



## Dishonour of cheque: An overview

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### Abstract

The present day economies of the world which are functioning beyond the international boundaries are relying to a very great extent on the mechanism of the negotiable instruments such as cheques and bank drafts and also the oriental bill of exchange prevalent in India, known as 'hundis'. Since cheque plays an important role in business transaction, dishonour of cheque threatens the credibility in transacting business through cheque. Thus, the object of bringing section 138 on statute appears to be, to inculcate faith in the efficacy of banking operations and credibility in transacting business on Negotiable Instruments.

**Keywords:** cheque, negotiable instrument, dishonour of cheque, drawer, drawee

### 1. Introduction

The cheque system in India is of British parentage. It is common knowledge that the London Goldsmiths were the first bankers in England and the system of payment of cash through cheques dates back to 17<sup>th</sup> century<sup>[1]</sup>. Gradually, the cheque became widely and popularly accepted as negotiable instrument in settlement of trade and commerce transactions. Advent of cheques in the market has given a new dimension to the commercial and corporate world. Its time when people have preferred to carry and execute a small piece of paper called cheque than carrying the currency worth the value of cheque.

Dealings in cheques are vital not only for banking purposes but also for the commerce and industry and the economy of the country. Rhetorically therefore a truncated cheque system is injurious to the economic health of the country as the system of cheques is a matter, a subject that concerns everybody whether he is a man on the street, a layman, a business magnate, an industrialist, a banker or a member of bench or bar.

One of the biggest problems, which we are facing in the smooth functioning of the cheque system, is Dishonour of cheques, which threatens the credibility of this negotiable instrument. The problem is becoming bigger with the passage of time. It is hindering smooth business transactions. The great hardship is caused to a person if a cheque issued in his favour is dishonoured due to insufficiency of funds in the account of the drawer of the cheque. To discourage this, the dishonour of certain cheques has been made an offence by an amendment of the Negotiable Instruments Act, 1881 by the Banking Public Financial Institutions and Negotiable Instrument Laws (Amendment) Act, 1988. After this amendment, a new chapter consisting of section 138 to 142 has been inserted in the Negotiable Instruments Act, 1881<sup>[2]</sup>.

Prior to the year 1988, the act of dishonour of cheque was treated as an offence under Indian Penal Code. Other remedy was to file a suit for recovery which was civil in nature and was dilatory. To ensure promptitude in remedy against defaulters and to ensure credibility of the holders of the negotiable instrument a criminal remedy of penalty was inserted in Negotiable Instruments Act, 1881.

### Section 138 of Negotiable Instruments Act, 1881

A negotiable instrument is lifeblood of commerce and to

ensure this concept section 138 of Negotiable Instrument Act, 1881 was enacted. This section deals with the dishonour of cheques as a result of insufficiency of funds in the account of a drawer<sup>[3]</sup>. The Act does not define the offence contemplated under section 138. It is a special offence not covered by the Indian Penal Code. However, the Act describes precisely the nature and conditions precedent for constituting an offence within the meaning of Section 138.

Section 138 provides that- "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—

- a) The cheque has been presented to the bank within a period of three months from the date on which it is drawn or within the period of its validity, whichever is earlier;
- b) The payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
- c) The drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

### Explanation

For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability"<sup>[4]</sup>

The title of the Chapter XVII makes it clear that dishonour of every cheque will not bring the case within the purview of

Section 138 and a person can be held liable only if the cheque has been issued in discharge of, in whole or in part, of any legally enforceable debt or liability. This section draws presumption that one commits the offence if he issues the cheque dishonestly. It aims of not only protecting the interests of the genuine drawers of the cheques with a view to give them a final opportunity to make payments in respect of dishonoured cheques, but also imposing punishments on the guilty <sup>[5]</sup>.

### Ingredients of the Offence

To constitute an offence under Section 138 of the Negotiable Instruments Act the following ingredients are required to be fulfilled:

- 1) Cheque should have been issued for the discharge, in whole or in part, of any debt or liability.
- 2) The cheque should have been presented within the period of three months or within the period of its validity, whichever is earlier.
- 3) The payee or the holder in due course should have issued a notice in writing to the drawer within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.
- 4) After the receipt of the said notice by the payee or the holder in due course, the drawer should have failed to pay the cheque amount within fifteen days of the receipt of the said notice.
- 5) On non-payment by the drawer, the complaint should have been filed within one month from the date of expiry of the grace time of fifteen days, before a Metropolitan Magistrate or not below the rank of a Judicial Magistrate of the first class.

