DECRIMINALISING SECTION 138 OF NEGOTIABLE INSTRUMENTS ACT, 1881: A RIGHT MANOEUVRE TO BOOST THE ECONOMY?

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ABSTRACT

The COVID-19 pandemic has not only affected the health but also affected the economy worldwide. The entire country including India has been facing many challenges. To control this pandemic, the lockdown, which is imposed by the government, had various adverse effects on the entire economy. After imposing the lockdown, the government has been constantly implementing different policy and program to rebuild the economic system. These policies and program also includes proposal of amendments in various acts and laws. One such proposed amendment is the decriminalisation of Section 138 of the Negotiable Instrument Act, 1881. The Section deals with dishonour of cheques and creates a civil and criminal liability on the issuer. The purpose of this amendment is to motivate and encourage business and trade, and also to help resuscitate the economy and to ensure easy and smooth functioning of the justice system.

KEYWORDS: Section 138, Negotiable Instrument, Cheque, Dishonour of Cheque

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INTRODUCTION

In *Rangachari v. Bharat Sanchar Nigam Ltd.*,¹ the Supreme Court opined that the law merchants treats negotiable instruments as instruments that oils the wheels of commerce and facilitates fast as well as rapid agreements along with businesses. Negotiable Instruments can be defined as, any written securities that can be moved by indorsement and delivery or by delivery merely, so as to vest in the indorsee the legal title and thus allow him to sue thereon in his own name.²

The Act deals with different kinds of negotiable instruments such as promissory note, bills of exchange, cheque. Cheque is the most widely used instrument in lieu with business transactions and trade purposes. The Act describes cheque as a bill of exchange drawn on a particular banker and not expressed to be payable otherwise than on demand and it comprises the e-image of a truncated cheque and cheque in electronic form.³ As per the provisions of the act, cheque can be differentiated as electronic and truncated. The cheque may get dishonoured if the bank denies the payment of the mentioned amount due to reasons like insufficient funds, absence of proper date, etc. Thus, Section 138 of the Act comes into picture where payment insured by issuing a cheque is not honoured.⁴

MEANING AND TYPES OF CHEQUES

Black's Law Dictionary defines cheque as a draft upon a bank and payable on demand authorized by the maker or

¹ 2007 (3) SCC 626.

² Black's Law Dictionary, 4th edition 1968.

³ Section 6, The Negotiable Instruments Act, 1881.

⁴ Ashwani Sarpal, *Dishonour of Cheque Criminal Law in Action*, Chawla Publications (2008) 10.

drawer, comprising an unconditional assurance to pay a sum determined in money to the order of the payee.⁵ A cheque is one of the frequently used medium of payment. Cheque may be a common mode of payment for giant sum of such, it's a command directed to the banker to issue the amount mentioned on cheque to a selected individual. A cheque is issued with an intention that it will be paid at an early date.⁶ The transaction by cheque involves three people i.e. drawer, drawee and payee. Drawer was the one who provides the cheque to the bank to pay the specified amount of money by duly signing the cheque. Drawee is the bank to which the command to pay money is given and payee is the person who withdraws or receives the money from the bank through the cheque. A cheque may be classified as bearer cheque, order cheque, uncrossed cheque or open cheque, crossed cheque, anti-dated cheque, post-dated cheque, stale cheque, etc.

DISHONOUR OF CHEQUE

Section 92 states that, 'Dishonour by non-payment – A promissory note, bill of exchange or cheque was stated to be dishonoured by non-payment if the creator of the note, acceptor of the bill or drawee of the cheque creates default in payment upon being duly needed to pay the alike.'⁷ A cheque is dishonoured in case the bank rejects to pay the money to the payee due to insufficiency of funds and such other grounds and thus dishonour occurs and the holder obtains at once the right of recourse contra to drawer as well as the other parties on the cheque.⁸ It leads to loss and inconvenience to the payee which may also result into financial instability. The dishonour of cheque has been recognised as an offence under the Act by the amendment in Banking, Public Finance Institution and Negotiable Instrument laws (amendment) Act, 1988. When a cheque is dishonoured, an authorized intimation was given to the drawer within 30 days of receipt along with the reasons of such dishonour. It was opined by the bench that within 30 days of receiving the information about return of cheque, a statutory notice has to be issued by drawee; a complaint will be deemed to be dismissed if a legal notice for demand of payment is not issued.⁹ A criminal complaint is to be filed in case if the drawer refuses to pay the sum within 15 days of receiving the notice.

