

THE CONTROVERSY GETS MURKIER - CAN THE ACCUSED SEEK COMPOUNDING OF AN OFFENCE FOR CHEQUE DISHONOUR WITHOUT THE CONSENT OF THE COMPLAINANT?

1. INTRODUCTION

The object of introducing sections 138 to 142 to the Negotiable Instruments Act, 1881¹ (the “NI Act”) was to ensure efficacy of banking operations and credibility of transacting in negotiable instruments. However, with the passage of time, the number of pending criminal cases for cheque dishonour increased exponentially. The Negotiable Instruments (Amendment and Miscellaneous) Act, 2002², among others, introduced Section 147 to the NI Act that made the offence of dishonour of cheques compoundable. One of the reasons for this amendment was to ensure speedy disposal of these cases that were causing a huge burden on the judicial system. In 2008, the report of the Law Commission of India³ had recommended setting up fast track courts at magisterial levels with the objective of resolving more than 3.5 million criminal cases for cheque dishonour across India⁴. However, the situation did not improve, and the cases have only piled up over the years.

Traditionally, the concept of compounding a criminal offence requires the consent of the aggrieved or the injured party. Section 320 of the Code of Criminal Procedure, 1973 (“CrPC”) provides for compounding of offences. The table provided in the said provision makes it clear that the compounding of the named offences can take place only with the consent of a person who is either a complainant or who has been injured or aggrieved. Section 147 of the NI Act⁵ has a non-obstante clause that makes an offence of cheque dishonour compoundable, notwithstanding the provisions of the CrPC.

When the complainant and the accused agree to settle the case amicably, the accused can avail the remedy under Section 147 of the NI Act and compound the offence. However, the difficulty arises in situations where the accused appears before the magistrate court and expresses an intention to pay up the value of the cheque amount and have the offence compounded, but the complainant refuses to accept it. In such a situation, can the magistrate permit the accused to unilaterally compound the offence, despite objections of the complainant? This question has remained unresolved despite several judicial precedents. It will be interesting to analyse the law as it evolved over a period of time.

2. JUDGMENTS OF THE COURTS

A three-judge bench of the Supreme Court of India (the “**Supreme Court**”) in *Damodar S. Prabhu v. Sayed Babalal H.*⁶ (“**Damodar**”) allowed the compounding of the offence of cheque dishonour since both parties had arrived at a settlement. However, the court considered the larger question of the huge pendency of cases for cheque dishonour and the enormous strain that it was putting on the judicial system. Mr. Goolam

¹ Inserted by the Banking, Public Financial Institutions and Negotiable Instrument Laws (Amendment) Act, 1988 (66 of 1988).

² Introduced with effect from 6 February 2003.

³ Law Commission of India, *Report No. 213: Fast Track magisterial Courts for Dishonored Cheques*.

⁴ Please also see report of the Reserve Bank of India at https://m.rbi.org.in/scripts/bs_viewcontent.aspx?Id=2598, which shows that nearly 60% of the non-cash transactions in India happen through paper-based instruments.

⁵ Section 147 of the NI Act – “Offences to be compoundable – Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable.”

⁶ (2010) 5 SCC 663.

E. Vahanvati (then Attorney General of India) was appointed as the amicus curiae. He suggested that the court frames guidelines to ensure that the parties seek compounding of the offence at an early stage, instead of availing it at a belated stage after a protracted litigation - causing delays, expenditure, and strain on the judicial system. The following guidelines were framed - (a) if the accused makes an application for compounding (the "**Application**") in the first or second hearing of the case, compounding may be allowed without the imposition of costs (b) if the Application is filed at any other stage, accused will be required to pay 10% of the cheque amount as costs to the legal services authority or any such authority as the court deems fit (c) if the Application is filed before the sessions court or the high court, the compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs (d) if the Application is filed before the Supreme Court, the costs would be 20% of the cheque amount. The competent courts were empowered to reduce the costs having regard to the specific facts and circumstances of a case, for reasons recorded in writing.

The Bombay High Court in *Prema v. The State of Maharashtra*⁷ dealt with an application for compounding filed by the accused in an appeal challenging her conviction by the magistrate court. The complainant opposed this application since it was filed after a period of ten years and the amount offered covered only the principal amount of the cheque. The judgment in Damodar was distinguished. The court noted that in Damodar the parties had arrived at a settlement and there was a joint prayer for compounding the offence. Since the complainant had opposed this application, compounding of the offence was not allowed by the court, at the unilateral request of the accused. However, since the accused had shown repentance, the court conditionally set aside the order of imprisonment and instead enhanced the amount payable to the complainant.

