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CRIMINALIZE OR DECRIMINALIZE THE DISHONOUR OF CHEQUE: A DILEMMA

Kaushiki Trivedi

ABSTRACT

The dishonor of cheques, a prevalent issue in financial transactions, has been a subject of debate worldwide. In many jurisdictions, including India, the question of whether to criminalize or decriminalize the dishonor of cheques remains a contentious dilemma. This abstract delves into the complexities surrounding this issue, exploring the arguments for and against criminalizing cheque dishonor and highlighting the implications for stakeholders involved. The dishonor of cheques occurs when a cheque issued by a drawer is returned unpaid by the bank due to insufficient funds or other reasons. In jurisdictions where cheque dishonor is criminalized, it is treated as a criminal offense punishable with fines, imprisonment, or both. Proponents of criminalization argue that it serves as a deterrent against fraudulent practices, protects the credibility of cheques as a payment instrument, and ensures accountability of the drawer. They contend that criminalizing cheque dishonor upholds the sanctity of contracts and fosters trust in commercial transactions. Conversely, opponents of criminalization advocate for the decriminalization of cheque dishonor, suggesting that it should be treated as a civil matter rather than a criminal offense. They argue that criminalizing cheque dishonor imposes undue burden on debtors, particularly in cases of genuine financial hardship or inadvertent errors. Decriminalization proponents emphasize the need for alternative dispute resolution mechanisms, such as arbitration or mediation, to resolve cheque bounce disputes efficiently and equitably. They argue that civil remedies provide a more proportionate response to dishonored cheques without subjecting debtors to criminal penalties. The dilemma of whether to criminalize or decriminalize the dishonor of cheques presents complex legal, social, and economic considerations. While criminalization may deter fraudulent practices and uphold the credibility of cheques, it also raises concerns about proportionality, fairness, and the impact on debtors. Conversely, decriminalization may offer a more balanced approach, but challenges exist in enforcing civil remedies and preserving the integrity of financial transactions. Further research and dialogue are needed to navigate this dilemma and develop policies that promote fairness, efficiency, and accountability in cheque bounce cases.

Keywords- Cheque bounce, criminalization, decriminalization, financial transactions, Civil

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Matter.

I. INTRODUCTION

Earlier the bouncing of cheques was not the criminal offence. But soon it was realized that some deterrence must be there to counter this offence. In 1975, a suggestion was given by the committee which was headed by Dr. Rajmannar to penalize the offence of dishonor of cheque. This problem can be seen in those cases where there was no means to instant exchange of money for the goods or material purchased or services provided. But soon it creates problem in cash flow as the cases of dishonor were slowly increasing. Consequently, the old Negotiable Instrument Act 1881 was amended to impose criminal liability in case of section 138. This change was brought almost after 100 years of the Act itself in 1988. There were various reason to introduce this significant change as to increase the credibility of cheque in the eyes of businessperson and traders. It was also demand of the various institution, industries and traders. As the credibility of cheque is increased the faith of the people to transact with cheque will also increase and to provide safety from carrying cash. It also curb the intention of the people to delay the process of payment by not maintaining sufficient amount in account. But suddenly in the month of June, 2020 Ministry of Corporate Affairs proposed an amendment in contradiction to those objectives and intentions mention above. Actually it was not a sudden move rather a circumstantial move. At present because of pandemic COVID-19, the condition of economy got into trouble. To cope up with these changed situations, Ministry of Corporate Affairs comes with the various policies to counter this pandemic. So on 8 June, 2020 a notification was issued by the Ministry of Corporate Affairs (MCA) and for the improvement of ease of doing business and unclogging the court system, it invites suggestions whether to decriminalize section 138 of the Negotiable Instrument Act.

II. Grounds For Decriminalizing

The proposal of the government is based on the following grounds-

I. Ease of doing business: Section 138 imposes criminal penalty on the drawer in case of default. It works as a barrier to create investments and attract business here. It takes a lot of time to settle the dispute.

