

FATE OF SECTION 138, NI ACT, 1881

ABSTRACT

Section 138: Refusal to pay a cheque with insufficient funds etc. When the drawer writes a cheque for the checker to repay debts or liabilities, and the bank refuses to pay the cheque due to insufficient funds in the account, this part of the above decree becomes a picture. The section in the drawer bears criminal responsibility and can be punished with a fixed-term imprisonment of up to two years or a fine, which can be twice the amount of the cheque, or both. However, the Supreme Court of India ruled in its judgment that the offences committed under section 138 of the Act were more of a civil nature. The proposed amendments to the bill are based on some of the principles emphasized in the notice from the Ministry of Finance.

A document that can be transferred via delivery note is known as a negotiable instrument. Under the Negotiable Instruments Act of 1881, promissory notes, money orders, and indemnity warrants are three distinct categories of negotiable instruments. Where checks and credit cards are commonly used, cheques are the most frequently used for the business transactions and trades. The bill, in Section 6, makes a point of identifying a check as a bill of trade. Electronic or truncated cheques may be accepted. If the bank refuses to pay the above number, they will probably not honour the cheque for lack of funds or have authorization for its date, etc.

SCOPE OF THE STUDY

The scope of this study is limited to understanding the meaning of Section 138, its implication and why to should be decriminalized from both the perspectives of government and legal fraternity..

INTRODUCTION

Towards the detriment of financial interests, the Central Government has released numerous initiatives known as "Removing Financial Strains" numbers 8/6/2016 to deal with the problems brought about by the Covid-19 mistake. Section 138 of the Negotiable Instruments Act of 1881 (as amended) will be considered to be one of the suggested measures to take. The efforts to outlaw misdemeanours are naturally intended to enhance the operation of the courts and reduce prison overcrowding. Our trade, corporate integrity, and operations have been severely undermined by the number of cases pending in many courts, according to Section 138. All other proceedings were delayed due to the large number of litigants who had lost confidence in the legal system.

As well, by incorporating Section 147 in 2002, the incidence of this offence was significantly decreased, and all offences specified in that section should be considered a possible causes of a forfeiture under the Negotiable Instruments Act, the defendants should be brought to an agreement, after which they must relinquish their liability under that section, thereby also. To ensure a fair trial, covering up civil lawsuits undermines our ability to pursue those claims effectively. 138 of the Negotiable Instruments

There is no prohibition on bringing an action under the NI Act, so the courts favour mediation as a "dispute settlement procedures", a previous set of decisions by the European Court of Human Rights holds to the effect have found. HC said that the 2004 Mediation and Mediation Rules would be relevant also for this follow-up process, and provided more detailed guidance. Deciding that there was no further need for adjudication, the Kolkata High Court concluded that partial payment could be regarded as a judgement at sentencing (if any).

DISHONOR OF CHEQUE

In either of the following situations, the bank will return the cheque. Failure to cash a check can lead to financial instability for the payee. [non-signing of Negotiable Instruments Act of 1881] has now been verified as a crime after changes were proposed in the Public Finance Act of 1988 and the Banking Act of 1988. In 1988, the Negotiable Instruments (Amendment) Act was enacted which provides for issues of a cheques or dishonoured cheques. Legal notices are sent to the drawer in 30 days after delivery if a cheque is returned for insufficient funds. The court deemed that if the recipient may not submit a statutory notice in 30 days, the complaint must be dismissed. Criminal prosecution would follow if you refuse to pay on the 15th day after you have been given a written notice.

SECTION 138 OF NEGOTIABLE INSTRUMENTS ACT

An answer to this question can be found in Chapter XVII of the NI Law, which is 138–142. They are engaged to encourage cheque transactions and to speed up the move away from physical industry. The subsection under section 138 details that if the cheque is returned for some reason, or if the fine is not paid the sentence is two years in prison or the maximum fine is twice the amount of the amount of the cheque.

The following criteria must be met:

1. You must present the bank within six months of the date of issuance or within the applicable banking duration, whichever comes first.
2. If you want the money listed on the cheque to be credited, a written notice from the payee must be sent to the drawer within 30 days.

3. And after he received the payment order, the debtor has still not charged.

Decriminalization of section 138:

Never use the phrase literally. Decriminalization means maintaining the law's status quo while also increasing social acceptance of a certain activity. NI Law was originally filed in the case of non-payment of cheques in 1881, but it was subsequently changed to criminalise this practise, and it became the Criminal Code of Canada in 1988. The primary aim of a criminalization of chequebook writing is to satisfy the criminal justice system and to provide adequate compensation for victims.¹ Criminal responsibility under 138 also included pursuing financial fraud, and guaranteed that any money given back was handed back in fear of retaliation.

CAUSE AND PURPOSE OF DECRIMINALIZATION:

The recovery of the cancelled check is exculpatory regardless of the cause. Removing criminal responsibility may pose a danger to the integrity of the rule of law and the justice system. Section 138, which seeks to establish civil and criminal liability as well as well as to reduce the issue of fake cheque abuse, would be rendered useless. the court's purpose under sections 138 and 139 is to curtail bank fraud. The Supreme Court has recognised the existence of such non-cashing cheques in rulings, and approved their legalisation.

