

L E X

# WITNESS

Volume 11 Issue 3 | October 2019

₹65 US \$6 UK £4

## expert speak



**Maneesha Dhir**  
Managing Partner,  
Dhir & Dhir Associates



**Sharmistha Ghosh**  
Associate,  
Dhir & Dhir Associates

P14

# Justice S.A. Bobde Heroic Times Ahead?

Transparency, Ayodhya, Bikes & More.

P08

## let's arbitrate



**S. Ravi Shankar**  
Sr. Partner,  
Law Senate

P42

## corporate pulse



**Rohan Verma**  
Legal Counsel,  
Wockhardt

P18

## counsel corner



**Dinchu Oommen**  
Legal Counsel,  
Johnson Controls India



**Renu Goel**  
Legal Specialist,  
Johnson Controls India

P38

## expert speak



**Raj Dev Singh**  
Partner,  
King Stubb & Kasiva,  
Advocates & Attorneys

P34

## expert speak



**Diwakar Maheshwari**  
Partner, Khaitan & Co  
**Nitin Mittal**  
General Counsel & CS, Signify

P20

## expert speak



**Sidhant Goel**  
Partner, Sim & San  
**Mohit Goel**  
Partner, Sim & San

P26

# A Matter of Trust - Juxtaposition between Two Enactments in Criminal Jurisprudence

■ Nitin Mittal & Diwakar Maheshwari

**A**

s we know, cheque(s) has historically (and continues to be) one of the most popular negotiable instruments in India. In its historical avatar, a cheque was called by various names during different eras. To name a few, 'adesha' during the Mauryan era, 'praescriptiones' during Roman era. They were earlier hand-written but with passage of time, cheques became pre-printed and gathered digital and security features that we know today. Cheques received the legal status in India by the enactment of the Negotiable Instruments Act, 1881 (NI Act), which provided the legal framework for non-cash paper payment instruments in India.

With the passage of time and despite the introduction of other modes of fulfilling business related financial commitments, cheque(s) still appears to be one of the preferred modes of financial transactions. This could largely be in view of its long-lasting usage, practice, and prevalence of diversity in business across India. Having said this, given its large-scale usage, logically and rightly so, legal friction has become inevitable. This has resulted in multi-fold & rapid development of the legal jurisprudence pertaining to business usage of cheque(s) in a relatively short span of time. Given this fact, as a sequitur, diversity of 'allegation', 'counter-allegations', 'defence', qua cheque related offence(s) also developed, with each such fact getting

support of continuing evolving judicial precedent to corroborate the respective factual case(s). This, in most situations, in view of its factual peculiarity, has resulted in conflicting judicial precedent by different Courts in India on similarly placed offence(s).

Having said this, one of the arcane legal aspects of cheque related offence(s) pertain to an interplay between two distinct enactments in criminal jurisprudence, i.e. NI Act and Indian Penal Code, 1860 (IPC). This write up is an endeavour to briefly discuss this legal aspect. In order to address this aspect with a perspective, following are the relevant extract these two enactments:

Section 138 of NI Act states, and we quote the relevant extract:

*"Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the*



*cheque, or with both: Provided that nothing contained in this section shall apply unless ....”*

Section 405 of IPC, defines ‘Criminal breach of trust’, and we quote the relevant extract:

*“Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits “criminal breach of trust”.”*

Section 406 of the IPC states, and we quote:

*“Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”*

By way of an interesting detour, prior to 1989, the NI Act only contemplated civil remedy by way of compensation in case of cheque dishonour. The possible rationale

behind introducing criminal prosecution post-1989 could be, inter alia, lack of deterrence, thereby provoking the legislature to bring in criminal sanctions to enhance the credibility on the usage of cheque(s) and enhance the business climate and assuage all possible concerns of the holders.

Coming back to the current topic, on a conjoint reading of the above provisions, while the payee (holder of the cheque) has a legal right to initiate criminal proceedings for an offence under NI Act against the payer in relation to a transaction, the pertinent question is whether the payer also has an independent legal right to initiate proceedings under Section 406 of the IPC against the payee in relation to the same very transaction?

