

Decriminalization Of Section 138 of The Negotiable Instruments Act, 1881 For Ease of Doing Business – An Analysis

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ABSTRACT

In India, the negotiable instruments like promissory notes, cheques and bills of exchange are regulated by the Negotiable Act, 1881. India has been massively progressing towards digital India where we transact through online. The corporates make online payment through NEFT (National Electronic Fund Transfer) and RTGS (Real Time Gross Settlement) have come under the regulation of Payment & Settlement Act, 2007. These Negotiable Instrument Act and Payment & Settlement Act are interlinked with each other to the extent that section 25(5) of the payment & Settlement Act states that in case of dishonour of the electronic transfers Chapter XVII of the Negotiable Instruments Act will be applicable and the offence relating to the dishonour will be tried accordingly. Every document which entitles any person a sum of money and which can be transferred is called as negotiable instrument. The term Negotiable Instrument is not defined anywhere in the Negotiable Instrument Act. The most only in Section 13 of the Act we get reference about what can be called as negotiable instruments. According to Sec. 13 of the Act, negotiable instrument means ‘a Promissory Note, Bills of Exchange or Cheque payable either to order or to bearer’. Thus, simply we can say that Negotiable Instruments are any written documents which are transferable on delivery. The transferee of the negotiable instrument holds a better title in compared to the transferor. The transferee gets the negotiable out of good faith and against consideration from the transferor. The title is a good title even if the transferor was suffering from defective title during the transfer.

Keywords: Negotiable Instruments, Cheque, Section 138, Payment & Settlement Act 2007, Defective Title.

PRESUMPTIONS UNDER THE NEGOTIABLE INSTRUMENTS ACT

As per section 104 of the Bhartiya Sakshya Adhiniyam, 2023, it is the burden of the complainant to prove the offence committed by the offender. The Indian Evidence Act, 1872 has been replaced by the Bhartiya Sakshya Adiniyam, 2023. When the complainant has sufficed his assertion with evidence, the burden of proof shifted upon the accused person or the offender to prove his innocence. The law of presumption as enacted under section 118 of the Negotiable Instruments Act that unless contrary is proved the court will presume that negotiable instrument was drawn for consideration and that when it was accepted it was transferred for consideration. This section also furthers the following presumptions in addition the consideration. Those are stated below: -

- i. The date endorsed in the instrument, were made on the date as specified therein.
- ii. The negotiable instrument was accepted within the due time and before its maturity.
- iii. The negotiable instrument was transferred within the due time and before its maturity.
- iv. The lost promissory note, bill of exchange and cheque was properly stamped.
- v. That the holder of the negotiable instrument is the holder in due course.
- vi. Where it is asserted that the instrument has been obtained from its lawful owner by unlawful means, the burden of proving that the holder is a holder in due course lies upon him.

Thus, it has been found that when the complainant has made a complaint for offence committed under section 138 of the Negotiable Act, the court will presume the offence until any contrary is placed before the court with proper evidence.

Aside to section 118 of the Negotiable Act, we also get reference on presumption in section 119 of the Negotiable Act. To go through section 119 of the Act, it is essential to understand the protest. The protest is a formal certificate given by the notary public attesting the dishonour of the bill by non-acceptance or by non-payment, as the case may be. If the instrument remains unpaid even after noting made by the Notary Officer as mentioned under section 99 of the Negotiable Act, the next step is that the notary officer prepares a certificate of the fact of dishonour which is called as protest under section 100 of the Negotiable Act. Therefore, protest is nothing, but a formal declaration made by the Notary Public Officer on the bill or a copy thereof stating the fact of dishonour. The chief advantage of protest is that the court on proof of the protest shall presume the fact of dishonour and will readily issue

process upon the accused person to face him the trial. Section 119 of the Act, states that if a complainant is made on dishonour of a negotiable instrument, on proof of the protest, the court will presume that the negotiable instrument was dishonoured unless the same is disproved by the offender.