II. Unclogging the Judiciary: The one of the motive of government to remove section 138 is to less the burden of judiciary or unclogging the system of court. According to 213th Law

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Commission Report, there are 38 lakh cases pending of dishonor of cheques that is 20% of the total case pending. In recent, the Apex Court in Makwana Mangaldas Tulsidas v The State of Gujarat, suggested decriminalise dishonour of cheques of small denomination.

III. Significance of Mens Rea and the need to re-classify offences: Mens rea plays an important role in order to determine criminal liabilities, and the omission or merely non compliance cannot be considered as the malafide intentions so criminalization will only overburdened the court.

IV. Reviving Economy and Cash-less transactions: Decriminalisation of section 138 would be proved as a catalyst in order to attract investors, foreign companies. It will also push the goal of the government of a cashless economy.

But there are various problems with this proposal of government which I have dealt further. There are various alternatives that can take place instead of scrapping section 138 of the Act. Repealing some section, act, proviso is not the solution of the problems.

III. SECTION 138 – AN INSIGHT

The Negotiable Act, Section 143 of the Act , that was amended by the parliament in 2001, specifies that, after the statutory reform in this Chapter, all offenses are specified in the Summary Trial Procedure of Articles 262 to 265 of CrPC to be prosecuted by the Judicial Magistrate or Metropolitan Magistrate (hereinafter 'MM'). The magistrate shall be entitled to levy a penalty of one year's imprisonment and a fine that exceeds Rs. 5000/- in cases covered by Section 138 of the Act.

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 provision 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

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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 of other liability" means a legally enforceable debt or other liability."

The trial may be summary or summon trial. If during the summary trial or at the commencement of proceeding the court is of the view that the punishment is of more than 1 year or by any other reasons, it should be tried like a summon case not summary trial, the court has to pass an order giving its reason that why it should not be tried summarily but like summon case after hearing both the parties. He may call witnesses again to examined them again for the summon case even if they were examined for the summary case.

The objective behind the summary cases has frustrated when the parties of the case and the advocates of the parties keep themselves absence from the hearing or trial. It is detrimental to the objective behind the summary procedure in case of dishonor of cheque Consequently, in case of Rajesh Agarwal v. State and Others, the Hon'ble High Court of Delhi laid down some guidelines in respect of summary trial proceedings which will take place in case of offences committed under section 138 of the Act.

Procedure that is followed in matters with regard to Section 138 of the Act is as follows:

- A legal notice with all the facts from the side of the complainant is to be issued within 15 days to the drawer of cheque to the drawer within 15 days of dishonor of cheque by registered post. The time period for the drawer will be of 15 days if the drawer within these days paid his debt to the payee then the issue will be settled and no further action will take place. On the other side if the payment is not made within these prescribed days then the complainant has option to file a criminal case against the drawer under section 138 of the Act. He has to file a case within 30 days from the date of expiry of 15 days in the court of concerned magistrate having a jurisdiction.
- The court if satisfied with the substances, details, witnesses of the complainant then it is to issue summon to the accused in order to present before the court..
- If after serving the summon, accused does not present himself in the court then the court will issue a bailable warrant against him in ordewr to compel his presence. Even after issuing of bailable warrant accused did not present in the court then court will issue non

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bailable warrant against him.

- If the drawer records his presence in the court then he may furnish a bail bond against the warrant and ensure the court his presence during the trial. If he pleads guilty then the punishments will be inflicted against him but in case he does not plead guilty, copy of the complaint will be served to him.
- The Complainant may present his evidence by way of affidavit and produce all documents including the original in support of his complaint. The complainant will be cross examined by the accused or his counsel.
- The complainant will present his all the evidences with the affidavit and also the original documents that are required in this regard. Then the cross examination of complainant shall take place by the council of accused.
- After that an opportunity will also be given to the accused to present all his evidences. And he will also submit all the documents in support of his documents and case. All the documents which support the statement of witnesses shall also be presented before the court. The council of the complainant will also cross examine the accused.
- After hearing arguments of both the side, the court will deliver the judgment. The judgment may be in favour of accused or in favour of victim. The acquittal of accused will end the matter but the conviction gaives a way to file appeal in the upper court.

