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Ease of Doing Business: Doing Away with Sections 138-148 of the Negotiable Instruments Act, 1881

The Payment and Settlement System across the world during the 19th and 20th centuries was mainly by way of Cheques, Bills of Exchange, and Promissory Notes. Therefore, in India, the Negotiable Instruments Act, 1881, was enacted to regulate them; however, frequent cheque 'Dishonour' persisted, and in the absence

of any convenient alternative for transferring large sums for goods or services, cheques remained the preferred mode of payment. In view of the prohibition under the Income Tax Act, 1961, from paying in cash above a specified amount, the payment through cheques has also been a legal necessity in our country. However, the unscrupulous people or traders, with mala fide intentions, either used to dishonour the cheques issued by them by not keeping sufficient amount in their bank accounts or by stopping payment of the cheques or by altogether closing the accounts. There was no specific remedy under the Negotiable Instruments Act, 1881, for the victims except to file a complaint with the Police alleging cheating or to file a civil suit for recovery of the amount, which was time-consuming and expensive.

In view thereof, to bring certainty to the mercantile transactions and to instil confidence in the system of cheque payments, the Parliament of India had amended the Negotiable Instruments Act, 1881, by way of Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (66 of 1988) and inserted Chapter No. XVII and Sections 138-142, under which the act of dishonour of cheques had been made an offence punishable with imprisonment for a period of one year or with a fine which could extend to twice the amount of the cheque. The said amendment came into force from 1.4.1989. Since transactions through cheques were a common phenomenon, there was also a high incidence of dishonour of cheques. In view of the fact that the dishonour of a cheque has been criminalised, a large number of

criminal complaints came to be filed before the Courts, which completely overwhelmed the criminal justice system. The complaints remained pending for years due to the elaborate procedure involved in criminal trials. This has affected and choked the criminal justice system, and hence the disposal of other criminal cases. To expedite disposal of these complaints, the Act was once again amended in the year 2002 to bring in certain radical changes like making the offence triable summarily, fixing a time limit for completion of the trial, taking evidence by way of affidavits, etc. The offence has also been made compoundable while enhancing the punishment from one year imprisonment to two years imprisonment.

In the case of *Gimpex Private Limited vs. Manoj Goel* [MANU/

SC/0829/2021] (Criminal Appeal No.1068/2021), the Hon'ble Supreme Court observed as under:

"The object of bringing Section 138 into the statute was to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. It was to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficient arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers."

It is quite evident that the legislative intent was to provide a strong criminal remedy in order to deter the high incidence of dishonour of cheques. 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 provision to punish the offender has encouraged the institution of a large number of cases that are relatable to the offence contemplated by Section 138 of the Act. So much so, that at present a disproportionately large number of cases involving the dishonour of cheques is choking our criminal justice system, especially at the level of Magistrates' Courts. As per the 213th Report of the Law Commission of India, more than 38 lakh cheque bouncing cases were pending before various courts in the country as of October 2008. This is putting an unprecedented strain on our judicial system."

In a reply to the Parliament, the Government of India informed that there were 43.05 lakhs cheque bouncing cases pending before various courts as on 18.12.2024.

Acknowledging the deep-rooted problem, the Hon'ble Supreme Court took up the matter on its own in *Suo Moto WP (Crl) No. 2/2020*. In this case, the Supreme Court considered the delay in the disposal of cases under the Negotiable Instruments Act, which is creating a severe logjam in courts at all levels, especially the Trial Courts and the High Courts. The Hon'ble Supreme Court vide order dated 10.03.2021, *inter alia*, directed to constitute a 10-member Committee with the objective of submitting a report specifying the

steps that must be taken in order to facilitate an early disposal of cases under the Negotiable Instruments Act. The Committee submitted its Report to the Court, wherein it, *inter alia*, suggested the creation of Special Negotiable Instruments Courts. The Amicus Curiae in the matter suggested a pilot study, in 5 judicial districts in the 5 states with the highest pendency (namely, Maharashtra, Rajasthan, Gujarat, Delhi, and Uttar Pradesh) so that the viability of the scheme can be examined based on the results of the pilot study. Thereafter, vide its order dated 19.05.2022, the Hon'ble Supreme Court has directed that the pilot study shall be conducted in the manner indicated in the said order for a duration of 1 year from 01.09.2022 to 31.08.2023 in 25 Special Courts with one Special Court in each of the 5 judicial districts which have been identified as having the highest pendency of NI Act cases by each of the five High Courts mentioned above. The pilot study was suggested to test the scheme of employing retired judicial officers and retired Court staff to operationalise these Special Courts in the five states with the highest pendency of cases, namely, Maharashtra, Rajasthan, Gujarat, Delhi, and Uttar Pradesh. The Supreme Court had also issued guidelines as to the setup of the said special courts, appointment of Presiding Officers, and Staff. Since the said period of one year for which the Special Courts were constituted expired on 31-08-2023, the hearings in the said special courts were stalled. Further, the Delhi High Court, through its notification dated 01-09-2023, directed to transfer back of all the matters to their parent Court in the absence of any direction/clarification from the Supreme Court. The decision of the Supreme Court on the constitution or continuation of special Negotiable Instruments Courts is awaited. This is the scenario of the disposal of complaints filed for the dishonour of cheques before the Criminal Courts.

