



DECRIMINALISATION OF SECTION 138 NEGOTIABLE INSTRUMENTS ACT, 1881: THE WAY FORWARD

By Harshit Jain

From Rajiv Gandhi National University of Law, Punjab

Abstract

Section 138 of the Negotiable Instruments Act, 1881 was introduced in the statute books to ensure the credibility of cheques as a medium of exchange by imposition of criminal as well civil liability on account of dishonour of cheques due to insufficiency of funds in the bank account. However, over time, cheque dishonour cases have only contributed to the pendency and backlog of cases. Further, cheques as a system of payment being gradually replaced by the digital payments. Therefore, decriminalisation of Section 138 of the Negotiable Instruments Act, 1881 provides an effective remedy to reduce the backlog of pending cases in the Indian courts as well as maintaining the credibility of cheques at the same time.

Keywords: Section 138, Negotiable Instruments Act, 1881 (NI Act), Decriminalisation

INTRODUCTION

Since the Covid-19 pandemic struck a deafening blow to the Indian economy, the Union Government has been focused upon bringing about economic reforms in the country by way of huge investment packages and liberalising laws pertaining to the

economic sector. Focus has also been on decriminalisation of minor economic offences with a view to improve the ease of doing business.

Finance Minister Smt. Nirmala Sitharaman in her Budget Speech 2020-2021 had said: “There has been a debate about building into statutes, criminal liability for acts that are civil in nature. Hence, for Companies Act, certain amendments are proposed to be made that will correct this. Similarly, other laws would also be examined, where such provisions exist and attempts would be made to correct them.”¹ Thereafter, in its Statement of Reason dated June 8, 2020, the Government of India Ministry of Finance Department of Financial Services proposed “Decriminalisation of Minor Offences For Improving Business Sentiment And Unclogging Court Processes”² inviting comments/ suggestions regarding decriminalisation of a particular Act or particular Sections of an Act, along with the rationale for the same.

In the Annexure to the Statement of Reason, certain provisions of different acts were proposed for decriminalisation one of which was Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the NI Act). Section 138 of the NI Act pertains to liability on account of cheque dishonour. It imposes criminal liability on the drawer of the cheque in case the cheque is returned unpaid by the bank.

This paper therefore seeks to explore the possibility of decriminalisation of Section

¹ Budget 2020-2021, Speech of Nirmala Sitharaman, Minister of Finance, February 1, 2020, Paragraph 82.

² Statement of Reason, Government of India Ministry of Finance Department of Financial Services, June 8 2020.



138 of the NI Act and its possible alternatives.

HISTORY OF SECTION 138 AND PROCEDURE THEREUNDER

Every transaction which takes place in the economy requires a medium of exchange. This medium of exchange has transitioned itself from time to time, ranging from the history to the present day. In the ancient times, barter system of exchange was the prevalent mode of exchange of goods, where goods were exchange for goods. Slowly, other mediums of exchange came into picture and eventually replaced the barter system. These include coins, currency notes, cheques, bills of exchange, promissory notes, other negotiable instruments, debit and credit cards, UPI based transactions and even cryptocurrency.

A negotiable instrument is a piece of paper which entitles a person to a sum of money and is transferable from person to person by mere delivery or indorsement and delivery.³ It is an evidence in writing embodying a chose-in-action of debt.⁴ Section 3 of the Negotiable Instruments Act, 1881 defines the meaning of 'negotiable instrument'. Before dealing with the meaning and types of negotiable instruments, it would serve a useful purpose to understand the history and need for enactment of the Negotiable Instruments Act, 1881.

- **Object and History of the Negotiable Instruments Act, 1881**

³ Avtar Singh, *Introduction to Negotiable Instruments (Negotiable Instruments Act, 1881)*, EBC Publishing (P) Ltd., Lucknow 2016.

⁴ P. Vasantha Kumar, *Banking and Negotiable Instruments Law and Practice*, EBC Publishing (P) Ltd., Lucknow 2020.

The Negotiable Instruments Act, 1881 was originally drafted in 1886 by the Law Commission after which it was introduced to the Council in December 1867 and was referred to a Select Committee. However, this draft bill could not see the light of the day and the bill had to be redrafted in 1877 because the merchants found the bill to be in contradiction with the English Law. However, even the re-drafted could not be approved due to certain shortcomings. Thereafter, in 1880, the bill was referred to a new Law Commission and was sent to the Select Committee which adopted most of the recommendations of the new Law Commission. This draft was passed by the Council in 1881 and it came into force in March 1882.

In *Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd.*⁵, the Supreme Court dealt with the object of the Act. The Court observed that the main object of the Act is to legalise and regulate the transfer of instruments contemplated by the Act. It was enacted to give sanctity to those instruments of credit which could be deemed to be convertible into money and could be easily transferred from one person to the other.⁶ Such recognition was deemed necessary to facilitate trade and commerce.

- **Section 138, Negotiable Instruments Act, 1881**

Section 138 of the NI Act deals with the offence of dishonour of cheques. Cheques can be dishonoured for a variety of reasons

⁵ (2001) 3 SCC 609.

