**Issue 53**

**October, 2018**

# Ensouth

**The E-magazine brought to you by**

**N South**

**Advocates**

C 62B Super Mart – I,
DLF Phase 4, Gurgaon, Haryana 122009

## At a Glance

## Managing Partner's message

Welcome to the October 2018 issue of Ensouth.

Regardless of whether he is India's most controversial Chief Justice or not, Mr. Deepak Mishra is most certainly its most prolific one, at least in the last week of September, when he delivered 16 judgments in five days! With a record like that, the smallest homage we can pay him is to deliver a 'Mishra Ensouth Special' next time, devoting an entire issue to his judgments. Hopefully!

This time though, we are more diverse but just as topical. First, in **Cheque-mate**, we reject the whole conception behind the latest amendments to the Negotiable Instruments Act and demonstrate their absurdity.

Next, in **Stern Judicial Headmaster,** we show how the relentless pressure from a steadily deteriorating polity is transforming the Supreme Court and forcing it to perform a role that wasn't its burden to do.

Finally, **A Lost Cause**, we look at how our IPR laws have become anachronistic in a world transformed by digital technology and the internet.

Happy Reading

Ranjeev C Dubey
(Managing Partner)

**Ranjeev C Dubey**
(Managing Partner)

## Print Media

### Comment-1

# Cheque-mate!

**Amendments to curb cheque bouncing are flawed as they criminalise the victim of the crime when debtor should be approaching the court to find a way to stay out of jail**

**Ranjeev C. Dubey**

On July 25, 2018, the Lok Sabha approved yet another set of amendments to India's troubled cheque bouncing law, the Negotiable Instruments (Amendment) Bill, 2017. This iteration was premised on the belated recognition that these cases took forever to be decided. The amendments therefore proposed to empower courts to order a debtor to pay 20 percent of the cheque amount to the creditor within 60 days (extendable of course!) as interim compensation regardless of the defence. If the debtor lost the case and filed an appeal, the amendments empowered the appellate court to ask him to make a deposit of 20 percent of the compensation awarded by the trial court before the appeal could be heard.

Laudable as the objectives are, on the face of it, I don't see how this piece of what Indians call "tokenism" is going to make the slightest difference. In a world where State Bank of India charges you 16.5 percent on a clean overdraft, refusing to pay your creditor makes perfect sense when you know that the court handling your cheque bouncing case is unlikely to award interest at much more than eight percent after litigation that could go on for several years. For the law to now offer 20 percent of the amount due as interim compensation to a creditor who will lose nine percent a year in interest on a bad debt even if he wins the case is not band aid for the battered: its legislatively approved felony.

In such an environment, fighting a court battle over 20 percent of the amount due as interim compensation has two main fallouts. First, it delays the case by months as the contenders argue about the justification for the interim relief. Bear in mind that if a magistrate fails to give you interim compensation within 60 (or even 90) days, you can both grit your teeth and grovel for early hearings or you can go up in appeal against the magistrate's failure to adhere to the law's timelines. As the appeal court has no timeline to follow, it can take a few years to decide your case. Should it eventually sympathise with you, it will at best direct the magistrate to decide your application quickly. When you get back to the magistrate, he may by then be seriously upset with you and refuse you what is, after all, a discretionary order. I can quote you dozens of cases where the Supreme Court has directed a High Court to decide a case within a timeline only for the litigant to find that the High Court didn't really pay much attention to the direction!

This brings us to Fallout No 2. All discretion relief runs on face value or "last mile connectivity"! To have the benefit of this discretion, you now need celebrity counsel. This means that young and cheaper lawyers who handle the bulk of cheque bouncing cases in the country are not going to cut it anymore. How much of the 20 percent will survive to arrive in your hands after you have paid the celebrity counsel?

It seems to me that the problems with our cheque bouncing law are easy to see, but this fix needs us to take a harsh look at the structure of our laws. If we really want an effective cheque bouncing law, we need to stand the law on its head and change its priorities. In a nutshell, it comes down to one simple thing. As it stands today, the law criminalises the victim of the crime. The creditor has to, for a start, find a lawyer, file a complaint, stand in line with other undertrials in court on that day till his case is called out to hearing, appear on every date, and "prima facie" prove his case by calling his banker as a witness, all of which can take a year or more. When he has done all this, the court may issue a notice to the debtor, who then avoids receiving it for another year. When he finally does appear two years after the saga began, he starts stonewalling the case using well-known tactics.

