

Payment through Cheque in Digital Age and its Related Issues under the Negotiable Instrument Act, 1881

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Abstract: In a country like India where out of the total workforce, approximately 50% are self employed, 30% are casual workers, 16.5% are the salary earners and rest are contract workers, flow of Cash and issuing cheque in lieu of cash is deeply embedded in its payment system. However planned efforts have been made by the Government with the aid of RBI, post - demonetisation that have shown a marked shift in Indian payment system as people are too adopting digital payments. It is difficult to opt the single payment system as both cash and non - cash payment instruments fulfil different unique needs, and as long as these needs do not change, both types of payment instruments are required to meet the full spectrum of present scenario. Thus, this article tries to elaborate the pros and cons of both payment systems.

Key Words: Cheque, Digital Payment, Section 138, Negotiable Instrument Act, 1881

I. INTRODUCTION

In the present age of “super connectivity” the whole world is going through the process of “digitalization” especially in banking sector and commercial transactions. Money transfer with certain limitations through e-banking is out there since 90's when for the 1st time ECS was launched later on followed by EFT, NEFT & RTGS facility. Especially after demonetisation in 2016 it has been seen that day - by - day we come across with the numerous modes of digital payments and e - transactions like e. Banking, Paytm, Phone Pay, Google Pay, Airtel Payment Bank etc. Thus with the growing penetration of computers and smartphones and increasing access to the Internet, mostly Indians are taking digital channels for their banking needs. But on the other hand as the cyber crime is becoming greater threat in present scenario about 90% of transactions in India are still paid in cash or through other traditional method such as negotiable Instruments particularly the “Cheque”. It has been reported by the RBI in its annual report for the year 2017 -2018 that there was a massive data breach of 3.2 million debt and credit cards and around 50,000 Cyber frauds. It classifies bank fraud as transactions involving any cheating, negligence, misappropriation of funds, or forged documents.¹ Therefore “Cheque” as a negotiable instrument is still having its own unique identity and transactional value for the purpose of money transfer in person as well as in account. Carrying a cheque is one of the easiest ways for a common man in place of bundle of cash. Worldwide a cheque has its greater value in terms of commercial transactions therefore its issuance and

dishonour is regulated under the law of negotiable instruments. It is an acknowledged bill of exchange facilitated by the bank as a part of its banking services to the holder of bank account and is readily accepted in lieu of payment or money and is negotiable. Over the years many important changes have been introduced to regulate the legality of an issued and dishonored cheque in India. Today issuance of a cheque is the proof of one's debt liability; the dishonored of the same have criminal liability. The Negotiable Instrument Act 1881 is the key enactment to facilitate smoother functioning of business transactions upholding the validity of its provisions the supreme court has also specify that in many transactions cheques were issued merely as a device to defraud the creditors and it then causes incalculable loss, injury and inconvenience thus the payee and the credibility of business transaction suffers a setback.² As reported during 2008 about 20% of the total numbers of cases filed in the Courts are of cheque dishonour.³ Recently a the study reveal that still there are 35 lakh cases of cheque bounce are pending which contributes about 15% of the total Criminal cases at district level throughout the country. These numbers shows that though the countries have witnessed a steady growth in digital payments over the period of past five years. Still the traditional method of paying through cheque still rules the commercial transactions the RBI itself accepts that “Cash is King, but at the same time it is of the opinion that Digital is too Divine”, as per RBI is no accurate formula to assess cash payments but the cash still rules it is increasingly seen as a way to store value as an economic asset rather than to make payments,” Therefore this article aims to discuss the importance of

¹ Reserve Bank of India, (Annual Report 2017-2018)

² M/S. Meters and Instruments Private Limited & Anr v. Kanchan Mehta, 2017(4) RCR (Criminal) 476

³ Law Commission of India, 213th Report, 2008 on *Fast Track Magisterial Courts for Dishonoured Cheque Cases* (November 2008)

Cheque in present digital age along with the important provisions of Negotiable Instrument Act, 1881.