CONSEQUENCES AND LIABILITY ON CHEQUE DISHONOUR

The sanctity and credibility of cheque has been degraded grossly in past decades. One of the legislative intent in enabling the provision is to re-establish the reliability of cheques as a principled alternative for cash transaction.¹⁰ There exist a huge number of cases of fraud relating to cheque, which leads to dishonour of cheque. The dishonour of cheque may be either rightful or wrongful dishonour.¹¹ Largely, in cases where there are justified grounds of cheque dishonour, no liability is attracted but when there is negligence or malafide intention behind dishonour of cheque, a liability is attracted by the banker. In event of dishonouring of cheque if the payee believes that cheque will be honoured and has wrongfully been dishonoured can resubmit it for the same. In case the cheque cannot be honoured and gets dishonoured it creates a liability, which may be civil or criminal in nature. Civil liability imposes fine of twice the amount of cheque and criminal liability imposes an imprisonment extending to a term of 2 years or fine or both. Initially the punishment granted was 1 year, which

⁵ 5th edition 1973.

⁶ S.N. Gupta, *Dishonour of Cheque, Liability Civil and Criminal*, Universal Law Publication (2002) 15.

⁷ The Negotiable Instruments Act, 1881.

⁸ *Ibid* 4, 33.

⁹ Kamlesh Kumar v. State of Bihar, 2014 (2) SCC 424.

¹⁰ Sen Gupta, *Negotiable Instruments Act 1881*, Kamal Law House (1998) 615.

¹¹ Dr S.R. Myneni, *Law of Banking*, Asia Law House, edition 3 (2014), 354.

was amended in the year 2002. The offence under dishonour of cheque is bailable, compoundable and non-cognizable.¹²

SECTION 138 OF NEGOTIABLE INSTRUMENTS ACT

Chapter XVII of Negotiable Instruments Act from Section 138 to 142 incorporates provisions relating to dishonour. The object of these provisions is to promote the use of cheques and also to promote business transactions with either no cash or minimum cash. Section 138 of the Act makes a crime as well as the rules associated with the penal provisions was to be elucidated firmly so that no one can creatively and gradually or guilefully or planning be conducted.¹³

Section 138 provides for imprisonment up to 2 years or fine of twice the sum of cheque or with both in case of dishonour of cheque, i.e. when the cheque was reciprocated unpaid by the bank because of any grounds reasonable for the dishonour of cheque.

For the application of this Section, succeeding requirements are to be complied-

- (a) Within 6 months from date of drawing the cheque or within the validity duration of cheque it has to be presented to bank.
- (b) A request regarding payment of amount mentioned on cheque has to be made through a written notification by the payee from the drawer within duration of 30 days or receiving the information regarding return of unpaid cheque by bank.
- (c) Even after receiving the notice the drawer abandons to pay the money within 15 days of receiving the notice of payment by payee.¹⁴

According to Supreme Court in *Kusum Ingots and Alloys Ltd. v. Pennar Peterson Securities Ltd.*¹⁵ the prerequisites of Section 138 of Negotiable Instruments Act were:

- (i) There must be a legally applicable debt or liability on the drawer.
- (ii) Cheque is returned by the bank due to either insufficient funds or exceeded amount than the agreed amount.
- (iii) It is presented within 3 months or within the validity of cheque whichever was prompt.
- (iv) Within 30 days, the bank was to dispatch the notification to drawer along with the reasons for the dishonour of cheque.
- (v) Even after the notice is served, the drawer does not pay the money within 15 days.

OBJECT AND SCOPE OF SECTION 138

Section 138 of the Act intends to bring about efficiency in banking function also to make sure reliability in transacting operations via cheque.¹⁶ It also aims to create strict liability with respect to cheque. The Section does not intend to protect unscrupulous drawers who do not intend to honour the cheque.¹⁷ In a case, Supreme Court opined that the main purpose in incorporating the provision is merely to recover the money and criminal liability is to ensure the same in case of default.¹⁸ However, when the cheque gets dishonoured under the section, a 'Cheque Return Memo' is issued by the bank stating the

¹² Section 138, The Negotiable Instruments Act, 1881.

