative dispute resolution (ADR) remedies for dishonoured cheques. Both of these remedies still exist. The civil remedy for a dishonoured cheque is filing a case for the enforcement of a contract. As is the case with separate criminal remedies, Section 138 does not preclude the institution of a civil suit and civil remedies are still available to the payee.

Analysis of Cases

Methodology

To understand how cases filed under Section 138 of the NI Act move through the courts, an empirical analysis was carried out and a total of 67,433 cases filed in 146 subordinate courts across 21 states were examined. These cases were filed between 1980 and 2015, with 95 per cent of them being filed between 2005 and 2015. Table 1 shows the details of the cases analyzed. Of the 67,433 cases, 27,925 cases were pending and 39,508 cases were disposed.

Table 1: Details of Cases Analyzed

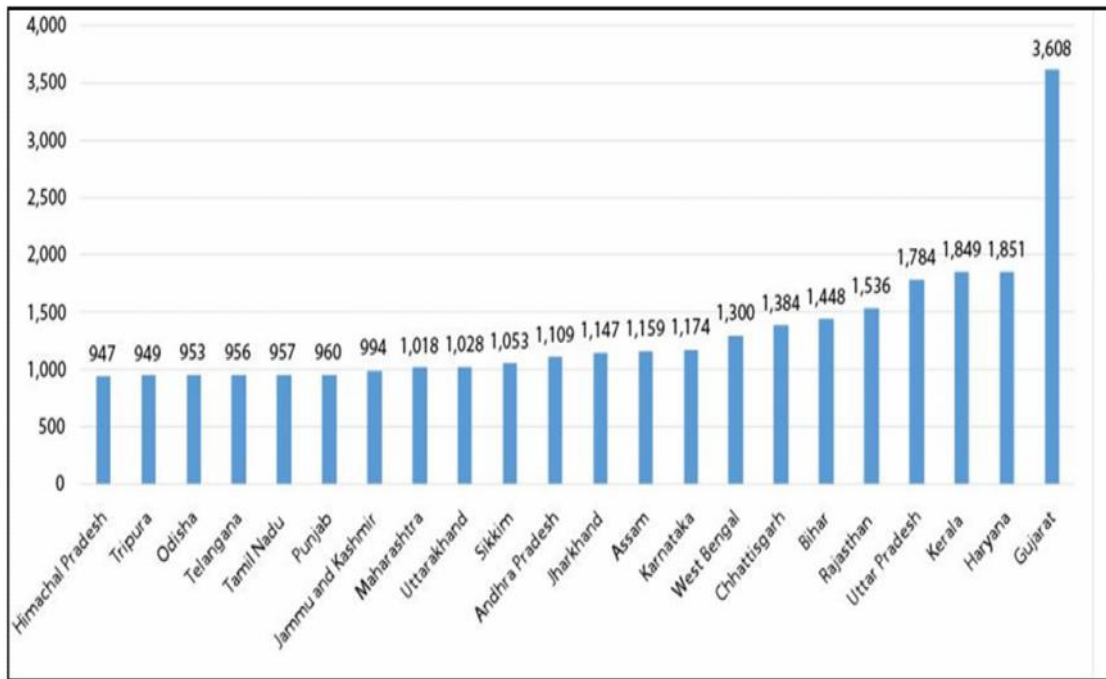
TABLE 1. DETAILS OF CASES ANALYSED			
State	Total cases analysed	Pending cases	Disposed cases
Andhra Pradesh	12,165	5,083	7,082
Assam	483	196	287
Bihar	34	25	9
Chhattisgarh	15,819	9,655	6,164
Gujarat	1,313	359	954
Haryana	5,173	2,596	2,577
Himachal Pradesh	1,146	773	373
Jammu and Kashmir	105	71	34
Jharkhand	479	311	168
Karnataka	1,100	289	811
Kerala	8,377	545	7,832
Maharashtra	8,750	2,344	6,406
Odisha	49	49	0
Punjab	661	312	349
Rajasthan	1,418	517	901
Sikkim	5	1	4
Tamil Nadu	735	39	696
Telangana	5,178	1,348	3,830
Tripura	145	72	73
Uttar Pradesh	2,621	2,456	165
Uttarakhand	1,275	582	693
West Bengal	402	302	100

What Do the Numbers Say?