To me, the solution is very simple. The law should stop trying to balance the scales between debtor and creditor, giving both an equal chance to win the judicial match! The law should require the debtor to find the creditor and not the other way round. If a cheque bounces, it's the debtor who should approach a court and find a way to stay out of jail. The law need simply say that if a cheque bounces, the debtor goes to jail unless a magistrate intervenes. Given the risks and inconvenience of the slammer, perhaps the debtor will find it better to honour his cheques than run around trying to save himself from jail day to day.

I am not being facetious, far from it. I am aware that every man is innocent till otherwise proven. I am arguing that guilt is inbuilt into the debtor's act of dishonouring his promise to pay. Parties make decisions in their commercial wisdom, right or wrong. If they are wrong, they should get it in the neck. There should be no occasion for courts to insert themselves into the distribution of business risk and protect one party or another from its bad commercial call. If I miscalculated my cash flow, I must find a way to pay or muse on existential issues in jail. Where is the philosophical justification to punish the creditor for my stupidity?

Equally, it may well be that the whole thing was one big computer glitch; or worse, I handed a cheque to a devious, satanic fraudster who is determined to blackmail me. It's fanciful but then, well, maybe. If a creditor's fraud contrived a crime (if such a thing is possible), then it is for the debtor to prove the fraud. At the end of the day, I need to do my due diligence before I start sprinkling cheques about the city. Why should the law promote the morning-after pill?

This is what it comes down to. Courts need to become courts of law, not courts of justice. As the situation stands today, there is no cheque bouncing law in India, only another onerous procedure that brings intermittent relief in the indeterminate future. How can a government determined to reduce cash-dealing in the economy achieve its objectives without making cheques nearly as holy as their cows?

What we need to do is go the Dubai way. If you issue a cheque, you must stay in jail till you pay your creditors. I admit this seems medieval but then, how jurisprudentially alien is it, really?

## Comment-2

## Stern Judicial Headmaster

A transformation the Supreme Court neither wants nor needs.

**Ranjeev C. Dubey**

When the Chief Justice of India announced on August 20 that the judges would contribute funds to help relieve Karala from the flood fury, no one protested that the judiciary is the last institution we should expect to make cash contributions to worthy causes. A cursory glance at the Union Budget 2018 should have attracted national outrage. Out of a total budget of Rs 21.47-lakh crore, the Finance Minister earmarked Rs 1,744.13 crore for the administration of justice in India. This means that on the whole, India spends 0.08% of its national budget on its quest towards a just society! That's just the beginning. Of this sum, the Supreme Court of India absorbed Rs 251.06 crore, which is about 14% of the total equal to 0.012% of our national budget. Given how little we pay for it, how can the people of India cast such a heavy moral burden on the Supreme Court at all?

By way of comparison, the budget allocated Rs 385 crore to the upkeep of the Special Protection Group, which provides security to the current and former Prime Ministers and their families. I see no irony in the idea that India pays less for justice for its people than it does to protect Prime Ministers and their families from the wrath of the people of India!

Even that's not the worst of it. We have 22 judges in the Supreme Court of India who will work 193 days within 2018. That gives us 4,246 judge days or 33,968 judge hours. Crudely put, India pays a mere Rs 73,910.74 for every hour a Supreme Court judge work for the nation. A great many mid-priced Supreme Court counsel would be offended if I offered them these low charges for an hour-long conference.

What really bothers me though is not that we pay not enough for justice: it's that our political classes enmesh our judiciary in all sorts of time wasting redundant squabbles, appropriating precious judicial resources that could be better utilised elsewhere. This has now acquired epidemic proportions. Two recent examples will make my point. On July 17, 2018, the Supreme Court delivered its 'anti-lynching' judgment in

the Tehseen S Poonawalla case to universal acclaim in the English print and electronic media. While the petition had initially been filed against the activities of cow protection vigilante groups, in-court dynamics widened it to include issues of lynching and mob violence. Did India need procedural and substantial safeguards against the nocturnal activities of these self-appointed guardians of the law?

The court agreed they did. In culmination, it prescribed a succession of preventive measures which amongst others (1) ordered the appointment of a 'nodal officer' in each district tasked to prevent incidents of mob violence (2) directed the home department to issue directives to police stations, (3) prescribed monthly meetings between cops and 'district intelligence units', (4) prescribed measures to sensitise the police to identify and prevent mob violence, (5) register FIRs against those who 'disseminate irresponsible and explosive messages and videos with content likely to incite mob violence' and so on and so forth. The court followed this up with a succession of remedial measures which granted to victims compensation for injury, legal aid on request and a right to be represented at the trials of perpetrators, amongst others. Punitive measures were prescribed too including departmental action against negligent public servants. In the end, the court directed parliament to create a separate offense of 'lynching'.

