

APPLICABILITY OF COMPENSATORY JUSTICE IN DISHONOUR OF CHEQUES*Suman Lata Chaudhary****ABSTRACT**

The cheque has been used as a means of payment. The dishonour of cheques was rampant in the society because it was considered a civil wrong. Sometimes it was also used as a means to defraud the payee of the cheque. This affects the acceptability and credibility of cheques and banking transactions, so it became necessary to make dishonour of cheques an offence. So, in 1988 dishonour of cheque was made an offence and punishable. The purpose of this legislation was to encourage the credibility and acceptability of the cheques and for that, a new chapter XII consisting of sections 138 to 142 was inserted into the Act in the year 1988. Now the payee of the cheque can bring a suit before the Court and get the drawer of the cheque punished and recover the cheque amount with interest. Here compensatory justice becomes the real issue that the payee of the cheque must be compensated the cheque amount with interest out of the fine realized by the Court when he became successful in his prosecution but it is not so, after that he has to file a civil suit for recovery of the cheque amount which causes inconvenience and expense. The purpose of the article is to make provisions for compensatory justice to the payee of the cheque which in furtherance of the object of this legislation.

Keywords: *Dishonor of Cheques, Compensatory Justice, Negotiable Instrument, Award of Compensation, Insufficiency of Funds, Interim Compensation*

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I. Introduction

“COMPENSATORY JUSTICE” is a new concept of the administration of justice. It comes into being when an offence is committed by any person and damage is caused thereunder. Such person shall be prosecuted and punished according to the provisions of Criminal Law. Since it is the duty of the State to protect the people against misdemeanor, action is taken by the State. It is the cardinal principle of law that no offender shall go unpunished. In this way

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prosecution and punishment of the offender take place. Punishment of any crime may be capital punishment or imprisonment or fine or both. The amount of the fine is deposited in the Government Treasury. The victim if alive or his dependents in case of his demise gets nothing except the solace that the offender has been punished. The victim and his family were victimized by the act of the offender and may suffer a lot in future. They may become helpless, or orphaned, so besides solace, they need compensation and rehabilitation under compensatory justice.

II. Compensatory Justice in Dishonour of Cheques

In the offence of dishonour of cheques compensatory justice may be explained as payment of cheque amount to the complainant *viz*, cheque amount with interest and cost of the suit to the complainant *i.e.*, payee or holder in due course just after the successful conclusion of the case in his favour. But it is not so because the complainant has to file another civil suit for recovery of the cheque amount. The offence of dishonour of cheques constitutes a complaint case in which the main concern of the complainant is to get back the cheque amount with interest and cost of suit. Since the introduction of this offence *i.e.*, April 1, 1989 the viewpoint taken by the Courts is that section 138 is a prosecution and punishment clause only and it nowhere says about the repayment of the cheque amount. When the complainant wins the case *viz*, the offence is proved. The complainant has to file another civil suit for recovery of the cheque amount. This causes inconvenience, harassment and dilatory to the complainant.

The author's viewpoint is that at this stage the complainant should be compensated by paying back his cheque amount and interest thereon out of the fine imposed by the courts without taking recourse of civil suit. It will subserve the very purpose of the Act for which the new provisions are incorporated in the Act. The theme of the article is to explain the scope and extent of compensatory justice in dishonour of cheques in the light of statutory provisions and judicial decisions.

Evolution of Compensatory Justice

Compensatory justice finds its source from sections 357(3) and 357A of the Criminal Procedure Code, 1973. Section 357(3) of The Criminal Procedure Code, 1973 provides:¹

¹ Ins. by s. 128 of the Act of 2009, w.e.f. 12.02.2009.

When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.²

Section 357A of The Criminal Procedure Code, 1973 provides a very significant provision as victim compensation scheme. The relevant provisions read as:³

(1) Every State Government in coordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme.

The object of section 357(3) of The Criminal Procedure Code, 1973⁴ is that in suitable cases the heirs and dependents of the victim should be compensated for the loss that resulted to them from the commission of the offence, from the person who was responsible for it. In modern criminal jurisprudence compensation and rehabilitation to the victim or his dependents who have suffered loss or injury as a result of the crime have become part and parcel of criminal justice.

Application to Dishonour of Cheques

So far, as the application of this compensatory principle as to dishonour of cheques, it is to be noted that the Negotiable Instruments Act, 1881, was amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 wherein a

² The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 357(4).

³ *Id.*, ss. 375A (1) and 375A (2).

⁴ *Id.*, s. 357(3).

new chapter XVII was incorporated "for penalties in case of dishonour of certain cheques for insufficiency of funds in the accounts of the drawer (account holder) of the cheque".