II. IMPORTANT AMENDMENTS OF NEGOTIABLE INSTRUMENT ACT WITH REFERENCE TO CHEQUE, TILL DATE

The parliament in order to strengthen the sanctity of the issued Cheque for the 1st time has introduced the amending Act in the year 1988 where the Act has been amended by the Banking public financial Institution and Negotiable Instrument Laws (Amendment) Act, 1988, through this a new chapter XVII was incorporated for penalties in case of dishonor of cheque due to insufficiency in funds in the account of drawer of the cheque. Another Amendment was carried out in the year 2002 in section 138 of the Act and the offence committed under section 138 of the Act is then became punishable for a term which may be extended to two years. The amendment further provided that 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.⁴ Accordingly, in exercise of the powers conferred by Section 35A read with Section 56 of the Banking Regulation Act, 1949, the Reserve Bank of India issued a notification reducing their validity to 03 months from the date of issue. Until, April 2012, cheque in India were valid for a period of 6 months from the date of their issue.⁵ Thereafter in the year 2015 the Government of India had overturned the Honourable Supreme Court's judgment of Rupsingh Rathod v. State of Maharashtra⁶ by promulgation of an Ordinance through the President of India on 15th June 2015. The Ordinance has introduced a new sub-section – sub-section 1 [Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)], to section 142 of The Negotiable Instruments Act. In the above noted case the honourable Supreme Court had made it mandatory that the complaint related to cheque bouncing must be filed only where the drawee bank is located. In 2017, for the purpose of countering the delaying tactics that are being adopted by those who want to avoid paying cheques issued by them. The Act is further amended via the Negotiable Instruments (Amendment) Bill, 2017, the Amendment provides for interim compensation to the complainant. By this Amendment a new Section was inserted subsequent to the section 143 (Power of Court to try cases summarily) e.g Section 143A it provides that 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.

The section further provides that the interim compensation under sub-section (1) shall not exceed twenty percent. of the amount of the cheque and shall be paid within sixty days from the date of the order or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque. If the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant. The interim compensation payable therein may be recovered as if it were a fine under section 421 of the Code of Criminal Procedure, 1973. Moreover the amount of fine imposed under section 138 or the amount of compensation awarded under section 357 of the Code of Criminal Procedure, 1973, shall be reduced by the amount paid or recovered as interim compensation. Along with section 143A section 148 was also added through the amendment subsequent to section 147 section 148 provides that where there is an appeal by the drawer against conviction under section 138, the Appellate Court may order the appellant to deposit such sum which shall be a minimum of twenty percent. of the fine or compensation awarded by the trial Court: Provided that the amount payable under this sub-section shall be in addition to any interim compensation paid by the appellant under section 143A. The amount shall be deposited within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the appellant. Provided that if the appellant is acquitted, the Court shall direct the complainant to repay to the appellant the amount so released, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

III. PAYING VIA CHEQUE VERSUS DIGITAL PAYMENT

No doubt that in 21st century technical innovations and electronic infrastructure and developments and internet revolution has introduced the new format of commerce. Today everything is on finger tips with mobile phones the ease and speed that comes along has grabbed the attention of corporate world also. But making payments through cheques for trade and commerce is even today is the 1st choice. However every activity that man has adopted for its well being have its own

⁴ The Negotiable Instruments (Amendment and Miscellaneous provisions) Act, 2002. Act No. 55 of 2002, Section.7, (w.e.f. 6-2-2003)

⁵ RBI Notification, Payment of Cheques / Drafts / Pay Orders / Banker's Cheques (RBI/ 2011-12/288, December 2, 2011)
⁶ (2014) 9 SCC 129

pors and cons. Both cheques as well as digital payment are subjected to criminal acts by the offenders of money market in one way or the other and will cause losses to the holder of cheque and receiver of digital payment in this section some of major advantages and disadvantages of both payment system are below :-

1. Digital modes of payment save time and labour and are available 24x7. There is no cash handling fees from the bank, and no trips to the bank to pay it in. money can be transferred directly from payee account to beneficiary account with in fraction of seconds.
2. Payment through cheque can also be done at any time by the payee but it can only be credited in the favour of drawer after the drawer presented it before the concerned bank for payment. A cheque can be presented before a bank any number of times till its validity, during banking hours only and can only be incashed to the holder imperson or in his account if the payees account have sufficient funds to withdraw otherwise the cheque is returned as dishonored.
3. Digital Banking Accounts and Payment Mode are always vulnerable to the Cyber threats like Hacking and cloning of Digital Account. There are many instances where AppsFlyer, bots, and malware have perpetrated most of the digital frauds and have resulted in unauthorized deduction of money from the bank account of an unsuspecting user.
4. Cheques come with their own set of concerns; for example, the instrument is prone to being lost or damaged and even being misused by way of forged signatures.
5. Digital transaction need super connectivity of internet; if it fails the it will be troublesome. Whereas cheques are manual.
6. Dishonour of Cheque by any reason for whatsoever attracts criminal liability under the specific law and holder of the cheque can sue the payee through directly approaching the court under section 138 of Negotiable Instrument. Digital fraud also attracts the criminal liability under the cyber law. The act of digital frauds is investigated under the preview of Information technology Act, 2000; one has to go through long procedural law initially from lodging of First information Report.
7. In case of payment through cheque if the cheque get dishonored the offender is known to the holder of cheque and to the prosecuting agencies. Whereas in case of digital fraud it is a difficult task to find out that who committed the offence.
8. Where the loss is due to negligence by a customer, such as where he has shared the payment credentials, the customer will bear the entire loss until he reports the unauthorised transaction to the bank.

9. The digital mode of payments was facilitated through only 87 authorised payment system operators, as on end-June 2017.⁷ Whereas cheque is duly recognized throughout the country as the Banks have provided to its customers multi city cheques for their ease of doing business.

