

Negotiable Instruments (Amendment) Act, 2018: A stopgap arrangement

1. Introduction

For the longest time, cheques have been a predominant medium of paper-based transactions. But, with focus shifting towards deepening digital payments, the number of cheque-based transactions has reduced significantly. Other factors leading to this decline are dispute settlement time lag and inherent credit and liquidity risks associated with these instruments. In the past, the Indian government introduced provisions of stricter penalties¹ and fast-track courts in cheque dishonor cases. However, it failed to provide any substantial relief to the complainants and only led to long drawn legal battles and further harassment.

In an effort to ensure sanctity of cheque-based transactions, speedy dispute resolution, and discourage frivolous litigation, the government has passed the Negotiable Instruments (Amendment) Act, 2018 (“**NIAA**”) with effect from September 1, 2018 (“**Effective Date**”). While NIAA does not expressly provide for its retrospective operation, various courts in India have examined its applicability on pending cheque dishonor cases. This newsletter aims to critically analyze the provisions of NIAA in light of the jurisprudence surrounding its retrospective application.

2. Overview of NIAA

2.1 Interim compensation

Section 143A of NIAA confers a discretionary power to the trial court to direct the drawer of cheque to pay interim compensation to the complainant. The provision for interim compensation triggers only at the stage when **(a)** in a summary trial or summons case,² the drawer pleads *not guilty* to the accusation(s) made against it; and **(b)** in any other case, upon framing of charges. The section further stipulates that the quantum of interim compensation, if payable, shall not be more than 20% of the cheque amount. This amount must be paid to the complainant within the stipulated timeline of 60 days from date of such order, with an additional 30 days allowed only where sufficient cause is shown by the drawer. In case the drawer is unable to pay the amount, the trial court can recover it through the procedure given under section 421 of Code of Criminal Procedure, 1973 (“**CrPC**”). Section 421 lays down a coercive method for recovery of fine. If a person is sentenced to pay fine, the court passing such sentence may recover it by **(a)** issuing warrant of attachment and sale of defaulter’s movable property or **(b)** realizing it as arrears of land revenue from sale of his movable or immovable property or both.

To balance the rights of the parties, section 143A envisages that if the drawer of the cheque is acquitted, the complainant shall be required to refund the interim compensation, with interest at the prevailing bank rate. The time-limit for refund is the same as stipulated for payment of interim

¹ Section 138 of Negotiable Instruments Act, 1881 (effective from April 1, 1989) provides that if a cheque gets dishonored on account of “insufficient funds”, the drawer is liable to be punished with imprisonment for a period which may extend to 2 years or fine which may extend to twice the cheque amount or both. The objective of this section is to act as a deterrent for unscrupulous drawers and enhance the acceptability of cheques

² Summons cases relate to offences of a less serious nature and not punishable with death, life imprisonment or imprisonment for more than 2 years

compensation. Further, it is stated that if the drawer is convicted under section 138, then the amount of fine or compensation imposed by the trial court shall be reduced in terms of the interim compensation, if paid.

2.2 Deposit of sums during pendency of appeal

Section 148 envisages that an appellate court may order a convict under section 138 to deposit certain sums during the pendency of an appeal challenging his conviction. The appellate court has been given the power to order deposit of minimum 20% of the fine or compensation imposed by the trial court. It is pertinent to note that this deposit shall be in addition to any interim compensation paid by the drawer at the stage of trial. Similar to section 143A, the appellant-accused shall be required to deposit such monies within 60 days from date of order. An additional 30 days may be allowed if the appellant is able to show sufficient cause for delay in compliance.

While appellant is obligated to deposit the amount with the appellate court, it is within such court's power to order its release to the respondent-complainant, at any time during the pendency of the appeal. Again, in the interest of balancing rights, it is provided that if appellant is acquitted, the court shall direct complainant to repay this amount, with interest at the prevailing bank rate. The time period given to complainant to repay is the same as provided to the appellant to deposit.