⁶ *Natesha Securities v. Vinayak Waman Mokashi*, 2007 SCC OnLine Bom 949.



such as mismatch of signature of cheque with the specimen signature; corrections which may not be signed by the drawer; validity period of cheque may have expired; insufficiency of funds in the bank account; amount of a cheque may exceed the overdraft facilities availed by the drawer; difference of amount as recorded in words and figures; payee's endorsement may be irregular or the cheque may have been mutilated. Out of the various situations of dishonour as stated above, Section 138 imposes a criminal liability on dishonour of cheques due to insufficiency of funds in the bank account. Section 138 of the Act reads:

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 extend 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.

Section 138 of the NI Act was not a part of the statute when the Act was enacted in 1881. It was only in 1988 that the Section was added to the Act under the newly added Chapter VII which deals with penalties in case of dishonour of cheques for insufficiency of funds in the account of the drawer. Chapter VII, Section 138-142 were added by the “Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988”.

This new chapter was incorporated in order to encourage the use of cheques and maintain the credibility of the instrument of cheque as a medium of exchange. The Supreme Court also observed that the amendment is aimed at speedy and timely disposal of cases relating



to the offence of dishonour of cheques.⁷ The amendment aims to safeguard the drawee and protect him from loss on the part of the drawer. In *Electronics Trade and Technology Development Corpn. Ltd. v. Indian Technologists and Engineers (Electronics) (P) Ltd.*⁸, it was reiterated by the Supreme Court observed that the object of Section 138 is to “inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments”.

Later, by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 55 of 2002, Sections 143 to 147 were also added in Chapter XVII of the NI Act, 1881.

❖ ***Ingredients of offence u/s 138***

In *K. Bhaskaran v. Sankaran Vaidhyan Balan*⁹ and *Shamshad Begum v. B. Mohammed*¹⁰, the Supreme Court laid down the following five ingredients which constitute the offence u/s 138-

- i) Drawing of a cheque;
- ii) Presentation of the cheque to the bank;
- iii) Returning of the cheque unpaid by the drawee bank;
- iv) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount;
- v) Failure on the part of the drawer to make such payment within 15 days of the receipt of the demand notice.

However, the above law laid down by the Supreme Court was overruled by the 3-Judge bench of the Court in *Dashrath Rupsingh Rathod v. State of Maharashtra*¹¹ wherein it laid down that the commission of an offence u/s 138 is complete as soon as the drawee bank returns the cheque unpaid. The proviso to Section 138 does not form a constituent of the cheque dishonour itself¹², however, it regulates the offence of cheque dishonour in circumstances where the crime committed u/s 138 cannot be prosecuted against, unless the conditions of Section 138 proviso are complied with. The Court observed that the Parliament in its wisdom considered it just and proper to give an opportunity to the drawer of the dishonoured cheque to pay the amount before initiating prosecution, regardless of the fact that the offence is complete the moment the cheque was dishonoured.

❖ ***Territorial Jurisdiction for Filing Complaint***

As regards the territorial jurisdiction for filing cheque dishonour complaint, the Apex Court in *Dashrath Rupsingh Rathod* held that the territorial jurisdiction lies with the court within whose territorial jurisdiction the offence is committed, which is the place where the cheque is dishonoured, i.e., returned unpaid by the bank upon which it is drawn. The jurisdiction is not determined by the place of issuance or the place of delivery of the statutory notice or the place where the complainant presents the cheque for encashment. The complainant is statutorily

⁷ *Indra Kumar Patodia v. Reliance Industries Ltd.*, (2012) 13 SCC 1; *Goa Plast (P) Ltd. v. Chico Ursula D'Souza*, (2004) 2 SCC 235; *Dalmia Cement (Bharat) Ltd. v. Galaxy Traders and Agencies Ltd.*, (2001) 6 SCC 463.

⁸ (1996) 2 SCC 739.

⁹ (1999) 7 SCC 510.

¹⁰ (2008) 13 SCC 77.

¹¹ (2014) 9 SCC 129.

¹² *Vinay Kumar Shailendra v. Delhi High Court Legal Services Committee*, (2014) 10 SCC 708.



bound to comply with Sections 177 to 179¹³ of the Code of Criminal Procedure, 1973 and he is not allowed the liberty of forum shopping in filing the complaint.

However, the law relating to territorial jurisdiction as laid down in *Dashrath Rupsingh Rathod* has been modified by Section 142(2) r/w Section 142A which have been inserted by the Negotiable Instruments (Amendment) Act, 2015. This statutory overruling has also been affirmed by the Supreme Court in *Bridgestone India Pvt. Ltd. v. Inderpal Singh*.¹⁴ Therefore, the complaint can now be filed in the court within whose jurisdiction the branch of the bank where the payee or holder, as the case may be, maintains the account is situated or the branch of the drawee bank where the drawer maintains the account is situated.

According to Section 138, the cheque must be presented to the bank within a period of 6 months from the date on which it is drawn or within the period of its validity, whichever is earlier. However, this period of 6 months has been reduced to 3 months by the RBI¹⁵ w.e.f. 1-04-2012, in exercise of the power under S. 35-A of the Banking Regulation Act, 1949.

❖ Requirement of Mens Rea

¹³ **177. Ordinary place of inquiry and trial.** - Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.