IV. DECRIMINALIZATION : AN INEXPEDIENT ATTEMPT

Ignored Intention And Object Of Section 138 And The Act

"The Act was enacted and section 138 thereof incorporated with a specified object of making a special provision by incorporating a strict liability so far as the cheque, to enhance the acceptability of cheques in settlement of liabilities, a negotiable instrument, is concerned. The law relating to the negotiable instruments is the law of commercial world legislated to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another. "

In 2015, the same intention was shared by the government when it approved, Negotiable (Amendment) Act, 2015, It was stated that "clarity on jurisdictional issues…would increase the credibility of the cheque as a financial instrument."

But these intentions and object of the Act have been ignored by proposing decriminalization of section 138. In fact, the act doesn't discourage business feelings, but rather the current

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system offers sufficient opportunities for protecting the rights of the honest and truthful drawers that serve as a catalyst for business growth. Cheque should not be used as deceitful weapons.

The Supreme Court in Indian Bank Association and others v Union of India and others have also held that the notice is first given to allow a person to pay the cheque amount and, if it were not paid, then the recourse to the criminal proceedings against the drawer and its repercussions shall be applied. The crime was already made compoundable under section 147 of the Act. Under which without the consent of the court parties can settle their dispute. Magistrate has power to set free the accused if the compensation for the complainant has been obtained to the satisfaction of the court.

The intention of the section is crystal clear as it gives more than one opportunity to the drawer to pay all his debt. If we read section 148 with section 258 of Cr.P.C we will see after the due amount with all the interest is paid by the defaulter then the courts close the proceedings against the defaulter. So the section 138 is not deterrent to business even it protects the rights of defaulter as it gives ample opportunity to the defaulter to pay off his debts at various stages in order to avoid the prosecution.

V. THE INEFFECTIVE SHIFT

The one of the motive of government to remove section 138 is to less the burden of judiciary or unclogging the system of court. If the criminal remedy will be scrapped then the complainant will approach the civil court in order to get his money back from the defaulter. This will only shift the burden from one court to another court but it will not unclog the court system. The complainant has to wait for a long time to get justice because these courts are already burdened.

According to 213th Report of the Law Commission of India ,

“More or less, 20% of the pending cases relate to the dishonoring of cheques. It is an explicit indication of the “magnitude of trade and commerce that is done on the strength of cheques”. It also denotes the applicability and significance of cheques and their dishonor in the Indian Economy. The possible shift would rather lead to a surge in contract enforcement disputes, which would zoom the matters in civil court therewith repositioning the legal battle from “Criminal” to “Civil” defeating the government’s purpose of decriminalization. It would rather be a self-defeating move.”

IMPACT UPON ADVOCATES

The proposal of the government came without consulting any statutory bodies. It also did not

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seek any recommendation from the experienced litigants in this area. This was highly objected by some Bar Councils like Delhi, Maharashtra & Goa . These members open up and said that it does not only detrimental for their livelihood, careers as they are practicing concerned area but also effect the confidence of public in present judicial system.

INDIRECT BURDEN UPON THE JUDICIARY

Scrapping section 138 will not decrease the burden of the court but if we deeply understand we will see it only burdens the courts. As we know civil remedy is much time taking. So it will be dubious to businesspersons to opt civil remedy. The alternate remedy for the complainant in this scenario will be filing a case under Criminal Breach of Trust (section 406) and Cheating (section 420) of Indian Penal Code. So it will not change anything whether before or after the scrapping of the section 138 because the cases will remain same whether in this court or in that court. Thus it would frustrate the purpose of decriminalization.

PRESENT LAW SAFEGUARDS HONEST DRAWERS

From the date on which the matter filed and date of notice which is given the drawer to make payment gives sufficient opportunity. It shows that the act protects the drawer as well.

