**COMPLAINT UNDER SECTIONS 138 AND 142 OF THE NEGOTIABLE INSTRUMENTS ACT**

IN THE COURT OF CHIEF METROPOLITAN MAGISTRATE....................

Shri.................... s/o.................... R/o....................

................................................................... Complainant

*versus*

.......................................................................... Accused

Complaint u/ss. 138 & 142 of the Negotiable Instrument Act, 1881 as amended by Act 66 of 1988.

The complainant respectfully submits as under: —

1. That the accused is Proprietor of............................................................. dealing....................

2. That the accused took loan of Rs..................... from the complainant and executed a pronote on.................... for Rs..................... (A photocopy of the pronote is Annexure.................... ).

3. That the accused issued Cheque No..................... dated.................... for the sum of Rs..................... (Rupees.................... only) drawn on.................... and gave it to the complainant to discharge his liability with respect to the said loan amount/pronote. (Photocopy of cheque is Annexure.................... ).

While issuing the said cheque the accused assured the complainant that the cheque will be honoured on its presentation.

4. That the complainant states that the cheque was presented for collection through the complainant’s bank.................... on........................................ and the said cheque was returned on.................... as unpaid due to insufficiency of funds in the account of the accused in the bank with a memorandum ‘refer to drawer’. (Photocopy of the memorandum of the bank is Annexure:.................... ).

The accused had thus dishonest and guilty intention right from the beginning at the time he issued the aforesaid cheque.

5. That the complainant immediately thereafter contacted the accused and apprised him about the dishonouring of the cheque but the accused did not pay any heed.

6. That the complainant states that within fifteen days of the receipt of his information from the bank regarding dishonour/the return of the cheque as unpaid, he send a registered AD and U. P. C. notice dated................... through his lawyer .................... to the accused on.................... vide postal receipt No..................... dated .................... (Post Office.................... ) calling upon the accused for payment of the said amount alongwith interest due on the dishonoured cheque within fifteen days from the date of the receipt of the notice. The accused acknowledged the receipt of the said notice vide acknowledgement due. (The photostat copies of the postal receipt of the Registered A. D. Letter/U. P. C. and the A. D. Card are Annexures..................... The photostat copy of the legal notice is Annexure.................... ). The accused having received the notice on..................... has failed to make payment within fifteen days of the receipt of the legal notice.

That the accused is deemed to have received the Notice on.................... as the Notice was sent under Registered A/D and as well U. P. C. on.................... The accused having received the notice on.................... has failed to make payment within fifteen days of the receipt of the legal notice.

7. That the complainant submits that accused had issued the cheque without sufficient funds in his bank account. Therefore the accused committed the offence u/s. 138 of the Negotiable Instrument Act, 1881 as amended by the Act 66 of 1988 and is liable to be punished.

8. That the complainant further submits that the Accused intentionally induced the complainant to render loan assistance/to him with preintention not to pay and thereby has cheated the complainant & committed offences u/ss. 415 and 420 of I. P. C.

9. The cause of action for the present prosecution arose on the 16th day i. e. .................... after the expiry of 15 days of receipt of the aforesaid legal notice, and due to non-payment of the amount by the accused.

10. That the complainant further submits that he has filed the complaint within one month from the date of expiry of the fifteen days time given under the law for the payment of the said money. The said cheque was issued at..................... presented at the.................... where the cheque was returned as unpaid by complaints Bank and so this Hon’ble Court has jurisdiction to take cognizance of the offence.

11. The accused has thus committed the offences punishable under Sections 415 & 420 I. P. C. and Section 138 of the Negotiable Instruments Act, 1881, as amended in 1988. The complainant, however, chooses to prosecute the accused only for the offence under Section 138 of the Negotiable Instruments Act an amended because of the said remedy being more efficacious and speedier.

It is, therefore, prayed that the accused may be summoned to face the trial under Section 138 of the Negotiable Instruments Act, 1881, as amended in 1988, tried and punished thereunder in accordance with law.

It is also further prayed that this Hon’ble Court may be pleased to order for the payment of the compensation out of the fine amount u/s. 357 of Cr. P. C. read with S. 117 of Negotiable Instruments Act to the complainant as follows:

(1) Cheque Amount Rs. .......................

(2) Bank Service Charge Rs. .......................

(3) Notice Charge Rs. .......................

(4) Advocate’s Fees Rs. .......................