178. Place of inquiry or trial. - (a) When it is uncertain in which of several local areas an offence was committed, or

(b) where an offence is committed partly in one local area and partly in another, or

(c) where an offence is a continuing one and continues to be committed in more local areas than one, or

(d) where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

Even though S.138 is a penal provision, the element of *mens rea* is not a statutory requirement for an offence u/s 138 and it is not a valid defence in cases of prosecution of u/s 138 that the “drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment on account of insufficiency of funds.”¹⁶ However, none of the provisions of the IPC, 1860 have been rendered nugatory by Section 138 of the NI Act and both operate in their separate spheres. The objective of Parliament while introducing Section 138 was only to strengthen the credibility of cheques as a mode of payment and it was essential for achieving such objective that S.138 had to be freed from the clutches of requirement of proving *mens rea*.¹⁷

Therefore, to initiate prosecution, the cheque must have been presented within 3 months from the date on which it is drawn or within the period of its validity, whichever is earlier. Further, the payee or the holder must make a demand for the payment of money from the drawer of the cheque by giving a notice in writing to him/her within 30 days of the receipt of information that the cheque is return as unpaid. The requirement of notice is

179. Offence triable, where act is done or consequence ensues. - When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued.

¹⁴ (2016) 2 SCC 75.

¹⁵ Vide Circular RBI/2011-12/251 DBOD AML BC No. 47/14.01.001/2011-12, dated 4-11-2011.

¹⁶ Section 140 of the *Negotiable Instruments Act, 1881*.

¹⁷ *Supra* note at 11.



a mandatory requirement¹⁸ and the non-issuance of prior notice renders the complaint non-maintainable.¹⁹ However, a liberal rule of statutory interpretation must be adopted with regard to provisions related to giving of notice.²⁰ If the drawer fails to make the payment within 15 days of the receipt of notice, then he is deemed to committed the offence of dishonour of cheque u/s 138 and there shall be a presumption in such cases that the cheque has been drawn for the discharge, in whole or in part, of any debt or other liability.²¹ However, such presumption is a rebuttable one and it can be rebutted by adducing credible evidence that the cheque was issued for some other purpose like security for loan.²² The complaint for offence u/s 138 has to be filed within 30 days from the accrual of the cause of action.²³

INTERNATIONAL PERSPECTIVE ON CHEQUE DISHONOUR

Internationally, criminal liability is absent in case of cheque dishonour in developed countries of the world, and even if it exists, dishonest intention on the part of the drawer of the cheque has to be necessarily proved to impose a criminal liability on the drawer of the cheque.

- **The United Kingdom**

In the United Kingdom, imprisonment for non-payment of debt had been done away with, way back in 1869 by virtue of the Debtors Act, 1869. Section 4 of the Act bars arrest or imprisonment for making default in payment of a sum of money. Even though the Act lays down certain exceptions, dishonour

of cheques due to insufficiency of funds is not covered under those exceptions and therefore, there is no imposition of criminal liability on the aforesaid offence. A civil remedy in the form of a civil suit is available to the holder of a cheque wherein he is entitled to recover the amount of the bill, the interest thereon and the noting expenses.

- **The United States of America**

In the United States of America, debtors' prisons have been abolished in 1833 and dishonest intention has to be proved on the part of the wrongdoer to impose a criminal liability upon him. The reasons given by the US lawmakers were that even if the debtor is put in prison, his debts still remain unpaid and thus there is no logic in putting him behind bars for non-payment of his debts. Civil as well as criminal liability is imposed by different states in the USA. The civil liability ranges from double to treble the amount of the cheque and the criminal liability ranges from imprisonment upto 10 years.

- **Australia**

The Australian legal system prescribes a civil remedy in case of dishonour of cheque and the holder of the cheque can file a civil suit for damages. When the cheque is dishonoured, the holder is entitled to recover as damages from any person liable on the cheque, the sum ordered to be paid by the cheque; and the amount of any interest that,

¹⁸ *Arsika Engineer v. Euroka Fuse*, (1992) 3 CCR 2982.

¹⁹ *Ghanshyam M. Swamy v. Classic Steel Products*, (1992) 75 Comp Cas 695 (Guj).

²⁰ *Supra* note at 9.

²¹ Section 139 of the *Negotiable Instruments Act, 1881*.

²² *T.P. Murugan v. Bojan*, (2018) 8 SCC 469.

²³ Section 142 of the *Negotiable Instruments Act, 1881*.



in accordance with the regulations, is payable in respect of that sum.²⁴

- **Singapore**

In Singapore, there is no criminal liability, and a civil liability is imposed on the defaulting party. The damages are liquidated and include amount of the bill, interest from the time of presentment of payment or maturity of the bill and expenses of noting.²⁵ Singapore is ranked number 2 in the Ease of Doing Business Index, 2020, thereby affirming the efficacy of imposition of civil liability instead of criminal liabilities.

- **France**

The offence of cheque dishonour is probably dealt in the best manner by France. France imposes a civil liability in cases involving cheque dishonour and it registers frequent and prolonged offenders in a Central database called the *Fichier Central Chèque* and provides for disqualification of such drawers from issuing cheques up to 5 years.²⁶ In addition to this, the banks are free to charge fee for dishonoured cheques up to certain limits, for example, upto €10 for an unpaid cheque under €50 and upto €50 for an unpaid cheque over €50. This proves as an efficient deterrent for the wrongdoer to prevent him from committing the offence as well as repeating the offence. This method also helps in keeping a record of the wrongdoers and prevents them from issuing cheques. The same practice is also followed in Italy and Spain.

