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## DISHONOUR OF CHEQUE- EVOLUTION OF THE NEGOTIABLE INSTRUMENTS ACT 1881

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### ABSTRACT

*To enhance the acceptability of cheques in settlement of liabilities chapter XVII was inserted in the Negotiable Instruments Act 1881 consisting of Sections 138 to 142 with effect from 01.04.1989. The law was amended subsequently to ease the procedural difficulties for speedy trial and for interim compensation to the payee of the cheque.*

**KEYWORDS:** *Legislative intent - deemed to have committed an offence.*

### INTRODUCTION:

In this article, the authors have analysed the impact of the amendments made in the Negotiable Instruments Act 1881, (herein referred as N.I. Act).

Law of Negotiable Instruments is universally followed as the law of the commercial world giving sanctity to the instrument that can be easily convertible into money in trade and commerce. Negotiable instrument means a signed document the value of which can be transferred from one person to another just by delivery or by endorsement. All negotiable instruments contain either a promise to pay money or an order to pay money. Cheque is the most prominently used negotiable instrument by the business community in settlement of liability. Proper and smooth functioning of business transactions, especially of cheques as negotiable instruments, primarily depend upon the credibility, trust and honesty of the persons involved. Despite the advent of electronic transfers namely, National Electronic Transfer (NEFT), Real Time Gross Settlement (RTGS), or Electronic Clearing System (ECS), millions of money transfers through cheques are still in vogue.

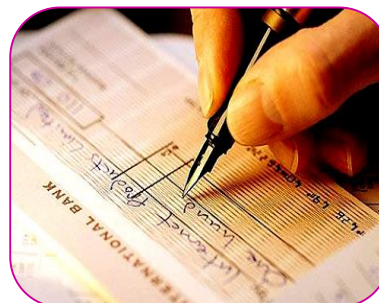
For the common man, a cheque is a document embodying an instruction to a bank to pay money to the person named therein or to the holder of the cheque, from the account maintained by the person giving the instruction.

### DEFINITION OF CHEQUE

Section 6 of the N.I. Act defines, "a cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and includes, the electronic image of a truncated cheque and a cheque in electronic form."<sup>1</sup>

### DEFINITION OF DISHONOUR OF CHEQUE

Section 92 of the N.I. Act defines, "A promissory note, bill of exchange or cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill or drawer of



the cheque makes default upon being duly required to pay the same.”<sup>2</sup>

### **AMENDMENT TO N.I. ACT (ACT 66 OF 1988) WITH EFFECT FROM 01.04.1989**

Section 4 of the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act has inserted a new Chapter XVII in the Negotiable Instruments Act 1881, containing Sections 138 to 142. The amendment takes effect from 01.04.1989.

### **DISHONOUR OF CHEQUE - AFTER AMENDMENT**

Prior to the amendment inserting the new chapter XVII in the N.I. Act, dishonour of cheque was a civil wrong, the only remedy available in cheque dishonour cases, was to file suit in civil court for the recovery of the amount. In India it takes a minimum of two to three years in cheque dishonour cases to recover the loan amount, not to speak of the cost and mental torture of litigation. The procedure in civil court is cumbersome – issuing Summons to parties concerned, examining evidences and witnesses. Proceedings under the Indian Penal Code needs 100% proof by the complainant to establish the offence. It is not uncommon that the accused adopting technical glitches to defeat the proceedings to get acquitted.

Dishonour of cheque is an unlawful act that erodes the trust and credit worthiness of the persons involved that ultimately lead to prolonged litigation. Cheque is dishonoured mainly due to not having sufficient funds in the bank account maintained by the drawer. Dishonour of cheque is one of the society's evils, that destroys the faith in the smooth trade and commerce, and credibility in settlement of accounts through negotiable instruments. It ultimately creates fiscal stalemate in business dealings, cripple the productivity and growth, and eclipse the integrity and economic sovereignty of the nation.

The statement of objects and reasons, appended to the Bill explaining the provisions of the new Chapter XVII, read as follows:

“The provisions contained in the new Chapter provide that where any cheque drawn by a person for the discharge of any liability is returned by the bank unpaid for the reason of the insufficiency of the amount of money standing to the credit of the account on which the cheque was drawn or for the reason that it exceeds the arrangement made by the drawer of the cheque with the bankers for that account, the drawer of such cheque shall be deemed to have committed an offence. In that case, the drawer, without prejudice to the other provisions of the said Act, shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both.”<sup>3</sup>

Dishonour of cheque, is made an offence in Section 138 of the N.I. Act. Penalty imposable for the offence is specified in the Section. The Act prescribed specific conditions which must be satisfied before the dishonour of cheque can constitute an offence. The specific conditions are:

- (i) the cheque should have been presented to the drawee bank within a period of six months from the date on which it is drawn or within its validation period, whichever is earlier;
- (ii) the payee or the holder in due course of the cheque, as the case may be, should make a demand for the payment of the cheque amount by giving a notice in writing, to the drawer of the cheque, within thirty days of receipt of information by him from the bank regarding the return of the cheque as unpaid; and
- (iii) the drawer of the cheque should have failed to make the payment of the cheque amount to the payee or the holder in due course, as the case may be, within fifteen days of the receipt of the said notice.

