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SHOULD SECTION 138 OF NI ACT BE DECRIMINALISED?

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ABSTRACT

Section 138 of the Negotiable Instruments Act, 1881, criminalises the dishonour of cheques due to the insufficiency of funds, deviating from the civil character of the provision, due to an increase in the frauds and dishonesty in the issuance of cheques. This paper analyses the ingredients of Section 138 of the NI act and examines the particular grounds of cheque bounce that attracts a criminal penalty. It also explores a few more provisions of the NI Act in support of Section 138. Further, this paper undertakes a comparative analysis between India's approach to such cases and US, UK and the United Arab Emirates, wherein these countries have adopted the civil liability rather than the criminal approach. It also assesses various amendments to the act and judicial precedents that state that the courts have a lot of case backlog that can be attributed to Section 138 of the NI Act. The paper ultimately concludes that it might be worth considering decriminalising Section 138, consistent with global framework, and increase the ease of doing business without comprising the credibility of the financial instrument.

INTRODUCTION

A cheque is a written instrument which the drawer instructs their bank to pay another person (payee) a specific sum of money on the demand of the payee. This is defined under Section 6 of the Negotiable Instruments Act, 1881 (hereinafter referred to as NI Act) as a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand. A cheque is categorised as a kind of 'Negotiable Instrument' under the NI act. Excluding the cheque, promissory notes and bills of exchange are a part of Negotiable Instruments under Section 13 of the Act.

The NI Act was enacted in 1881, during the British period which governs the use of financial instruments like bills of exchange, promissory notes and cheques. These instruments are used to ensure the ease of business and facilitates trade and commercial activities. Since the colonial era, the act has undergone many amendments to ensure the regulation of the transferability of these instruments. This act lays down what instruments constitute as a valid negotiable instrument, where liability is placed on the usage of such instruments, and the remedy available for the dishonour of cheque.

After the act was enacted, more than a century later, Section 138 of the Negotiable Instruments Act was introduced in 1988 as criminal offence for the dishonour of cheques. Before the introduction of Section 138, the dishonoured cheque was only treated as a civil liability and did not involve any criminal penalty. However, with the increase in cheques being issued carelessly and dishonestly, there was a need to impose stricter action to create a deterrent. Section 138 penalised the dishonour of cheque for insufficiency of funds in the account with a punishment of imprisonment of up to 2 years, a fine, or both.

EXISTING LAW IN INDIA

A cheque can be dishonoured by a bank for multiple reasons, but only a few qualify to attract criminal liability under Section 138 of the Negotiable Instruments Act. The most common reason for a cheque to be dishonoured is the insufficiency of funds, wherein the bank balance amount is lesser than the amount that the cheque is issued for. Apart from this, a cheque bounce can take place due to a difference in the signature of the drawer, the account being closed, the cheques being marked as ‘stopped by drawer’, cheques being presented before the due date or a cheque presented after the three-month validity period.

Not at the above grounds fulfil the ingredients of Section 138. Section 138 applies when a cheque is bounced for the insufficiency of funds. It also applies to an account that has since been closed but does not defeat the purpose of why the cheque dishonour took place, that is the insufficient funds. The ‘stop payment’ option taken by drawers cannot be used as defence against the criminal penalty as a way to escape liability under Section 138 because it would defeat the entire purpose of the Section.

The ingredients of Section 138 are only satisfied when a cheque is drawn on an account that is maintained by the drawer and must fulfil the definition of a cheque as per Section 6 of the NI Act. The cheque should be issued to discharge a lawful liability or debt. It can be issued in the form of a gift or a security or an illegal debt. Section 139 presumes that once the drawer has signed the cheque, it has been issued for a legally enforceable debt and not any illegal means and hence it falls on the drawer to refute this presumption.

The cheques should be returned by the bank, unpaid, for the insufficiency of funds and it must be presented within its period of validity or three months, whichever is earlier. When the cheque has been bounced, the payee must issue a written notice to the drawer demanding payment within thirty days of receiving information regarding the dishonour. If the drawer fails to pay the payee within 15 days after the written notice has been issued, he/she will attract criminal penalty under Section 138 of the Negotiable Instruments Act.

COMPARISON WITH OTHER JURISDICTIONS

India's method of treating the dishonour of cheque as a criminal offence is a comparatively unique and unusual tactic, and comparing with how other countries treat this similar problem brings into question whether criminalisation is truly required.