Therefore, it is clear from the above study of foreign nations that imprisonment for non-payment of debts and dishonour of cheques is only considered as a civil wrong and no penal provisions are in place for imposition of criminal liability for such a wrongful act. Even in exceptional cases, where there is such criminal liability, it takes into account the element of *mens rea*.

THE SUPREME COURT ON SECTION 138

The stance of the Supreme Court of India on any provision of law has a major impact on the interpretation of the legal provision. Therefore, it is important to take a look at the various decisions of the Supreme Court which have discussed the feasibility of the imposition of criminal liability under Section 138.

- *Meters and Instruments Private Limited and Ors. v. Kanchan Mehta*²⁷

In this case, the respondent had filed a complaint alleging that the appellants had to pay a monthly amount to the respondent under the terms of an agreement. Cheque was issued by the appellants in discharge of the above obligation; however, the same was returned unpaid for want of insufficiency of funds. The appellants did not pay the amount even after service of the legal notice. Therefore, the respondent preferred a complaint u/s 138 of the NI Act.

²⁴ Section 76(1)(a) of the *Cheques Act, 1986*.

²⁵ At, <http://easeofdoingbusiness.org/sites/default/files/resources/decongesting-cheque-bounce-cases.pdf> (last accessed on April 9, 2021).

²⁶ Amit Desai, 'Decriminalising Dishonouring Of Cheques: The Saga And The Need' (2020), at, <https://www.bloomberglaw.com/opinion/decriminalising-dishonouring-of-cheques-the-saga-and-the-need> (last accessed on April 8, 2021).

²⁷ AIR 2017 SC 4594.



The Magistrate after considering the complaint and the preliminary evidence on record summoned the appellants. The Magistrate passed an order observing that the case cannot be tried summarily as there are chances that a sentence of more than 1 year may be passed in the case and hence it has to be tried as a summons case. The second appellant in his appearance stated that he was ready to make the payment of the cheque amount but the complainant refused to accept the demand draft for the same and the case was adjourned for evidence.

The appellants filed an application u/s 147 of the Act for compounding of the offence. The said application was dismissed and the High Court did not find any grounds for interfering with the order passed by the Magistrate. Therefore, the appellants preferred an appeal before the Supreme Court.

The Supreme Court in its judgement observed that the normal rule for trial of cases under Chapter VII of the NI Act, 1881 is to try the cases summarily. Summons Trial procedure should be followed in exceptional cases only where imposition of sentence exceeding 1 year may be necessary, having regard to the conduct of the accused, the amount of the unpaid cheque and other relevant circumstances. The SC further held that in every summons issued to the accused, it may be indicated therein that if the accused deposits the specified amount (cheque amount + interest + costs if any) by a specified date, then the accused need not

appear unless required and where such specified amount is paid by the accused by the specified date, the Court is entitled to close the proceedings in exercise of its powers u/s 143 of the NI Act, 1881 r/w S. 258 of the CrPC²⁸, subject to any valid objection by the complainant.

If the trial proceeds in any case thereafter, then it is open to the court to explore the possibility of amicable settlement and also to consider the provisions relating to plea bargaining. Therefore, the Court in *Meters and Instruments Private Limited* advocated amicable resolution of the dispute u/s 138 and called upon the courts for summary disposal of such cases.

- *B.C. Seshadri v. B.N. Suryanarayana Rao*²⁹

In the instant case, the appellant was convicted for the offence u/s 138 of the NI Act, 1881 by the trial court and he was sentenced a fine of Rs. 20,000 and 4 months' simple imprisonment in lieu of default of payment of fine. The appeal against the judgement of the trial court was dismissed by the Sessions Judge. In a criminal revision petition filed u/s 482 of the CrPC, the High Court held that the appellant is liable to pay a fine only upto twice the cheque amount (which position is now the settled law of the country³⁰) and simple imprisonment for a period of 1 year in lieu of default of payment of fine. This order of the High Court was challenged by the appellant before the Supreme Court. It must be noted here that

²⁸ **258. Power to stop proceedings in certain cases.** - In any summons-case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such

stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge.

²⁹ (2004) 11 SCC 510.

³⁰ *Somnath Sarkar v. Utpal Basu*, AIR 2014 SC 771.



during the pendency of the appeal before the SC, the dispute was settled between the parties and the same was recorded by the Court as well.

The Supreme Court, relying on its judgement in *Anil Kumar Haritwal v. Alka Gupta*³¹, held that compounding of the offences u/s 147 of the NI Act, 1881 on the basis of parties settling their disputes outside the court is permissible and the same should be allowed and even promoted by the courts.

- *Sivasankaran v. State of Kerala and Another*³²

In this case of cheque dishonour, the appellant was convicted u/s 138 of the NI Act, 1881 and was sentenced to undergo simple imprisonment for 6 months. During the pendency of the appeal in the Supreme Court, a compromise was entered between the parties under the terms of which Rs. 45,000 were paid by the appellant to the respondent in full and final settlement. Further, the complainant also had no objection to the dismissal of the complaint or the modification of sentence of imprisonment.