(5) Interest Amount (upto........) Rs. .......................

Total Rs......................... (plus interest

@......... till

payment

|  |
| --- |
| **Complainant** |
| **List of Witnesses** |
| 1. Complainant |
| 2. The Manager/Official Bank Branch |
| The official of the Bank with the record to show that the accused did not have sufficient amount of funds in his Bank A/c. No.…………… on the date when he issued the cheque and also on the date the cheque was presented and dishonored. |
| 3. Any other witness with the permission of the court. |

 Dated at .................. this ............... day of....................

|  |
| --- |
| **COUNSEL FOR COMPLAINANT**  |
| **List of Documents** |
| 1. Dishonoured Cheque |
| 2. Bank’s Return Memo |
| 3. Complainant’s Bank Return Memo |
| 4. Copy of Notice served on the Accused |
| 5. Postal Receipt of Regd. A. D. Notice and U. P. C |
| 6. Acknowledgement Card |
| 7. Pronote |
| 8. Special Power of Attorney |
| 9. Chronological statement |

 **CASE LAW**

***S. 138 Negotiable Instruments Act***

**QUASHING OF COMPLAINT ON GROUND THAT COMPLAINT DID NOT DISCLOSE DATE ON WHICH NOTICE SERVED.**

Mere fact that date of delivery of notice under Section 138 Clause (c) of proviso of Negotiable Instruments Act is not mentioned in the complaint does not affect maintainability of complaint.1

**DISHONOUR OF CHEQUE (SECTION 138 OF N. I. ACT)**

The offence under section 138 of the Negotiable Instruments Act, can be completed only with the concatenation of a number of acts. Following are the acts which are components of the said offence: -

(1) Drawing of cheque.

(2) Presentation of cheque to the Bank.

(3) Returning the cheque unpaid by the drawer bank.

(4) Giving notice in writing to the drawee of the cheque demanding payment of the cheque amount.

(5) Failure of the drawer to make payment within fifteen days of the receipt of notice..

It is not necessary that all the five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at five different localities. But concatenation of all the above five is a *sine qua non* for the completion of the offence under section 138 of the Act.2

**NOTICE — SERVICE OF**

Service of notice of demand in clause (b) of the proviso to section 138 of Negotiable Instruments Act, 1881 is a condition precedent for filing a complaint under section 138 of the Act.3

**NOTICE OF DEMAND (SECTION 138 PROVISO (B))**

A notice cannot be faulted if in addition to "cheque amount" any other sum by way of interest, cost etc. is separately indicated.4

1. S. K. Trading & Co. v. Beerbal Dass Jindal, 1996 (3) Crimes 8 (All).

2. K. Bhaskaran v. Sankaran Vaidhyan Balan, AIR 1999 SC 3762.

3. Central Bank of India v. M/s. Saxons Farms, AIR 1999 SC 3607.

4. Suman Sethi v. Ajay K. Churiwal, AIR 2000 SC 828.

**DISHONOUR OF CHEQUE — COMPLAINT OF**

Mere presentation of the complaint in the court cannot be held to mean that its cognizance had been taken by the Magistrate.5

**DISHONOUR OF CHEQUE — PROSECUTION OF COMPANY**

The winding up proceedings of a company do not render debt unenforceable.6

**DISHONOUR OF CHEQUE — COMPANY DECLARED SICK**

The fact that the company has been declared sick before expiry of period for payment of cheque amount does not save it or its directors from criminal prosecution.7

Complaint under section 138, Negotiable instruments Act can be filed by power of attorney holder of payee.

It is obligatory on court under Section 139 of Negotiable Instruments Act to raise presumption in every case where factual presumption has been established.8

Proceedings under Section 138 Negotiable Instruments Act cannot be quashed in a petition under Section 482, Cr. P. C. on a plea that petitioner director of the accused company had resigned much prior to cause of action had arisen for the case.9

To prosecute a director of company for offence under Section 138 of Negotiable Instruments Act a bald allegation by merely repeating those words mentioned in Section 141 of the Act would not be enough and there must be something more clearly stated in complaint.10

In a prosecution under Section 138/141 of Negotiable Instruments Act where cheque has been issued by a partnership firm, all the partners are not liable for prosecution on a contention that their liability was joint but only those partners could be prosecuted who were in charge of and were responsible for conduct of business of firm.11