WHAT TAKES IT TO COMPRISE AN OFFENCE UNDER SECTION 138 OF THE NEGOTIABLE ACT?

The offence committed under section 138 of the Negotiable Act, 1881 has to satisfy the following components (K. Bhaskaran v. Sankaran Vaidhyan Balan, (1999) 7 SCC 510): -

1. Drawing of the cheque.
2. Presentation of the cheque in the bank.
3. Returning of the cheque by the drawee bank.
4. Giving and subsequently receiving or successfully communicating of the statutory notice for making payment.
5. Failure of the drawer of the cheque to make payment within 15 days of the receiving of the notice.

In addition to the above components, in order to attract the offence under section 138 of the Negotiable Act, 1881, proper consideration also should be there. The general principle of the Law of contracts is that any agreement which is made without consideration is void. The law of contract cannot be detached from the negotiable instrument Act. It is presumed that when a bill of exchange is handed over to a person, the same has been done in lieu of consideration. This will be presumed unless contrary is proved otherwise. The consequences of lack of consideration are provided in section 43, 44 and 45 of the Negotiable Instrument Act. The crux of the sections is that if a bill of exchange is endorsed without any valid consideration it will be invalid and the immediate parties will be discharged from their liability of making payment. A holder for consideration is not affected by the prior absence of consideration, and he can recover the amount from the transferor for consideration, and also from all the parties to such transferor. Moreover, any subsequent holder who got the instrument from a holder for value can also recoup the sum from the transferor. In this way, when the instrument gets

under the control of a 'holder in due course' he or some ensuing holder getting title from him, can recuperate the sum from transferor for consideration or from any prior party to such transferor. (K. Bhashyam 1963).

SECTION 138 OF THE NEGOTIABLE INSTRUMENT ACT

Section 138 of the Negotiable Instrument Act of the act talks about consequence the offender may face for dishonouring of cheque. Section 138 was introduced as a criminal offence in 1989 amendment of the Negotiable Instruments Act, 1881. The main objective of this section was to minimise cashless transaction and to increase the credibility of transactions.

Section 138 states on what circumstances the section will be attracted. Aside, there are many interpretation and observations of the High Courts' Supreme Court of India which are considered as an important aspect in deciding the application. The section suggests that the offender if proved guilty may be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or both. This offence is categorized under the category of non-cognizable offence.

THE NEGOTIABLE INSTRUMENTS (AMENDMENT) ACT, 2018 – AN ANALYSIS

Sections 143A and 148 were inserted in relation to cheque bouncing cases whereby the complainant has been given the option to pray interim compensation payable by the accused person during the pendency of the trial or appeal. The trial court and the appellate court are at its discretion to pass interim compensation under these two sections and cannot decide the payment of interim compensation in a mechanical way. Section 148 applies in appeal cases. The convicted person stands in a discomfort position in comparison to the trial of his case at the trial court.

The incorporation of these two sections in the 2018 amendment has obviously answers the accused persons and their lawyers who take a delaying tactics and trends to escape the justice by way of tactics but at the same time the provisions did not describe or state any parameters under which the court will exercise its discretionary power. This uncontrolled discretionary power of the court can be unjustified too which the aggrieved party can challenge it before the appellate court. This will ultimately lead to more filing of motions before the Sessions Courts or High Courts. It is quite natural, after filing revision application before the Sessions Court, the Session Court will call for the Lower Court Record, and this will consume more

time. The accused person may be incapable of paying the interim compensation. The recourse is provided under section 421 of the Code of Criminal Procedure, 1973, and (With effect from 1st July 2024) section 461(1) of the Bharatiya Nagarik Suraksha Sanhita, 2023. The new section 461(1) of the 2023 prescribes that the court may order the recovery of the interim compensation by issuing a warrant for the recoverable amount by attaching and sale of moveable property of the offender. The court under this section may even issue warrant to the Collector of the District, authorizing him realise the amount of the interim compensation as arrears of land revenues from the moveable or immoveable property of the defaulter. This issuing of warrant to the district collector for collecting the moveable property also means wasting of resources and consumption of time of the Government. The core job of the District Collector will be affected if he is directed to implement the order of the Court. Aside, the complainant is hardly aware of any immoveable or moveable property of the accused person. The law does not prescribe the accused person to submit his every bank account or deposits or other property before the Court and this will entitle the accused person to play with the justice delivery system.

