
DECRIMINALISATION OF SECTION 138 OF THE NEGOTIABLE INSTRUMENTS ACT, 1881: IS IT A STEP FORWARD?

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ABSTRACT

The government has been working hard to minimize the effects of the COVID19 pandemic, which has affected every sector in the country. We all know that the issue of backlog and pending cases has been prevalent since before the pandemic but the arrival of the pandemic, the lockdowns have worsened the condition. It would not be wrong to say that the Indian judiciary was clogging. Therefore, the centre came up with strategies to improve, enhance and boost up the “ease of doing business” in the country. One of those strategies was to decriminalize Section 138 of the Negotiable Instruments Act, 1881. Section 138 talks about dishonour of cheques. Originally this section was not a punitive provision, rather it was a civil wrong originally, which was criminalised by an amendment in the year 1988. People who are pro criminalization argue that punishment for dishonour of cheques under Section 138 definitely brought surety to transactions, and reduced the fear of fraudulent activities related to such transactions. Whereas some argue that it being a trivial or minor offence, it doesn’t need to be punitive, and the judiciary has other comparatively serious matters to look into, so decriminalizing this section was the need of the hour. This paper analyses whether decriminalization of Section 138 of the Negotiable Instruments Act, 1881 is a boon or a bane. In the process we look into Section 147 of the Negotiable Instruments Act 1881 and the existence of other punitive provisions like cheating under Section 420 of the Indian Penal Code, 1860. The main analysis in the paper is whether the decision of the centre to decriminalize Section 138 of the Negotiable Instruments Act, 1881 is a balanced decision or not, because every decision or change comes with its own set of pros and cons but the point is the cons should not outweigh the pros.

INTRODUCTION

The COVID 19 pandemic has had a drastically adverse effect on the economy of not only India but also the world. It would not be wrong to state that this deadly pandemic has put pause on the entire world. Every sector's mobility was clogged. The same was the condition of the Indian Judiciary. This pandemic has also led many sectors of Indian economy to cripple. Therefore, in order to play its part in mitigating the adverse effects of the pandemic, the Centre decided to announce some relief in various sectors such as GST, Insolvency and Bankruptcy, etc. One of the reliefs provided by the Centre was to decriminalize Section 138 of the Negotiable Instruments Act, 1881, among other minor or trivial economic offences.

It was a decision taken by the Centre in order to try and attempt to unclog various sectors of India, especially the Economic sectors and the Indian Judiciary. Therefore, in order to enhance, improve and boost up the 'ease of doing business' in this country, the Centre came up with the strategy to decriminalize some minor offences. Centre released a notification dated June 8th, 2020, containing about 39 offences, that were decriminalized. The notification was titled "*Decriminalization of Minor Offences for Improving Business Sentiments and Unclogging Court Processes*". Through this notification the Centre decriminalized a list of minor and trivial corporate offences in order to motivate, enhance, appreciate, boost up and build up a smooth platform for foreign multinational businesses in and with India. The stance of the Centre was that these steps will attract foreign as well as domestic investments in India and this will help bring the Indian Economy back on track.

The proposal of the government or the Centre was to decriminalize various white-collar crimes, this article focuses on one of those crimes that was mentioned in Section 138 of the Negotiable Instruments Acts, 1881. 'White-collar crimes' is a term used to define activities that are non-violent in nature, but are fraudulent by characteristic having a financial motivation attached to it, which generally yield some fraudulent financial benefits to the perpetrator of the crime.

UNDERSTANDING SECTION 138 OF THE ACT

Section 138 of the Negotiable Instruments Act, 1881 talks about Cheque dishonour in case of insufficient funds in the bank account or any other reason. Previously it was a penal provision. According to the Act, Section 138 of the Negotiable Instruments Act states as follows:

"138. Dishonour of cheque for insufficiency, etc., of funds in the account. —

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier ;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid ; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation. — For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.”¹

In layman’s words, Section 138 imposes criminal liability when any person maintaining an account in a bank, draws a cheque on it for the purpose of payment or remittance of a certain amount to another person in order to discharge a liability or a debt, and the cheque is returned and sent back by the bank unpaid, for any reason some of which could be either insufficiency, shortage and inadequacy of funds in the account of the drawer, or the amount mentioned in the cheque may be exceeding the amount that was agreed to paid by the Bank from that account due to existence of such agreement made with the Bank. In such cases, the person who drew the cheque became liable to imprisonment for a period which may extend to two years, or he may have to pay twice the original amount, and in some cases, both liabilities can be incurred.

¹ **Negotiable Instruments Act, 1881** (No.26 of 1881 dated 9th December 1881).

It is relevant to state at the outset that originally this section was not a punitive provision, rather it was a civil wrong originally, which was criminalised by an amendment in the year 1988. It can be argued that the existence of this punitive provision, brought surety in transactions done by cheques, which is an instrument for exchange widely used in business transactions. This led to the smoothening of business transactions as the fear of fraudulent activities related to such transactions reduced, and a factor of trust was brought in. It is said that the objective of the amendment of 1988, which criminalized Section 138 was to “instil financial discipline in business dealings and encourage the efficiency of banking operations”.²

The necessary ingredients of Section 138 were reiterated by the Supreme Court in the case of *Kusum Ingots and Alloys Ltd vs Pennar Peterson Securities Ltd*³ wherein it was stated that

“(a) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(b) That cheque has been presented to the bank within six months from the date on which it is drawn or within the period of its validity whichever is earlier;

(c) That cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(d) The payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(e) The drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.”

