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THE NEGOTIABLE INSTRUMENTS (AMENDMENT) ACT, 2018:

A STEP IN THE RIGHT DIRECTION?

1. INTRODUCTION

The Negotiable Instruments (Amendment) Act, 2018 (the "**Amendment**") was recently passed by parliament and came into effect from September 1, 2018. It introduces substantial changes to the Negotiable Instruments Act, 1881 (the "**Act**"), which may have a significant impact on commerce and the ability of parties to transact through negotiable instruments.

This alert highlights the key changes introduced under the Amendment, and considers their impact on the complainant (the "**Complainant**") and the drawer (the "**Drawer**") of dishonored cheques.

2. KEY CHANGES

2.1. Drawer to pay interim compensation to the Complainant

The Amendment inserts a new section, Section 143A, in the Act. It empowers the courts, in a summons trial or a summons case, to direct the Drawer to pay interim compensation to the Complainant, in two scenarios: (i) at the time the Drawer pleads *not guilty* to the accusations made in the complaint; or (ii) at the time of framing of the charge, in any other case.

The court can direct the Drawer to pay interim compensation of up to 20% of the amount of the dishonoured cheque, within 60 days from the date of its order, or within a further period of 30 days, if the Drawer provides sufficient cause for such delay. If the Drawer fails to pay interim compensation within this time frame, the court may recover the said amount as a *fine* under Section 421 of the Code of Criminal Procedure, 1973.

2.2. Power of appellate courts to order the Complainant to deposit a sum

Section 148 of the Act has been amended to state that if the Drawer appeals against an order of conviction, the appellate court may order the Complainant to deposit with such court, a minimum of 20% of the fine or compensation awarded by the lower court. This amount is in addition to the interim compensation paid by the Drawer under Section 143A of the Act. The amended provisions also give appellate courts the discretion to release this amount deposited by an appellant Drawer, to the Complainant, during the pendency of the appeal.

However, if the Drawer is acquitted, the court has the authority to direct the Complainant to repay the interim compensation to the Drawer, along with interest at rates prescribed by the RBI at the beginning of the relevant financial year. This amount is payable by the Complainant within 60 days from date of the order directing the Complainant to make payment, or within a further period of 30 days, if the Complainant provides sufficient cause for the delay.

3. INDUSLAW VIEW

The judgment of the Supreme Court of India in 2014, in the case of *Dashrath Rupsingh Rathod v. State of Maharashtra & Anr.*[1], had significantly eroded the confidence of the public in undertaking commercial transactions through cheques.

The judgment held that the Complainant was required to sue the Drawer within the territorial jurisdiction of the Drawer bank, which resulted in cases being transferred across the country to the court exercising jurisdiction over the Drawer bank. The Government brought in further amendments to set right the legal position and restore public confidence. In this background, the Amendment certainly comes as a shot in the arm to the rights of the Complainant under the Act.

In a country which is plagued with immense delays in deciding criminal complaints under the Act, the Amendment is a welcome change. Many Complainants write off the liability of the Drawer, considering the enormous delays in deciding the complaints filed under the Act.

Given that the newly-introduced Section 143A provides for a portion of the cheque value to be paid to the Complainant as interim compensation, the Complainant's rights will be protected to an extent. The amended Section 148 further provides for additional amounts to be deposited by the Drawer before the appellate court, if the Drawer is convicted. Since the interim compensation has to be paid at the time of framing of the charge, the Drawer may have to pay due attention to this process. This is vastly different from the position prior to the Amendment, where the Drawer could delay making payments to the Complainant and could delay proceedings to frustrate the rights of the Complainant.

The requirement to deposit interim compensation protects the Complainant against undue financial strain, since, in most cases, the Drawer has benefitted from goods or services provided by the Complainant without paying for them. Further, the Amendment may reduce instances where the Drawer knowingly delays the trial to buy some time, only to settle the case at a later date. The requirement to pay interim compensation at the early stages of the trial may either compel the Drawer to settle the case at the early stage itself, or ensure that the Complainant receives a portion of the money due to him.

However, on the flip side, the Drawer could be required to pay interim compensation even before the guilt is adjudicated through a proper trial. The Amendment does not account for situations where the cheques may have been issued under duress or coercion, or obtained through fraud. There may also be situations when the cheques that are issued do not correspond to a *debt,* which is sacrosanct for initiating proceedings under the Act. The Amendment, essentially, presumes the guilt of the Drawer, for the purposes of awarding interim compensation.

Further, though Section 143A of the Act provides that the courts *may* grant interim compensation which shall not exceed 20% of the cheque value, the Amendment does not provide for the *basis* to decide whether or not to grant the interim compensation.

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[1] *Dashrath Rupsingh Rathod v. State of Maharashtra & Anr.*, decided on August 1, 2014. For the full text of the judgment, please refer to the citation 2014 (3) ACR 2914.

The Amendment also does not set out any factors to be considered by the courts to decide whether the entire 20% of the cheque value should be granted as interim compensation, or any amounts lesser. In the absence of this, the courts would be at liberty to decide whether or not to award interim compensation, and also to award the interim compensation on factors they deem appropriate. Such unbridled discretion could lead to parties challenging court orders, either granting, or failing to grant, interim compensation, before appellate or writ courts, leading to increase in litigation.

While Section 143A of the Act empowers the court to order '*the drawer of the cheque*' to pay interim compensation to the Complainant, when read with Section 138 and Section 141 of the Act, it appears that if a *company* commits an offence under Section 138 of the Act for the dishonour of a cheque, the company and *every person* who, at the time the offence was committed, was in charge of and responsible for the conduct of the company's business, shall be deemed to be guilty of the offence and liable to be punished.

Therefore, there is a possibility that even non-executive directors and other persons who are not in charge of the day-to-day affairs of the company (and, therefore, are not liable for the offence) may *also* be called upon to pay the interim compensation to the Complainant on a proportionate basis, even before the adjudication of their liability under the Act. The Amendment provides no safeguards in this regard.

Further, the Amendment does not provide for any discretion to courts to waive the requirement of paying the interim compensation at the request of the Drawer. In situations where the Drawer is undergoing financial crisis or is in the process of liquidation, directing the Drawer to pay the interim compensation may be onerous, particularly when the guilt of the Drawer is yet to be adjudicated. The Amendment states that, in the event the Drawer succeeds in the trial court or the appellate court, the interim compensation has to be repaid by the Complainant, with applicable interest. Given that the Amendment does not account for a situation where the Complainant is not in a position to repay the same, this may prejudice the rights of the Drawer, if the Drawer ultimately succeeds in the case.

Although the Amendment sets out additional rights for the Complainant, it also imposes conditions on the Drawer of the cheque. Only time will tell whether or not the Amendment has the desired effect of increasing public confidence to deal with negotiable instruments for commercial transactions.

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