Therefore, on account of such compromise, the Supreme Court commuted the sentence of simple imprisonment to a fine of Rs. 1000.

- *Priyanka Nagpal v. State (NCT of Delhi) and Another*³³

In *Priyanka Nagpal*, the appellant had been convicted by the trial court for offence u/s 138 of the NI Act, 1881 and sentenced to undergo simple imprisonment of 2 months alongwith a fine of Rs. 10,000 and compensation of Rs. 6 Lakhs within 1 month

and on failure to do so, a further simple imprisonment of 3 months. The first appeal before the Additional Sessions Judge was dismissed. By way of a Criminal Revision Petition before the High Court, interim relief was granted, however, it was not extended further. The revision petition was eventually withdrawn by the appellant. Before approaching the Supreme Court in appeal, the appellant had already deposited the amount due towards fine and compensation as ordered by the trial court.

The Supreme Court upheld the conviction of the appellant in appeal, however, it modified the order of simple imprisonment of 2 months to an additional compensation amounting to Rs. 50,000 payable within 3 months and it further ordered that the order of simple imprisonment of 2 months passed by the trial court would stand revived on account of non-payment of additional compensation.

Thus, the Apex Court again commuted the sentence of imprisonment to payment of fine by way of additional compensation.

- *P. Ramdas v. State of Kerala and Another*³⁴

The above case in another instance of the Apex Court converting the sentence of simple imprisonment to payment of fine in lieu thereof.

In this case, the appellant was convicted by JMFC, Ottappalam u/s 138 of the NI Act, 1881 and he was sentenced to undergo simple imprisonment of 3 months and payment of compensation to the tune of Rs. 2,45,000 and further simple imprisonment of 15 days in lieu of default of payment of fine. The appeal

³¹ (2004) 4 SCC 366.

³² (2002) 8 SCC 164.

³³ (2018) 3 SCC 249.

³⁴ (2018) 3 SCC 287.



filed before the Additional Sessions Judge was dismissed. The Criminal Revision Petition filed before the High Court was dismissed as well.

Before the matter was taken up for hearing by the Supreme Court, the appellant had already deposited Rs. 2,45,000 as ordered by the trial court. However, the Supreme Court ordered the appellant to further deposit Rs. 1,00,000 before the trial court.

When the matter was finally heard by the Supreme Court in appeal, it upheld the conviction of the appellant; however, having regard to the fact that the appellant had duly deposited the amount of compensation ordered by the trial court as well as further amount of Rs. 1,00,000 as ordered by the Supreme Court itself, it modified the sentence of imprisonment to payment of additional compensation of Rs.1,00,000 which was already deposited by the appellant before the trial court.

- *Makwana Mangaldas Tulsidas v. State of Gujarat and Another*³⁵

In this case, the Supreme Court reprimanded the trial court for prolonging the decision in case of dishonour of cheque for 7 long years. Even after the decision of the trial court, the case was contended for 8 more years before it was finally disposed off by the Supreme Court on March 5, 2020.

The Supreme Court also made some important observations pertaining to expeditious disposal of cases filed u/s 138 of the NI Act, 1881. The Court called for various measures to be undertaken by the various stakeholders involved-

- a) Need to evolve such a system of service/execution of process issued by the court which ensures the presence of the accused which is possible only with the simultaneous and coordinated efforts of the police, complainant and banks.

The Apex Court lauded the directions in this regard in the case of *Meters and Instruments Private Limited*³⁶, where the Court had directed the banks to give the details of e-mail of the accused to the payee/complainant for service through e-mail.

- b) Development of an information sharing mechanism where the banks share all the requisite details available of the accused-account holder, with the complainant and the police for the purpose of execution of process. The RBI, being the apex banking institution of the country was also called upon to evolve guidelines for banks to facilitate the sharing of information for the trial of these cases and such other matters as may be required.
- c) Development of a separate software-based mechanism to keep a track and ensure the service of process on the accused in cases u/s 138 of NI Act.
- d) Considering the feasibility of developing a new proforma of cheques which includes the purpose of payment, along with other information which is helpful in the adjudication of real issues.
- e) Developing a mechanism for pre-litigation settlement in cases falling u/s 138 of the NI Act under the provisions of the Legal Services Authorities Act, 1987.

In fact, in *K.N. Govindan Kutty Menon v. C.D. Shaji*³⁷, the Supreme Court held that: “Even if a matter is referred by a criminal court u/s 138 of the NI Act,

³⁵ (2020) 4 SCC 695.

³⁶ *Supra* note at 27.

³⁷ (2012) 2 SCC 51.



1881 and by virtue of the deeming provisions, the award passed by the Lok Adalat based on a compromise has to be treated as a decree capable of execution by a civil court.”

This measure of pre-litigation ADR process can go a long way in settling the cases before they come to Court.

- f) Considering the setting up of exclusive courts by the respective High Courts to deal with matters relating to S.138, especially in those jurisdictions where the pendency is above a standard figure.

The Court in the case of *Meters and Instruments Private Limited* had itself observed that modern technology should be used to reduce overcrowding of courts. The Court in this case observed:

At least some number of Section 138 cases can be decided online. If complaint with affidavits and documents can be filed online, process issued online and accused pays the specified amount online, it may obviate the need for personal appearance of the complainant or the accused. Only if the accused contests, need for appearance of parties may arise which may be through Counsel and wherever viable, video conferencing can be used.