¹³ *Shri Ishar Alloy Steels Ltd. v. Jayaswals NECO Ltd.*, AIR 2001 SC 1161.

¹⁴ *Supra* Note 12.

¹⁵ (2002) 2 SCC 745.

¹⁶ *Modi Cement Ltd. v. Kuchil Kumar Nandi*, (1998) 3 SCC 249.

¹⁷ *M/s Dalmia Cement (Bharat) Ltd. v. M/s Galaxy Traders and Agencies Ltd.*, AIR 2001 SC 676.

¹⁸ *Damodar S. Prabhu v. Sayed Babalal H.*, AIR 2010 SC 1907.

reasons about why the cheque has been dishonoured. The provision creates a statutory offence on ground of insufficiency of funds.

DECRIMINALISATION OF SECTION 138

Decriminalisation can be termed as to stop something from being illegal, that is maintaining its legality or removing illegality of some act by changing the law. When the Negotiable Instruments Act emerged in 1881, the act created a civil liability in form of civil suit in cases of dishonour of cheque which was amend in 1988 and the dishonour of cheque was criminalised by inserting Chapter XVII to the act. The main intention to criminalise is to give rise to penal remedy and adequate compensation. The criminal liability created under section also keeps a check on malafide acts of issuing bounced cheques and also ensures repayment of the amount on bounced cheque by creating a sense of fear on the wrongdoers.

CAUSES AND PROPOSAL OF DECRIMINALISATION

Decriminalisation of Section 138 would mean setting the issuer of bounced cheque free from any kind of criminal liability irrespective of the innocent or malafide intent possessed by him. Removing the criminal liability would increase the chances of no recovery or non-payment of dues thereby creating a threat to public security and justice system. It would also defeat the entire purpose of Section 138, which is to bring the offenders in shoes of civil and criminal liability and to reduce the false issue of cheque. The Supreme Court noticed that, 'the legislative intent behind Section 138 along with Section 139 are to prevent abuse of banking system.'¹⁹ In *Meters and Instrument Pvt. Ltd. v. Kanchan Mehta*²⁰, the court also opined that the object of the provisions is primary compensatory, with punitive element being only secondary, also thus observed that this would only result in increase of litigation procedure. And thus, favoured in decriminalising of dishonour of cheque of small amounts.²¹ The righteousness as well as reliability of cheques in business deal has been dissolved to a huge range and unquestionably, the dishonour of a cheque by the bank leads in computable deprivation, harm as well as trouble to the payee and the whole reliability of the business deals within and outside the nation suffers a serious setback.²² It was observed by Supreme Court that due to the lengthy proceedings the legislative motive to make sure belief in efficiency of banking functions also reliability in performing dealing on cheques, to give a powerful unlawful solution in order to prevent the high occurrence of dishonour of cheques also guarantee compensation to the complainant was thereby trounced.²³

Apart from the view of Supreme Court, after looking at the conditions due to the pandemic of COVID-19 and thus in the situation of lockdown, in order to revive the economy back and to overcome the loss to the economic situation, the government proposed to decriminalise various minor provisions including Section 138 of Negotiable Instruments Act, 1881. The purpose to decriminalise certain provision was to encourage business and investment to bring economy on track. The government's proposal to reclassify unlawful acts to compoundable crimes may include: (i) to reduce the load on businesses and stimulate belief amongst investors, (ii) to prioritize on economic development, public interest and national protection must stay predominant, (iii) *Mens rea* (malafide/criminal intent) takes a major part in application of illegal responsibility, hence, it was crucial to assess nature of non-compliance to negligence or inadvertent commission and

¹⁹ *Rajesh Laxmichand Udeshi v. Pravin Hiralal Shah*, Appeal (L) No.202 of 2012.

²⁰ (2018) 1 SCC 560.

²¹ *Kaushalya Devi Massand v. Roopkishore Khore*, (2011) 4 SCC 593.

²² *Goa Plast (P) Ltd. v. Chico Ursula D'Souza*, (2004) 2 SCC 235.

²³ *Makwana Mangaldas Tulsidas v. State of Gujarat*, SLP (criminal) No. 5464 of 2016.

(iv) the habitual nature of non-compliance.²⁴ Also the other reason may include that around 38 lakh cheque bounce cases are pending in the country,²⁵ which further increases the burden on the judicial system and is thus not a feasible situation in this current scenario. And to eliminate this, the government may decriminalise this provision to knob over the situation at hand.