Scrapping section 138 of NI Act will be proved an insignificant move for the holder of the cheque. Some guideline will be fruitful in this regard. Bifurcation according to the amount of the cheque and then imposing penalty and initiation of court proceeding will be a good initiative.

VI. ANALYSIS

From all of the above discussion of provisions and decision we can see that from the beginning civil remedy is available for the offence under section 138 of the NI Act. Thus the proposal of the Ministry of the Corporate Affairs has no significant value because it will not bring any changes. This civil remedy is in addition to the criminal penalties against the wrongdoer who intentionally or without intention commits the offence under section 138. Besides civil remedy criminal penalties are given with an intention to deter people from such kind of malpractices. This kind of deterrence effect will help the payee to recover their money from such dishonest drawer. So scrapping this type of criminal penalties would be prejudicial to the payee of cheque.

This criminal penalty comes with the imprisonment from one to two years. The term has been extended by the recommendation of the Standing Committee on Finance, submitting its report

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in 2001 to Loksabha, to prevent the accused from defrauding poor payees. So the this step of the government may lead to frustrate the recommendation of the Committee and decision of the high courts

The move to decriminalize of section 138 would change anything in regard to the pendency of cases because either cases will increase or remain unaffected. People will rush towards civil court and now the burden will shift from one court to another. Even the number of defaulters will increase in absence of criminal penalty and will make the situation worse

The increased number of cases and pendency will also not good for economy as it will also affect the ease of doing business.

VII. THE WAY FORWARD

Ministry of Corporate Affairs instead of decriminalizing the offence of Dishonour of Cheque, should seek some alternatives in this regard to improve the prevailing conditions. The one of the significant alternative can be the establishment of some special courts and tribunal which will only deal with these kind of cases. It will decrease the pendency of cases. If this alternative is not feasible few more are provided further.

Dishonor of cheques cannot be termed as a minor offence

As it is stated by the MCA that dishonor of cheque is a minor offence, cannot be accepted. Because the minor offences are merely inadvertent in nature and happens without any intention on the part of the wrongdoer as well as if we see section 138 of the Negotiable Instrument it clearly imposes a strict liability which is not concerned with the presence of men rea.

If we look at the process under section 138 closely we will find it is more than the non payment or failure to pay money to the payee. There is a difference between an omission to pay the due amount to the payee and issuing a cheque in regard to the payment. It is an implied as well as expressed promise to the payee from the side of the drawer that the cheque will be honored if it is presented in limited time.

When the cheque is presented before the bank and dishonored then it may be unintended or intent to not to honor the cheque at the side of the drawer and at this stage the offence is not completed. Further we see the holder of the cheque furnished a notice under section 138 of the act intimating the fact of the dishonor and demands the due payment within 15 days of the

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notice. At this stage unless the otherwise the drawer did not pay the amount then cause of action arises and a criminal complaint is filed against him by the payee. At this time failure to pay the amount shows the intention of the drawer to cheat, fraud and the criminal breach of trust. Here the element of mens rea can be traced.

At the same time the statute provides safeguards to the genuine cases. Because against the presumption given under section 139, there is rebuttal at the time of trial.

Hence it can be said that the offence of dishonor of cheque must come under the criminal offence.

Ignored Possibility Of Alternative Measures To Reduce the Burden On The Courts

Besides decriminalization of the dishonor of cheque, there are various alternatives available in this regard because repealing is not the answer to every problem. The government should make it more efficient in order to protect from financial fraud.

1. By degrading the score of CIBIL the drawer: The basis of this score is the history of repayment and borrowing of a person. These scores show the creditworthiness of a person in order to get a loan from the bank. If this score will be degraded then the chances of getting loan approved would be less. If matters of dishonor of cheque would be included here then it will help to decrease such type of cases.

2. Adopting a blanket penalty imposition without Court's intervention: We may come with an amendment to penalize an individual directly without taking recourse of the court like in UAE if we see Dubai Public Prosecutor can directly penalize individual in the matters of AED 200,000 or less.

