Territorial Jurisdiction U/s 138 of N.I. Act: *Dashrath Rupsingh Rathod Case* – A Critique

Rajesh Gupta and Gunjan Gupta***

Abstract

With the recent pronouncement of the larger bench of the Supreme Court in Dashrath Rupsingh Rathod vs State of Maharashtra, laid down the law of territorial jurisdiction in respect of an offence under Section 138 of the Negotiable Instruments Act afresh holding that the Drawee Banker alone shall determine territorial jurisdiction. Prior to the pronouncement in Dashrath's case the ratio as laid down by the Division Bench comprising of 2 judges of the Supreme Court in K. Bhaskaran vs Sankarana Vaidhyan Balan was holding the field, whereby the territorial jurisdiction was made out at 5 different places on the anvil of relevant provisions of the Code of Criminal Procedure,1973.

The article contains the thread bare critical evaluation of the judgement in Dashrath Rupsingh Rathod's case and it is observed that for various reasons the said dictum had a draconian effect of the implementation of law as contained under Section 138 of the NI Act.

Having felt the brunt of the issue, the legislature came in for rescue with the pronouncement of two successive Ordinances followed by the Amending Acts of 2015, whereby the law of territorial jurisdiction under section 138 of the NI Act has again been written by the law makers. Some experts are of the view that the evil effect of Dashrath is irreversible and at the same time the said statutory amendments so made by the legislature in their bid to arrest the evil has crafted even bigger evil than the one it sought to remedy.

By virtue of the said amendment, the territorial jurisdiction has now finally been restricted to the place where the Payee's Banker is situated.

Keywords: Dishonour of cheque, Territorial jurisdiction, Section 138 NI Act.

* Advocate LL.M., Ph.D. (Delhi)
** Associate Prof., Campus Law Centre, Faculty of Law, DU.

1. Introduction

The law with respect to territorial jurisdiction for the applicability of the provisions contained under section 138 of the Negotiable Instruments Act, 1881 had undergone radical changes with the pronouncement of three judges' decision of the Apex Court in *Dashrath Rupsingh Rathod* v *State of Maharashtra*[1] till the promulgation of two amendment Ordinances culminating into Negotiable Instruments (Amendment) Act, 2015. The said statutory amendment has again done bigger mischief, as opinioned by various scholars and researchers, than the one it sought to remedy!

Prior to the pronouncement in *Dashrath*[2] the law in this regard was applied in terms of Two Judges' decision of the Apex Court in *K. Bhaskaran* v *Sankarana Vaidhyan Balan,*[3] wherein the law as laid down by the Supreme Court was that the jurisdiction for launching prosecution under section 138 of the Negotiable Instruments Act, 1881 was made out at five places as stated therein. Whereas, with the pronouncement in *Dashrath*[4] the jurisdiction was restricted to only one place, that is, the place where the 'drawee banker' situate. Though said decision of the larger Bench of the Apex Court in *Re: Dashrath Roop Singh Rathod case, supra.,* invited lot of criticism in this regard for the reasons as discussed succinctly herein below, the legislature in its special sovereign bid also promulgated two amendment Ordinances followed by the penultimate Negotiable Instruments (Amendment) Act, 2015 with an intention to remedy the evil purportedly created by the said dictum. The substance of the said statutory amendment was to prescribe one point for determination of territorial jurisdiction with respect to cases filed under section 138 of the Negotiable Instruments Act, 1881 (as amended upto date), that is, the place where the branch of the payee's presenting banker where the payee maintains his account is situated. However, as per the opinion of various law experts, the said statutory amendment has created even bigger evil than the one it sought to remedy.

Though after the pronouncement in *Re: Dashrath*, the law again has undergone basic changes in this regard by virtue of two Negotiable Instruments (Amendment) Ordinances of 2015 and the amendment Actas stated above that has made the place of presenting banker alone to confer jurisdiction, the pronouncement in *Dashrath* created a turmoil during the time till it was overruled by the statutory amendment in this regard, requires its thorough

1 2014 VIII AD (SC) 293, Decision dated 01-08-2014: 2014 (3) Crimes 162 (SC); Followed by two Judges' Decision of Supreme Court in Apex Distributors v Timex Group India Ltd., 2014 (3) CrLJ 447.

2 *Ibid*.

3 (1999) 7 SCC 510: 1999 (2) JCC (SC) 552; Followed by *Harman Electronics Private Limited v National Panasonic India Private Limited* (2009) I SCC 720; *Nishant Aggarwal v Kailash Kumar Sharma* (2013) 10 SCC 72; *Escorts Limited v Rama Mukherjee* 2013 (4) JCC (NI) 233: (2014 2 SCC 255.

4 *Supra* note 1.

analysis.

2. Law of Territorial Jurisdiction during the period from *K. Bhaskaran*[5] to *Dashrath*[6].

In *Bhaskaran*, the division Bench comprising of two judges of the Supreme Court crystallized the concatenation of actus that constitutes cause of action for filing of complaint under section 138 of the Negotiable Instruments Act, 1881 such that each of such act will confer jurisdiction to the court where such act is committed. Five places were enumerated in the said judgment wherein the complaint would be well found, namely:--

(1) Drawing of cheque;

(2) Presentation of cheque to the bank of the payee;

(3) Returning the cheque unpaid by the drawee bank;

(4) Giving of notice of demand; and

(5) Failure to make payment within notice period.

This pronouncement was holding the field till recently, when the same is overruled by larger Bench of Three Judges in *Dashrath*. Numerous judgments came from various High Courts, who were obviously bound to follow the said dictum. Other judgments came from the Supreme Court also, and none showed its inability to accept the same. Numerous larger Bench decisions also were pronounced of the Apex Court, who at the most stated that mere sending of notice will not confer jurisdiction, if otherwise it did not have. Threadbare analysis is done later in this chapter with respect to almost all the relevant judgments that had a say in the regard.

3. Law of Territorial Jurisdiction after *Dashrath* till statutory amendment of 2015

Three Judges' Bench decision of the Apex Court in *Dashrath Rupsingh Rathod* v *State of Maharashtra*.[7] has explicitly overruled the law as was developed on the basis of guidelines as laid down by Two Judges' Bench decision of the Apex Court in *K. Bhaskaran* v *Sankarana Vaidhyan Balan,*[8] holding that the place where the drawee bank situate alone

5 *Supra* note 3.
6 *Supra* note 1.
7 *Supra* note 1.
8 *Supra* note 3.

will confer jurisdiction to file complaints under section 138 of the Negotiable Instruments Act, 1881.