SUGGESTIONS

The author believes that decriminalising Section 138 will not combat the problem of cheque bounce and issue of bounced cheques with malafide intention. The provision in its nature is a regulatory provision to ensure public interest and the trustworthiness of these instruments of credit.²⁶ The immediate influence of the illegal act was normally limited to the private parties engaged in business dealings but in the broader perspective, the impact is stretched out to the entire mercantile society at large.²⁷ Decriminalising the provision will surely lessen the long process and thus reduce the burden of the court. However, rather than decriminalising Section 138 and setting the criminal liability completely aside, the government can opt for making strict guidelines for the banks regarding issue and acceptance of cheque. Due to which the cases where malafide intention exists would not be just left free however, would certainly have some liability for their action. In addition, the penalty in regards to dishonour can be increased to higher sum of money, which may reduce fraud. Also to reduce dishonouring of cheques, resorting to online mode of payment, which would leave no space to issues like bounced cheque, rather would make the banking system more efficient, fast and safe.

CONCLUSIONS

Negotiable Instruments Act, 1881 incorporates Section 138, which plays a vital role in fixing the civil or criminal liabilities of the offenders who issues cheque with a malafide intention. Every cloud has silver lining, similarly decriminalising the provision broaches both efficacious and inefficacious solution. The proposal of government to decriminalise Section 138 defeats the entire purpose of the provisions and would also withdraw the fear of payment, which exists in the minds of the wrongdoers due to the existing criminal liability and will also encourage non-payment of dues. However, decriminalising the provision up to some extent of value of the cheque, rather than decriminalising the entire provision can be considered an apt solution in this current scenario. The proposal of decriminalising the provision though has been brought forward to sustain the circumstances in the pandemic of COVID-19 outbreak and to encourage the business and trade; however, it will not be beneficial in a long-term process as it tails off the fear of criminal proceedings from the minds of wrongdoers. Also would not satisfy the main objective of government as it may not be beneficial to the economy as whole-

'SabkaSath, Sabka Vishwas and Sabka Vikas'

REFERENCES

1. Ashwani Sarpal, *Dishonour of Cheque Criminal Law in Action*, Chawla Publications (2008).
2. S.N. Gupta, *Dishonour of Cheque, Liability Civil and Criminal*, Universal Law Publication (2002).

²⁴ Ministry of Finance, Government of India, *Decriminalisation of Minor Offences for Improving Business Sentiment and Unclogging Court Processes* (8th June 2020).

²⁵ 213th Law Commission Report, November 2008.

²⁶ S. Krishnamurthi Aiyar, *Law Relating to the Negotiable Instruments Act*, Universal Law Publishing (2012) 12.

²⁷ Supra Note 4, 6.

3. KUNDU, SUKANYA, and NAGARAJA RAO. "FRAUD MANAGEMENT IN INDIAN BANKING INDUSTRY." *International Journal of Information Systems Management Research & Development (IJISMRD)* ISSN (P): 2250-236X; ISSN (E): 2319-4480 Vol. 6, Issue 2, Apr 2016, 17-30
4. Sen Gupta, *Negotiable Instruments Act 1881*, Kamal Law House (1998).
5. Chhabra, J. A. T. I. N. D. E. R., and B. R. A. J. E. S. H. Tripathi. "Value engineering: a vital tool for improving cost & productivity." *International Journal of Industrial Engineering and Technology (IJIET)* 4.6 (2014): 1-10.
6. Dr S.R. Myneni, *Law of Banking*, edition 3, Asia Law House (2014).
7. Ministry of Finance, Government of India, *Decriminalisation of Minor Offences for Improving Business Sentiment and Unclogging Court Processes* (8th June 2020).
8. MANI, MUKTA. "A STUDY ON GROWTH OF FINANCIAL MARKETS IN INDIA." *International Journal of Business and General Management (IJBGM)* 3. 3, July 2014, 59-66
9. 213th Law Commission Report, November 2008.
10. CHANDRAMATHI, MV. "Economic Foundations of International Trade in the Context of WTO." *International Journal of Economics, Commerce and Research (IJECR)* 6. 3, Jun 2016, 35-44
11. S. Krishnamurthi Aiyar, *Law Relating to the Negotiable Instruments Act*, Universal Law Publishing (2012) 12.