New sections 38 to 148 were added in the Act.⁵ Now section 138 of the Negotiable Instruments Act, 1881 makes the dishonour of cheques under certain conditions an offence and shall, without prejudice to any other provision of this Act be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice of the amount of the cheque or with both.⁶

It should always be remembered that provisions of sections 138 to 148 are special provisions and it has an overriding effect on provisions of the Code of Criminal Procedure, 1973 as it is obvious by the use of the words "notwithstanding anything" contained in the Code of Criminal Procedure, 1973 relating to the offence of dishonour of cheques. Thus, provisions of sections 357 and 357A do not apply to offence of dishonour of cheques even though on the analogy of these provisions we have to see the application of compensatory justice in cases of dishonour of cheques which has been established by the Supreme Court in recent cases.

Dishonour of cheques was made an offence in the year 1988 by the Negotiable Instruments Laws (Amendment) Act, 1988 (w.e.f. April 1, 1989). It was not an offence prior to it, and it should also be remembered that all dishonour of cheques is not an offence. Dishonour of Cheques is an offence only where cheques are dishonored for insufficiency of the funds in the accounts of the drawer. The purpose of making so has been explained in the Act as purposes and reasons mainly were:

- i. to encourage the culture of use of cheques, and
- ii. to enhance the credibility and acceptability of cheques in commercial transactions.⁷

The offence of dishonour of cheques differs from general offences as defined in the Indian Penal Code, 1860 or other law for the time being enforced as there is no F.I.R., no investigation, no warrant, no arrest, no bail, *etc.* As to commission of the offence of dishonour of cheques following two stages are involved:

- i. Conditions for the commission of the offence, and

⁵ Ss. 138 to 142 were added in 1988, ss. 143 to 147 were added in 2002 and ss. 143-A and 148 were added in 2018, now ss. 138 to 148.

⁶ Earlier it was imprisonment for a term which may extend to one year or with a fine which may extend to twice of the cheque amount or with both.

⁷ Purpose and reasons of Act No. 66 of 1988.

ii. Procedure of prosecution of the offence.

Section 138 of the Act provides the following conditions *sine qua non* for the commission of the offence:⁸

1. Issuance of a cheque for discharge of debt or liability,
2. The cheque must be presented for payment within the permissible period,
3. The cheque is returned unpaid on the ground of insufficiency of funds,
4. Demand notice is given to the drawer, and
5. Default in payment by the drawer within fifteen days

This section also provides the quantum of punishment⁹ *i.e.*, imprisonment for a term which may extend to two years, or with fine which may extend to twice the cheque amount or with both.

As to procedure of prosecution section 142 provides as:¹⁰

- (1) No court shall take cognizance of any offence punishable under section 138 except upon a complaint in writing made by the payee or holder in due course,
- (2) Such complaint is made within one month of the date on which cause of action arises under clause (c) of the proviso to section 138, *viz.*, where drawer fails to make payment within fifteen days of the receipt of the notice.
- (3) No court inferior to that of Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.

On a successful prosecution the court may sentence imprisonment which may extend to two years or with fine which may extend to twice the cheque amount or with both.¹¹ At the end of prosecution *i.e.*, end of trial following two things have to be adjudicated:

1. Punishment and award of the sentence, and
2. Award of compensation to the complainant.

Every offence invites prosecution, and such prosecution ends in either acquittal or conviction. In case there is a conviction the court is concerned with punishment and award of the sentence which is pronounced according to provisions of the Indian Penal Code, 1860 or any other law under which offence is defined.

(1) *Punishment and Award of Sentence:*

Section 138 of the N.I. Act, 1881 provides an award of sentence that extends to:

⁸ The Negotiable Instruments Act, 1881 (Act 26 of 1881), s. 138.

⁹ *Ibid.*

¹⁰ *Id.*, s. 142 (1) (2) and (3).

¹¹ *Id.*, s. 138.

- (i) imprisonment for a term which may extend to two years, or
- (ii) fine which may extend to twice the cheque amount, or
- (iii) with both imprisonment and fine.¹²

There will be no discrimination on imposition of a sentence on the basis of sex as held in *Smt. Mymoona v. M/S H.M. Trading Co.*¹³ that being a woman cannot be a ground for reduction of sentence.

Maximum or minimum sentence

Since the nature of the offence is absolute,¹⁴ where the cheque is returned back unpaid on insufficiency of funds and no defence whatever may be allowed by the accused. Prior to 2002, it was also not a compoundable offence. The Supreme Court has established this principle firmly in several cases in furtherance of the object of the Act.

As to the quantum of punishment, the very pertinent question is whether the punishment provided in the Act is maximum or minimum or any amount subject to maximum on the discretion of the Court. The words "which may extend to" show that it means to have a certain area, range or scope or to enlarge in area, range and scope.¹⁵ It may be taken that the maximum subject to which the Court may order having in view the nature and circumstances of the commission of the offence.