In addition to the Supreme Court's ruling, there have been other minor sections, such as the 137th version of the bill of rights, produced and locked away to allow for various modifications, to promote the movement of small parts." State deregulation of these parts of the drug industry was designed to aid the growth of the industry and aid in attracting new capital. One of the primary justifications for the recommendation to decriminalise Section 138 is that there are over 3.8 million pending cases. Another statistic is that 30% of the convictions that lead to problems in the justice system are due to check-kiting or traffic violation offences.

EFFECT OF CRIMINALIZATION:

Following 30 years of criminalising cheque dishonesty, embarrassment, dishonesty has now become more respectable. S.138 has been successful. With a the volume of intra-state and inter-corporate/transnational

¹ Krrishan Singhanian, *Section 138 Of Negotiable Instruments Act: Overview*, 6 June 2019, URL: <https://www.mondaq.com/india/financial-services/812822/section-138-of-negotiable-instruments-act-overview#:~:text=The%20Negotiable%20Instruments%20Act%2C%201881,bills%20of%20exchange%2C%20cheques%20etc.&text=Section%20138%20of%20the%20Act,dishonour%20of%20cheques%20is%20filed.>

activities, the check has become more common. However, to a certain degree, confidence in criminal courts has played a critical role in the recovery of non-cash cases in the post-oriented economy.

However, at least one-fifth of all criminal cases in the Southern District of New York are linked to the so-called S.138 case. When looked at in this light, reputation is now at an all-time low, and prohibition yields marginal results. Regardless of confirmed or unproven myth, both criminal and non- and non-criminal convictions help the same.

[Following the offence being committed in 1988, the legal system enacted further laws, which] greatly increased penalties, which deterred anyone from committing similar crimes. Nevertheless, it is due to these rules and the low conviction rate, along with the previously built-in rigour and loopholes in the courts, that laws concerning bounced checks have become nearly obsolete.

The biggest problem hindrance to resolution of these cases and the instrument's integrity is that the defendant cannot be required to appear in court on a bond. The 'Criminal Procedure Law, § 72, granted an arrest warrant' And if it involves criminal charges, a formal case is made on S.138 is merely in the private interest of the parties involved. Starting today, police focus will now be directed elsewhere due to widespread criticism of their failure to deal with private complaints. The court was unable to solve this mystery, and took no further action. Section 138 of the legislation mandates a preliminary hearing after the filing of charges. Procedures, on the other hand, make a conflict especially complex, resulting in the issue dragging on because of the time necessary to collect proof. He found that the courts seldom follow the Section 82 and 83 of the Criminal Law Procedure to guarantee the presence of the defendant, which makes him aware that these cases are never really over. This also suggests that we should therefore legalise bounced cheques.

EFFECT OF DECRIMINALIZATION

For one thing, the MSMEs' businesses and ordinary citizens will suffer, as this will trigger dues, personal loans, and additionally, it will decrease credit for normal business growth and development.

Second, the government recently added section 143A and 148 to increase the effectiveness of the Negotiable Instruments Act and diminish the harm the charge.

If Section 138 of the 1881's conditions are not adopted, this would relieve the obligation to pay cheques on banks.

With regard to promptly paying off a debt, fear of prosecution and/fear of incarceration is a large consideration. It benefits creditors as creditors will have to wait longer to be paid.

Proscribing S.138 would eliminate the advantages that the honest people have in using cheques as a secure means of payment. This goes directly toward the "simpl doing business" government initiatives.

According to the Codification of Uncertainty Principle, laws already exist to protect the honest-dealing actor. It shall be presumed that the offence was committed after the notice was received and 15 days after the date of mailing.

Anonymity presents the ability to pay the fee in full within fifteen days without having to answer for it.

For that reason, the provisions of Section 147 of this Act would get in the way of several possible crimes. so as a result, therefore, the parties can both rest assuredly engage in peace talks, and the drawer will not be subjected to any legal action. Additionally, in that regard, the rights of the honest customer are therefore secured.

to guard against attempts by the Ministry of Industry and Commerce of India Direct foreign investment will be reviewed in countries that are bordered by India. Stricter regulations and regulations on potential investors led to stricter foreign policies. What this means is, however, is that despite the recent reduction in penalties for Section 138, foreign investment will continue to have less rights. Thus, reducing criminal penalties for foreigners is one step in the right direction.

At the same time, some long-term interests gain comes with the long-term risk, and these issues may be good for India's economy by legalising S-138 Much of these side effects would be

India's foreign investment (particularly in manufacturing) serves as a vital source of development for the country's economy. Decriminalizing non-serious crimes It is more likely that non-criminalization would attract international investors in order to spur India's economic growth. Investing in shady businesses can incur considerable legal costs, but decriminalising misdemeanours can save you money.

To play an important role in the post-covid economy, India must take basic business strategies into consideration. On top of that, India's fiscal deficit grew to 4.6% of GDP in the next fiscal year. February and March GDP growth rate decreased to 3.1% during the first three months of the fiscal year, with the onset of the lock-in COVID-19 on March 25.² When business is done this way, the work can be finished quickly. There should be no space for complacency with regard to the economy, even at the level of national security.