DECRIMINALIZATION OF SECTION 138

² Ambashtha, Y., & Srivastava, S. (2020, October 7). *Decriminalization of Section 138, NI Act: Dishonouring its Purpose?* CrLRR. <https://crlreview.in/decriminalization-section-138-ni-act/>

³ *Kusum Ingots and Alloys Ltd vs Pennar Peterson Securities Ltd*, (2000) 2 SCC 745.

When a criminal offence is decriminalized, there are certain principles that need to be kept in mind which are concerned with reclassification of criminal offences into compoundable offences. Those principles are:

- (a) to reduce the encumbrance on businesses and to instil confidence amongst the investors,
- (b) to concentrate upon economic upliftment, nation security as well as public interest, giving utmost priority to national security,
- (c) mens rea
- (d) the persistent characteristic of non-compliance.⁴

When this section of the Negotiable Instruments Act was decriminalized, it was pointed out prior to the decriminalization in the 213th Law Commission of India Report that more than thirty-eight lakh case of cheque bounce and cheque dishonour was pending before different courts of the country. It was also pointed out and emphasized that due to pendency of such a huge number of cases under and concerning with Section 138 of the Negotiable Instruments Act, many other cases that were more serious as compared to these cheque bounce and cheque dishonour cases were being side-lined, delayed etc., and this was over-burdening the judicial system of the country.

If we try to look at this from another perspective, it can be said that for the aggrieved party in such type of cases, there is already a punitive provision of Cheating under Section 420 of the Indian Penal Code, which can provide a fair and just remedy, therefore, there was no need to create another provision for the same act, because all it did was over-burden and unnecessarily clog the judicial system of the country. Secondly, apart from punitive provisions, there are other civil remedies available for the parties to such dispute or wrong.

In the case of *Damodar S Prabhu v Sayed Babalal H.*,⁵ the Hon'ble Supreme Court also reiterated that "The scheme of the law governing the offence of cheque dishonour seems to encourage the parties to settle the dispute by having the offender pay the cheque amount and

⁴ Rai, D. (2020, June 27). *Decriminalization of Section 138 of Negotiable Instrument Act, 1881*. Ipleaders. <https://blog.ipleaders.in/decriminalization-of-section-138-of-negotiable-instrument-act-1881/>

⁵ *Damodar S Prabhu v Sayed Babalal H.*, (2010) 5 SCC 663.

avoid penal confinement. A scheme has also been devised for the graded increase in fines levied to encourage early compounding of the offence.”⁶

It is also relevant to note here that the criminal importance of this section reduced substantially with the introduction of Section 147 in the Negotiable Instruments Act, in the year 2002. Section 147 made the offence punishable under Section 138 compoundable, meaning that if the parties to the dispute choose to settle, can mutually agree to drop the charges levelled against the accused. Therefore, it has been observed in recent times that the simultaneous existence and applicability of both criminal and civil remedy is blurring the distinction between criminal law and civil law.

Nevertheless, it can also be argued that the objective of the punitive provision of Section 138 is to enhance and ensure the credibility of the instrument that is cheque, and this in itself is enhancing the objective of “Ease of doing Business” of the Government. Therefore, a major drawback of decriminalization of Section 138 is that since the surety and credibility of the instrument is taken away, it will deflate the motivation of the honest parties to adopt or take on and consider cheques a credible means of transaction and payments. Moreover, the punitive provision of Section 138 instilled fear in the minds of the drawer of the cheques, due to which they had to ensure that cheque drawn by them is duly honoured. Decriminalization removes such fear and takes away with itself the de-facto duty of the drawer to ensure that the cheque is properly honoured, because the trepidation of criminal prosecution is gone.

CONCLUSION

It would not be incorrect to state that the decision of the Centre to decriminalize Section 138 of the Negotiable Instruments Act, comes with its own pros and cons. The question that remains now is whether the pros out-weigh the cons or is it the other way round. When the Central Government proposed this amendment in the Negotiable Instruments Act, it pointed out that objective behind it was “Sabka Saath, Sabka Vikas, aur Sabka Vishwas”. In my opinion, the makers of this policy should have dug a little bit deeper regarding whether everybody will benefit from this amendment or not.

As a matter of fact, this amendment was opposed by litigants on a large scale. The Bar Council of Delhi, Maharashtra and Goa, openly opposed this amendment stating that before doing such amendments, the legislature should have taken expert opinion, opinions of the expert members

⁶ Ibid.

of the bar, and should have consulted statutory bodies dealing with the same. They emphasized on the point that this decision of the Central government may lead to the erosion of the public confidence in the Indian judicial system as on the face of it, “it tends to encourage the minds of the perpetrators to defraud and cheat innocent people, and also renders the aggrieved party helpless”.⁷

⁷ Rai, D. (2020, June 27). *Decriminalization of Section 138 of Negotiable Instrument Act, 1881*. Ipleaders. <https://blog.ipleaders.in/decriminalization-of-section-138-of-negotiable-instrument-act-1881/>