In the United Kingdom and the United States of America, the cheque bounce cases are treated as a civil matter that is recoverable through civil proceedings. The cases that do attract criminal penalty involving cheques are those wherein there is an intent to defraud another person. These countries make a distinction between the ordinary cheque dishonoured cases that only attract a civil liability and the cases wherein there is a deliberate deception which attracts criminal liability. Such cases are prosecuted under the provisions for general fraud and do not have a cheque-specific provision.

The United Arab Emirates followed a similar regime to India until a few years ago by penalising cheque bounce cases with more stricter and severe consequences. However, with the increase in the number of pending cases, the impact on the ease of doing business and the unbalanced consequences of commercial failures in good faith, they amended the Commercial Transactions Law to decriminalise the dishonour of cheque. When a cheque is dishonoured in ordinary circumstances, it would only attract civil liability. Nevertheless, in the situation that a cheque is issued in an attempt to defraud or in bad faith, the law still retained the criminal penalty. The change from criminalising to decriminalising was to align the country's law governing financial instruments to their objective of the 'ease of doing business'. After the decriminalisation of the cheque dishonour, there was no reduction in the number of cheque payments, that the commercial confidence in cheque did not diminish.

Other countries around the world have not separately legislated for a cheque-specific provision and just treat is as a civil matter rather than an offence. India's approach to cheque bounce as an offence is an exception and not a global norm. The other jurisdictions have not reported a fall in this instrument and have provided for a civil remedy and punishes fraud separately.

AMENDMENTS AND JUDICIAL TRENDS

The Negotiable Instruments Act has not remained unchanged since its enactment in 1881 and has undergone several amendments. The parliament has changed the surrounding framework to Section 138 and the judiciary has, in several cases, questioned whether the criminal aspect of the Section is required.

The Amendment Act in 2002 that introduced Sections 143 to 147 facilitated for the summary trial procedure and the compounding of offences. Additionally, in 2018, Sections 143A and Section 148 was added. Section 143A gave the power to courts to direct the drawer to pay interim compensation to the payee not exceeding twenty percent of the cheque's amount. Furthermore, Section 148 deals with the power of the appellate court to order payment pending appeal against conviction. This Section requires the court to direct the drawer to a deposit a sum before suspending a sentence that is pending appeal. These provisions illustrate that the idea behind them is not to incarcerate but promote speedy monetary recovery. This can further be extrapolated to suggest that Section 138 can be redesigned to focus more on monetary recovery rather than just a criminal deterrent.

In Kaushalya Devi Massand v Roopkishore Khore, the Supreme Court was of the view that a complaint under Section 138 although having criminal aspects, is still a civil matter and cannot be equated to the same gravity as an offence under the Bharatiya Nyaya Sanhita, 2023. The court was of similar opinion in M/s Meters and Instruments Private Limited v Kanchan Mehta, where they observed that in certain cases, the payment of compensation would be adequate without the need for a full-fledged trial. In the 213rd Law Commission Report, in 2008, it was reported that there was a total pendency of 1.8 crore cases, out of which twenty percent was relating to Section 138 of the NI Act. This view was further affirmed in Makwana Mangaldas Tulsidas v State of Gujarat, the court was faced with a dispute dealing with cheques worth Rs.1,70,000 and it took more than 15 years resolve and observed that cheques, at least worth smaller amounts, should be considered to be decriminalised.

In June 2020, the finance minister Nirmala Seetharaman, proposed the decriminalising of multiple minor offences across 19 different laws which included Section 138 of the Negotiable

Instruments Act, 1881. The proposal gained a lot of resistance and has since not resulted in any amendments.

CONCLUSION

Section 138 should be decriminalised because the approach to treating cheque bounce cases as a criminal matter, has weakened rather than strengthened over time. Decriminalisation is however, not to be equated to under regulation. A civil, instead of a criminal remedy should be considered to be adopted. The purpose of Section 138 was to increase the credibility of the instrument and as the legislations of other jurisdictions illustrate, decriminalising this matter has not resulted in the collapse in the trust and the usage of the instrument. The courts have further opined, while enforcing this Section, that is issue is an underlying civil rather than a criminal matter. The data reporting the large number of pending cases show that the criminal remedy is leading to the clogging of courts rather than a speedy trial as the Act set out to ensure. Furthermore, the government has also recognised the need for a reform which further points to the same conclusion of whether Section 138 in its current form acts as an appropriate deterrent.

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