In this respect, decision of the Supreme Court in *K. Bhaskaran v. Shankaran Vaidhyan Balan*¹⁶ throws significant light. In this case, the complainants and the accused were siblings being sons of the same parents fighting over a dishonoured cheque. The Judicial Magistrate on the jurisdictional aspect favoured the accused and acquitted him. On appeal, the High Court reversed the acquittal and convicted the accused for the offence under section 138 of the Act with imprisonment of six months and a fine of Rs.100. Hence, appeal before the Supreme Court by the accused. The Supreme Court held that the Court cannot obviate the jurisdictional limit prescribed in section 386 of The Criminal Procedure Code, 1973. In this context reference to section 29(2)¹⁷ of The Criminal Procedure Code, 1973 is also necessary

¹² *Supra* note 8.

¹³ *Smt. Mymoona v. M/S H.M. Trading Co.*, AIR 2007 (NOC) 947 Ker.

¹⁴ *Supra* note 8, s. 140.

¹⁵ Legal Glossary (1992) at p. 127.

¹⁶ *K. Bhaskaran v. Shankaran Vaidhyan Balan*, AIR 1999 SC 3762.

¹⁷ *Supra* note 2, s. 29(2) reads as:

as it contains a limitation for the Magistrate of the first class in the matter of imposing a fine as a sentence or with imprisonment of six months and fine of five thousand rupees or both since the trial in this case held before a Judicial Magistrate of the first class who could not have imposed a fine exceeding five thousand rupees besides imprisonment. The High Court while convicting the accused in the same case could not impose a sentence of a fine exceeding the said limit.

Rule of Innocence cannot be applied

The offence of dishonour of cheques under the Negotiable Instruments Act, 1881 is absolute and the rule of innocence cannot be applied as it has been held by the Supreme Court in *Rohit Bhai Jivanlal Patel v. State of Gujarat*.¹⁸ This rule shall be applied with the same rigor to an offence under section 138, particularly where the presumption is drawn that the holder is received the cheque for the discharge of the debt or liability. Therefore, it is required to be proved that the cheques in question were drawn for consideration and the complainant received them in the discharge of an existing debt.¹⁹

The rule of innocence is in the consonance of the Act which says:²⁰

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 dishonored on presentment for the reason stated in that section.

Award of Compensation

It is to be noted that dishonour of cheques though an offence differs from a general offence because it does not arise by injury or hurt to any property or body but it involves a breach of promise of a civil wrong *i.e.*, not paying the amount of cheque. Here complainant is primarily concerned with the recovery of the cheque amount and secondarily to punish the drawer. The complainant (holder of the cheque) generally becomes content by getting back the cheque amount with interest and he is least concerned with the punitive aspect. Here complainant finds a ray of hope of getting back the cheque amount under the principle of compensatory justice.

The Court of Magistrate of first class pass a sentence of imprisonment for a term not exceeding three years or a fine not exceeding ten thousand rupees or both. Prior to 2005 it was six months or a fine not exceeding Five thousands Rupees.

¹⁸ *Rohit Bhai Jivanlal Patel v. State of Gujarat*, AIR 2019 SC 1876.

¹⁹ *Supra* note 8, s. 118 (a).

²⁰ *Id.*, s. 140.

III. Nature of section 138

Section 138 of the Negotiable Instruments Act, 1881 only provides punishment for the offence of dishonour of cheques. It is silent as to the question of compensation. Payment of compensation first time came for consideration before the Supreme Court in *Hari Krishan v. Sukhbir Singh*.²¹ It was observed by the Supreme Court that though section 357(3) of the Criminal Procedure Code, 1973 has no application in relation to the dishonour of cheques still though, the Magistrate in such case can alleviate the grievance of the complainant by making resort to section 357(3) of the Code. It is also well to remember that this Court has emphasized the need for making liberal use of that provision. No limit is mentioned in the sub-section and therefore, a Magistrate can award any sum as compensation. But while fixing the quantum of such compensation the Magistrate has to consider what should be the reasonable amount of compensation payable to the complainant. Thus, even if the trial is before a Court of Magistrate of the first class in respect of a cheque which covers an amount exceeding Rs. 5000 the court has the power to award compensation to be paid to the complainant.

