

Recent on Cheque Return Crime
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(Views are personal)

Background

Cheque Return for want of funds, basically a civil wrong, was also made a criminal offence providing jail sentence effective 1.4.1989¹ by introducing a new Chapter XVII (sections 138 onwards) to Negotiable Instruments Act, 1881.

While the purpose was to enhance the acceptability of cheques² presumably for easier settlement of trade transactions this has been over a period of time used more for inducing loan recovery given delays in recovery via civil courts and DRTs owing to pendency of cases.

It worked well initially but lost its sheen in course of time owing to pendency of section 138 cases as well in the cheque return courts and consequently facing the same fate of delay in recovery.

Taking suo motu cognizance of the pendency of cases before cheque return courts, the Supreme Court³ eventually directed for forming special/ separate courts for cheque return cases; presumably the work currently in progress, but that is a separate story for another day.

Current Issue

In a recent case⁴, Supreme Court examined the issue of whether the offence under section 138 is committed if the dishonoured cheque does not represent the enforceable debt at the time of encashment and upheld that the criminal action for cheque return would not succeed if part amount of the cheque is already paid, unless in such case the cheque is endorsed noting the part payment (in terms of section 56 of Negotiable Instruments Act, 1881) and only the remaining (balance/ net) amount is claimed, thereon.

This has unearthed and brought into attention section 56 of Negotiable Instruments Act, 1881 (not much used for cheques in the rememberable past) facilitating payment of balance/ net amount on a cheque on which part amount if paid.

However, a challenge on ground is, currently a cheque with the endorsement as above could be presented for remaining (balance/ net) amount only across the counter of the drawee bank but not via interbank clearing since neither there is current practice (also nor a practice in rememberable long past) of endorsement of cheque for part amount received and presenting it for the remaining part amount nor the current clearing mechanism provides for or anticipates part payment on a cheque.

This challenge would understandably not have arisen in 1881, when Negotiable Instruments Act was born for probably there was no interbank clearing then and the cheques used to be presented for payment only across the counter of the drawee bank where presenting for part payment was possible and also could have been practised, which practice apparently has since fallen into disuse.

One fallout of the judgment is the possibility of a cheque issuer paying a small part amount (on a cheque given earlier for full amount of due) and getting free from the criminal action...!

¹ By Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988. Further changes brought in effect in the years 2003, 2012, 2015 and 2018.

² The statement of object of the above act reads as follows in this regard: *“To enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers”*

³ By Suo Motu Writ Petition (Criminal) No.2 of 2020.

⁴ In re: Dasharathbhai Patel Vs Hitesh Patel- Criminal Appeal No. 1497 of 2022 decided on 11.10.2022.

Way Forward

Until the interbank clearing provides for presentation of cheque for part amount, the holder of the cheque (held for the full amount of debt) could consider in case of return of such cheque for want of funds to-

- (A) Issue the demand notice on cheque return only for the remaining (balance/ net) amount (i.e., amount of cheque less the part amount already received) and not for the full amount as appearing on the cheque; and
- (B) Present such cheque across counter to the drawee bank with a letter demanding only such remaining (balance/ net) amount having endorsed the cheque (in keeping with the provisions of section 56 of Negotiable Instruments Act, 1881) for the part amount received.

Alternatively, a repayment cheque could be taken without stating a specific amount in the space for amount but mentioning the total amount elsewhere on the cheque with legend "Not Over Rs _____" (as is done in case of a demand draft/ payment order) and also a covering letter giving authority to fill in the eventually due amount and such due amount i. e. remaining (balance/ net) amount could then be stated at the space meant for amount⁵.

The interbank clearing may consider to facilitate processing of cheque for the remaining (balance/ net) amount, after reducing the amount as appearing on the face of cheque by endorsement on it (in terms of section 56 of Negotiable Instruments Act, 1881) for the part amount of it having been received.

It may also be worthwhile to consider amending Negotiable Instruments Act to:

- (A) Exclude cheque from the operation of section 56; and
- (B) Add explanation to section 138 stating that the offence under it would be deemed to have been committed in case of a cheque issued toward repayment of debt is returned unpaid regardless of the part amount of debt having been repaid if the amount in the account at the relevant time when the cheque is presented is insufficient to pay the (balance/ net) amount remaining to be repaid on such cheque.

In perspective

Criminalization of cheque return for insufficient funds, besides having a theoretical objection of unjustifiably converting a civil wrong into a criminal offence and creating collateral issues like in the present case, also burdens already overloaded criminal justice system with further burden of such cheque return cases. It also does not go well with the Governmental agenda of promoting Ease of Doing Business by generally decriminalizing commercial or business defaults.

The long run solution to better facilitate timely recovery of dues is to strengthen the civil/ commercial courts and DRTs enhancing their number, providing sufficient infrastructure and staffing, digitalization for faster delivery of justice through civil/ commercial courts and DRTs and reduce reliance on criminal action for the repayment of dues.

End.

Disclaimer

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⁵ As Inchoate Stamped Instrument, vide section 20 of Negotiable Instruments Act, 1881.