As I read this judgment, I struggle to see why India needed the Supreme Court to say any of what it did. We have here a long list of preventive measure that look a lot like stuff that every administration everywhere in the world is expected to do anyway. These are followed by a couple of remedial measures that Indian politicians routinely announce and then equally promptly forget to implement. The punitive measures are such as already exist on the rule books. At a very quick glance, I can spot 8 different crimes that a lynch mob is capable of committing on the face of it: Murder (302) and culpable homicide (304) attract life; Attempt to murder (307) attracts ten years; Causing Hurt (323) attracts one year; Grievous Hurt (325) attracts seven years; rioting (147) attracts two years; Rioting with deadly weapons (148) attracts three years; and promoting religious or race enmity (153A) attracts three years. The enforcement of these crimes is fortified considerably by our Criminal Conspiracy (34 read with 120B) and unlawful assembly (149) laws which make all participants equally guilty no matter what they individually did while located in the mob. Does India need to create more laws or will we do better to simply enforce the laws we already have?

Still, there may be merit in this judgment in that rowdy kids do need to be lectured from time to time. When it comes to the comedy central show between AAP and the Lt Governor of Delhi, can we even justify the judgment as a case of a regrettably necessary pep-talk? Consider the issue.

In 1991, Article 239AA was added to the Constitution of India to enable the administration of Delhi as a National Capital Territory. Sub section (4) of this provision empowers the Council of Ministers of Delhi to "aid and advise" the Lt Governor of Delhi.

Its proviso states that if there is a difference of opinion between the Lt. Governor and the Delhi Government on "any matter", the Lt. Governor can refer this to the President of India for a decision. It is self-evident that the Delhi government runs the show, not the Lt Governor. The law certainly does not say that the Lt Governor can sit on a file indefinitely if he does not agree with the Delhi government.

Despite the obvious legal situation, in 2015, the question arose whether the Lt Governor was bound by the 'aid and advice' of the AAP Government. When the case wound its way up to the Supreme Court, a Five Judge Bench of the Court concluded that the Lt. Governor needs to bear in mind that he does not have any independent authority: that decision-making authority in a democracy lies with the executive, i.e. the Delhi Government. The court concluded by ruling that under Article 239AA(4), the Lt. Governor is bound by the aid and advice of the Council of Ministers of Delhi, unless he decides to exercise his power under the Proviso to refer differences of opinion to the President.

Just so I can make my point, bear with me and read the provision of law that the court interpreted:

> *"(4) There shall be a Council of Ministers consisting of not more than ten per cent, of the total number of members in the Legislative Assembly, with the Chief Minister at the head to aid and advise the Lieutenant Governor in the exercise of his functions in relation to matters with respect to which the Legislative Assembly has power to make laws, except in so far as he is, by or under any law, required to act in his discretion:*
> *Provided that in the case of difference of opinion between the Lieutenant Governor and his Ministers on any matter, the Lieutenant Governor shall refer it to the President for decision and act according to the decision given thereon by the President and pending such decision it shall be competent for the Lieutenant Governor in any case where the mailer, in his opinion, is so urgent that it is necessary for him to take immediate action, to take such action or to given such direction in the matter as he deems necessary."*

I must admit that try as I might, I cannot see what it is in these provisions that were not clear to the political classes at all times or required the Supreme Court to expend more time rendering a decision. So why is the Supreme Court forced into this situation? The answer can only be that this is the inevitable result of the deterioration in the political climate. Everyone knows the law, but the politicians act like they don't and pander to their self-interest in flagrant violation of the law while posturing a self-righteously innocence. The ensuing circus spins out of control, forcing the apex court to intervene to restore sanity. This is now occurring with increasing frequency.

Any which way we look at it, India is proceeding on a course that will result in a radical change in the functions the Supreme Court performs. From an interpreter of the

Constitution, the Supreme Court is being transformed into a stern headmaster constantly compelled to lecture infantile students who refuse to do their homework and compound their misdemeanour by constantly cost cutting on the headmaster's remuneration.

## Comment-3

## IPR and Digital Piracy: A Lot Cause

### In an age when digitisation of the world has radically changed the consumption of copyright, it is evident that Intellectual Property Right laws have failed to achieve their objectives

**Rohin Dubey**

Recently, the New Zealand Court of Appeals approved an American request to extradite one of the world's most celebrated digital pirates, Kim Dotcom, back to the United States. American prosecutors had alleged that the creator of *megaupload.com* had cost copyright holders upwards of $500m (Rs 3,454 crore) in unpaid royalties on pirated content. Dotcom, however, believes that Hollywood studios have sponsored these moves and will naturally appeal the ruling. The Dotcom saga is the latest litigation to beg the 500-million dollar question: Are Intellectual Property Rights (IPR) laws relevant in the age of information?