Cause of action for filing complaint under Section 138 of Negotiable Instruments Act arises only once and time for filing complaint would start running from the date of service of notice issued under Section 138(b) of the Act.12

5. Narsingh Das Tapadia v. Goverdhan Das Partani, AIR 2000 SC 2946.

6. Pankaj Mehra v. State of Maharashtra, AIR 2000 SC 1953.

7. Kusum Ingots and Alloys Ltd. v. Pennar Peterson Securities Ltd., AIR 2000 SC 954.

8. Y. Sreelatha @ Roja v. Mukanchand Bothra, 2002 (2) Crimes 19.

9. Smt. Sunaina R. Mathani v. National Capital Territory of Delhi, 2002 (2) Crimes 61.

10. Neeta Bhalla (A-4) v. S. M. S. Pharmaceutical Ltd. Hyderabad, 2002 (2) Crimes 89.

11. Punjab State Coop. Supply & Marketing Federation Ltd. v. M/s. Malerkotla Rice Mills, 2002 (2) Crimes 178.

12. Mohammed Jakeer v. Ch. Koli Reddy, 2002 (2) Crimes 188.

Bouncing of cheque with remarks drawer’s signature incomplete would also attract offence under Section 138 of Negotiable Instruments Act.13

Once notice under Section 138 of Negotiable Instruments Act has been sent by regd. post on the correct address and is returned with an endorsement that "party was not available" it shall be deemed to have been served.14

The complaint filed under Section 200, Cr. P. C. or under Section 142 of the Negotiable Instruments Act would not *ipso facto* terminate or abate upon the death of the complainant and his LRs., their agents or power of attorney holder could be permitted to prosecute the complaint under Section 302(2), Cr. P. C. or under Section 142 of the N. I. Act.15

Cheque drawn for a loan four years prior to the issuance of cheque does not cease to be legally enforceable for a complaint under Section 138 of the Negotiable Instruments Act, 1881.16

Cheque given by accused in favour of bank for issuance of Demand Draft in favour of complainant for amount payable to complainant will make complainant payee of cheque and on dishonour of cheque, complainant was competent to maintain complaint under Section 138 of Negotiable Instruments Act.17

A cheque which has become invalid because of the expiry of the stipulated period could be made valid by alteration of dates.18

A state cheque can be revalidated by drawer. Change in date with consent is not material alteration. Whether change in date was voluntary or involuntary is a question of fact which has to be established by evidence. High Court was thus wrong in quashing complaint on alleged change in dates of earlier dishonoured cheques.19

13. Vinod Tanna v. Zaheer Siddiqui, 2002 (1) Crimes 104.

14. M/s. VIF Airways Ltd. v. M/s. Aishu Finance Ltd., 2002 (2) Crimes 205.

15. Jimmy Jahangir Madan v. Mrs. Bolly Cariyappa Hindley, 2002 (1) Crimes 291.

16. A. V. Murthy v. B. S. Nagabasavanna, 2002 (1) Crimes 306 (SC).

17. Ram Kasyyap Chits Pvt. Ltd. Visakhapatnam v. Chinnam Krishna Murthy, 2002 (1) Crimes 673.

18. Veera Exports v. T. Kalavathy, AIR 2002 SC 38.

19. Veera Exports v. T. Kalavathy, 2002 (1) Crimes 123 (SC).

IN THE COURT OF.........................................

Complaint No......................... of 200

**In the Matter of: -**

AB............................................................. Complainant

*versus*

CD.................................................................... Accused

**APPLICATION FOR RECALLING THE SUMMONING ORDER DATED ........................ ON BEHALF OF ACCUSED/APPLICANT**

**Most Respectfully Showeth: -**

1. That vide order dated........................ this Hon’ble Court was pleased to issue process to the applicant for an alleged offence under section 138 N. I. Act, 1881.

2. That the said order of summoning the applicant as an accused is bad in law on the following amongst other grounds and is liable to be recalled: -

**GROUNDS**

a. Because the complaint is barred by limitation as per record produced by the Complainant, the bank’s intimation/advise regarding return of cheque is dated........................ and the notice under section 138 N. I. Act was to be given within 15 days from ................................................ but the alleged notice is purported to be dated................................................ and was sent on........................ which on the face of it is beyond the prescribed period of limitation provided under section 138 N. I. Act and as such the Complaint is incompetent and liable to be dismissed on this ground alone.

b. Because a perusal of the Complaint would show that there is no allegation whatsoever as to on what date the alleged notice dated ........................ was allegedly delivered to the applicant and when the cause of action arose to the complainant for filing the complaint, in the absence of it is settled law that cause of action for maintaining a Complaint under section 138 N. I. Act, arises on the failure of the addressee to pay the demanded amount within 15 days from the receipt of the notice. In this case admittedly no notice was ever served upon the applicant.

c. Because the Complainant is alleged to have sent the alleged notice on two addresses: -

(1) .......................