- ***D.K. Chandel v. Wockhardt Limited and Another***³⁸

The facts of this case are such that the appellant-accused used to purchase pesticides on credit from the respondent-company and made payments in parts. For one such payment due and payable to the respondent, the appellant issued a cheque on 30-04-1999 of Rs. 4,17,148 drawn on SBI at Bathinda, Punjab. However, the cheque was dishonoured on account of insufficiency of

funds and intimation of the same was received by the appellant on 26-05-1999. No amount was paid thereafter and the respondent filed a complaint u/s 138 of the NI Act, 1881.

The trial court convicted the appellant and sentenced him to imprisonment for 6 months along with fine to the tune of Rs. 4,17,148 and imprisonment of 2 months in default of payment of fine. In appeal, the conviction was set aside by the Additional Sessions Judge, Bathinda. Aggrieved by the order of the Additional Sessions Judge, the respondent-company filed a revision before the High Court, wherein the High Court set aside the judgement of the Additional Sessions Judge and restored the conviction of the appellant. The appellant thus preferred an appeal before the Supreme Court.

During the pendency of the appeal, the Court ordered the appellant to deposit the fine amount of Rs. 4,17,148 which the appellant duly complied with. The Court upheld the conviction of the appellant; however, taking into consideration the fact that the cheque was issued in 1999 and the fine amount had also been deposited, the Apex Court set aside the sentence of imprisonment imposed by the trial court which was later affirmed by the High Court in second appeal.

Thus, the judgement was modified from a sentence of fine and imprisonment to that of fine only.

- ***Kalamani Tex and Another v. P. Balasubramanian***³⁹

The respondent and the appellant were engaged in a business arrangement of exporting of garments. On one occasion, due

³⁸ (2020) 13 SCC 471.

³⁹ 2021 SCC OnLine SC 75.



to certain issues, the appellants had to pay to the respondent a sum of Rs. 11.20 lakhs. Appellant No. 2 (Appellant No. 1's Managing Partner) issued a cheque dated 07.11.2000 on behalf of Appellant No. 1 in this regard. However, the cheque was dishonoured and the respondent issued a notice to the appellants demanding payment within days. On non-payment of the debt, the respondent lodged a private complaint u/s 138 and 142 of the NI Act, 1881.

The trial court dismissed the complaint, holding that the respondent had failed to establish a legally enforceable liability on the date of issue of cheque. The respondent preferred a criminal appeal before the High Court wherein the High Court convicted the appellants u/s 138 of the NI Act and the following sentence was passed-

- a) 3-months simple imprisonment alongwith a fine of Rs. 5,000 or 20-days further imprisonment in lieu thereof (For Appellant No. 2).
- b) Fine of Rs. 5,000 (For Appellant No. 1) and 1-month simple imprisonment for Appellant No. 2 in default thereon.

The appellants therefore filed a SLP before the Supreme Court challenging the decision of the High Court. When the SLP came up for hearing, the appellants had deposited the sum of Rs. 11.20 lakhs with the Registry of the Apex Court. Even though the Supreme Court did not interfere with the judgement passed by the High Court, it took a lenient view and directed that Appellant No. 2 shall not be required to undergo the sentence of imprisonment and the same was accordingly set aside by the Court.

⁴⁰ (2010) 5 SCC 663.

⁴¹ **S.320(9)**: No offence shall be compounded except as provided by this section.

• *Damodar S. Prabhu v. Sayed Babalal H⁴⁰*

In this case, the court made some important observations regarding the compounding of offences u/s 138 of the NI Act, 1881 and reducing the plethora of cases filed thereunder.

The Court clarified that compounding of offences under the NI Act, 1881 is governed by S.147 of the NI Act and S.320 of the CrPC is not strictly applicable to offences u/s 138 of the NI Act since S.320 CrPC is meant for offences specified under the IPC, 1860. S. 147 NI Act is an exception to the general rule incorporated u/s 320(9)⁴¹ of the CrPC and it has an overriding effect on S.320(9) CrPC, since the NI Act is a special law.

The Supreme Court in an earlier case⁴² held that compounding of the offence u/s 138 is also permissible at later stages of litigation since there is no bar u/s 147 of the NI Act, 1881 from compounding an offence even at the appellate stage. However, the court proposed the parties to choose compounding during the earlier stages of litigation. The Court also observed that with respect to the offence of dishonour of cheques, it is the compensatory aspect of the remedy which should be given priority over the punitive aspect.

Lastly, to decrease the burden of courts, the Court proposed the following guidelines by virtue of its power u/a 142 of the Constitution in cases relating to dishonour of cheques-

- a) Directions be given in the summons to the accused that he is entitled to make an

⁴² *K.M. Ibrahim v. K.P. Mohammed*, (2010) 1 SCC 798.



application for compounding at the very 1st or 2nd hearing of the case and if such application is made, then compounding may be allowed by the Court without imposing any costs on the accused.