On analyzing these cases, it was found that (on an average), cases filed under Section 138 of the NI Act were pending in the subordinate courts for 1,326 days, which is a little more than three years and seven months. While this number is considerably lesser than the overall average pendency of subordinate court cases, which stands at 2,210 days (approximately six years), it is by no means an ideal duration for these cases. Section 143 of the NI Act states that judges should make all possible endeavors to complete trials pertaining to cheque bounce cases within six months from the date of the complaint. The average pendency of the cases analyzed is almost six times this.

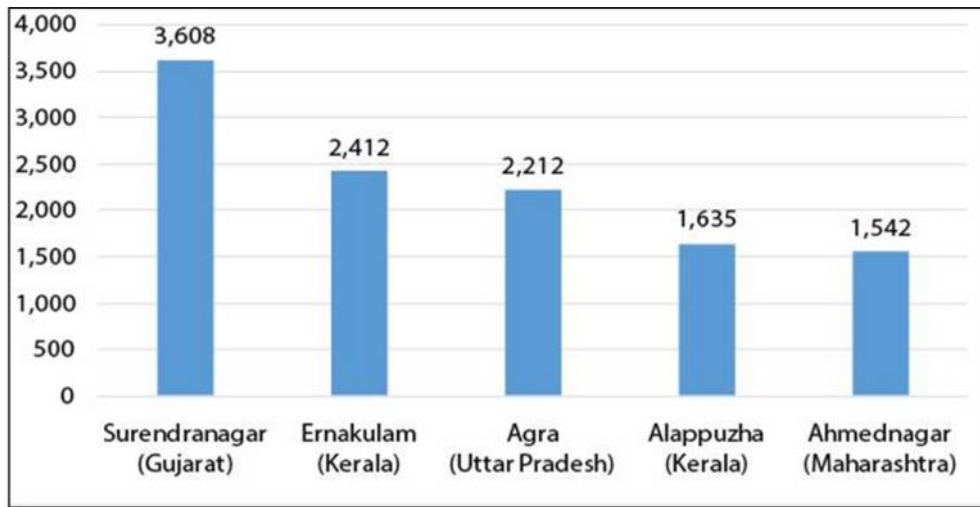
Figure 1 shows the average number of days a case under Section 138 has been pending by comparing the data from 21 states. The highest average pendency is seen in Gujarat, with cases pending on average for 3,608 days (a little less than 10 years), whereas Himachal Pradesh has the lowest average pendency of 967 days (nearly two years and nine months). Even the court with the lowest pendency has well overshoot the time prescribed in the NI Act by two years and three months.

Figure 1: State-Wise Representation of Average Pendency of Cheque Dishonour Cases



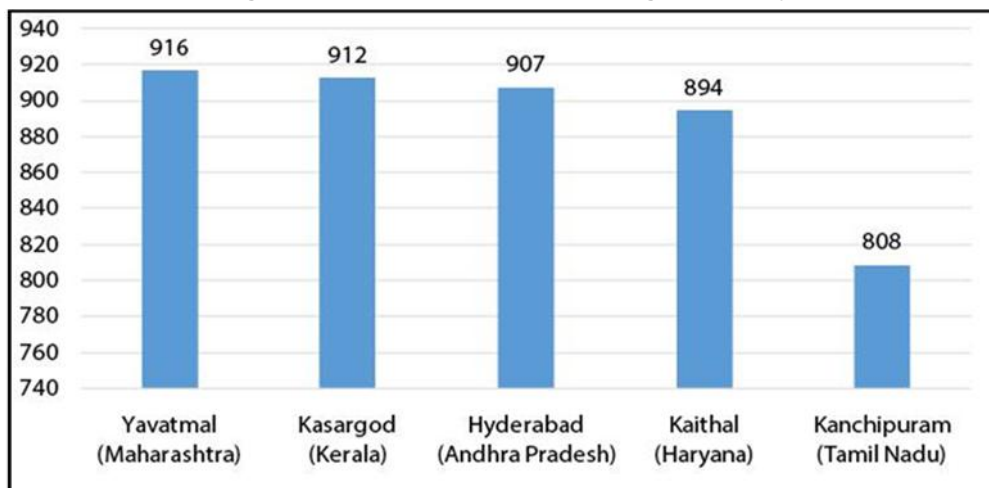
Note: Pendency is shown in days.