IV. THE CHEQUE TRUNCATION SYSTEM

In the year 2010, in order to save time and not to physically move the cheque to a clearing house the Reserve Bank of India brought CTS the Cheque Truncation System. Under CTS the hard copy of cheque is scanned and its image MIRC data is then transfer electronically to the clearing house from there the same data would go the paying bank, there the MIRC data so received got inspected which include the signature of the payee on scanned image of cheque and thereafter – after verifying the authenticity of all data so received the money is released from the drawers account. It is a sort to the digital or electronic payment method and is quite safe and faster. With amendments to Sections 6 and 1(4) and with the addition of Section 81A to the Negotiable Instruments Act, 1881, the truncation of cheques has been legalized.⁸ Following are the advantages of CTS:-

1. The system has totally minimized the fear of loss of cheques in transit including chances of it being lost due to mishandling, etc. since the movement of cheques from one bank to another having been stopped.
2. The system has eventually resulted in integration of clearing houses into a nation-wide standard clearing system, thus making cheque clearance drawn on any bank in India possible within 24 hours.
3. CTS brings elegance to the entire activity of cheque processing and clearing and offers several benefits to banks in terms of cost and time savings, including human resource rationalization, cost effectiveness, business process re-engineering and better customer service

V. CHEQUE IN ABSENCE OF SECTION 138 OF THE NEGOTIABLE INSTRUMENTS ACT

Owing to uncertainty in legal processes and the time taken for resolution in the courts which hurts the ease of doing business, there are rumors spreading around that Government of India is thinking and proposed to decriminalize the old age enactment of section 138 of Negotiable Instrument Act, 1881, terming the same as "Minor Offence", If it happens to be so then the basic scope and object of section 138 will drain and the community in commercial transaction will loses its faith and confidence of trading. Because in commercial world a cheque is not just a piece of paper it is equivalent to the hard earned cash or original currency notes. The developments and amendments carried out by the parliament in relation to section 138 so far

⁷ Reserve Bank of India, 134 (Annual Report 2017-2018)

⁸ Chennai Bankers Clearing House, "Procedural Guidelines for Cheque Truncation System", 35 (September, 2017)

even make it more valuable as it dishonor attracts punishment. The section 138 itself proves to be deterrent for the defaulters of commercial world. Thus the proposed action of the government of India if implemented then it cannot be termed as action in interest of justice and good conscience. As an offence will remain an offence even if we are going through difficult time. The proposed Decriminalization encourages the gullible offenders having similar criminal tendency to issue the Cheque in commercial transaction casually without realizing or worrying.

VI. CONCLUSION

The advent of cheques in the market has given a new dimension to the commercial and corporate world. It facilitated trade and commerce tremendously. As with the flow of Cash and ease of payment through cheque, business activities have increased rapidly along with it the attempt to commit economic crimes and to indulge in activities for making easy money have also increased. Therefore the legislature from time to time has introduces amendments to the Negotiable Instrument Act which regulate the way the cheques are to be used and provided cheque a legal recognition as equivalent to that of hard cash not only this its dishonour attracts punishment and fine both . Not only has this later on the cheques been digitalized via CTS. Thus, making it the easiest, safest, fastest and traditional mode of payment in commercial world. Yet another accepted fact that nothing is permanent and change is the rule of universe therefore the Reserve Bank's continued efforts towards migrating to a less-cash society gained momentum during the year with the introduction of newer digital modes of payment. With the rapid advancement of technology and the advent of new developments and innovations in the payment landscape, the

Bank enhanced its focus on the safety and security of the payment systems. Further, the Bank targeted on making technology infrastructure robust to ensure smooth running of the critical and systemically important payment and settlement systems in India. The initiatives taken by the Bank, along with enhancement in infrastructure and addition of innovative products in the payment space enabled the spread of electronic payments to a larger customer base across the country. As per RBI the electronic payment and settlement systems continued its robust growth during this year and will gain progress in future with more advancement in infrastructure and technology. However Digital Banking Accounts and Payment Mode are always vulnerable to the Cyber threats like Hacking and cloning of digital account and have resulted in immediate loss to the user. But it is not so with the traditional method because the judiciary by its interpretations has cut the deadwood and trimmed of the branches so that the holder of the cheque is not lost in thickets and branches. There is nowhere any batting on sticky wicket on cheques. It is always a win - win situation for the cheque holder. As the Statutory presumption under section 118 and 139 of the Act in all respect favours the action of the holder of cheque. We hope that our legislature in near future rather than decriminalizing the offence of dishonour of cheque, shall incorporate the principles laid down by the judiciary in its pronouncements, by the way to statutory amendments to section 138 of the Act to avoid any ambiguity as well as considered the inclusion of electronic operation of the bank accounts within the ambit of section – 138 of the Act. As we are living in a federal structure thus on the same noting both system of payments shall be encouraged as both were the part of same coin.