Both these provisions are Complainant centric and are aimed to safeguard their interests. The complainant suffers loss due to cheque bounce and beyond this loss the time it will take to final disposal of the case, apart from the litigation cost. This section 143A gives a ray of hope to at least sustain during the litigation. Further section 148 protects the Complainant from the endless appeals and stays. Though this provision stipulate that where the accused person is acquitted, the Court shall order the complainant to return the money sum received by him under Section 148, but in practice, the long term litigation has already made loss to the complainant which may turn out to be dishonouring the court's order and appeal before the appellate court. The statute should state that the amount paid by the accused person should be deposited in a bank account to be created for this specific purpose else it is quite natural that a needy person will spend the money in his hand in need and will not wait for any especial circumstances.

Whereas section 143A and section 148 of the Negotiable Instrument Act are a welcome section, but the High Courts and Supreme Court time and again have held that the court cannot exercise its discretionary power in a mechanical manner and should apply its judicial mind before making decisions. The main challenge of both the complainant is to satisfy the court to get the interim relief and the main challenge of the accused person is to object that

interim prayer. However these sections are very welcome provisions and play a considerable important role in the entire trial process.

DECRIMINALIZING SECTION 138

On 8 June, 2020 the Ministry of Finance proposed decriminalizing various minor offences “for improving business sentiment and unclogging court processes”. Reference to serial no. 18, of the annex of the proposal, the Government proposed to decriminalize Section 138 of Negotiable Instruments Act, 1881. Link: https://www.livelaw.in/pdf_upload/pdf_upload-376169.pdf

This was made in order to take a significant step towards fulfilling the Government of India’s objective i.e. “Sabka Saath, Sabka Vikash and Sabka Vishwas”. The Government of India has been trying its heart and soul to attract investment in India. The criminalization of section 138 of the Negotiable Instrument Act, 1881 will preclude investors from investing in India. The motive of the Government was to decriminalize only those offences which have happened due to the act or omission of the party and does not constitute ‘fraud’ in its stricter sense. The fear of imprisonment, interim compensation or paying of fine of the double amount of the cheque bounce will demotivate the market players in doing business. Apart, the long pendency of cheque bounce cases will only frustrate the business environment.

Now, the Government has obviously taken a generous step to boom the business environment, but at the same time the law should make some demarcation as to the what shall be the criterion to decide which are the act of omission or act of commission or otherwise. If proper yardstick is not formulated in the statute, it will only make the situation more contentious and litigious.

The main reason for this proposal was to increase the foreign investment in our country and will help in boosting the economy of the country during this condition during the corona period. The contact with people was a major issue and therefore cashless transaction was encouraged. The litigation during the corona period was needed to be controlled. Therefore, this proposal was made by the Government.

The Government requested feedback on the proposal from all the stakeholders. The objective of the proposal was to promote investment in the country in the corona period. While section 138 of the Negotiable Instruments Act, 1881 was brought into effect to punish the offenders

of cheque bounce, this proposal was just opposite. The corona virus outbreak in the country have slowed down the economy the proposal to decriminalize section 138 of Negotiable Instruments Act will have an impact in the mind of business giants. Like it has been discussed earlier here before that what will be the negative or contentious effect of the proposal, therefore unless the law enacted properly and debated in its full nature, this proposal would have been only a time-pass and nothing else. In the report the following principles were made to deciding on reclassification of criminal offences to compoundable offences:

- i. Decriminalizing will decrease the burden on businesses and will attract confidence among the investors.
- ii. Increase in the economic growth, public interest and national security.
- iii. Evaluating the nature of non-compliance to justify the mens rea (malafide or criminal intent).
- iv. The habitual nature of non-compliance has to be kept in mind. Negligence must be differentiated with the non-compliance on regular basis.