Two separate, though concurring, judgments have been crafted by their Lordships in *Dashrath,* one by Justice Vikramjit Sen and the other by Justice T. S. Thakur.

Besides various other numerous judgements of the Apex Court, reference has been made to *Bhaskaran*[9] (now overruled), whereas reliance has been placed basically on two judgements of the Apex Court in *Ishar Alloy*[10] (Three Judges' Bench Decision) and one on *Harman Electronics*[11] (Two Judges Bench Decision).

Besides above, reference has also been made to section 20 of the Code of Civil Procedure, 1908 and various provisions of Code of Criminal Procedure, 1973 including the one contained under section 177 and 178 thereof.

After various references, quotations, reliance and rejections, the court held that a reading of section 138 of the Negotiable Instruments Act, 1881 in conjunction with section 177 of Cr.P.C. leaves no manner of doubt that the return of the cheque by the drawee bank alone constitutes the commission of the offence and indicates the place where the offence is committed. In normal course, we would have quoted the relevant excerpts of the judgment for ready reference, but due to paucity of space, we prefer to write comment instead, and leave our esteemed readers to refer to the said judgment wherever necessary.

4. Critical analysis of *Dashrath*

With due respect, the court in *Dashrath's* case has stated that one may alternatively resort to remedy under section 420 of the Indian Penal Code, 1860, if the crircumstances of the case so permit. Secondly, their Lordships have opined that another remedy may also be resorted as available to the creditors in the nature of civil suits, may be by way of Summary Procedure, if the facts of the case may permit so. But the bone of decision is, as the court has stated in the above quoted para, that the big business houses or big banks have become reckless in extending loan facility solely because of the availability of this remedy. The court lastly stated that the today's Magistracy is inundated with prosecutions under section 138 of the Act and the burden is becoming unbearable. The Apex Court resorted to section 177 of the Code of Criminal Procedure, 1973 to support their decision

All the above stated reasons does not seem to be sound enough for passing such

9 *Ibid.*

10 *Shri Ishar Alloy Steels Ltd.* v *Jayaswals Neco Ltd.,* 2001 (2) Apex Court Journal (SC): 2001 (3) SCC 609

11 *Harman Electronics P Ltd* v *National Panasonic India Ltd,* (2009) 1 SCC 720

a judgment which is going to shake not only the judicial system as a whole but also the economic stability of the State which at least gave guarantee at one time by lawmakers to make the banking system efficient when the economy was initially opened. Though the cases were not decided, may be due to lack of expertise of courts, or it may be due to other reasons, including the one of lethargy of those who preside over such courts; and therefore for the reason of want of quick decisions, the business community and common man knew that it may not be so easy to get their money back even by resorting to this remedy, but with the pronouncement of this decision, the Indian Legal System this time has explicitly raised its hands for their inability to cope up with pending litigation. Would this not tantamount to reflection of a state of 'judicial helplessness' or this judgment is simply based on sound principles of criminal law. To me, it seems to be more in the nature of an administrative order than a judicial pronouncement.

Without endorsing this judicial dictum, and for the sake of arguments, it is submitted that the retrospective operation also should have been avoided, or if that was not possible for the reasons best known to their Lordships, then at least the cut-off should have been provided as the one where the accused/ drawer has been served with court notice to make the said cut-off for retrospective operation effective.

We shall be dealing with some of the aspects with respect to the point in issue one by one.

(i). Object of Section 138 of the Act.

The objectives of the proceedings of section 138 of the Negotiable Instruments Act, 1881 are that the cheques should not be used by persons as a tool of dishonesty and when the cheque is issued by a person, it must be honoured and if it is not honoured, the person is given an opportunity to pay the cheque amount by issuance of a notice and if he still does not pay, he nust face the criminal trial and consequences.[12] To inculcate confidence in the banking system, in nutshell, was the motive of these provisions.[13]

There would be numerous judgments not only from various High Courts of India but also from the Supreme Court. Many judgments have been pronounced even by larger Benches of the Supreme Court on the point to increase the efficacy of the system of making payments by cheques. Judiciary has always been very active for construing

12 *Indian Bank Association* v *Union of India* IV (2014) SLT 244.

13 Reference in this connection may kindly be made to *Electronics Trade & Technology Development Corporation Ltd* v *Indian Technologists & Engineers (Electronics) Pvt. Ltd.* I (1996) CCR 136: (1996) 2 SCC 739; *Goa Plast* V *Chico Ursula D'Souza* I (2004) BC 246 (SC): VII (2003) SLT 247: (2004) 2 SCC 235.

various provisions of the Act relating to dishonour of cheques in such a manner so that the objectives of this piece of legislation are achieved in their true sense. Therefore, horizons of the definition and import of these provisions have throughout been widened by the Apex Court making the system of payment of cheques more reliable and more trustworthy leaving no room of escape to unscrupulous defaulters. Stop payment advice was made to cover in this direction and many other lacunae that defeat the prosecution without there being any substance in such technical point, the same have been interpreted by the court in such a manner in consonance with the object sought to be achieved by the legislature.

Two recent decisions of the Apex Court, one of three Judges' Bench in Re. *C.C. Alvi Haji* v *Palapetty Muhammed*[14] saying that all the defects in the service of notice, or in the contents thereof, can be overcome to the favour of the complainant by giving last and final opportunity to make payment within 15 days from the service of court summons in appropriate cases. By this purposive interpretation the object which the legislature sought to achieve has been fully satisfied.

Similarly, in another very recent case, that is, *MSR Leather* v *S Palaniappan and Anr.*,[15] which is also a three Judges' Bench decision of the Apex Court, a long drawn theorem has been given a go-bye by holding that the prosecution will not fail only for the reason that the same was launched on the basis of any subsequent notice. [Emphasis].