- b) If the application for compounding is made before the Magistrate at a later stage, then compounding may be allowed subject to payment of 10% of the cheque amount to be deposited as a condition precedent for compounding with the Legal Services Authority.
- c) If the application for compounding is made before the Sessions Court or the High Court in appeal, then compounding may be allowed subject to payment of 15% of the cheque amount.
- d) If the application for compounding is made before the Sessions Court or the High Court in appeal, then compounding may be allowed subject to payment of 20% of the cheque amount.

It is thus clear from the analysis of the above decisions of the Supreme Court that even though Section 138 of the NI Act entails criminal liability, the Apex Court is in favour of compounding of the offence and settlement of the dispute at early stages of litigation. Further, the Court is not in favour of imposition of sentence of imprisonment either as a substantive sentence or in default on payment of fine. Even the cases u/s 138 should be ordinarily tried summarily and it is only in exceptional cases that the summons procedure should be adopted.

Therefore, the focus of the Supreme Court is not on imposition of criminal liability but on the civil aspect of the remedy, *i.e.*, compensation to the aggrieved party.

DECriminalisation: THE WAY FORWARD

It is clear from the above discussion that at various stages of the litigation process, the court has diluted the strict procedural provisions of criminal law in relation to the offence u/s 138 of the NI Act, 1881. This is a recognition of the fact that a wrong, which is in substance a civil wrong, is being tried under the veil of criminal wrong. Even the practices in foreign nations is indicative of the fact that a civil remedy is a better and efficacious remedy than imposition of a criminal liability.

In *Meters and Instruments Private Limited*, the Apex Court observed the nature of offence u/s 138 primarily relates to a civil wrong. Taking into account the magnitude of economic transactions, the Court noted that decriminalisation of dishonours of cheque of a small amount may be considered, to be dealt with under civil jurisdiction.

Decriminalisation is also necessary for a country like India where the trial courts are heavily burdened with the pendency of cases. In *Makwana Mangaldas Tulsidas v. State of Gujarat and Another*⁴³, it was observed by the Apex Court that there are 35 lakh pending cases relating to the offence of cheque dishonour, which constitute 15% of the total criminal cases pending in the country. Out of the 35 lakh pending cases, 18 lakhs are pending due to the absence of the accused. Decriminalisation would go a long way in reducing this burden on the courts as well as improving the efficacy of the dispute resolution system of cases pertaining to dishonour of cheques.

⁴³ *Supra* note at 35.



As already observed in Chapter IV, focus is more on the compensatory aspect of the remedy rather than punitive and on the compounding of the offence rather than going through the entire trial procedure. Therefore, criminality attached to the offence has already been reduced. Insertion of S.147⁴⁴ by way of legislative amendment also makes the legislative intent clear that such offences must be settled by compounding without imposition of criminal liability. The punishment u/s 138 is not a means of seeking retribution but is more inclined towards ensuring payment of money. The complainant's interest is more in recovering his money rather than seeing the drawer behind bars. Further, there is little remedy left for the holder of a cheque against such accused who is willing to undergo imprisonment.⁴⁵

In fact in *MSR Leathers v. S. Palaniappan*⁴⁶, the Supreme Court remarked that there is nothing in the proviso to S.138 or S.142 of the NI Act while imposes an obligation upon the holder/payee of the dishonoured cheque to necessarily file a complaint regarding the same. The holder/payee is well within his rights to defer the institution of criminal proceedings on the request of the drawer or on his own volition. The Court noted with regard to the deferring of institution of criminal proceedings⁴⁷:

“Such a decision to defer prosecution may be impelled by several considerations but

more importantly it may be induced by an assurance which the drawer extends to the holder of the cheque that given some time the payment covered by the cheques would be arranged, in the process rendering a time-consuming and generally expensive legal recourse unnecessary.”

The Court further noted⁴⁸:

“We see no reason why the parties should, by a process of interpretation, be forced to launch complaints where they can or may like to defer such action for good and valid reasons. After all, neither the courts nor the parties stand to gain by institution of proceedings which may become unnecessary if cheque amount is paid by the drawer.”

It is also important to note here that in the fiscal year 2020, the share of paper clearing in total retail payments plunged to just 2.96% in terms of volume and to 20.08% in terms of value. This figure was 15.81% in terms of volume and 46.08% in terms of value in the year 2016 when the RBI and the Government aggressively began to push digital payments. Between 2016 and 2020, the digital payments as a whole grew at a compounded annual growth rate of 55.1% from 593.61 crore in fiscal year 2016 to 3,434.56 crore in fiscal year 2020, according to the RBI data.⁴⁹ It is clear from the above statistical data that the use of cheques has reduced drastically and the trend is expected

⁴⁴ **Section 147. Offences to be compoundable.** - Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable.

⁴⁵ Arun Mohan, *Some thoughts towards law reforms on the topic of Section 138, Negotiable Instruments Act-Tackling an avalanche of cases*, Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2009.

⁴⁶ (2013) 1 SCC 177.

⁴⁷ *Id.*, at p.189.

⁴⁸ *Id.* at p.196.

⁴⁹ ‘Retail cheque payments down to a trickle in FY20 to 2.96 per cent: RBI data’, at <https://www.newindianexpress.com/business/2020/oct/18/retail-cheque-payments-down-to-a-trickle-in-fy20-to-296-per-cent-rbi-data-2211899.html> (last accessed on April 11, 2021).



to remain the same, with the digital payments continuing to rise in number.