(2) .......................

The Complainant have however filed one envelope addressed at address No. 1 stated above, and which contains a remark "Refused" dated......................... It is pertinent to point out that the said envelope does not contain any Postal Stamp of any post office which shows that the envelope filed with the complaint is manipulated one and the envelope sent to post office has been replaced by the envelope filed in the Complaint and the Complainant is guilty of an offence of perjury for which the applicant reserves right to file an application under section 340 Cr. P. C. relating thereto.

d. Because the alleged notice dated........................ is purported to have been sent on........................ at the address ................................................ and is purported to have been refused en.......................... However the Complainant has not examined anyone from the Postal Department to prove that it was refused by the addressee. It is respectfully submitted that the applicant is not residing at the address................................................ at which address there are number of shops and it is not the exclusive address of the applicant place of business.

e. Because neither in the Complaint nor in the statement of the complainant it has been averred or stated as to what was the fate of the alleged notice said to have been sent at the address

f. Because there is not an iota of evidence of the Complainant being partner of applicant which assertion is falsified from the very fact that the alleged cheque itself shows that the applicant was sole proprietor of the firm and the cheque in question was without consideration whatsoever. In this connection it is submitted that the Complainant who used to visit the applicant frequently. During one such visit, when the applicant needed money urgently and the closing hour of the bank was nearby, the applicant hurriedly signed a cheque and gave it to the Complainant who offered to get the same encashed by going to the bank. The Complainant came back within 15 minutes and handed over the cash................................................ to the applicant. It now transpires that he retained the cheque fraudulently and dishonestly by filling it up of the sum filed by him and has now filed the present Complaint for dishonest gain.

3. That this Hon’ble Court passed the summoning order without taking into the aforesaid important facts which go into the root of the matter and ning order is bad in law far it does not give any reasons for coming to the *prima facie* that an offence under Section 138 N. I. Act had been made out.

**PRAYER**

It is therefore prayed that this Hon’ble Court may be pleased to recall summoning order dated......................... and drop the proceedings against applicant.

This Hon’ble Court may be pleased to pass such further order(s) as ma complete justice on the facts and circumstances of the case.

Applicant/ Accused

Through Advocate

Place:................

Dated:.................

**IMPORTANT NOTE**

**CHANGES MADE BY**

**THE NEGOTIABLE INSTRUMENTS (AMENDMENT AND**

**MISCELLANEOUS PROVISIONS) ACT, 2002**

**WITH EFFECT FROM 17. 12. 2002**

(1) The period of notice by the payee to the drawer has been increased from fifteen to thirty days. (Section 138)

(2) Punishment prescribed under the Act has been increased from one year to two ye (Section 138)

(3) Person nominated as a director of a company by virtue of his holding any office employment in the Central Government or State Government or a financial cor ration owned or controlled by the Central Government or the State Government, the case may be, shall not be liable for prosecution under Section 141 of the (Section 141)

(4) Discretion has been vested in court to waive period of one month for taking cog zance of the case under the Act, if complainant satisfies the court that he had su dent cause for not making a complaint within such period. (Section 142)

**By the Amendment Act 2002 Sections 143 to 147 have been *inserted*to provide for—**

(a) Summary trial of the cases with a view to speed up disposal of cases and the Mar trying an offence empowered to pass sentence of imprisonment for a *ter* ing one year and amount of fine excreding five thousand rupees; (Sec

(b) Procedure for service of summons to the accused or witness by the post or by such courier services as are approved by a Court of. 144)

(c) Evidence of the complainant on affidavit and on application of summon and examine any person giving evidence on affidless. tained therein; (Section 145),

(d) Bank’s slip or memo *prima facie* evidence of fact of dishonour of cheque unless and until such fact is disproved; (Section 146)

(e) Offence under the Act compoundable; (Section 147)

\*\*\*\*\*\*\*\*\*\*