In this line of judicial pronouncements, saying now in this *Dashrath case* that the judiciary in inundated with about 40 lacks of cases under section 138 of the NI Act alone and therefore such decision was necessary, in the opinion of the present authors, would only tantamount to sanction an established injustice to millions. Had this been an administrative order, things would have been different. But the order is judicial, and that too by a larger Bench.

(ii). Retrospective operation of Dashrath.

Their Lordships in *Dashrath* Case[16] have held that though the magnitude of the impact of the decision in this case would be possibly to lakhs of cases pending in various courts spanning across the country and therefore the approach could have been to declare that the judgment would have effect prospectively only, that is, only to those complaint cases which are filed after the judgment. However, the accused persons, in that situation, would continue to suffer hardship and therefore the judgment in *Dashrath* was made operative

14 AIR 2007 SC 1705: (2007) 6 SCC 555: (2207) 2 BC 533.

15 (2013) 1 SCC 177.

16 *Supra* note 1.

retrospectively. In the penultimate para of the judgment pronounced by Justice Vikramjit Sen, the observations with respect to retrospective operation of the judgment have been made at three places in different sentences.

At one place in the last para of the judgement of His Lordship it has been stated, thus:

> Consequent on considerable consideration we think it expedient to direct that only those cases where, post summoning and appearance of the alleged Accused, the recording of evidence has commenced as envisaged in Section 145(2) of the Negotiable Instruments Act, 1881, will proceeding continue at that place.

At another place in the same para, His Lordship has repeated the same direction in couched in different words:

> To clarify, regardless of whether evidence has been led before the Magistrate at the pre-summoning stage, either by affidavit or by oral statement, the complaint will be maintainable only at the place where the cheque stands dishonored. To obviate and eradicate any legal complications, the category of Complaint Cases where proceedings have gone to the stage of Section 145(2) or beyond shall be deemed to have been transferred by us from the Court ordinarily possessing territorial jurisdiction, as now clarified, "to" the court where it is presently pending. [With abundant caution, and with an advance apology, the present authors verified the word "to" in the above sentence from two publication and in the opinion of the present authors, it may kindly be read as "from", if there is any clerical mistake, subject to due approval of their Lordships.]

At yet another place in the same concluding para, there is yet another observation, and rather a direction, and this time the phraseology is again in a different combination of words. To quote:

> All other complaints (obviously including those where the accused/ respondent has not been properly served) shall be returned to the complainant for filing in the proper Court, in consonance with our exposition of law.

With due emphasis, it is submitted that the above three sentences and observations made by His Lordship seems to be confusing, inconsistent and may be self-contradictory.

The issue is very important, as dozens of lawyer friends approached the present author in one week only from the date of pronouncement in *Dashrath* seeking my opinion and clarifications in this regard. Further analysis may result into over-analysing the self-explanatory position.

To say the least, the first observation would simply mean that deposition should have started after filing of application under section 145(2) of the Act. Thus, even if an application is filed and evidence has not yet commenced in consonance with section 145(2) of the Act, the matter in terms of this observation would require to be transferred to another court of competent jurisdiction.

However, with respect to the second observation, the words "to the stage of Section 145(2) or beyond" would only mean that when the matter is adjourned by the court seized of the matter for filing of application under section 145(2) by the accused and at any stage thereafter, the matter shall continue in that court only, irrespective of whether an application under section 145(2) has actually come on record by that time or not and notwithstanding, obviously, as to whether any evidence in consonance with section 145(2) has begun or not.

Regarding the third observation, it is emphatically submitted that the same leads to yet another irresistible conclusion that where the accused has been properly served or not shall alone determine the terminus. Thus, where the accused has been reported by the process server or when the record shows that the court summons have been properly served, whether the accused appears or not in consequence, irrespective of whether any warrants of arrest are liable to be issued or not, the matter shall continue in the very same court.

The three such sentences in one para create confusion. However, in view of the present authors, if we are bound to accept one of the three directions, on the anvil of logic and reason, the last one should be preferred.

When the present authors have opined that of the three interpretations on the issue of retrospective applicability of the said dictum the last one should be accepted for the reason of the same being most logical of the three, it does not mean that the present authors in their view are approving the dictum of the judgment as a whole or they are in favour of retrospective operation of the said pronouncement. [Emphasis.]

It is further submitted that cardinal rule of construction of criminal law is that it does not permit retrospective application of any provision of law by any stretch of imagination for which no further reference may be required.

However, one would argue that the present dictum is not a statutory law and is

only an interpretation of the same by a judicial court and therefore this rule of construction of statutes would not be application to the present facts and circumstances. It is with due emphasis stated that there is one more rider to the above proposition, that is, that when a law is developed with a particular interpretation for a long time and the subject do very well take the law in the wake of that particular interpretation as it stood, in that situation, sudden pronouncement with retrospective applicability may not be taken to be in good taste. Sudden change of law in this fashion may not be very healthy for the economy and even otherwise, subjects would start treating law as speculative bid.

(iii). Payable at par.

A recent development in this last decade is that the banking system in India is being made 'computer friendly', where use of internet facility has made the performance of this sector revolutionary. Be it in the form of 'cheque truncation' and conversion of conventional paper cheque into an 'electronic image' thereof, it may be a case of 'electronic clearing system' or of electronic money transfer or it may be the one of 'electronic cheques', they all have made the system of payments of cheques and money transfers with the use of Internet. To bring the system of payments by cheques or money transfers in consonance with this new system of information and technology, a new system of banking has now been evolved, that is, Core Banking.

One may notice that now the cheque leaves issued by the bankers to their clients bear an endorsement thereon to the effect that the same is 'payable at par'. It means that the cheque with this kind of endorsement can be encashed and negotiated at any branch of the drawee banker and in other words, the meaning and relevance of 'branch' as such has been left nugatory. Thus, each of such branches of a bank would mean, when dealing with a cheque with above stated endorsement thereon, every branch of the same bank at par. It is emphatically submitted that when the drawee banker itself has stated that the cheque is 'payable at par', there would be no occasion for any court of law to say otherwise. Either the drawer of the cheque may prefer not to use such cheque at all, if not satisfied or similarly, even the payee may opt for not taking a cheque without such an endorsement. However, so long as the cheque in question bears the endorsement in the nature of 'payable at par', the dictum of *Dashrath*[17] may not be applicable and prosecution based on such cheque can be launched anywhere in the country where any of the branch of drawee banker situate. [Emphasis].