Compensation not part of the sentence

As to the award of compensation, the Calcutta High Court in *Krishna Gupta v. State of West Bengal*²² held that section 138 of the Negotiable Instruments Act, 1881 provides for a sentence of imprisonment and sentence of fine. The compensation is neither the part of any sentence, nor is a substitute for the sentence, but in addition thereto. The provision of section 357(3) of the Code of Criminal Procedure, makes it abundantly clear that when Court imposes a sentence may order the accused person to pay by way of compensation such amount as may be specified when the fine does not form the part of the sentence, therefore, no compensation can be awarded without being preceded by the imposition of sentence and obviously not by imposition of a sentence of fine. So, the High Court of Calcutta confirmed the order of conviction and the order of awarding compensation was set aside only on the ground that the same was not preceded by the imposition of any sentence.

Constructive approach

²¹ *Hari Krishan v. Sukhbir Singh*, AIR 1988 SC 2127.

²² *Krishna Gupta v. State of West*, AIR 2007 (NOC) 2021 Cal.

In *Chairman cum Managing Director, Rajasthan Financial Corp. v. Commander S.C. Jain*,²³ a bench of Justices P. Sathasivam and H.L.Dattu while appreciating the provisions of section 357(3) of The Criminal Procedure Code, 1973 has observed:

It is an important provision but Courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the Court to award compensation to victims while passing a judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to the victims who has suffered by the action of the accused.

The Supreme Court has directed the trial courts that they besides convicting the accused in cheque bounce cases award compensation to the complainants to meet the end of justice.²⁴ The Bench²⁵ also said that the whole purpose of the provision was to accommodate the interests of the victims in the criminal justice system. Sometimes the situation becomes such that no purpose will be served by keeping a person behind bars. Instead directing the accused to pay compensation to the victims or the affected party can ensure the delivery of total justice. Therefore, a grant of compensation is sometimes in lieu of sending a person behind bars or in addition to a very light sentence of imprisonment. Thus the Bench directed for the dishonour of the cheque for Rs. 5,00,000 to pay a further Rs. 3,00,000 towards the compensation of Rs. 5,00,000 and disposed of the appeal since Rs. 2,00,000 had already been deposited by the accused.

In a three-Judge Bench decision in *Damodar S. Prabhu v. Syed Babalal*,²⁶ this Court briefly examined the object sought to be achieved by the provisions of section 138 and the purpose underlying the punishment provided therein. This court held that, unlike other crimes, punishment in section 138 cases is meant more to ensure payment of money rather than to seek retribution. The Court said:²⁷

...Unlike that for other forms of crime, the punishment here (in so far as the complainant is concerned) is not a means of seeking retribution, but is more a means to ensure payment of money (cheque amount). The complainant interest lies primarily in recovering the money rather than seeing the drawer of the cheque in Jail. The threat of Jail is only a mode to ensure recovery. As against the

²³ *Rajasthan Financial Corp. v. Commander S.C. Jain*, AIR 2010 SC 1604.

²⁴ AIR 2016 SC 1604.

²⁵ *Supra* note 24.

²⁶ *Damodar S. Prabhu v. Syed Babalal*, AIR 2010 SC 1907.

²⁷ *Ibid.*

accused who is willing to undergo a Jail term, there is little available as remedy for the holder of the cheque.

Further, as to the compensatory nature of offence, Justice K.G. Balakrishnan, C.J. has observed that:²⁸

what must be remembered is that the dishonour of cheque can be best described as a regulatory offence that has been created to serve the public interest in ensuring the reliability of these instruments. The impact of this offence is usually confined to the private parties involved in commercial transactions.

Following above, this Court in *Somnath Sarkar v. Utpal Basu Mallick*²⁹ has observed:

What must be remembered is that the dishonour of cheque can be best described as a regulatory offence that has been created to serve the public interest in ensuring the reliability of these instruments. The impact of this offence is usually confined to the private parties involved in commercial transaction. Further this court took note of the number of cases involving dishonour of cheques choking the criminal justice system of this country, especially at the level of the Magisterial Courts and held that dishonour of cheques being a regulatory offence, aimed at ensuring the reliability of negotiable instruments, the provision for imprisonment extending up to two years was only intended to ensure quick recovery of the amount payable under the instrument.

Section 357(3) of The Criminal Procedure Code, 1973³⁰ has been the subject matter of judicial interpretation by this Court in several decisions. In *State of Punjab v. Gurmej Singh*³¹ this Court held that:

A reading of sub-section (3) of section 357, it is clear that the question of award of compensation would arise where the court imposes a sentence of which fine does not form a part. This court also held that section 357(3) of The Criminal Procedure Code, 1973 will not apply where a sentence of fine (whatever may be) has been imposed.

²⁸ *Ibid.*

²⁹ *Somnath Sarkar v. Utpal Basu Mallick*, AIR 2014 SC 771.

³⁰ *Supra* note 2, s. 357(3).

³¹ *State of Punjab v. Gurmej Singh*, AIR 2002 SC 2811.