It is also relevant to note that these cases are not merely pending, but also delayed. The Law Commission of India has distinguished these two concepts in its 245th report, where it has clarified that pendency refers to all cases that have not been disposed of, irrespective of when they were filed, whereas delayed cases are those that have been in the judicial system for a longer duration than the normal time that such cases should have been. Benchmarking what would constitute 'normal time' for a case filed under Section 138 is simple, since the NI Act itself states that all trials pertaining to cheque bounce cases should be conducted as expeditiously as possible and be concluded within six months from the date of filing of the complaint. It is very clear therefore that not only are huge numbers of cheque bounce cases pending in the Indian courts, they are also delayed in courts across the country. In order to understand the problem of delay at a more granular level, the pendency of these cases was calculated at a district level. The cases came from 144 districts across 21 states. There was a not a single district where the average pendency was less than two years. Figures 2 and 3 shows the districts which are having the highest and lowest pendency, respectively, for cheque bounce cases.

Figure 2: Districts with Highest Average Pendency

Notes: (1) Pendency is shown in days.

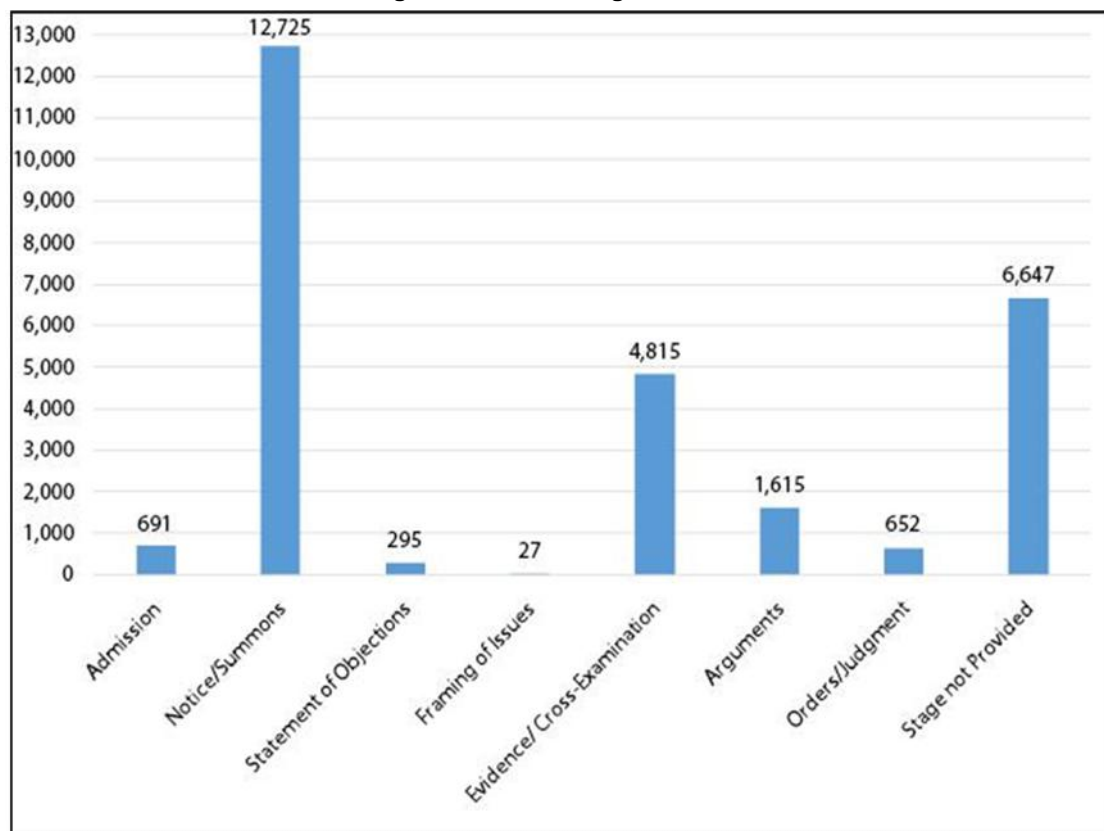
(2) For this calculation, only districts with more than 500 cases were considered.