(iv). At least 70% of 50 Lakh pending cases affected.

17 *Supra* note 1.

In our respectful submission, we regret our inability to subscribe to the view that merely due to pendency of 40-50 lakh cases emanating from section 138 of the Act[18] *ipso facto* can be a ground to dismiss or uproot such cases. This seems to be an outcry, for which there is no room for interpretation of pure questions of law. Such decisions should best be left to the special wisdom of those whose duty it is to legislate or if they fail in their endeavor, appropriate Writs can also be issued. This comment is based on the observations of their Lordships with respect to their respective observations made regarding plethora of pendency of such cases.

To quote Justice Vikramjit Sen from *Dashrath*[19]*:*

> Today's reality is that the every Magistracy is inundated with prosecutions under section 138 of the NI Act, so much so that the burden is becoming unbearable and detrimental to the disposal of other equally pressing litigation.

To quote Justice TS Thakur from *Dashrath*[20]*:*

> Before parting with this judgment we need to remind ourselves that an avalanche of cases involving dishonour of cheques has come upon the Magistracy of this country. The numbers of such cases as of October 2008 were estimated to be more than 38 lakh.[21] The result is that cases involving dishonour of cheques is in all major cities choking the criminal justice system at the Magistrate's level. Courts in the four metropolitan cities and other commercially important centers are particularly burdened as the filing of such cases is in very large numbers. More than five lakh such cases were pending in criminal courts in Delhi alone as of 1st June, 2008. The position is no different in other cities where large number of complaints are filed under section 138 not necessarily because the offence is committed in such cities but because multinational and other companies and commercial entities and agencies choose these places for filing the complaints for no better reason than the fact that notices demanding payment of cheque amounts were issued from such cities or the cheques were deposited for collection in their banks in those cities.

18 As stated in *Dashrath's* case.

19 *Supra* note 1.

20 *Supra* note 1.

21 Law Commission of India, 213th Report on Fast Track Magisterial Courts for Dishonoured Cheque Cases (November 2008)

In another two judges' Bench decision of T.S.Thakur and Vikramjit Sen in *Somnath Sarkar* v *Utpal Basi Mallick*[22] while placing reliance on *Damodar S. Prabhu* v *Syed Babalal H.*[23]*:*

> It is quite evident that the legislative intent was to provide a strong criminal remedy in order to deter the worryingly high incidence of dishonour of cheques. While the possibility of imprisonment up to two years provides a remedy of a punitive nature, the provision for imposing a 'fine which may extend to twice the amount of the cheque' serves a compensatory purpose. What must be remembered is that the dishonour of a 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.
>
> Invariably, the provisions of a 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 report of Law Commission of India,[24] more than 38 lakh cheque bouncing cases were pending before various courts in the country as of October 2008.

There is yet another aspect of the matter; this seems to have written with a special aspect in mind, that is to say, concerning those bank cases where despite the cause of action having arisen in a particular locality where both the parties bargained and carried out the transaction, but when such time comes, the bankers send such cheques for their presentment and dishonour to their head offices which mostly situate at Delhi and Bombay followed by issuance of notices. By so doing, they artificially create jurisdiction to a place which otherwise it did not have. [Emphasis].

Neither the courts of law permitted such practice, nor did the present authors ever approve any such course taken by such bankers. However, to remedy this defect, dissection of different classes of cases was necessary as is applicable in the matters of 'reservation and protective discrimination'. Applying the dictum in all cases under the provisions of Section 138 of the Act in blanket does not seem to do any justice and looks illogical. This actually

22 AIR 2014 SC 771.

23 AIR 2010 SC 1907: (2010) 5 SCC 663.

24 *Supra* note 21.

alone was the function of the judiciary to disintegrate 'grain from sheaf'; and the task to dissect those cases where big bankers misuse the process of law from other cases alone was left for the judges to decide. Pendency of cases may be due to unfulfilled vacancies, non-creation of vacancies or lack of expertise of judges and so on, for which innocent creditor should not have been allowed to suffer!

Take a case, for example, that a person in Delhi Pitampura locality seeks housing loan form a particular bank branch, who in turn takes some advance cheques by way of security or for repayment of such loan. Though both the parties, namely, the person who took loan as well as the bank branch, situate in a particular locality. However, in case of default in payment of installment or otherwise, such branch sends the cheque(s) to their head-office at Bombay from where the cheque is presented and notice of demand is issued. In such case, in the considered opinion of the present authors, it can very well be said that merely by artificially presenting cheque from a third place or even by sending notice of demand from such a place will not confer jurisdiction to Bombay Courts if otherwise it did not have. Such cases alone were required to be dealt with accordingly and not all and it is this that is the thesis of this write-up.

(v). Litigants negotiated in terms of Bhaskaran – taken by surprise!

As said above, at the cost of repetition, but this may be due to anxiety of not to leave any notice of caution, I deem it appropriate to say that people of this country negotiated and bargained on the basis of their belief that *Bhaskaran* was holding the field on the point of Territorial Jurisdiction. During the course of their negotiation and bargains, they might have opted not to choose to go for litigation and to have accepted any lesser amount or so, had they been told upfront that *Dashrath* was to be pronounced. Legally speculative judgements of such wider impact require to be avoided as they partake the character of legislation. Whereas, legislation is not put on statute book by surprise, as public opinion is collected, matter is discussed in debates in public meeting and on the floor of the parliament and then by passing through a process such statute is engrafted and still thereafter a notification is issued as to from which date such statute will come into force. Sufficient time is therefore granted to the subjects to take appropriate decisions according to the existing law of land.

(vi). Suggestion to resort to Sec. 420 IPC etc[25]. to invoke Jurisdiction.

25 Reference in this connection may also be made to remedy available to payee of a cheque by filing of a simple suit for recovery of amount or even under summary jurisdiction.

In *Dashrath*[26] there is one more observation made in the last concluding para of judgment rendered by Justice Vikramjit Sen to the effect that:

> Section 420 of Indian Penal Code, 1860,[27] is still available in case the payee finds it advantageous or convenient to proceed under that provision.