Further, in *Sivasuriyan v. Thangavelu*³² this Court held that:

view of the submissions made, the only question that arises for consideration is whether the court can direct payment of compensation in exercise of power under sub-section (3) of section 357 in case where fine already forms a part of the sentence. Apart from sub-section (3) of section 357 there is no other provision under the Code where the Court can exercise such power.

After extracting section 357(3) of the Code, the Court proceeded to hold thus:

On a plain reading of the aforesaid provision, it is crystal clear that the power can be exercised only when the court imposes sentence by which fine does not form a part. In this case, a court having sentenced to imprisonment, as also fine, the power under sub-section 3 of section 357 could not have exercised. In that view of the matter, the impugned direction of the High Court directing payment of compensation to the tune of Rs. one lakh by the appellant is set said.

The court held that section 357(3) will not apply where a sentence of a fine has been imposed.

*R. Vijayan v. Baby*³³ is a leading case where the Division Bench of this Court observed:

The apparent intention is to ensure that not only the offender is punished but also ensure that the complainant invariably receives the amount of the cheque by way of compensation under section 357 (1) (b) of the Code. Though a complaint under section 138 of the Act is in regard to criminal liability for the offence of dishonouring of the cheque and not for the recovery of the cheque amount, which strictly speaking has to be enforced by a separate civil suit. We are conscious of the fact that proceedings under section 138 of the Act cannot be treated as civil suits for recovery of the cheque amount with interest. Our observation is necessitated due to the need to have uniformity and consistency in decision making.

Thus, in *R. Vijayan* case³⁴ principle of compensatory justice was mooted but as to payment of cheque amount, it was held that since there is no provision for payment under section 138 of

³² *Sivasuriyan v. Thangavelu* (2004) 13 SCC 795.

³³ *R. Vijayan v. Baby*, AIR 2012 SC 527.

³⁴ *Supra* note 33.

the Act, so a separate civil suit for recovery of the cheque amount has to be filed and the court cannot order payment of the cheque amount.

It is clear from the judgment of the *R. Vijayan* case³⁵ that the Supreme Court has suggested two things:

- i. An amendment under section 138 for making payment of cheque amount out of the fine imposed by the Court which is the matter of the Law Commission to consider, and
- ii. Let there be uniformity of the Court in imposing fine *i.e.*, double the cheque amount, it will increase the credibility of the cheque as a negotiable instrument, as well as the credibility of the court of justice.
- iii. Levy of fine on the accused must be of such amount sufficient to cover the cheque amount and interest thereon.

This court while dismissing the appeal, refused payment of compensation and sought a solution for further amendment to the provision of chapter XVII so that in all cases where there is a conviction, there should be a consequential levy of a fine of an amount sufficient to cover the cheque amount and interest thereon at a fixed rate of 9 per cent per annum followed by an award of such sum as compensation from the fine amount. This is, however, a matter for the Law Commission of India to consider.³⁶

Further, we find affirmation of the compensatory principle by the Supreme Court in a recent case *Somnath Sarkar v. Utpal Basu*³⁷ and thereby resolving this controversy to some extent. The following passages from the decision are in this regard apposite:

It is quite evident that the legislative intent was to provide a strong criminal remedy under to deter the worryingly high incidence of dishonour of cheques.

While the possibility of imprisonment up to two years provide a remedy of a punitive nature, the provision for imposing a fine which may extend to twice of the amount of the cheque serves a compensatory purpose.

These observations of this Court make it amply clear that the complainant should be paid out of the amount of the fine imposed subject to the provisions of section 138 of the Act without

³⁵ *Ibid.*

³⁶ AIR 2002 SC 527.

³⁷ *Somnath Sarkar v. Utpal Basu*, AIR 2014 SC 771 para 4 at 774.

taking recourse of section 357 (3) of the Code.³⁸ Invariably the provision of strong criminal remedy has encouraged the institution of a large number of cases that are relatable to the offence contemplated by section 138 of the Act. So much so, that at present a disproportionately large number of cases involving the dishonour of cheques is choking our criminal justice system, especially at the level of Magistrates Courts. As per the 213th Report of the Law Commission of India, more than 38 lacs cheque bouncing cases were pending before various courts in the country as of October 2008. This is putting an unprecedented strain on our judicial system.³⁹