While introducing the Negotiable Instruments (Amendment) Bill, the Finance Minister informed the Parliament that the proposed amendment was found necessary in the light of the Report of the

Committee on Banking Laws by Dr. Rajamannar, submitted in 1975. This Report suggested penalising the drawer of the cheque for issuance of cheque without sufficient funds in the bank account. Some members of Parliament had expressed apprehension that the provisions of Chapter XVII were rather abnormal and very dangerous since civil liability was converted into criminal offence which may lead to far-reaching consequences.<sup>4</sup>

The Legislative intention in introducing chapter XVII of the N.I. Act was, “to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheque due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangement made by the drawer, with adequate safeguards to prevent harassment of honest drawers.”<sup>5</sup> Despite these stringent measures, the perversity of cheque dishonour still remains unstoppable.

The Law Commission in its Report No. 213<sup>6</sup> claimed that 38 lakh cases (about 20% of total pendency) were pending in various courts in the country. There were 7, 66,974 cases pending in criminal courts in Delhi at the Magisterial level as on 01.06.2008. Out of this huge workload nearly 67% (514433) cases were related to dishonour of cheques. According to Gujarat High Court sources, there were approximately two lakh cheque bouncing cases were pending all over the State, with the majority of them (84,000 cases) in Ahmadabad, followed by Surat, Vadodara and Rajkot. 73,000 cases were filed under Section 138 of the N.I. Act on a single day by a private telecom company before a Bangalore Court, informed the former Chief Justice of India, Shri. K.G. Balakrishnan, urging the Government to appoint more Judges to deal with 1.8 crore overall pending cases in the country. The enormous growth in the number of complaints on dishonour of cheques, is alarming and seriously cast shadow on the economic credibility of trade and commerce of the country.

Public Sector Banks in our country have written off a whopping sum of 1.20 trillion rupees as bad loans - that is one and half time more than their total loss posted in 2017-18 according to official data. This is the first time in a decade that banks have written off huge amount as bad loans while booking hefty losses. These N.P.A. accounts (Non Performing Assets) are no longer part of banks' Balance Sheets.<sup>7</sup>

Non repayment of loans borrowed from banks, by corporate bodies will paralyse the economy of the country as a whole and will adversely reflect on the overall economic development of the country.

### **AMENDMENT TO N.I. ACT (ACT 55 OF 2002) WITH EFFECT FROM 06.02.2003**

The N. I. Act was further amended in 2001 - the objects and reasons given are “ these provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument. The existing provisions in the Negotiable Instruments Act, 1881, namely Sections 138 to 142 in Chapter XVII have been found deficient in dealing with dishonour of cheques.”<sup>8</sup> This amendment provides deterrent punishment to those persons, who issue cheques for discharging their liabilities without really intending to honour the promise that goes with the drawing up of such a negotiable instrument. These measures are made to enhance the acceptability of cheques in extinguishing debts by making the drawer liable for criminal liability in case the cheque is dishonoured due to insufficiency of funds in the bank account. But at the same time the law provides adequate safeguard to prevent harassment to honest persons.

The amendment made in 2002 were aimed to achieve the following acts.

- i. to increase the punishment as prescribed under the Act from one year to two years;
- ii. to increase the period for notice by the payee to the drawer from 15 days to 30 days;
- iii. to provide discretion to the court to waive the period of one month which has been prescribed for taking cognizance of the case under the Act;
- iv. to prescribe procedure for dispensing with preliminary evidence of the complaint;

- v. to prescribe procedure for servicing of summons to the accused or witness by the court through speed post or empanelled private couriers;
- vi. to provide for summary trial of the cases under the Act with a view to speeding up the disposal of cases;
- vii. to make the offence under the Act compoundable;
- viii. to exempt the directors from prosecution under Section 141 of the Act, who are nominated as directors of a company by virtue of their holding any office or employment in the Central Government or State Government or a Financial Corporation owned or controlled by the Central Government or State Government;
- ix. to provide that the Magistrate trying an offence shall have power to pass sentence of imprisonment for a term exceeding one year and amount of fine exceeding five thousand rupees;
- x. to make Information Technology Act 2000 applicable to the Negotiable Instruments Act, 1881 in relation to electronic cheques and truncated cheques subject to such modifications and amendments as the Central Government in consultation with the Reserve Bank of India, considers necessary for carrying out the purposes of the Act, by notification in the Official Gazette; and
- xi. to amend definitions of “banker books” and “certified copy” given in the Bankers’ Books Evidence Act 1891.