It is specially seen in practice that for the first 5 to 10 years when this new law under section 138 of the NI Act came into force, lawyers used to club in their complaints under section 138 of the Act with Section 420 of the Penal Code. However, slowly some courts started offering issuance of instant summons on the basis of affidavit of complainant alone, on the condition if complainant write-off section 420 from their complaint. Later on, statutory amendments also were made in this regard whereby pre-summoning, and even post summoning, evidence can be adduced by way of affidavit of the complainant. This development, it is quite worthy to remind our esteemed readers, was made in the background of reality of facts that complaint under section 138 of the Act along with section 420 of IPC used to take 3 to 5 years for simply summoning the accused, thereby frustrating the very purpose of litigation.

It is emphatically submitted that their Lordships in their bid to clear off the judicial desk of their undecided cases have brought the legal position in this arena back to same place as it stood 20 years back. It is often said that 'legislators are always successful in befooling the subjects by propounding plethora of legislations without caring of their implementation'. Even traffic regulating constables on road often, in the state of traffic jams, divert the traffic to the other side, so that even after spending half-an-hour or even a full hour, the vehicle comes back to the same place; and such regulator knows fully well the consequences of his befooling the public. In our respectful submission, this ought not to be allowed in judicial parlance.

(vii). Statutory provisions.

So far as statutory provisions are concerned, we do not find any such provision specially made for the purpose of determination of territorial jurisdiction for launching prosecution under Chapter XVII of the Negotiable Instruments Act, 1881 except section

26 *Supra* note 1.

27 Section 420. **Cheating and dishonestly inducing delivery of property**
Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

138 itself, read with section 142, dealing with the offence of 'dishonour of cheques'; and therefore, we are left with no other option but to take cue from section 177, 178 and 179 of the Code of Criminal Procedure, 1973 in addition to section 138 and 142 of the Act, if there is any ambiguity in the latter.

A careful perusal of the provision contained in clause (b) of section 142 of the Negotiable Instruments Act, 1881 would unequivocally reveal that 'complaint u/s 138 is required to be made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138'. When we look at the provisions contained under clause (c) appended to section 138 of the Act, it would reveal that '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'.

Conjoint reading of the provisions contained in Section 142(b) r/w section 138(c) of the Negotiable Instruments Act, 1881 leaves no manner of doubt that the legislature in its bid was very clear in its mind that the 'cause of action' shall arise only on the expiry of 15th day of statutory notice as contained u/s 138 of the Act when the drawee fails to make the payment to the payee of the cheque. [Emphasis].

Either the above referred provisions of the Negotiable Instruments Act, 1881 should have been declared as Unconstitutional, if they were so, or *non-est*, if the same was found so by the Bench in *Dashrath*. Neither explicitly, nor by necessary implication, it has been so done in the said judgment. It being a piece of criminal legislation, strict interpretation was *sine qua non* for culling out the true import of the said provisions.

In so far as above stated provisions of Section 177 to 179 of the Code are concerned, it would be profitable to quote verbatim observations made in some, very recent yet well celebrated, judgments of the Apex Court while interpreting horizons of section 138 of the Act as follows:

> [W]e must note that in *K. Bhaskaran*[28] this court has held that section 178 of the Code has widened the scope of jurisdiction of a criminal court and section 179 of the Code has stretched it to still a wider horizon. Further, for the sake of repetition, we reiterate that the judgment in

28 By K.T. Thomas and M.B. Shah, JJ, (1999) 7 SCC 510: 1999 (2) JCC (SC) 552; Followed by Harman Electonics Private Limited v National Panasonic India Private Limited (2009) I SCC 720; Nishant Aggarwal v Kailash Kumar Sharma (2013) 10 SCC 72; Escorts Limited v Rama Mukherjee 2013 (4) JCC (NI) 233: (2014 2 SCC 255.

Ishar Alloy[29] does not affect the ratio in *K. Bhaskaran*[30] which provides jurisdiction at the place of residence of the payer and the payee.

In the considered opinion of the present authors, provisions of section 138 r/w section 142 of the Act are very clear in their import and leaves no doubt that the cause of action will accrue only on non-payment of the cheque amount wihin notice period. Another cardinal rule of construction is that 'debtor is to find place of creditor and not *vice versa'*, we shall be dealing with this aspect in the following note herein after.

Though the provisions of section 138 etc of the Act being unequivocal in themselves would require no reference to the general provisions of the Procedure Code, still by way of abundant caution, we seek to say that even those provisions does not bar jurisdiction at the place of the payee. Clauses (a) and (d) of section 178 and section 179 clearly says that not only the place where the action is taken for the offence will confer jurisdiction, but also where the 'consequences ensues'. Well established principle of law, as we have already said above, is that the debtor is to find the place of creditor. In these cases of dishonour of cheques, the only irresistible conclusion is that on the dishonour of cheque by the drawee banker, the consequence will ensue to the payee with respect to non-payment of money, because the drawer was to go and make payment to the payee within notice period as envisaged u/s 138 of the Act. [Emphasis].

(viii). Debtor to find place of creditor.

In *Harman's* case[31] Division Bench comprising of two judges of the Apex Court observed:

> Banking institutions holding several cheques signed by the same borrower can not only present the cheque for its encashment at four different places but also may serve notices from four different places so as to enable it to file four complaint cases at four different places. This only causes grave harassment to the accused. It is, therefore, necessary in a case of this nature to strike a balance between the rights of the complainant and the rights of the accused *vis-à-vis* the provisions of the Code of Criminal Procedure. Principle that the debtor must seek the creditor cannot be applied in a criminal case. Jurisdiction of the court to try a criminal case is governed by the provisions of the Criminal

29 *Supra* note 10.
30 *Supra* note 3.
31 *Supra* note 11.

Procedure Code and not on common law principle.

In our respectful submission, we do not say that filing of four different cases, on the basis of four notices, issued from four different places, based on four cheques, between the same parties, is to be advocated for; nor can we say that the provisions of section 138 of the Act should be left as a tool for harassment of the accused persons at the hands of big bankers. As we have said earlier, it is this that is the function of judiciary, that is, to disintegrate grain from sheaf. In our considered opinion, the legal postulate should be that: merely by sending notices, with or without presentment of the cheque, alone will not confer jurisdiction to a court which otherwise it did not have. In other words, artificial creation of the jurisdiction should be dealt with an iron hand as it is not only an abuse of the process of law, but in our opinion, it also is a fraud played upon court, in addition to extortion against drawer by the illegal use of legal means.