Though this case is very simple but of very wide repercussion as it affirms the principle of compensation to the victim under section 138 of the Negotiable Instrument Act, 1881 in order to appreciate the gravity of the principle underlying, it is necessary to state the facts of the case. The appellant (Somnath Sarkar) issued a cheque dated September 6, 1999 of Rs. 69500/- in favour of respondent (complainant) towards discharge of existing liabilities which was dishonoured for "insufficient funds". After complying with all the conditions under section 138, filed a complaint on December 9, 1999. The Metropolitan Magistrate convicted the appellant for the offence under section 138 of the Act and sentenced him to six months of simple imprisonment and to pay compensation of Rs. 80,000 under section 357(3) of the Code. Both the conviction and sentence were upheld by the Additional District and Session Judge. Further on appeal in the High Court, the Court upheld the conviction but imposed an additional fine of Rs. 69,500 (cheque amount) in lieu of six months imprisonment awarded by the Metropolitan Magistrate. The Supreme Court in appeal found that both sums added together *i.e.*, Rs. 80,000 + Rs. 69,500 comes Rs. 1,49,500 beyond twice the amount of the cheque which offends the limit for the fine prescribed in section 138. Here we must keep two significant aspects in view. First and foremost is the fact that the power to levy a fine is circumscribed under the statute to twice the cheque amount. Even in the case, the court may be taking the lenient view in favour of the accused by not sending him to prison, it cannot impose a fine more than twice the cheque amount. The statutory limit is inviolable and must be respected. The High Court has, in the case at hand, obviously overlooked the statutory limitation on its power to levy a fine. It appears to have proceeded on the basis as though payment of compensation under section 357 of the Code is different from the power to levy fine under section 138, which assumption is not correct. The direction of the High Court is,

³⁸ *Supra* note 2, s. 357(3).

³⁹ *Supra* note 37.

therefore, to pay a further sum of Rs. 69,500/- in lieu of imprisonment was legally not sustainable and the fine imposed was reduced to Rs. 2,000.⁴⁰

This judgment of the Supreme Court makes two things clear, firstly, that sentence of fine in no case goes beyond the limit of twice the cheque amount as laid down in section 138 of the Act and the other, that the complainant should be compensated out the fine so imposed the cheque amount and the simple interest thereon at 9 percent per annum without taking recourse of section 357(3) of The Criminal Procedure Code, 1973. This will increase the credibility of the cheque as a negotiable instrument as well as the credibility of the Court of Justice.

This case goes a step forward in furtherance of compensation to be paid to the victim *i.e.* complainant in the light of section 357 of the Code *vis-a-vis* section 138 of the Act. But as to payment of compensation (cheque amount and interest thereon) law still remains vague. Having in view of the above judgments it is clear that uniformity and consistency in deciding cases under section 138 of the Act have never been maintained. Opinions of the Courts as to sentence and compensation have never been practical and realistic. We find a diversity of judgments and orders of the various High Courts and even of the Supreme Court.

IV. The Recent Legislation on Compensatory Justice

The Negotiable Instruments Act (Amendment) Act, 2018 inserted section 143-A⁴¹ and section 148⁴² which supports compensatory justice for the victims of dishonour of cheques under section 138 of the Negotiable Instruments Act, 1881. The relevant provisions are:

1. Power to Direct Interim Compensation

(1) The Court trying an offence under section 138 may order the drawer of the cheque to pay interim compensation to the complainant.

(2) The interim compensation under sub section (1) shall not exceed 20 percent of the amount of the cheque.⁴³

⁴⁰ *Supra* note 37.

⁴¹ The Negotiable Instruments Act (Amendment) Act, 2018, (Act 20 of 2018), s. 2.

⁴² *Ibid.*

⁴³ *Supra* note 41, s. 143A(2).

(3) The interim compensation shall be paid within 60 days from the date of the order under sub-section(1), or within such further period not exceeding 30 days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque.⁴⁴

(4) If the drawer of the cheque is acquitted, the court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rates as published by the Reserve Bank of India.⁴⁵

(5) The interim compensation payable under this section may be recovered as if it were a fine under section 421 of the Code of Criminal Procedure, 1973 (2 of 1974).⁴⁶

(6) The amount of fine imposed under section 138 or the amount of compensation awarded under section 357 of the Code of Criminal Procedure, 1973 (2 of 1974) shall be reduced by the amount paid or recovered as interim compensation under this section.⁴⁷

2. Power of the Appellate Court to Order Payment Pending Appeal Against Conviction⁴⁸

(1) In an appeal by the drawer against conviction under section 138, the Appellate Court may order the appellant to deposit such sum which shall be a minimum of 20 percent of the fine or compensation awarded by the trial court provided that the amount payable under this section shall be in addition to any interim compensation paid by the appellant under section 143A.

(2) The amount referred to in sub-section (1) shall be deposited within 60 days from the order or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the appellant.

(3) The Appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal.

Thus, section 143-A and section 148 inserted under the Negotiable Instruments Act, 1881 by the Amendment in 2018 supports the compensatory justice in case of dishonour of cheques under section 138 of the Negotiable Instruments Act, 1881.