#### **AMENDMENT TO N.I. ACT (ACT 26 OF 2015) WITH EFFECT FROM 15.06.2015**

The Hon’ble Supreme Court in a judgment dated 1<sup>st</sup> August, 2014 in the case of *DasrathRupsinghRathod v. State of Maharashtra (2015) 191 Comp. Cases 1*, held that “the territorial jurisdiction for dishonour of cheque is restricted to the courts within whose local jurisdiction the offence was committed. Following this judgment the Government received representations from various stakeholders including industry associations and financial institutions expressing concerns about the wide impact this judgment would have on the business interests as it will offer undue protection to the defaulters at the expense of the aggrieved complainants; will give a complete go-by to the practice/concept of Payable at Par Cheques and would ignore the current realities of cheque clearing with the introduction of Cheque Truncation System (CTS) where cheque clearance happens only through scanned image in electronic form and cheques are not physically required to be presented to the issuing branch (drawee bank) but are settled between the service branches of the drawee and payee banks; will give rise to multiplicity of cases covering several cheques drawn on bank(s) at different places; and adhering to is impracticable for a single window agency with customers spread all over India.”<sup>9</sup>

To nullify the judgment of the Hon’ble Supreme Court in the above case, the Government brought an amendment to the N.I. Act by promulgating an Ordinance (Ordinance No 7 of 2015) which was subsequently enacted into law. Negotiable Instruments (Amendment) Act, 2015 was made effective retrospectively from 15.06.2015. With this amendment, all cheque bouncing cases shall be filed only in the specified courts. While introducing the Amendment Bill in the Parliament, the Hon’ble Minister claimed that over eighteen lakh cheque dishonour cases were pending in different courts mainly challenging territorial jurisdiction of the court to try the cases. Courts verdicts are inconsistent on this issue. It is to clarify the jurisdiction of court competent to take cognizance of offence under Section 138 of the Act, Section 142 was renumbered as Section 142(1) (a), (b) and (c) and Section 142 (2) (a) and (b). The amended provisions of Section 142 (2) (a) and (b) read: that the offence shall be tried only by a court within whose jurisdiction:

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated., or

(b) if the cheque is presented by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

*Explanation:* For the purposes of clause (a), when a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.

The ordinance issued on June 15, 2015 made it clear that all pending cheque-bounce cases should be transferred to the jurisdictional court where the cheque is presented.

**NEGOTIABLE INSTRUMENTS (AMENDMENT) Act, 2018 - (Act 20 OF 2018) Gazette of India, Entry No.32 dated 02.08.2018, Part 11, Sec 1.<sup>10</sup>**

The Objects and Reasons to the Bill read “ it is proposed to amend the said Act with a view to address the issue of undue delay in final resolution of cheque dishonour cases so as to provide relief to payees of dishonoured cheques and to discourage frivolous and unnecessary litigation which would save time and money.” New Sections 143A (1) to (6) and Section 148 (1) to (3) are inserted in the proposed Bill: Section 143A (1) :- Notwithstanding anything contained in the Code of Criminal Procedure 1973, the court trying an offence under Section 138 may order the drawer of the cheque to pay interim compensation to the complainant -

- (a) in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint, and
- (b) In any other case, upon framing of charge.
- (2) The interim compensation under sub-section (1) shall not exceed twenty (20%) percent of the amount of the cheque.
- (3) The interim compensation shall be paid within sixty days from the date of the order under sub-section (1) or within such further period not exceeding thirty days, as may be directed by the court on sufficient cause being shown by the drawer.

Section 148: (1) Notwithstanding anything contained in the Code of Criminal Procedure 1973, in an appeal by the drawer of the cheque against conviction under Section 138, the Appellate court may order the appellant to deposit such sum which shall be a minimum of twenty percent (20%) of the fine or compensation awarded by the trial court.

Despite these amendments, cheque bouncing cases remain unstoppable and the Magistrate Courts are not able to clear the cases in a time bound manner. The proposed amendment prescribing interim compensation is a welcome step that would prevent frivolous litigation.

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