On the other hand, with the advent of technology, new payment systems

have come up, and their usage has spread rapidly. Now, persons can operate their accounts electronically, and a counterpart payment system through Electronic Clearing Service (ECS) has been introduced. Now, funds can be transferred through ECS, and as such, issuing or accepting cheques can be avoided. Similarly, Internet Banking facilitates a person to transfer huge amounts of money to the supplier of goods or services almost instantaneously. A person can transfer money through NEFT/RTGS, which is cost-effective and time-effective. Money can also be transferred through UPIs like Google Pay and PhonePe which is more efficient and faster and even a common man or a layman in our country has become well conversant in using these UPI systems for the transfer of money. UPI payments completed 15,547 crore transactions, amounting to Rs. 23.49 lakh crore, between January and November 2024. Earlier, there was no other alternative to a person who supplied goods or services other than to accept the cheques, as it cannot be expected of a person to carry a huge amount of physical cash. Further, payments above a specified limit were not being allowed as a business expenditure under the Income Tax Act, 1961, which further necessitated payment through cheques.

In the case of *P. Mohan Raj Vs. Shah Brothers Ispat Pvt. Ltd.*, Hon'ble Supreme Court described the proceedings of Section 138 as "Civil Sheep in a Criminal Wolf's clothing" while observing that the nature of the offence under Section 138 of the NI Act is quasi-criminal since it arises out of a civil wrong. Therefore, as the Supreme Court stated, dishonour of a cheque is originally a civil wrong, whereas by statute it has been made an offence.

As per the National Judicial Grid, presently there are 3.45 crore criminal cases pending at various stages in various courts, including the Supreme Court. Presently, since alternate payment systems have come up, there





is no need to accept payment through cheques, and if anyone accepts cheques will be doing so at their own risk and peril. There is no need to continue to encourage payment through cheques. Further, the Income Tax Act, 1961, has also been suitably amended to include payments made through electronic systems. The provisions of Section 138-147 have been made applicable to payments through ECS under Section 25 of the Payment and Settlements Systems Act, 2007, and are liable for punishment for dishonour of the mandate given for ECS payments. Other payment systems like Internet Banking, UPI etc., provide for instant payments, and RBI has issued guidelines regulating these payments. These payment systems are now well entrenched in our economy and have become an indispensable part of the payment systems. The credibility in these systems has now been well established, and there is no need to rely upon archaic payment systems like Cheques.

Victims of heinous crimes, especially women, are unable to get quick justice owing to the huge pendency of cases in criminal courts. Therefore, the criminal courts are required to devote their resources and time to rendering justice in serious cases rather than complaints like dishonour of cheques.

The Ministry of Finance, on 8th June 2020, issued a statement of reasons for 'Decriminalization of Minor Offences for Improving Business Sentiment and Unclogging Court Processes', including the offences

under Section 138 of the Negotiable Instruments Act, 1881. The statement underlines the fact that the risk of imprisonment for actions or omissions that aren't necessarily fraudulent or the outcome of mala fide intent is a big hurdle in attracting foreign investments. It further stated that the uncertainty in legal processes and the time taken for resolution in the courts hurts the ease of doing business. Criminal penalties, including imprisonment for minor offences, act as deterrents, and this is perceived by the Government as one of the major reasons impacting business sentiment and hindering investments, both from domestic and foreign investors. The notification aims to help revive the economic growth and improve the justice system. The central government had invited the comments of State Governments/ UT Administrations, Civil Society/ Non-Government Organizations, Academicians, Public and Private Sector Organizations, Multilateral Institutions, and members of the public to submit their suggestions to the Department of Finance Services, Ministry of Finance, by 23rd June 2020.

Some stakeholders had opposed the government's move or proposal to decriminalize the offence of dishonour of cheques. They have suggested that monetary limits can be fixed for cheque bounce cases to attract criminal prosecutions. The Government is yet to take any decision thereon.

Further, the volume of the transactions through cheques has been declining over recent years thanks to the growing popularity of electronic payment methods like online banking, mobile banking, digital wallets etc. Once widely prevalent method of payment through cheques have experienced a decline in usage in many countries due to the emergence of digital payment methods and other instruments such as Debit and Credit Cards. Several countries have either completely phased out or significantly reduced the usage of cheques. The monetary

authority of Singapore announced that all corporate cheques will be done away with by the end of 2025. This was announced following the reduction in cheque transaction volumes by almost 70% from 61 million in 2016 to less than 19 million in 2022. Similarly, transactions in cheques in Australia once accounted for 85% of the number of non-cash payments and witnessed a 90% decrease in cheque usage over the past decade and hence, Australia has decided to phase out cheques by 2030.

The developed countries like the UK, USA, France, Australia, Singapore, etc. have not criminalised the act of dishonour of cheques and still treat it as a civil wrong and damages are payable therefor. In fact, through UPI payment systems, our country is far advanced in payment systems than the above-referred developed countries.

Hence, it is time to decriminalise dishonour of cheques so that pendency of criminal cases in various courts across the country is drastically reduced, and hence the provisions related to dishonour of cheques in the Negotiable Instruments Act, 1881 should be repealed by the Parliament. This urgent reform is required to be made to reform the judiciary and to reduce the unnecessary burden of carrying the weight of cheque dishonour cases.

Presently, there is no threshold as to the amount to initiate criminal action for dishonour of cheques. At least, to start with, the Government should bring forth an amendment to fix a threshold of Rs. One crore and above to apply the provisions of Section 138 of the Negotiable Instruments Act, 1881. This move can drastically reduce the number of complaints being filed before the criminal courts for dishonour of cheques.

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