⁴⁴ *Id.*, s. 143A (3)

⁴⁵ *Id.*, s. 143A (4).

⁴⁶ *Id.*, s. 143A (5).

⁴⁷ *Id.*, s. 143A (6).

⁴⁸ *Id.*, s. 148.

It has been held in *G.J. Raja v. Tejraj Surana*⁴⁹ by the Supreme Court that section 143A is prospective and section 148 is retrospective in operation. Further in *Surinder Singh Deshwal v. Virendra Gandhi*⁵⁰ the Supreme Court held that section 148 is of retrospective effect.

V. Recent Judicial Trend

The following decisions of the Supreme Court also support compensatory justice. The first case in which payment of compensation to the complainant has been recognized is *Anss Rajshekhar v. Augustus Jeba Ananth*.⁵¹ In this case the High Court reversing the judgment of the Trial Court convicted the accused (drawer) and sentenced him to undergo imprisonment of one year and to pay a fine of Rs.7,00,000 out of which Rs.8,75,000 was directed to be paid to the respondent (holder in due course) by way of compensation. Though, in appeal to the Supreme Court, it was reversed. Even though this case affirms the principle of compensation. The next case is *Rohitbhai Jivanlal Patel v. State of Gujarat and others*⁵² in which this principle of compensation was followed by the Supreme Court. The accused (appellant) drew a cheque of three lakh rupees in favour of the complainant (respondent No. 2). The Trial Court acquitted the accused but on appeal convicted by the High Court. Further, on appeal the Supreme Court affirming the judgment of the High Court held that the accused had committed an offence under section 138 hence shall undergo simple imprisonment for a period of one year and fine to the extent of double the amount of cheque *i.e.*, a sum of Rs. 6,00,000 and out of amount payable as fine the complainant is ordered to be compensated. This case clearly affirms payment of compensation out of the fine realized by the accused.

The next important case in which compensation to the complainant was held permissible is *Bir Singh v. Mukesh Kumar*⁵³ in this case respondent (accused) issued a cheque of Rs.15,00,000 in favour of appellant (complainant) which on presentment return back unpaid on the ground “insufficient fund”. The appellant (complainant) filed a criminal complaint before the Judicial Magistrate who convicted the accused under section 138 and sentenced for a period of one year and further directed him to pay compensation of Rs.15,00,000 to the complainant and on appeal to the Additional Session Judge, it was affirmed and directed that

⁴⁹ *G.J. Raja v. Tejraj Surana*, Criminal Appeal No. 1160 of 2019 @ SLP (Cr.) No. 3342/2019.

⁵⁰ *Surinder Singh Deshwal v. Virendra Gandhi*, AIR 2019 SC 2956.

⁵¹ *Anss Rajshekhar v. Augustus Jeba Ananth*, AIR 2019 SC 1876, 1891

⁵² *Rohitbhai Jivanlal Patel v. State of Gujarat*, AIR 2019 SC 1876, 1891

⁵³ *Bir Singh v. Mukesh Kumar*, AIR 2019 SC 2446.

Rs.15,00,000 to be paid to the appellant as compensation. But on appeal to the High Court, the findings of the Trial and Appellate Court were reversed. But on appeal to the Supreme Court appeal was allowed and the order of the High Court was set aside. The respondent (accused) was ordered to pay Rs.16,00,000 which shall be deposited in Trial Court within Eight weeks from the date and shall be paid to the complainant.

In *Vijay Gopala Lohar v. Pandurang*,⁵⁴ the Supreme Court ordered payment of the amount lying in the Registry shall be paid to the complainant. This also supports our viewpoint. In *B. Krishana Reddy v. Syed Hafeej*,⁵⁵ a cheque of Rs.4,00,000 was given towards consideration for the purchase of a property. Neither any document was produced on record nor was there any evidence that any conveyance was executed in favour of the respondent (complainant). On dishonour of cheque proceedings started under section 138. The submission of the appellant was that there was no existing debt or liability against which the cheque was issued. The Trial Court found that there was no case established against the appellant. On appeal, the High Court found the accused guilty of the offence and was sentenced to suffer imprisonment till the rising of the Court and was also directed to pay a fine of Rs. 4,25,000 out of which an amount of Rs.4,00,000 was to be paid to the complainant towards compensation and the remaining Rs. 2,50,000 was to be paid towards the fine to the State. On appeal, the Supreme Court set aside the judgment and order of the High Court and restore the judgment and order of acquittal passed by the Trial Court. In this case judgment of the High Court affirms the principles of compensation though it was reversed in appeal by the Supreme Court.