Figure 3: Districts with Lowest Average Pendency

Notes: (1) Pendency is shown in days.

(2) For this calculation, only districts with more than 500 cases were considered.

The districts with the highest average pendency ranged between four and 10 years, while those districts with the lowest pendency averaged between two and three years. Figure 4 represents the current stage of pending cases. Of the 27,925 pending cases, a little less than half, or 12,725 cases, are in the notice or summons stage. They are followed by 4,815 cases that are in the evidence or cross-examination stage. It was not possible to calculate the exact amount of time each case spent at every stage; however, data in Figure 4 shows the stages that occupy most of the courts' time. It can be seen that most cases are pending in the notice and summons stage, followed by the cross-examination stage. Notice and summons are essential stages, and cannot be done away with. However, courts need to put in place mechanisms to ensure that these stages progress more efficiently, and their time is not wasted. The question that arises with respect to cross-examination is, in an offence that does not require *mensrea*, why is cross-examination required, unless the accused is claiming that they have not signed the cheque?

Figure 4: Current Stages of Cases**Speedy Trial and Access to Justice**

The huge number of pending cheque bounce cases is no doubt worrisome to the courts; however, it is even more worrisome to the litigants. The inability of the courts to adjudicate these cases in a timely manner is a serious infringement of the fundamental rights of litigants. In addition, the Supreme Court of India has laid down special directions to criminal courts for the expeditious disposal of cases falling under Section 138 of the NI Act. In April 2014, in **Indian Bank Assn. v. Union of India**, the Supreme Court issued the following directions:

- To the greatest extent possible, magistrates should take cognizance of complaints under Section 138 of the NI Act on the day they are presented. When the complaint appears before the magistrate, they should scrutinize it along with any accompanying affidavits and documents. If all of these are found to be in order, the magistrate must take cognizance and direct the issue of summons immediately.
- Magistrates should adopt a realistic approach to the issue of summons. Summons must be sent by post and can also be sent by email. For the notice of appearance, a short date should be fixed. If the summons is received back unreturned, or there is no response to the email summons, immediate follow-up action should be taken.
- With respect to settlement or compounding of offences the court may indicate in the summons that if the accused makes an application for compounding of offences at the first hearing of the case, the court may pass appropriate orders at the earliest.
- To ensure a speedy trial, the court must ensure that the examination-in chief, cross-examination, and re-examination of the complainant are conducted within three months of the case appearing before the court. The magistrate also has the option of accepting affidavits from the witnesses, instead of examining them.

Conclusion

Bounced cheques are one of the most common offences plaguing the financing world. According to the Supreme Court, there are over 40 lakhs such pending cases in the country. Although, there have been a few amendments in the Act which has made the Act, a self contained statute, wherein provisions have been made to check the delays and to ensure speedy justice with more deterrent punishment, yet the problem of cheque bouncing is not decreasing. Moreover, the law is unnecessarily complicated and there is lack of provisions for forcing the appearance of the accused in the court. Though the amendments to the Negotiable Instruments Act, 1881 are helpful in dealing with the offence of bouncing of cheque, they are not fully proved successful in stopping the offence.

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