Even, by including Section 147 in the 2002 "Against the Agreement act", the crimes stipulated in Section 138 can be mitigated, resulting in a settlement by agreement between the parties. The Supreme Court unanimously

² Palash Taing, *Decriminalization Of Criminal Offence Under Section 138 Of Negotiable Instruments Act, 1881*, 4 August 2020, URL: <https://www.mondaq.com/india/crime/966664/decriminalization-of-criminal-offence-under-section-138-of-negotiable-instruments-act-1881>

concluded that in the Metres & Instruments case, the offence is predominantly civil in nature, and the burden of proof shifts to the defendant under section 139. The reduction in penalties will not result in any significant increase in illegal activity.

as of India's courts had over 3.8 million absentee votes at the time Just in the high court in Delhi there were 7.6 million criminal cases awaiting trial at the time of 2005. Earlier, in *Makwana Mangaldas v. Gujarat*³, which was decided on March 5, 2020, small cheques were declared non-criminal by the Supreme Court, petty dishonesty was considered a misdemeanourable offence. The key element of the order is to remove the stigma of small cheque frauds, allowing an alternate way of handling the numerous bounced check incidents. As a result, it is shown that decriminalisation frees up court time and reduces the workload for the courts.

Proceeding with criminalization when taking into consideration of various factors such as strengthening the country's economy and preparing for the future is vital. It's just a matter of simplifying transactions if criminalising minor offences were removed from the market. This will have a big effect because if the public's confidence in monetary instruments has fallen, the entire transaction system will fall with it.

COMPARISON WITH THE LEGISLATION IN OTHER COUNTRIES

Legislators can learn from other countries and address these issues by learning about the legal systems of other countries. Many things have France done well in this regard, for example, they refuse to cash the cheques. A fee will be added to the account when the check is not paid. Since it is the bank's "cash flow" (or cheque) issuer, the central bank is able to charge an individual who regularly bounces their checks to the account, and this is called the central bank's collection book charge. It's possible that the individual will even be banned from writing cheques for five years.

California, for instance, rules in some states grant financial institutions the ability to impose increased cheque-clipping fines. Legal restrictions are effective when it comes to the amount of defaulters. Notwithstanding the statute, people in India are permitted to issue cheques, service fees are so small that it does not make sense to prevent them. Congress could pass a new legislation that would include a list of flagrant defaulters and raise penalties regardless of the dollar amount of the fines. Another initiative that can be implemented in India to stop frequent-fault-issuers from issuing checks is to keep track of the amount of checks they've already written.

There is a civil penalty imposed on France when there is proven cheque fraud, but there is also a central database called the *Fichier de Centenaire* that includes such criminals and forbids all individuals and corporations from issuing cheques for five years regardless of their crime. Since implementing this programme, analysts believe it is clear that it has had a positive impact.

³ *Makwana Mangaldas Tulsidas v. State of Gujarat*, (SPL (cri.) NO. 5464 of 2016)

OBSERVATIONS

Currently, the short-term effects of cheque holders are not accounted for by the approach to decriminalisation. Bona fide cheque holders are not allowed to file criminal charges against the highest-value counterfeit cheque. In this case, incorporating the concept of "US dollars are broke" into the "Code" would be ideal. Also, the bill should have specific rules, specify the civil remedies, and explain what the liabilities are and compensation each cheque holder is entitled to. Additionally, the legislature may recommend administrative punishments, including a ban on cheques, such as issuing cheques for a specified time period of time.

It is possible to use a small amount of mediation to treat the condition. The Delhi High Court has suggested the use of "arbitration, mediation, and conciliation" to minimise the backlog of cases in *Dayawati v. Yogesh Kumar Gosain*⁴. Thus, it should be considered for incorporation as part of the bill. This would reduce the number of cases waiting to be adjudicated and, most importantly, speed up remedy application for plaintiffs. If we are talking about the possibility of a borrower avoiding fresh insolvency proceedings, we have two other alternatives: civil proceedings and arbitration, as well as state or national enforcement of creditors' rights.

CONCLUSION

Likewise, the decriminalisation also has its own benefits and drawbacks. Whereas on the one side, creditors will lose confidence in the scheme, it simplifying the market options isn't the only alternative to criminalization. Decriminalizing this aspect would make it difficult for creditors to have faith in the merger, and harm the reputation of the inspection system, so it's not a good idea. Uneconomic instruments are regulated by the Negotiable Instruments Act, which became law in 1881. Under section 138, we've placed civil or criminal responsibility on the defendant. If the government proposal to decriminalises section 138, the intent of this section would be thwarted. Wronging will be eradicated, but also individuals will no longer be afraid of owing money because of the fear of criminal liability. It was intended to sustain the situation created by the COVID-19 epidemic, and stimulate trade and entrepreneurship. In the eyes of the readers, it does not accomplish the state's main objective of "Oneness of efforts, fairness and inclusiveness" since it helps one section of the economy only.

⁴ *Dayawati v. Yogesh Kumar Gosain*, 2017 SCC OnLine Del 11032