It is thus clear from the above that decriminalisation should gradually be done away with, beginning with decriminalisation of cheques of small amount. However, the credibility of cheques has still got to be maintained since they still constitute 20.08% in terms of value of total retail payment systems. The next part of this chapter analyses the various available alternatives instead of imposition of criminal liability u/s 138 of the NI Act, 1881.

Alternatives to Criminalisation u/s 138

- *Mandatory Use of Alternative Dispute Resolution Mechanisms*

Instead of cases being tried by the Civil Courts and Criminal Courts, suitable amendment must be brought in by the Parliament so that it becomes compulsory for the parties to resolve cheque dishonour cases through alternative dispute resolution techniques such as arbitration and conciliation. Since majority of the cases are eventually settled by way of compounding or compromise⁵⁰, the arbitration award or the conciliation settlement should be made final and binding on the parties.

This would require suitable amendment to S.89 of the Code of Criminal Procedure, 1908 as well as to the Arbitration and Conciliation Act, 1996. The current window of little discretion available to the parties and the

courts u/s 89 CPC, 1908 should also be closed and resolution of the dispute vide arbitration and conciliation should be made compulsory. This would reduce the burden of both the civil as well as the criminal courts.

- *Self-regulatory Mechanism by the Banks*

Following the footsteps of France, banks in India should be given power to ban repeat offenders from issuing of cheques and mechanism should be developed by the banks to maintain a record of the offenders so that their dishonest activities can be effectively monitored. Currently, if a cheque for a value of INR 1 crore or more is drawn on an account on four occasions in one financial year, and there are insufficient funds in the account, the account holder will not be issued a cheque book. However, this should not be made limited to cheques of higher value only but to all values, whether large or small.

Instead of small cheque return charges, banks should be allowed to impose higher penalties on dishonour of cheques and even higher penalties on subsequent defaults. This will prove to be an effective deterrent for repeated offenders.

- *Criminal Prosecution u/s 415 IPC for the offence of 'Cheating'*

Even if S.138 of the NI Act, 1881 is decriminalised, criminal liability can still be imposed u/s 415⁵¹ of the Indian Penal Code, 1860. The punishment for the offence of

⁵⁰ *Supra* note at 45.

⁵¹ **Section 415. Cheating.** - Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would

not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation. - A dishonest concealment of facts is a deception within the meaning of this section.



cheating is stated by S.417 of the IPC which can be imprisonment for a term upto 1 year or with fine or with both.

Thus, decriminalisation of S.138 NI Act, 1881 would serve the dual purpose of reducing the pendency of cases u/s 138 as well as preserving the criminality of the offence u/s 415 IPC.

- ***Replacement of Cheques with Digital Payments***

Since demonetization in November 2016, the Indian Government and the Reserve Bank of India have been aggressively pushing digital payment systems, which has reduced both the volume and value of retail trade payments by cheques. With the continuous development of technology, the digital payment systems will continue to rise, with the cheques eventually becoming redundant.

CONCLUSION

Decriminalising dishonour of cheques will solve the issues pertaining to cheques on many fronts. Firstly, it will induce investors to invest in the country because there would be no fear of criminal prosecution while entering into transactions through cheques. This would help in increasing the rank of the country in the Ease of Doing Business Index. Secondly, it would reduce the burden of the courts which is very necessary for the Indian judiciary. Thirdly, the credibility of cheques would still be ensured through civil remedies as well as criminal prosecution u/s 415 of the IPC, 1860.

Proceedings u/s 138 of the NI Act, 1881 are already in the nature of quasi-criminal proceedings.⁵² The principles which apply to

other criminal cases do not strictly apply to cases u/s 138. In fact, in *Kaushalya Devi Massand v. Roopkishore Khore*⁵³, the Supreme Court observed:

“The gravity of a complaint under the NI Act cannot be equated with an offence under the provisions of the IPC or other criminal offences. An offence u/s 138 of the NI Act 1881, is almost in the nature of a civil wrong which has been given criminal overtones.”

It is therefore clear that Section 138 is a unique provision which blurs the line between civil and criminal jurisdictions.⁵⁴ Even the decisions of the Apex Court point towards the direction that the primary objective of the proceedings u/s 138 is recovery of the cheque amount. The punishment of the drawer by way of his imprisonment is only a secondary objective. The offences are increasingly being settled by way of compounding. Thus, Section 138 proceeding is nothing but a “civil sheep” in a “criminal wolf’s” clothing.⁵⁵, as it is the interest of the victim that is sought to be protected, the larger interest of the State being subsumed in the victim alone moving a court in cheque bouncing cases.

Section 138 must accordingly be decriminalised to reduce the burden of the courts, at the same time maintaining the credibility of the instrument of cheque through above-mentioned alternatives modes of dispute resolution and monitoring.

⁵² *M. Abbas Haji v. T.N. Channakeshava*, (2019) 9 SCC 606.

⁵³ (2011) 4 SCC 593.

⁵⁴ *R. Vijayan v. Baby*, (2012) 1 SCC 260.

⁵⁵ *P. Mohanraj and Ors. v. Shah Brothers Ispat Pvt. Ltd.*, 2021 (2) BLJ 312.