IPR is grounded in the ideological assumption that the rights of the individual must trump the rights of society. It is based on the theory of self-ownership, where an individual has property rights over his/her labour, skills, work, etc. However, it has over time morphed into something which not only demands the right to own and sell ideas but also the right to regulate their use. In the realm of IPR, absolute control is granted to the creator.

But does this benefit society? It may be argued that innovation is being stifled as rights-holders become the sole judge of what they wish to do with it. *Apple Inc. vs Samsung Electronics Co.* was just one of the few instances of litigation in the "smartphone patent wars". However, it was an endless legal war between big multinational corporations for complete monopolies; how does this even seem to lead to innovation? *Bajaj Auto Limited vs TVS Motor Company Limited* was an instance where the Supreme Court had to intervene and direct the timely disposal of all IPR cases, observing that IPR litigation is fought for the initial temporary injunction, allowing effective control of the monopoly, after which cases remain pending for years.
Digitisation of the world has radically changed the consumption of copyright, from cross-cultural collaboration to cross-cultural consumption. The ubiquity of piracy has led to easy accessibility and circumvention of copyright on a mass scale. The National Research Council of the National Academies came out with a report which argued that the dissemination of knowledge and the functioning of computers have changed how conventional words like "publication" and "copying" are understood. The *modus*

*operandi* of computers is based on copying; when data is accessed, it ultimately is a form of duplication.

Digital piracy is often excoriated for its circumvention of intellectual property laws and consequent losses that arise. Such claims may not always be true and tend to overlook the impact in allowing for cross-cultural development and the positive consequences in non-developed countries. Often, there is a flawed understanding of piracy. When big private corporations claim billions of dollars of losses, they often factor in illegal downloads by people who can't otherwise afford the data. This is applicable for India as well. But how will people in a country with low purchasing power have the money to buy luxuries like music and movies still remains unanswered.

Digital piracy can have its advantages, acknowledged by several stakeholders. Although four employees of *Star India* were arrested in Mumbai, allegedly for leaking episodes of *Game of Thrones* in 2017, its director, HBO programming president and Time Warner CEO Jeff Bewkes noted that "*Game of Thrones* is the most pirated show in the world. That's better than an Emmy." To brag about being the most pirated show in the world when you're looking for investors may sound counter-intuitive but sometimes truth is stranger than fiction.

In another example, John Perry Barlow, writer for Grateful Dead, known as the largest attractor of crowds in live performances, admitted that it may not have been possible without the consistent bootlegging of their performances.

Studies have suggested that digital piracy may not be as insidious as lawmakers may make it out to be. It has been reported that "researchers within the British university's media department examined sales data and found that the music, gaming, movie and publishing industries are all growing and adopting new business models based on digital sharing". Due to such wide accessibility, it's leading to wider awareness about the existence of expression of ideas and people often tend to galvanise its popularity. Today, foreign bands play in India with enough of a fan base and ticket sales to justify the journey. Could this have been possible without digital piracy? In the process of digitisation, digital piracy is leading to a cultural revolution against knowledge as a property.

It's a reality that access to digital content free of cost seems to be dominating the practical world. IPR is struggling to achieve the aims it sets out to achieve. While past history has shown us that big-money corporations have won a few battles, one such being the fall of Napster, but all that did was open the floodgates for a whole host of file-sharing websites.

Today, there are private and public attempts to reach a consensus on how to harmonise these conflicts. One such website which tries to equalise the process is *Bandcamp*. The idea is that artistes can put up their music on this website which

allows the consumer to pay him directly at whatever price they think the work is worth. This can be a powerful tool in promoting talent and reducing corporate control on music.

Other alternatives that are finding greater traction in India are streaming services such as *Netflix* and *Spotify*, which provide access to a wealth of data in exchange for a monthly fee. While the royalty is minimal, it is creating a paradigm of cheap access where otherwise people would look to obtain the data for free. Often, lack of access to data can be as much a perpetuation of piracy as the exorbitant price tag that goes with acquiring it.

It is evident without doubt that IPR is floundering in achieving its objectives. All things considered, enriching fat cat lawyers is solving nothing because the problem is certainly not the pirate: it is the anachronistic laws.

**-x-**