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## Decriminalisation of Section 138 of the Negotiable Instruments Act, 1881

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*Cheques are a widely accepted and trusted mode of payment and they are used in various financial transactions. A cheque is a document by which the drawer of the cheque can order the drawee bank to give the sum of money as specified on the cheque to the payee. Very often, drawee banks return the cheque due to the non-availability of funds in the drawer's bank account. This is referred to as a dishonour of the cheque or in common parlance, bouncing of a cheque. Section 138 of the Negotiable Instruments Act, criminalises the dishonour of a cheque and provides for criminal liability in such cases. This article sheds light on the current legal position on the dishonour of cheques and it also delves deeper to verify if the proceedings under Section 138 are truly criminal in nature. Further, this article also discusses the various problems that are caused by the criminalisation of dishonour of cheques. The article also aims to suggest the methods that can be adopted on the way forward so as to successfully decriminalise Section 138 of the Negotiable Instruments Act 1881.*

**Keywords:** *cheques, dishonour of cheques, negotiable instruments act, decriminalisation,*

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### INTRODUCTION

Commercial transactions, along with the various methods of payments used for such transactions, have evolved over the years. Usage of cheques for financial transactions has

become a widely accepted practice. An increase in cheque-based transactions has also resulted in an increase in the incidents of dishonour of cheques, which is commonly referred to as bouncing of cheques.

## DISHONOUR OF CHEQUES

A cheque is said to be dishonoured by a drawer if a cheque issued by him pursuant to the discharge of a liability to the payee is returned by the drawee bank due to the drawer not having sufficient funds in his bank account.<sup>1</sup> Initially, the payee of a dishonoured cheque could only seek a remedy under civil law. The Banking, Public Financial Institutions, and Negotiable Instruments Laws (Amendment) Act, 1988 introduced criminal liability in cases of dishonour of cheques. This amendment inserted Chapter XVII in the Negotiable Instruments Act 1881, consisting of Sections 138 - 142<sup>2</sup>. Section 138<sup>3</sup> of the Negotiable Instruments Act 1881 deals with the dishonour of cheques. The impugned legal provision provides for a criminal remedy that can be sought by the aggrieved party in such a case. Section 138 was said to be incorporated with an objective of providing for strict liability in cases of dishonour of cheques in order to give sanctity to negotiable instruments such as cheques which can be passed from one person to another and are deemed to be convertible to money.<sup>4</sup> Presently, in cases of dishonour of a cheque, the drawer of the cheque, who is the offender, can be punished with imprisonment for a term extending up to two years, or he can be fined to pay an amount equal to twice the amount of the cheque or with both.<sup>5</sup> The punishment was enhanced to two years imprisonment by the Negotiable Instruments (Amendment And Miscellaneous Provisions) Act, 2002. The object stated for criminalizing the dishonour of cheques was to enhance the acceptability of cheques in settlement of liabilities by making the drawer of the cheque liable in cases of bouncing of cheques.<sup>6</sup> However, the criminalization of dishonour of cheques has also

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<sup>1</sup>Anunoy Basu and Shounak Mukhopadhyay, 'Decriminalisation of Cheque Dishonour: A Step Forward' (SCC Online, 16 February 2021) <<https://www.sconline.com/blog/post/2021/02/16/cheque-dishonour/>> accessed 22 April 2022

<sup>2</sup> Negotiable Instruments Act, 1881, ss 138-142

<sup>3</sup> Negotiable Instruments Act, 1881, s 138

<sup>4</sup> *Dalmia Cement(Bharat) Ltd. v Galaxy Traders and Agencies Ltd.*, (2001) Appeal (Criminal) No. 957/2000

<sup>5</sup> Negotiable Instruments Act, 1881, s 138

<sup>6</sup> Avtar Singh, *Negotiable Instruments* (4th Edition, Easter Book Company 2005) 351

had certain adverse impacts. There is an ongoing debate on the decriminalization of Section 138 of the Negotiable Instruments Act 1881. This debate progressed further when the Government of India, in 2020, issued a public notice titled ‘Decriminalisation Of Minor Offences For Improving Business Sentiment and Unclogging Court Processes’<sup>7</sup> and sought public opinions on a proposal to decriminalize the dishonour of cheques.<sup>8</sup>

### **DISHONOUR OF CHEQUES: CIVIL LIABILITY OR CRIMINAL LIABILITY?**

The payee, in case of a dishonoured cheque, can proceed against the drawer by seeking a remedy in civil law and/or a remedy in criminal law. The remedy in civil law is to file a suit for the recovery of money as there is no express provision dealing with the dishonour of cheques. The other remedy that the payee can resort to is to proceed against the drawer of the cheque under Section 138 of the Negotiable Instruments Act 1881. However, though the impugned legal provision imposes criminal liability, it does not seem to want strict punitive action to be taken against the offender. Though the literal sense of the provision conveys that criminal liability will be attracted, which conventionally aims at punishing the offender, the scheme of this legislation entails that compensating the victim takes precedence over punishing the offender in cases of bouncing of cheques. Chapter XVII of the Negotiable Instruments Act 1881 contains provisions that give an understanding that the main purpose of criminalisation of dishonour of cheques seems to be to encourage the parties to settle the dispute by payment of the cheque amount by the drawer to the payee, in order to avoid penal confinement. This is evident from certain provisions contained in the Act, such as those which provide that an offence of dishonour of cheques is compoundable without the intervention of the court<sup>9</sup> and that the court shall try such offences by summary proceedings.<sup>10</sup> Besides, the