In a recent *APS Forex Services (P.) Ltd. v. Shaki International Fashion Linkers*⁵⁶ case the respondent (accused) issued a cheque for Rs. 9,55,574 which was dishonoured with remarks 'stop payment'. The Metropolitan Magistrate dismissed the complaint. On appeal, the Session Court dismissed the said appeal. On appeal the High Court also dismissed the appeal hence appeal to the Supreme Court. The Supreme Court held that the impugned judgment and order passed by the High Court and that of the Metropolitan Magistrate acquitting the accused respondent cannot be sustained and the same deserves to be quashed and set aside and the accused are sentenced to undergo three months of simple imprisonment with fine of Rs.

⁵⁴ *Vijay Gopala Lohar v. Pandurang*, AIR 2019 SC 3272.

⁵⁵ *B. Krishana Reddy v. Syed Hafeej*, AIR 2019 SC 5123.

⁵⁶ *APS Forex Services (P.) Ltd. v. Shaki International Fashion Linkers*, AIR 2020 SC 945.

10,000 and the accused are also directed to pay a sum of Rs. 19,11,148 by way of compensation to be paid within a period of eight weeks from today.

Proceeding under section 138 is a Civil Wrong than Punitive

While explaining the compensatory principle in *M/s Meters and Instruments(P) Ltd. v. Kanchan Mehta*,⁵⁷ the Supreme Court has observed:

(i) Offence under section 138 of the Act is primarily a civil wrong and this principle of section 258 The Criminal Procedure Code, 1973 will apply and the Court can close the proceedings and discharge the accused on the satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

(ii) The object of the provision being primarily compensatory, the punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage must be encouraged but is not debarred at a later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

Thus, the Supreme Court has laid down a new paradigm of the nature of the offence under section 138 of the Act and the purpose of the section is fulfilled where complainant gets a payment of cheque amount with interest and assessed costs then there is no need to proceed with the punitive aspect. The punitive aspect of section 138 is only to ensure payment of cheque amount.

Implied Power of the Magistrate

Further, the Supreme Court in the *Meters and Instruments case* has also ruled that under section 143. The magistrate has implied power to discharge the accused by closing the proceedings. Here the Supreme Court followed the principle of law laid down in *J.V. Bahrani v. State of Gujarat*,⁵⁸ and *Mandavi Co-operative Bank v. Nimesh B. Thakore*,⁵⁹ the statutory scheme post-2002 amendment, section 143 of the Act confers implied power on the Magistrate to discharge the accused if the complainant is compensated to the satisfaction of the Court, where the accused tenders the cheque amount with interest and reasonable cost of

⁵⁷ *M/s Meters and Instruments(P) Ltd. v. Kanchan Mehta*, AIR 2017 SC 4594, 4603.

⁵⁸ *J.V. Bahrani v. State of Gujarat* (2014) 10 SCC 494.

⁵⁹ *Mandavi Co-operative Bank v. Nimesh B. Thakore*, AIR 2010 SC 1402.

litigations assessed by the Court. The Court has to balance the rights of the complainants and the accused and also enhance justice. The basic object of the law is to enhance the credibility of the cheque transactions by providing a speedy remedy to the complainant without intending to punish the drawer of the cheque whose conduct is reasonable or where compensation to the complainant meets the end of justice. Appropriate order can be passed under section 143 by the Court in the exercise of its inherent power under section 143. This principle of the implied power of the Magistrate also supports the compensatory principle of section 138 of the Act.

VI. Conclusion

To conclude, it is evident from the above discussion that compensatory justice has been followed in the offence of dishonour of cheques. The approach of the Courts, in the beginning, was that complaint under section 138 meant for prosecution and punishment for the dishonour of cheques and not for the recovery of the cheque amount which strictly has to be enforced by a separate civil suit. The proceedings under section 138 cannot be regarded as a civil suit for recovery of the cheque amount and the Courts were of opinion for amendment in section 138.

Compensatory justice has been followed by inserting section 143-A and section 148 in the Act in 2018 which provides interim compensation. Now we have a catena of cases decided by the Supreme Court which supports the compensatory justice under which the cheque amount has been ordered to be paid out of the imposed fine amount. It has now become law of the land which is the theme of the article.

Hereby the author concludes, with two suggestions that suitable amendments under section 138 be made as to:

(i) A mandatory provision for an award of fine twice of the cheque amount so that cheque amount with interest and cost of the suit be paid to the complainant, and

(ii) Provision as to payment of cheque amount out of the fine just after the conclusion of the case in favour of the complainant deducting interim compensation paid under section 143-A and 148 of the Act.

The author is confident that it will serve the purpose of the Negotiable Instruments Act, 1881 as amended by the Negotiable Instruments (Amendment) Act, 2018 for which it has been enacted.