These above parameters are all subject matters of dispute and depend on situation-to-situation basis. In the most, the parties will take judicial recourse to finally end the dispute, but again this will turn into more litigious.

DECRIMINALIZING SECTION 138 - IS IT DESIRABLE?

Section 138 of the Negotiable Instruments Act, 1881 is based upon the principle of ‘Deterrent theory of punishment’ as well as ‘restorative theory of punishment’. The imprisonment ensures that the offender will refrain himself from committing the offence and other future offenders will take it as an example to refrain themselves from committing the crime. The payment of fine as twice the amount of the cheque bounce and the interim compensation will provide compensation to the victim. Further trial of section 138 of the Negotiable Instruments Act, 1881 are considered as summary trial and are tried by the magistrate courts of first class. This decriminalize will make the victim to approach the civil court where delay and consumption of time is a serious issue. Still the Code of Civil Procedure is not reformed as

per the digital India and still depends on the old ways of issuing summons to the defendants. Again, the Government also should come up with an alternative on decriminalize of the cheque bounce cases like solving dispute through Arbitration or mediation or otherwise. The legislature should take a note that not all parties will take the arbitration seriously and few will play with the 'appointment of Arbitrator by consensus' provision and employ delaying tactics. Decriminalize of the cheque bounce cases will convert it into taking judicial recourse for appointing of Arbitrator, which will make the situation more worrisome. Therefore, a specific law also should be laid down as an alternative too with regards to the decriminalization.

If the section got decriminalized, there would be an increasing risk of cheating and fraud. On one hand that court has pendency of cases and decriminalizing would help in reducing the piles of cheque bounce cases obviously but on the other hand there will be an increased number of cases on cheating and fraud. The fear of imprisonment and litigation charges along with fine are the main factors for either settlement of cheque bounce case outside court or timely payments of the cheques, which if it is not there, the offender will be prone to committing of more offences. In case the punishment is removed by decriminalising section 138, definitely creditors will have to incur lot of risk.

CURRENT STATUS OF SECTION 138 OF THE NEGOTIABLE INSTRUMENTS ACT

The section is not yet decriminalized. The offence committed under this Act is non-cognizable offence and is a bailable offence. The punishment prescribed is still prevailing. The offender if found guilty can be sent to imprisonment up to two years and fined with fine which can be double the cheque bounced amount.

CONCLUSION & SUGGESTION

In this study it has been found out that in cheque bounce case not only the Negotiable Instrument Act is applicable. The Laws of Contract, the Reserve Bank of India Act and its rules, Bhartiya Naya Sanhita, 2023, Barthiya Nagrik Suraksha Sanhita, 2023, and other laws are also applicable. Each law has its own specific purpose. The Government must come with

an alternative against this decriminalization. Aside, the Government must encourage arbitration in the business community. The appointment of arbitrator through consensus ad idem must be sent into fire for those who prone to escape the dispute resolution system. When such situation arises, the Government must have a pre-set list of Arbitrators consist of representation from retired law professors, retired judges, Senior Advocates, Management Consultants, etc. Further the law on summary trials should be brought into practice. The Courts should give dates for consideration of the trial of the cheque bounce cases on weekly basis. The Negotiable Instruments Act, 1881 must set up a specialized court. Further the recovery of fine from the convicted person must be parted with the judiciary to build up its infrastructure.

The initiative of the Government in decriminalizing the cheque bounce cases is a good initiative, but without an alternative it will be litigious.

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