A two-judge bench of the Supreme Court in *JIK Industries Limited v. Amarlal V. Jumani*⁸ ("**JIK Industries**") distinguished Damodar and did not allow an application for compounding filed by the accused. The accused had filed a scheme of compromise under Section 391 of the Companies Act, 1956 (the "**Scheme**") before the competent high court, which was opposed by the complainant (creditor of the accused company). The Scheme was allowed by the high court. Subsequently, the accused filed an application for compounding the offence on the ground that the Scheme that was sanctioned by the high court was binding on all parties, including the complainant. It was argued that there was no requirement of consent of the complainant to compound the offence for dishonour of a cheque. The court did not accept this argument. The court held that the provisions of Section 147 of the NI Act obliterated only Section 320(9)⁹ of the CrPC and not the other provisions of this section. Therefore, it was held that obtaining the consent of the complainant to compound an offence for dishonour of a cheque is sacrosanct, and that cannot be wished away by Section 147 of the NI Act.

A similar approach was also taken by the Bombay High Court in *Soft-touch Computer v. State of Maharashtra*¹⁰ ("**Soft-touch**"). The court did not accept a unilateral declaration by the accused that the matter stands settled. The court observed that an offence of cheque dishonour is committed once the period of 15 days as provided in Section 138(c) of the NI Act is over and accused cannot walk away by merely saying that he is depositing the cheque amount. It was held that the element of compounding requires the consent of both parties.

⁷ 2011 SCC Online Bom 1004.

⁸ (2012) 3 SCC 255.

⁹ Section 320(9) of the CrPC reads: - ".... No offence shall be compounded except as provided by this section."

¹⁰ 2014 SCC OnLine Bom 492.

The law thereafter took an interesting turn. A two-judge bench of the Supreme Court in *Meters and Instruments Private Limited v. Kanchan Mehta*¹¹ ("**Meters Instruments**") took a completely new course. One of the accused directors made a statement that he was ready to make the payment of the cheque amount, however, the complainant refused to accept the demand draft. The court considered both Damodar and JIK Industries, and held that "...though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the Accused". The decision in JIK Industries (which was also by two judges) was not followed, and the court without referring this issue to a larger bench, took a completely different view. The court held that if the cheque amount with interest and cost as assessed by the court is paid by a specified date, the court is entitled to close the proceedings in exercise of its powers under Section 143 of the NI Act read with Section 320 of the CrPC. The court placed heavy reliance on several other judgments of the Supreme Court to treat an offence of cheque dishonour as primarily a civil wrong with the punitive element of Section 138 of NI Act being primarily compensatory in nature.

The Madras High Court in *R. Kalaiyarasi v. C. Jayapal*¹² ("**Kalaiyarasi**") while holding that the accused has committed an offence under Section 138 of the NI Act, permitted the accused to pay the cheque amount with interest at the rate of 12% per annum and costs of litigation in lieu of the punishment for imprisonment, by primarily relying on *Meters Instruments*.

However, the Punjab and Haryana High Court in *Anant Tools (Unit No. II) Pvt. Ltd. v. Anant Tools Pvt. Ltd.*¹³ ("**Anant Tools**") declined the request of the accused to compound the offence of cheque dishonour since the complainant had not agreed. The court considered both JIK Industries and *Meters Instruments* and followed the former. The court drew support from the decision of the Supreme Court in *National Insurance Company Limited v. Pranay Sethi and Ors*¹⁴ which had held that in case the subsequent bench of equal strength does not intend to follow the earlier bench of the same strength, the appropriate course would be to refer the issue to a larger bench; and that if such an approach is not taken, the judgment first in point of time, would be the binding precedent on the point of law and not the subsequent judgment. Since JIK Industries was earlier in point of time, the court followed this judgment and not *Meters Instruments*.

The Delhi High Court in *Prakash Gupta v. SEBI*¹⁵ declined an application filed under Section 24A of the Securities and Exchange Board of India Act, 1992 ("**SEBI Act**") to compound offences under the SEBI Act. The court relied on *Meters Instruments* that the consent of both parties is not required for compounding. However, considering that the offences were under the SEBI Act the application for compounding was not allowed.

The Himachal Pradesh High Court in *Jai Ram Bhatia v. Padam Singh*¹⁶ ("**Jai Ram**") permitted the accused to compound the offence in an appeal filed before it, even before notice of the petition was issued to the complainant. The court relied on *Meters Instruments* and proceeded on the basis that it was not necessary to obtain consent of the complainant.

¹¹ (2018) 1 SCC 560.

¹² 2018 SCC OnLine Mad 1331.

¹³ 2018 SCC OnLine P&H 1723.

¹⁴ (2017) 16 SCC 680.

¹⁵ 2019 SCC OnLine Del 7930.

¹⁶ 2019 SCC OnLine HP 500.