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<sup>7</sup> Rohan Thawani, ‘Decriminalisation Of Minor Offences For Improving Business Sentiment and Unclogging Court Processes’ (*Bar and Bench*, 1 July 2020) <<https://www.barandbench.com/columns/decriminalization-of-dishonor-of-cheques-a-step-backwards>> accessed 23 April 2022

<sup>8</sup> Rahul Srivastava, ‘Govt seeks stakeholders’ opinion on decriminalising cheque bounce, lesser economic offences’ (*Business Today*, 9 June 2020) <<https://www.businesstoday.in/latest/economy-politics/story/govt-seeks-stakeholders-opinion-on-decriminalising-cheque-bounce-lesser-economic-offences-260627-2020-06-09>> accessed 23 April 2022

<sup>9</sup> Negotiable Instruments Act, 1881, s 147

<sup>10</sup> Negotiable Instruments Act, 1881, s 143

Act affords an additional opportunity to the drawer of the cheque to make the payment due by stating that the drawer must fail to make the payment within fifteen days of receiving a notice from the payee.<sup>11</sup> Moreover, the Act also stipulates that the cognizance of an offence of dishonour of cheques shall be taken only on a written complaint made by the payee<sup>12</sup> and that such a written complaint must be made by the payee within one month of the date on which the cause of action took place.<sup>13</sup> This term 'cause of action' is unheard of in criminal jurisprudence and is often used in civil law in suits for the recovery of money. Furthermore, the procedure mentioned in the Act for service of a summons<sup>14</sup> and producing of evidence by the complainant<sup>15</sup> in cases of dishonour of cheques is exclusionary to the procedures laid down in the Code of Criminal Procedure 1973. Also, unlike other criminal proceedings wherein men's rea or the intention of the accused to commit the offence must be proved, a cursory glance through the legal provisions for the criminalisation of dishonour of cheques show that men's rea of the accused is not required to be proved. Thus it can be deduced that the main aim of these provisions is giving compensation to the victims rather than punitive action, which is primarily civil in nature. In the case of *Meters and Instruments (P) Ltd. v Kanchan Mehta*, the Supreme Court allowed the accused to be discharged with the mutual consent of both the parties even though the case was not compounded, as long as the complainant had been duly compensated.<sup>16</sup>

The Supreme Court of India has, on various occasions, recognized the fact that cases of dishonour of cheques are essentially civil cases masquerading as criminal cases.<sup>17</sup> In the case of *P. Mohanraj v Shah Brother Ispat Pvt. Ltd.*,<sup>18</sup> the Supreme Court again reiterated that a proceeding under Section 138 of the Negotiable Instruments Act 1881 can be said to be a 'civil sheep' in the clothing of a 'criminal wolf.' Thus the proceedings carried out under Section 138 of the Negotiable Instruments Act 1881 are not strictly criminal in nature. They can be said to

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<sup>11</sup> Negotiable Instruments Act, 1881, s 138

<sup>12</sup> Negotiable Instruments Act, 1881, s 142(1) (a)

<sup>13</sup> Negotiable Instruments Act, 1881, s 142(1) (b)

<sup>14</sup> Negotiable Instruments Act, 1881, s 144

<sup>15</sup> Negotiable Instruments Act, 1881, s 145

<sup>16</sup> *Meters and Instruments (P) Ltd. v Kanchan Mehta* (2018) Criminal Appeal No. 1731/2017

<sup>17</sup> *R. Vijayan v Baby* (2011) Criminal Appeal No. 1902/2011

<sup>18</sup> *P. Mohanraj v Shah Brother Ispat Pvt. Ltd.*, (2021) Civil Appeal No. 10355/2018

be quasi-criminal proceedings as the procedures involved are a deviation from the procedures adopted in a conventional criminal proceeding. The impugned section thus aims to give a remedy that is civil in nature through the criminal justice system.

### **PROBLEMS CAUSED BY CRIMINALISATION OF DISHONOUR OF CHEQUES**

Criminalisation of dishonour of cheques, as provided for in Section 138 of the Negotiable Instruments Act 1881, aims to ensure that compensation is paid to the complainant by the drawer of the cheque in order to avoid imprisonment, and it also aims to deter persons from dishonouring cheques. However, criminalisation of dishonour of cheques has its own demerits and has also caused certain problems in the legal field, which are as follows:

- **Multiple cases and the overburdening of the judiciary**

The payee, in cases of dishonour of cheques, can opt for a civil remedy and/or a criminal remedy against the drawer of the cheque. Hence the payee may, if he/she so chooses to, proceed against the drawer of the cheque, both in civil as well as criminal courts. This, in turn, leads to a situation wherein multiple proceedings are held in respect of the same subject matter and seeking the same relief.<sup>19</sup> The Indian judiciary is overburdened with cases, and Section 138 further increases this burden. In the 213th Report of the Law Commission, it was reported that there are about thirty-eight lakh cases involving Section 138, which are pending in the criminal courts throughout India.<sup>20</sup> The Supreme Court, too, has highlighted the issue of pendency of cases regarding Section 138. The Supreme Court recently stated that there is approximately thirty-five lakh pending criminal cases regarding dishonour of cheques under Section 138, which constituted 15% of the total criminal cases pending before the District Courts in India.<sup>21</sup>

- **The dilemma of choosing either remedy**

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<sup>19</sup> Anunoy Basu and Shounak Mukhopadhyay (n 1)

<sup>20</sup> Law Commission of India, *Fast Track Magisterial Courts for Dishonoured Cheque Cases* (Law Com. No. 213 2088) Para 2.18 <<https://lawcommissionofindia.nic.in/reports/report213.pdf>> accessed 23 April 2022

<sup>21</sup> Makwana Mangaldas Tulsidas v State of Gujarat (2020) Special Leave Petition (Criminal) No. 2464/2016

In many cases, the payee, who is the aggrieved party in a case of dishonour of cheque, may be in a dilemma of which remedy should be opted for. If only the criminal remedy is chosen under Section 138, the proceedings therein may be very time-consuming and may not be decided expeditiously. The payee may thus lose his right to seek the civil remedy due to the expiration of the period of limitation. In the case of *R. Vijayan v Baby*,<sup>22</sup> the Magistrate levied an inadequate fine on the accused in a case of dishonour of cheques, and the period of limitation to pursue a civil action had expired. Thus the complainant was left with no remedy to recover the cheque amount. The Supreme Court too observed that in such cases, citizens would be unable to regulate their affairs properly as they will be unsure of whether they should file a civil suit or not during the pendency of the criminal proceedings, as such a criminal proceeding may or may not grant them compensation.<sup>23</sup>

- **The financial burden on the Parties**

If the payee proceeds with both the remedies available to him/her, it creates an undue burden on both the payee and the drawer of the cheque. Both the parties have to bear the costs involved with the civil suit and criminal proceedings. Thus, having the option of proceeding with two remedies for the same offense can put a financial strain on both parties.

- **Delay in the disposal of serious criminal cases**

There are a huge number of criminal proceedings involving Section 138 that have been pending for years. Cheques are dishonoured every single day, and thus such cases are instituted on a daily basis. Disposal of such cases takes up a lot of time for the criminal courts. Thus criminal courts, which could have otherwise focussed on other cases involving more serious and grave offenses, are prevented from doing so due to lack of time. This, in turn, affects the credibility of the criminal justice system as a lot of cases concerning grave offenses are not decided expeditiously.

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<sup>22</sup> *R. Vijayan* (n 17)

<sup>23</sup> *Ibid*

## OPPOSITION TO DECRIMINALIZATION OF SECTION 138

The proposal put forward by the Government of India in June 2020 faced opposition from various quarters as far as decriminalization of dishonour of cheques was concerned. Industrial bodies raised concerns that decriminalisation of Section 138 would lead to an increase in instances of bouncing of cheques. They asserted that this move would do away with the fear of imprisonment that people had and which forced them to compensate the victims. It was argued that contrary to the purpose that it seeks to achieve, decriminalisation of Section 138 would erode the trust of people in cheque transactions which in turn would hamper businesses.

## THE WAY FORWARD

Sooner or later, decriminalisation of the dishonour of cheques needs to be adopted. It is the correct way forward. It will not just increase the ease of doing business but will also help the overburdened courts to provide speedier justice in important matters. The apprehensions and objections voiced by people against the decriminalisation of Section 138 can be addressed in the following ways:

**1. Fixing a threshold limit:** A minimum threshold limit should be fixed on the cheque amount that has been dishonoured. In case of a dishonoured cheque containing an amount above the fixed limit, criminal jurisdiction should be allowed to be invoked. Dishonour of cheques for smaller amounts that are below the fixed limit must be decriminalised. This will ensure that large business transactions are protected, and the trust of people in cheque transactions is maintained. This will also lessen the burden on the criminal justice system to some extent as it will not have to deal with small cases of such nature.

**2. Mediation:** In cases of dishonour of cheques, a legal provision has to be incorporated to provide for compulsory mediation between the parties. An attempt must be made to settle the disputes involving Section 138 by way of mediation which can be held at any stage deemed appropriate within the legal framework. Mediation will help in the speedy disposal of such matters without the involvement of the criminal justice system.

## CONCLUSION

Decriminalisation of the dishonour of cheques is a move in the right direction. In order to keep pace with the constantly developing trade and commerce scenarios, it is imperative that Section 138 is decriminalised. This will be a boost to many businesses, which will benefit the economy as a whole. Besides, it will also ensure that the burden on the judiciary is lessened a little, thereby allowing the criminal courts to focus on other essential matters.