Regarding the observation that 'the principle that debtor must seek the creditor cannot be applied in a criminal case', our respectful submission is that we do not find any basis of this observation that such principle of law would apply to civil law but not criminal. In the succeeding paras, we shall be referring to some well celebrated judgments of different courts on the issue to support our contention.

Lastly, regarding the principles concerning jurisdiction as contained in the Criminal Procedure Code, we have already discussed the correct position of law in this area as above.

In support of the proposition, that the maxim 'debtor should find the place of the creditor' has been referred and relied upon by various judicial courts from the time immemorial; in this regard it would be profitable to refer to a few of such cases.

Kerala High Court in *Muraleedharan (P.K.)* v *Pareed (G.K.)*[32] it was held that:

> [T]he cause of action arises at the place where the cheque was issued or delivered or where the money was expressly or impliedly payable. There can be no doubt that when a cheque is issued, by implication, the amount is payable by the drawer to the payee through the bankers of the payee. In other words, the amount due on the cheque is impliedly payable by the drawer through the bankers of the drawer.

The maxim that 'debtor should follow the creditor and not *vise versa*', was also reiterated and applied to such cases in *NEPC Micon Ltd.* v *Magma Leasing Ltd.*[33] Similar

32 (1992) 19 CrlLT 450 (Ker.): III (1992) CCR 2371: I (1992) BC 315: 1992 (1) KLT 59; also see, *Suresh* v *State of Maharashtra* 1998 VIII AD (HC) (BOM) 95.

33 1999 (4) Crimes 119 (Cal); reliance place on *Rabin Jhunjhunwala* v *Mohta (L.K.)* 1997 (1) CHN 390.

would be the observations made by Karnataka High Court in *Pobathi Agencies* v *State*[34] wherein reliance was placed also on section 178(b) of the Code of Criminal Procedure to say that when offence is committed partly in different local areas, all such areas shall have jurisdiction. Another reliance was placed in the said judgment on section 179 of the Code to say that where the consequences of the act ensue will also attract jurisdiction. Delhi High Court[35] also repeated the same proposition that for discharging of debt the accused were to find out their creditors and therefore wherever the creditors situate, it will confer jurisdiction to such courts. The present authors wants to draw a sketch of caution that it does not, obviously, mean that the jurisdiction can be artificially created by the payee by shifting to Port Blair or so; and it would naturally mean, that the place where he normally resided or carried on his business or carried on his bank account, when the transaction took place.

There would be plethora of judicial pronouncements[36] on this score to say that it is the debtor who is to find the place of credit to attract the territorial jurisdiction under section 138 of the Act. The law in this arena was developed like this and there is not an iota of any evidence or literature to say that the said maxim is purely applicable to civil law and not criminal law.

(IX) Territorial Jurisdiction and Core Banking (Payable at Par)

In its recent Guidelines issued by the Reserve Bank of India on use of Cheque Truncation System[37], which is speedy, quick, less expensive, simple and eliminates voluminous paper work, a new system of presentment and clearing of the cheques has been evolved which is in tune with the latest developments, electronic and legal, in the field of information and technology.

In this new system of presentment and clearing of cheques, a conventional paper cheque on its presentment to the payee's banker, is converted in its electronic image by the

34 1992 (1) KLT 393; reference and reliance placed on *Khungar Services Ltd.* v *Sanjay Ghai* IV (1993) CCR 2776 (P&H); *Ishwari Devi* v *State of Punjab* (1997) 88 Comp Cas 544 (P&H).

35 *Canbank Financial Services Ltd.* v *Gitanjali Motors Ltd.* 1995 I AD (Delhi) 361: 1995 (32) DRJ 125: (1995) 83 Comp Cas 485 (Ker); *Mahesgwari Protein Ltd.* v *State* 1993 IV AD (Delhi) 912: 1994 (29) DRJ 379.

36 Also see *Ess Bewe Food Specialities* v *Kapoor Brothers* 1992 (Suppl) MWN Crl. 132 (P&H); *Hindustan Mills and Electricals Stores, Bhilai* v *Kedia Castle Delan Industries Ltd.* 1999 (1) Crimes 391 (MP); *Prithviraj Kukkillaya* v *Mathew Koshy* 1991 CrlLJ 1771 (Ker): (199) 71 Comp Cas 131: 1991 (1) KLT 95 (DB).

37 Bankers' Clearing House at New Delhi (BCHND), Prodecural Guidelines for Grid-based Cheque Truncation System (CTS), Version 1.0, Feb., 2014; and New Delhi Bankers' Clearing House Procedural Guideline for Cheque Truncation System (CTS) (Version 2.0), Manual of Systems and Procedures.

process of scanning or otherwise and it is this electronic image of the cheque that is further sent to the clearing house which later and ultimately is sent to the drawee banker. When the payee's banker converts the physical conventional paper cheque into an electronic image on computer and further sends the same outwards, the paper cheque is retained by the presenting banker itself as a custodian of the drawee banker.

Regarding the meaning of 'truncation of cheques', suffice it would be to say that it means putting a mark on the cheque or tearing it off. How the cheque in question will be truncated, has been left purely on the wisdom and choice of the presenting banker who retains the cheque so presented as a custodian of the drawee bank.

Practically, when such electronic image is sent to the drawee bank for clearing or dishonoring, as the case may be, through internet, that electronic image factually practically is not sent to the place where the drawee bank branch situate. What actually happens in such cases is that each of the bank has its own clearing houses situated in each of the States or Union Territories, as the case may be, and such cheque when is called upon to be presented to the drawee bank, the same is electronically presented to the clearing house of the drawee bank as situated in the State or Union Territory where the presenting banker situate. Thus, at no point of time, the cheque, be it in its physical form or it may be in its electronic form, now-a-days touches the 'drawee bank' for all practical purposes.