3. Retrospective application of NIAA: Divergent views by High Courts

Various High Courts (“HC”) have interpreted the provisions of NIAA differently. The key question to be answered is whether NIAA applies only to fresh matters viz. filed after the Effective Date or does it also encompass all pending matters filed before the Effective Date. While some courts have not taken a position on the overall retrospective applicability of NIAA, they have dealt with its individual provisions, suggesting possible inclination towards retrospective operation in entirety. Some of the key decisions are discussed below:

3.1 *V. Narasimha Murthy v. Santhosh J.*³ The complainant sought release of deposit made by accused during pendency of the appeal. While disposing the complainant's interim application, the Karnataka HC dealt with retrospective operation of section 148. After reviewing the objects and reasons of NIAA, the HC held that even though it does not expressly provide for retrospective application, it indicates as much by “necessary implication.” It further took the view that NIAA being a “beneficial legislation,” it must be applied retrospectively. Moreover, the HC widened the scope of section 148 by stating that besides appellate court; even a revisional court⁴ may direct an appellant-accused to deposit minimum 20% of the fine or compensation awarded by the trial court.

3.2 *Ajay Vinodchandra Shah v. The State of Maharashtra and Ors.*⁵ Here, the Bombay HC considered validity and legality of orders of Sessions Court directing appellant-accused to deposit 25% of compensation imposed by trial court as a “condition precedent” to maintain order of bail

³ 2019 (2) KarLJ 713

⁴ Under CrPC, a revisional court is one which has the powers to examine and satisfy itself of the correctness, legality and propriety of any finding, order or sentence of an inferior criminal court. The HC or Sessions Court may be referred to as revisional courts

⁵ Criminal Writ Petition Nos. 258, 259 and 260 of 2019

or entertain appeal. Since these orders were passed on August 3, 2018, i.e. prior to the Effective Date, appellant challenged retrospective application of section 148. While the issue only pertained to section 148, the Bombay HC went on to discuss retrospective operation of NIAA in entirety. It held that the term “retrospective” must be given a “purposive interpretation” and hence, all cases irrespective of when they were instituted must be brought within the ambit of NIAA. But the HC urged appellate courts to exercise caution while ordering deposit of sums under section 148. It observed that appellate court must not impose unreasonable conditions which curtail the accused person’s statutory right to appeal in any manner. This statement is in consonance with NIAA as it does not intend to take away any existing or vested right of appeal.

3.3 *M/s Ginni Garments and Anr. v. M/s Sethi Garments:*⁶ In a bunch of appeals before it, the Punjab and Haryana HC (“PHHC”) had to decide the retrospective application of NIAA. Some of the appeals arose from decisions of trial courts which directed payment of interim compensation under section 143A, while others challenged orders of appellate courts regarding deposit under section 148. The PHHC reached its conclusion on the basis of rules of interpretation of statutes. It observed that since section 143A affects the vested rights of an accused and places a new “stand-alone liability” on it, it must be construed as substantive in nature. On the other hand, section 148 was only a procedural requirement. Since rules of interpretation clarify that laws affecting substantive rights should not be applied retrospectively; the HC held that section 143A would **not apply** to pending cases. Similarly, section 148 being procedural in nature, would **apply** retrospectively.

4. Supreme Court’s view

4.1 Applicability of section 148

On May 29, 2019, the Supreme Court (“SC”) decided a group of appeals on a common question of law, i.e. whether section 148 of NIAA would apply retrospectively.⁷ The appeals arose out of 33 cases with similar facts. In all these cases, criminal complaints were filed against the appellants under section 138. Through a common order dated October 30, 2018, the trial court convicted the appellants, sentenced them to imprisonment for 2 years and pay cheque amount plus 1% as interest and litigation costs as fine. Aggrieved by order of conviction, they appealed along with applications under section 389 CrPC for suspension of sentence, before the Additional Sessions Judge, Panchkula (“Appellate Court”). The Appellate Court issued notice of appeal to the respondents (original complainants) and through a common order suspended the sentences of conviction subject to deposit of 25% of the compensation amount under section 148. Aggrieved by this order, appellants filed revision applications before PHHC. The PHHC dismissed their applications and affirmed order of the Appellate Court. Thereafter, being dissatisfied by PHHC’s order the appellants approached the SC to decide if section 148 would apply to their appeals. The appellants contended that since complaints were instituted prior to the Effective Date, section 148 would not apply. However, it is pertinent to mention that conviction orders against the present appellants were passed on October 30, 2018, i.e. after the Effective Date. Therefore, obviously the appeals against said conviction were also filed after NIAA came into force.

