

THE BUZZ

Monthly Newsletter By Team Ayana Legal

Rationale Behind Proposal

“Decriminalization of minor offences is one of the thrust areas of the government. The risk of imprisonment for actions or omissions that aren’t necessarily fraudulent or the outcome of mala-fide intent is a big hurdle in attracting investments. The ensuing uncertainty in legal processes and the time taken for resolution in the courts hurts the ease of doing business”

- Ministry of Finance
Statement of Reasons

Other Acts proposed to be decriminalized

Insurance Act 1938
SARFAESI Act 2002
PFRDA Act, 2013
RBI Act, 1934
NABARD Act, 1981
NHB Act, 1987
State Financial Corporations Act, 1951 and many more..



Bounced Cheques - Decriminalisation

At the early stages of the COVID-19 lockdown, the government of India with aim to improve the ease of doing business and revive the economy, sought to re-classify certain offences in the financial sector. This included the proposal to decriminalize 39 sections under 19 statutes, one of them being Section 138 of the Negotiable Instruments Act, 1881. But, as it stands today, cheque dishonour is a punishable offence under the NI Act, 1881.

What Is A Bounced Cheque

A 'bounced cheque' or also called a 'dishonoured cheque' is when the bank declines to honour a cheque that was used for payment due to some inaccuracies (e.g. signature mismatch, the date etc.) or the not meeting of certain requirements (e.g. insufficient funds in the cheque drawers' account etc). It is a criminal offence.

When a cheque is dishonoured, the bank of the drawer processing the cheque will issue a memo or the 'Cheque Return Memo' to the bank of the payee which mentions the reasons for dishonour. The payee's bank will then send the dishonoured cheque and memo to the payee.

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Decisions of the Supreme Court

Meters and Instruments Private Limited and Ors.v. Kanchan Mehta

- It was held that Section 138 was in the nature of a civil wrong and that the provision was more compensatory in character allowing for the compounding of the offence by the court.

Kaushalya Devi Massand v. Roop Kishore Khore

- It was held that Section 138 is of the nature of a civil wrong but with shades of a criminal nature

Alka Khandu Avhad v. amar Syamprasad Mishra &Anr

It was held that even incase of joint liability incase of individual persons, only the person who has drawn the cheque will be liable to be prosecuted under Sec. 138

Did you know?

In Makwana Mangaldas Tulsidas v. State of Gujarat, it was held that more than 38 Lakh cases of dishonored cheques are pending

Thank You

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Within 30 days of receiving the memo, the payee is to give notice to the drawer of the cheque mentioning that the drawer is liable to pay the payee within 15 days of receiving such notice. On non-payment the payee can take legal action, registering a complaint with the magistrate within a month of giving the notice.

The payee also has the option of re-submitting the cheque to be cashed in within 3 months of the date on which the cheque was issued. If the cheque is not processed and dishonored a second time, then the payee can prosecute the drawer.

Section 138 Negotiable Instruments Act, 1881

Section 138 provides that when the cheque is dishonoured the defaulter shall 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 both. There are certain conditions that required to be proved as given by the Supreme Court in the case of **Kusum Ingots And Alloys Ltd v. Pennar Peterson Securities Ltd** these include:

- i)The cheque must have been drawn on the drawer's account.
- ii)The cheque must be issued towards the clearance of a debt or legal liability.
- iii)The cheque must have been dishonored as a result of insufficient funds in the drawer's account.

Implications of Decriminalization of Section 138

If section 138 of the Negotiable Instruments Act, 1881 were to be decriminalized then one must look at the effects it would have. While the proposal to decriminalize may have been made to increase efficiency os business, one must question whether the loss of fear of criminal prosecution would lead to loss of trust and credibility of cheques and in turn adversely affect small scale businesses. The proposal of the government to make the offence compoundable, would reduce the burden on the courts. The apex court too has held previously that Section 138 is primarily in the nature of a civil wrong and cannot be treated the same as a criminal offence under the Indian Penal Code.