The above view shall further be ventilated also by bringing to the attention of our readers that the endorsements invariably made on the 'cheque leaves' is also to the effect "payable at par". Thus for the last few years, the cheque leaves issued by the drawee bankers to their clients contain an endorsement that the cheques can be presented anywhere in India, or may be abroad, with any other branch also of the same banker and the same shall be cleared at par as if the same was presented to the drawee branch only. This system has been evolved only because of the use of internet facilities in the banking system in India. Thus, with the advancement of presenting and clearing of banking cheques in India in tune with the developments made in the field of information and technology, the banking law has been made computer and internet friendly.[38]

Post Dashrath Pronouncements.

As said earlier, the law on territorial jurisdiction under section 138 of the Negotiable Instruments Act, 1881 was covered by the two judges' decision in *K. Bhaskaran* v *Sankarana Vaidhyan Balan,*[39] by virtue whereof it was held that jurisdiction for launching of criminal prosecution under the said provision can be made out at any of the five places as

38 *Supra* note 37.

39 *Supra* note 3.

enumerated in the said judgment. However, with the pronouncement of yet another recent three judges' bench decision of the Apex Court in *Dashrath Rupsingh Rathod* v *State of Maharashtra*[40] the jurisdiction has now been restricted to only one place, that is, where the drawee banker's relevant branch situate.

In the above background, three judgments of different High Courts, two prior to *Dashrath*[41] and one post *Dashrath*[42] would be very profitable to refer and we shall be dealing with each one of them in chronological order with respect to their date of pronouncement.

First of such decisions is one pronounced by the Gujrat High Court in re: *Surenderpal Singh Chawla* v *State of Gujarat*[43] the undisputed facts of the case as relevant to the point in issue fell within a very narrow compass. The presenting banker as well as the drawee banker were two branches of the same bank, that is, ICICI. The presenting branch of the ICICI bank situated in Gujarat, whereas the drawee branch of the same bank situated in Kanpur. The bank office of the Gujarat branch came and deposed before the court that 'there is an on-line system in the bank whereby the branch where the cheque has been deposited, that is Gujarat, need not contact the issuing branch of the cheque, which in the case was Kanpur. The cheque was therefore returned dishonoured for the reason of insufficiency of funds in the account of the drawer by the presenting branch of the same bank. The drawer took the objection that the cheque was not ever presented to the drawee branch and there was no question of its dishonour by the drawee branch to invoke the provisions of section 138 of the Negotiable Instruments Act, 1881. While negating the contention of the drawer of the cheque and accepting the arguments as advanced on behalf of the payee, the court held that in this system of 'core banking' or on-line banking', or by whatever name it may be called, non-presentment of the cheque to the drawee branch would not be relevant for dishonour for invoking the provisions of Section 138 of the Act. In nutshell, in this system of presentment and clearing of cheques based on internet, the contention was accepted that for all practical purposes, neither the cheque in its paper form nor its electronic image is sent to the drawee branch; and notwithstanding the same fact, the jurisdiction and cause of action would be well made out at the place where the presenting banker situate.

The second in the series is the decision of the Bombay High Court in *Jambu Kumar Jain* v *Tata Capital Ltd.*[44] the jurisdiction at the place where the presenting banker situate was negated by the court under the banking system based on Internet. The point to be noted is that at that time when this judgment was pronounced, *Bhaskaran*[45] was holding the field and therefore, in any case the decision in the said case cannot be said to be a good decision.

40 *Supra* note 1.

41 *Ibid.*

42 *Ibid.*

43 2010 (1) Crimes 397 (Guj.)

44 2012 (1) Crimes 390 (Bom.)

45 *Supra* note 3.

Be that as it may, the point in issue for which we have preferred to refer this judgment is that the concept of core banking system was recognized for the first time by the court in this judgment, whatever may have been the result. Reliance was placed on three judges' bench decision of the Apex Court in *Shri Ishar Alloy Steels Ltd.* v *Jayaswals Neco Ltd.*[46] wherein the law was made clear that for reckoning the period of its validity of 6 months, as it then was, which now is 3 months,[47] what is to be seen is not the date on which the cheque was presented to the collecting bank, but the relevant date for the purpose would be only the date on which it reaches the drawee bank. Thus, emphasis was given to dishonour of the cheque by the drawee bank, as against the presentment and return by the presenting bank. The facts of the case in *Jambu*[48] were that the presenting banker and the drawee banker were different and their respective branches also situated at different places. The branch of the presenting bank situated at Bombay, whereas the branch of the drawee bank situated at Indore. Further facts of the case were that the cheque in question was presented at Bombay branch of the presenting banker who then in turn presented the same to the Cheque Processing Centre of the Drawee bank at Bombay itself and was returned dishonored. The court assumed that the said cheque thereafter must have been forwarded to the drawee bank at Indore, which presumption, in view of the present authors, was not based on any facts on record. And ultimately the jurisdiction at Bombay was ousted. In the said judgment in *Jambu*[49], reliance was further placed on *Harman Electronics P Ltd* v *National Panasonic India Ltd.*[50] to say that mere sending of notice also will not confer jurisdiction to Bombay Courts. We regret our inability to accept the reasoning of the Bombay High Court in *Jambu*[51] for the obvious reason that the spirit, tone and tenor of the judgement in *Harman Electronics* was that by issuing a notice from a third place, one cannot be allowed to say to have conferred the jurisdiction to a court which otherwise it did not have. In other words, the court held against malicious or artificial creation of jurisdiction by sending of notices from third place where neither any transaction took place nor any of the parties lived or carried on business nor where any of the bankers situate. Merely on the pretext of sending of the matter to complainant's head-office and sending of notice from such place was negated to confer jurisdiction.

The Third judgment in the series is again of the Bombay High Court in *Ramanbhai Mathurbhai Patel* v *State of Maharashtra*[52] after pronouncement of *Dashrath*[53]. The Bombay High Court took a very logical stand read the very judgement in *Dashrath* and placed

46 *Supra* note 10.

47 Letters and Circulars of the Reserve Bank of India.

48 *Supra* note 44.

49 *Ibid.*

50 *Supra* note 11.

51 *Supra* note 44.

52 2014 SCC OnLine Bom 4625.