⁶ CRR No. 9872-2018 (O&M) and other connected cases

⁷ Surinder Singh Deswal @ Col. S.S. Deswal and others v. Virender Gandhi, Criminal Appeal Nos. 917-944 of 2019

The appellants argued that in absence of an express mandate of retrospective operation, section 148 cannot be applied to pending cases. It was also submitted that Appellate Court erred in interpreting “may” as “shall” and proceeded on the basis that section 148 is a mandatory provision. Contrarily, the respondents contended that the Appellate Court’s order was in consonance with the spirit and intent of section 148. The respondents interpreted section 148 as procedural in nature since it did not take away an accused person’s statutory right to appeal. Therefore, they submitted that section 148 could be applied retrospectively.

By adopting a purposive interpretation, SC held that section 148 would apply to pending cases. It observed that if such retrospective effect was not given, the object of NIAA would be defeated i.e. to deter unscrupulous drawers from filing frivolous appeals and easily obtaining stay on proceedings. It further stated that courts should construe section 148 as a mandatory provision in light of objects and reasons of NIAA. Effectively, SC held that appellate courts should mandatorily direct convicts to deposit a portion of the compensation or fine. Where the court does not make such direction, it must record reasons for making the exception.

4.2 Fate of section 143A?

While SC has settled the question of retrospective operation of section 148, it remains unanswered with respect to section 143A. Presently, an appeal is pending before the SC⁸ wherein it has to adjudicate if section 143A has retrospective application or not. As an interim measure, it has directed the petitioner to deposit 15% of the cheque amount. It also directed that this amount shall not be released to the respondent until further orders. The SC is likely to give its final decision on next date of hearing, i.e. July 1, 2019. Stakeholders should be mindful that since section 148 has been held to be retrospective, there is a possibility that SC might decide a similar fate for section 143A.

5. Possible impact – a piecemeal solution?

The legislative intent behind NIAA may be positive, yet it seems inadequate on several accounts. *Firstly*, it does not specify what factors a trial court and appellate court must take into account before giving an order for payment interim compensation and deposit, respectively. The courts should understand that legislature intended to confer a discretionary power on them, which should be exercised with due caution. *Secondly*, without an upper cap under section 148, the appellate court may order deposit of upto 100% of the fine or compensation. The underlying scheme is to prevent vexatious and frivolous appeals. However, it is unclear as to what aspects the appellate court will consider while determining the quantum of deposit. *Thirdly*, while section 143A clearly defines the stage during trial at which interim compensation may be granted, section 148 is silent on this aspect. *Fourthly*, by allowing a time-limit of 60 +30 days to pay interim compensation or deposit sums during appeal, it is unlikely to expedite the resolution process. Considering a situation where the drawer is unable to pay interim compensation and recovery process under section 421 of CrPC is initiated, there is a possibility of further delay in getting relief.

With respect to retrospective operation, stating that every pending case would come within the purview of NIAA is a misnomer. Complaints filed prior to the Effective Date, if are at the stage where drawer pleads not guilty or charges are framed against him after the Effective Date,

⁸ G.J. Raja v. Tejraj Surana SLA (Crl.) No. 3342/2019

would be within the purview of the amendment. A pending case which is at the stage of cross-examination would be outside the scope of section 143A. However, the same is not applicable for section 148 as appellate court has power to order deposit at any time during pendency of appeal. This essentially brings all pending and fresh appeals within its ambit.

6. Conclusion

A cardinal principle of interpretation is that every statute is *prima facie* prospective, unless it is expressly or by necessary implication made to have retrospective operation. While NIAA does not expressly provide for its retrospective application, through purposive interpretation, Indian courts have taken a view that it is *necessarily implied*. Going forward, drawees of cheques will need to factor in the provisions of refund before agitating a complaint for cheque dishonor. Similarly, drawers will have to be mindful of the increased financial penalties at both trial and appellate stage of cheque bounce matters. Perhaps, NIAA would eventually lead to a number of out-of-court settlements. Now, with a step further towards its retrospective application, one can hope that this amendment will live upto the hopes of harassed complainants and provide them with the necessary relief.

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