Interestingly and alarmingly, the Supreme Court in *Suryalakshmi Cotton Mills Limited vs. Rajvir Industries Limited and Ors.*, (2008) 13 SCC 678 has answered the above question in affirmative in the following extracted manner:

*“However, a case for proceeding against the respondents under section 406 has, in our opinion, been made out. A cheque is a property, the same was entrusted to the respondents. If the said property has been*



**Nitin Mittal** is General Counsel & Company Secretary with Signify Innovations India (earlier Philips Lighting) and part of the South Asia leadership team. He has rich and diverse experience of around 17 years in areas of legal (also litigation), compliance, governance, risk management, and management. As part of the regional team at Signify, he actively works on and also leads projects and assignments having regional and international impact. He has travelled for work to a number of countries giving him insight into diverse cultures and practices. In addition to his professional passion, Nitin is also an ardent reader on both fiction and non-fiction and is equally passionate about expressing his views by publishing articles on various intricate topics.

*misappropriated or has been used for a purpose for which the same had not been handed over, a case under section 406 may be found to have been made out. It may be true that even in a proceeding under section 138 of the Negotiable Instrument Act, the appellant could raise a defence that the cheques were not meant to be used towards discharge of a lawful liability or debt, but the same by itself in our opinion would not mean that in an appropriate case, a complaint petition cannot be allowed to be filed.”*

The above judgment does not seem to have been conflicted or overruled, thereby clearly paving way for a payer of a cheque to duplicate his defence by initiating a separate criminal proceeding under the onerous provisions of IPC. Arguably, this situation would result in a peculiar situation of double whammy for the payee (holder of the cheque). This is because, while on one hand, upon dishonour of a cheque, the payee becomes a victim of loss of financial gain, and on the other hand, it also runs the risk of getting exposed to an independent criminal proceeding under Section 406 of the IPC. This situation gets further intricate and oppressive when the said payee, upon filing a petition to quash the said proceedings, does not get any relief and is forced to face criminal trial to prove his innocence. Needless to say, while there do exist certain legal defences for seeking quashing of such proceedings, however, the success of the same would also depend on the factual strength of the respective cases.

One school of thought may argue that the present judgment creates a legally enforceable parallel jurisdiction in relation to one offence arising out of the same transaction. They may further argue that the strong edifice of conducting large scale genuine commercial transactions through cheques would get sabotaged. While there could be several other similarly placed supporting arguments, rightly or wrongly, all of these would remain a futile exercise


in view of the above-referred judgment, unless and of course, the said judgment is overruled by Supreme Court.

Despite there being arguably some latent legal drawbacks (including the one discussed above), while doing business dealings in cheque(s), such dealings continue to remain an evitable scenario in the current situation. Therefore, this clearly further re-enforces the requirement to maintain a well-advised proper and adequate documentation to achieve dual safeguard, i.e.,

(i) Building a strong legal case in case of dishonour of cheque(s); and

(ii) To obviate (much less mitigate) being exposed to any legally enforceable counter-blast of criminal proceedings under Section 406 of the IPC against the payee.

While to achieve the said dual safeguard is predominantly dependent on the facts of a particular case, however, amongst various other safeguards, it should be borne in mind that the object, purpose, and scope of the cheque(s) is clearly articulated in the supporting covering letter, oral communications be adequately documented to obviate any factual war going forward. Accordingly, we reiterate that impetus is given on proper and adequate business and legal safeguard so that a payee (holder of a cheque) is able to enforce its legal rights in case of any default without there being any fear of, inter alia, being a victim of committing an act of ‘criminal breach of trust’.

To succinctly conclude, unless proper and adequate safeguards, as briefly indicated above, are adopted by the payee (holder of the cheque), initiation of proceedings under NI Act by such payee could well serve as a double-edged sword. This is because the said payee could run the risk of being faced with the prospect of being prosecuted under section 406 of the IPC, thereby leading to an unwarranted situation akin to the ‘sword of Damocles’ hanging over its head. 



**Diwakar Maheshwari** is a Dispute Resolution Partner with Khaitan & Co and is based in Delhi. He is an alumnus of NALSAR University of Law, Hyderabad. Having practiced law for close to a decade and a half, Diwakar has significant exposure in various complex areas of law including IBC, Arbitration (domestic and international), White Collar Crime. He practices advocacy before the Supreme Court, NCLAT, various High courts and tribunals across India. Additionally, Diwakar is frequently consulted by his clients for rendering strategic & preventive legal advice on complex matters. Diwakar is an avid writer and his articles on varied commercial legal topics can be read on various local and international publications. His expert legal views are very often quoted in leading business newspapers and he is a frequent invitee to deliver talks on various evolving legal topics.