53 *Supra* note 1.

relieance on para 17 of the said judgement in *Dashrath* to the following effect:

> "17. ….In our discernment, it is also now manifest that traders and businessmen have become reckless and incautious in extending credit where they would heretofore have been extremely hesitant, solely because of the availability of redress by way of criminal proceedings. It is always open to the creditor to insist that the cheque in question be made payable at a place of the creditor's convenience [emphasis].[54]

The Bombay High Court after quoting the above para from *Dashrath* held that:

> It is thus clear that in the present case by issuing cheques payable at all branches, the drawer of the cheques had given an option to the banker of the payee to get the cheques cleared from the nearest available branch of bank of the drawer. It, therefore, follows that the cheques have been dishonoured within the territorial jurisdiction of the Court of Metropolitan Magistrate at Kurla. In view of the judgment of Hon'ble Supreme Court in the matter of *Dashrath* v *State of Maharashtra*[55], the learned Magistrate of Kurla Court has jurisdiction to entertain and decide the compliant in question.

Of the two judgments of Bombay High Court, one pronounced prior to *Dashrath* in *Re: Jambu*[56] and the one pronounced after *Dashrath* in *Re: Ramanbhai*[57], the present authors subscribe the view taken by the latter, both in letters of law and even more in spirit.

(X). Statutory amendment of 2015

For the reason of resentment amongst the litigants and lawyers and so also amongst all the business community and common man due to the pronouncement in *Re: Dashrath*, the legislature came in for rescue to the common man with the engrafting and putting on statute book two successive Negotiable Instruments (Amendment) Ordinances in the year 2015 that ultimately culminated into passing of Negotiable Instruments (Amendment) Act, 2015. The core premise of the said statutory amendment was to make one place alone for determination of jurisdiction of "all the pending cases" and all those cases that were to be filed in future, that is, the place where the payee maintains his account from where the cheque in question was presented before getting the same dishonoured. In the first blush, it seems that the said amendment is made to the favour of the complainant payee, which on a deper probe would reveal that all the discretion and choice that was made available

54 *Supra* note 52.
55 *Supra* note 1.
56 *Supra* note 44
57 *Supra* note 52.

to the complainant payee in terms of *Bhaskaran case* has now been withdrawn by the legislature. It is not understandable as to how the complainant can be debarred from lodging his complaint at the place of the drawer accused if the same is suitable to the complainant as the same would not be prejudicial to the interests of the accused in any manner whatsoever.

Take, for example, a case where the payee opens his salary account in Gaziabad, UP as the payee is doing a job there, whereas both the parties reside in Chandni Chawk, Delhi. Will it not be futile, and rather absurd, to transfer such case to Gaziabad courts for trial, even if such case is pending for final arguments. One of such bunch of cases were being fought from the side of the payee complainant by one of us, and we failed to understand as to how to argue the matter. In such situation, the transfer of such matters from Chandni Chawk to Gaziabad in the wake of legislative amendment was argued against by the transferee court on behalf of the payee complainant and such arguments were even not opposed from the side of the accused and still the matter was transferred to the Gaziabad Courts. This does not appeal to reason by any stretch of imagination.

Thus, making the said statutory amendment applicable to "all the pending cases" would be unnecessary, even if it had some worth in it, as the corrective legislative measures should have been restricted to only those cases that were moved or removed by *Dashrath* and not beyond.

(XI). Conclusion

After careful perusal of law and precedent in the light of recent decision of three Judges' Bench of the Apex Court in *Dashrath Rupsingh Rathod* we are of considered opinion that the said dictum does not lay down good law.

The reasons are, as we have discussed above, that the very concept of "Core Banking" as is now taking the field, the theory propounded by the Apex Court does not seem to hold the ground any longer and this view has been taken by Bombay High Court in *Ramanbhai*[58].

Even otherwise, section 138 etc themselves are couched in such words that it becomes very clear that the cause of action will arise only on non-payment of the amount by the drawer to the payee of the cheque on the expiry of notice period and when this position is read in juxtaposition with the maxim that 'debtor is to find place of the creditor and not *vise-a-versa'*, it becomes manifest that jurisdiction shall be made out at the place of presenting banker. Sections 177 to 179 also does not help the cause of the drawer and rather work against him, as we have already discussed above.

The correct approach, in the opinion of the present authors, would have been to

58 *Supra* note 52.

disintegrate grain from sheaf and to identify those cases which were abusing the process of law. Changing the law with wider ramifications may neither be in good taste as it shakes the confidence of the public and at the same time such practice may not be good in the interest of the economy either.

This cannot be a reason to throw-out the cases for the sole reason that 40-50 lakhs cases have accumulated and the Magistracy is inundated with pending cases. No pains have been taken to conduct any empirical research to identify the real cause of such huge pendency. With due apology, now-a-days, judicial services are taken-up by new-comers as a fashion, and only for the obvious reasons which better we refrain ourselves to comment any further, without there being any aptitude to serve the cause of the people and without at all there being any academic interest. Some Magistrates work excellently and analysis of their court records would reveal that they do not let accumulate their work and yet impart full justice; and there would be equally those courts who work to the contrary!

To conclude, one sentence proposition would be sufficient to say that "one cannot artificially be allowed to create territorial jurisdiction by merely sending of notice or by merely presenting the cheque, if such court otherwise did not have any such jurisdiction". Thus, if a person from Chennai comes to Old Delhi to purchase bales of cotton and issues cheque of Chennai bank at the Delhi counter of the seller, by any stretch of imagination, the seller at Delhi cannot be asked by courts to go to Chennai and it is this that is the thesis of this write-up.

Lastly, when the judgment itself gave a cut-off for retrospective operation of the same to pending cases by prescribing 'as to whether accused has been served or not' as a terminus, only one stage would be left preceding the said cut-off. Thus, retrospective operation seems to be illogical and unreasonable and also not in consonance with Article 14 of the Constitution. When we disagree with the retrospective operation of the judgment, it does not mean that we agree with basic findings in the judgment with respect to ousting of jurisdiction from the payees' view point. [Emphasis].

Now in their ultimate bid, the legislature has undone the draconian effects of *Dashrath* with promulgation of the two amendments ordinances and an Act of 2015 *op.cit.* whereby the place of presenting banker alone shall be conclusive to confer jurisdiction under section 138 of NI Act. However the turmoil created by *Dashrath* has not been restored as the loss occasioned thereby is irreversible and some experts claim, as illustrated above, that the said statutory amendment has crafted far bigger evil than the one it sought to remedy!