3. Pre-Litigation Settlement: There is a need to establish pre litigation mechanism. As provided by the Legal Services Authority Act, 1987, Lok Adalats are created under section 19 and 20 of the Act. In a similar way mediation and arbitration should also be considered by the government as the effective remedy. These special courts will save lots of time of the criminal courts. The nature of the remedy provided by the Lok Adalat is civil in nature as given in section 21 of the Act.

The Delhi High Court in Dayawati v Yogesh Kumar Gosain , prominently promoted the practice of mediation to resolve cheque bounce offences.

Recently the Supreme Court in the following case

Makwana Mangaldas Tulsidas v/s the State of Gujarat and Anr .

"The effect of the above legal proposition is that an Award passed at the pre-litigation stage or pre-cognizance stage shall have an effect of a civil decree. The National Legal Services

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Authority, being the responsible Authority in this regard, may evolve a scheme for settlement of dispute relating to cheque bounce at pre-litigation i.e. before the filing of the private complaint. This measure of prelitigation ADR process can go a long way in settling the cases before they come to Court, thereby reducing docket burden".

4. Maintaining an internal database for blacklisting:

In order to protect the banking/financial fraud the government should set up a vigilant committee to cast a eye upon on habitual offenders. The work of the committee should be to keep and maintain the record of such offenders. This information must be utilize to blacklist that individual from availing all the banking facilities for a limited period. In Japan almost a similar practice is carrying on, where an account will be suspended for a period of two years in case of two cheque bounced in 6 months.

5. Insuring the presence of the accused:

One of the reason of the pendency of the of the cases is the insuring the presence of the accused during the trial. And the summon process should be made fast. Various fast means such as emails should be used.

6. Summary trials as a rule, and summons only as an exception

In this context it is discussed how the crime should not be decriminalized under Section 138. The pendency of the proceedings and the time period will be impacted by decriminalization. The implementation of a civil summary trial can also reduce the effect of the accused's strategies of delay.

7. Amendment of section 147

The other alternative can be compounding of dishonor of cheque offence at the very initial stage. Most of the time parties settle their dispute after losing so much time, money and energy in litigation. Therefore government should amend section 147 in order to insert the proviso to allow parties to compound their dispute at an initial stage rather than later stages of cases.

VIII. CONCLUSION

By the number of cases we can see that the Supreme court has held that the nature of section 138 civil wrong as well as criminal edge is also provided to punish the offender. Decriminalisation of section 138 would wipe out the apprehension of criminal proceedings. This will also affect the importance and credibility of cheque in the eyes of the parties. In

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place of decriminalisation government needs to reconsider its proposal and opt various other alternatives available in this regard. To invoke a criminal jurisdiction a limit of certain amount should be fixed in case of dishonour of cheque. It will impact the economy of the country.

Indisputably, the volume of cases filed under Section 138 has grown exponentially over the course of time. But that's hardly the reason for repeal. This, in fact, shows that Section 138 of the Act really works. Section 138, in that sense, is a victim of its own success as it has emerged as an effective remedy.

The statistics available in this regard shows the exponential growth of cases in this area. It shows that this section works indeed. But this is one of the reason of scrapping the criminal liability so this section suffers because of its own success. It provides an effective remedy. Too many of cases indicate the success of this section.

So it is the duty of the government to further strengthen these remedies in place of repealing the existed successful remedies. Repealing things is not the answer of every problems.

The decriminalisation will affect the activities of the government to improve the business sentiments and economy. It will be in contrast with the objects and intention of the Act.

Ironically, Through 2018 Amendment in Negotiable Instrument Act section 143A and 148 was inserted in order to strengthen the existed legal mechanism provided to punish the wrongdoer in case of dishonour of cheque. These sections provide interim relief to the complainant. But suddenly because of pandemic it has classified the offence under section 138 as a minor offence. By this move it is completely ignoring the legislative intent, previous amendments and the judicial pronouncement in this regard.

So the decriminalization will be proved fatal to the bonafide payee because this will lead to the more fraudulent cases as there was no criminal liability in this regard.