3. CRITICAL ANALYSIS OF THE PRESENT POSITION OF LAW

As of today, there is no clarity on whether the accused can compound an offence of cheque dishonour without the consent of the complainant. As a result of the inconsistency in law, there have been tangential views taken by the high courts as well. The Bombay High Court and Punjab and Haryana High Court in *Soft-touch* and *Anant Tools* respectively, followed *JIK Industries*. However, the Madras High Court in *Kalaiyarasi*, and the Himachal Pradesh High Court in *Jai Ram* followed *Meters Instruments*.

JIK Industries and *Meters Instruments* (though of the same bench strength) have taken diametrically opposite views. Since *JIK Industries* was decided at an earlier point of time, if the court in *Meters Instruments* intended to take a different view, it ought to have referred this question of law to be decided by a larger bench. However, by taking a different view, *Meters Instruments* has created some confusion in law. The very basis on which the court proceeded to take a contrary view in *Meters Instruments*, makes the law expounded in the case, a bit shaky.

JIK Industries analysed the provisions of Section 320 of the CrPC and Section 147 of the NI Act rather technically and held that consent of the complainant is necessary for compounding the offence. However, though *Meters Instruments* relied on *JIK Industries*, it did not analyse the law meticulously, to arrive at a different conclusion. There was no proper analysis on whether the non-obstante clause in Section 147 of the NI Act trumps over all the provisions of Section 320 of the CrPC or just Section 320(9) of the CrPC (as held in *JIK Industries*). The court was persuaded to conclude that even in the absence of consent of the complainant, the offence can be compounded by the accused if the complainant has been duly compensated, primarily because the court was of the view that an offence for dishonour of cheque is mainly civil in nature and there was a huge backlog of pending cases.

It would be relevant to note that one of the guidelines in *Damodar* was that the “accused” could make an application for compounding of the offence in the first or second hearing of the case (Para 15 (i) (a)). The guidelines in *Damodar* did not specify that the application for compounding had to be jointly filed by the parties, or that consent of the complainant is a pre-requisite. There is no doubt that in *Damodar*, both parties had consented for compounding the offence. However, the guidelines that were issued in *Damodar* (including the above) were general in nature and not based on the specific facts of the case. It appears that this argument was not made either in *JIK Industries* or *Meters Instruments*. It will be interesting to see if any other subsequent judgment concludes that the guidelines issued in *Damodar* at Para 15(i)(a) enables an accused to get the offence compounded without the consent of the complainant. This would put an end to the controversy, since *Damodar* case was decided by a larger bench.

There is no dispute that under the general principles of law, an act of compounding requires the consent of the injured party. This is clear even from a reading of Section 320 of the CrPC. However, considering that Section 147 has a non-obstante clause, it could be argued that it obliterates not just Section 320(9) of the CrPC, but also the other provisions in Section 320 of the CrPC. As a result of this, there cannot be a strict requirement of obtaining the consent of the complainant for compounding the offence. *Damodar* analyses the non-obstante provision in Section 147 of the NI Act vis-à-vis Section 320 of the CrPC and concludes that the scheme contemplated under Section 320 of the CrPC will not be applicable in the strict sense to the offence of cheque dishonour, since the latter is meant for specified offences under the Indian Penal Code, 1860 (the “IPC”). However, despite these observations, *JIK Industries* (of a smaller bench) goes on a different tangent and concludes that Section 147 of the NI Act obliterates only Section 320(9) of the CrPC and not the other provisions of Section 320 of CrPC. This approach of *JIK Industries* was not correct. The offence of cheque dishonour is covered under the NI Act, which is a special enactment and not under

the IPC (for which Section 320 CrPC would be applicable). There are cracks in both JIK Industries and Meters Instruments that need to be filled by a decisive judgment of the Supreme Court.

4. CONCLUSION

There are occasions when the accused is willing to pay the cheque amount (and in some cases with additional reasonable compensation). Despite this, the complainant does not consent. This may be just to settle scores or claim unreasonable compensation. Following JIK Industries, the magistrate would be powerless to permit the accused to compound the offence, even though the accused is willing to pay up. Meters Instruments takes a more progressive approach in permitting an accused to compound the offence by paying the cheque amount with interest and costs of litigation. However, Meters Instruments was a judgment of a later point in time and did not refer the question of law to be decided by a larger bench. Considering the conflict in law, one can only hope that a larger bench of the Supreme Court settles this controversy finally by deciding whether the law in JIK Industries or Meters Instruments has to be followed. Until such time, the accused in a cheque dishonour case can only hope that they receive the consent of the complainant, in the event they decide to compound the offence before the magistrate. If not, the accused will have to endure a prolonged litigation to obtain justice.

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