### i) Issuance of Cheque for Discharge of any Debt or Other Liability:

It is essential that the dishonoured cheque should have been issued in discharge, wholly or partly, of any debt or other liability of the drawer to the payee. The expression 'debt or other liability' means a legally enforceable debt or other liability. If a cheque is given by way of gift or present and it is dishonoured by the bank, the maker of the cheque is not liable for prosecution <sup>[6]</sup>.

In *Maruti Udyog Ltd Vs Narender* <sup>[7]</sup>, the Supreme Court held that by virtue of Section 139 of the Negotiable Instruments Act, the court has to presume that the holder of the cheque received the cheque for discharge of a debt or liability until the contrary is proved.

In *Tamil Nadu Retrenched Census Employees Association Vs K Thennan* <sup>[8]</sup>, it was held that arrears of legal fee of an advocate can be classified as legally enforceable debt and complaint under section 138 cannot be quashed.

### ii) Presentation of Cheque

Legally a cheque can be presented for payment repeatedly any number of times within three months from the date of drawing of the cheque or within the period of its validity which is earlier.

In *K C Nadar Vs Chenabai M R Simon* <sup>[9]</sup> the question was raised for the first time before the court whether a cheque may be presented on any number of times during the period of its validity. This was the case which propounded the basic theory that a cheque can be presented any number of times during the period of its validity. Further, the Supreme Court held in

*Sadanandan Bhadrans Vs Madhvan Sunil Kumar* <sup>[10]</sup> that section 138 of the Act does not put any embargo upon the payee to successively present a dishonest cheque during the period of its validity and a fresh right arises with every presentation but cause of action arises only once when the notice is served.

### iii) Reasons for Dishonour of Cheque

#### a) Stop Payment

In *Electronics Trade and technology development Corporation India Vs Indian Technologies and Engineers (Electronics) Pvt. Ltd.* <sup>[11]</sup> The Supreme court of India observed that if, before presentation of a cheque, notice is issued by the drawer to the payee or holder in due course not to present the cheque for payment, and it is still presented and, on the drawer's instructions, dishonoured, Section 138 is not attracted. But in another case *Modi cements Ltd. Vs Kuchil Kumar Nandi* <sup>[12]</sup>, the Supreme Court disapproved its own observations in earlier case and held that even if a cheque is dishonoured because of "Stop Payment" instruction to the bank, section 138 would get attracted. It was further affirmed in *M/s M. M. T. C. Ltd. Vs M/s Medchl Chemicals and Pharma (P) Ltd.* <sup>[13]</sup>

#### b) Bank Account Closed

The dishonour of cheque on the ground that the account has been closed by the drawer of the cheque constitutes an offence under section 138. "Account Closed" would mean that "though the account was in operation when the cheque was issued, subsequently the account is closed <sup>[14]</sup>. It shows that the drawer has no intention to make payment. Closing of account is one of the modes by which a drawer can render his account inadequate to honour the cheque issued by him, therefore, the closing of the account would not enable the accused to wriggle out of his liability under section 138 of the Act <sup>[15]</sup>. In *N. A. Issac Vs Jeeman P. Abraham & Anr* <sup>[16]</sup>, it was held that cheque issued when account has already been closed, provision of Section 138 will apply.

#### c) Refer to the Drawer

"Refer to drawer" in the ordinary meaning amount to a statement of a bank, "we are not paying, go back to the drawer and ask why", or else "go back to the drawer and ask him to pay". The remarks "refer to drawer" necessarily means, as per banking custom, that the cheque has been returned for want of funds in the account of the drawer of the cheque. It is a courteous way normally adopted by a bank to show its inability to honour the cheque for want of funds <sup>[17]</sup>.

In *M/s Electronic Trade & Technology Development Corporation Ltd. Vs M/s Indian Technologist and Engineer (Electronic) Pvt. Ltd.* <sup>[18]</sup> It was held that if cheque is returned with endorsement 'Refer to drawer' or Instructions for stoppage of payment or exceeds arrangement, it amounts to dishonour of cheque.

#### d) Post Paid Cheques

A "post dated" cheque is a bill of exchange when it is written or drawn, it becomes a 'cheque' when it is payable on demand <sup>[19]</sup>. A post-dated cheque cannot be presented before the bank and as such question of its return does not arise. It is only when the post dated cheque becomes a cheque with effect from the date shown on the face of the said cheque, Section 138 comes into play.

#### iv) Notice

Notice is a very important stage. It is the non-payment of dishonoured cheque within fifteen days from the receipt of the notice that constitutes an offence. Issuing of a cheque and its dishonour is not an offence. The offence is when the drawer receives a notice from the payee and he fails to pay the dishonoured cheque amount within the grace period of 15 days that constitute an offence any demand made after the dishonour of cheque will constitute a notice.

The requirement of giving of notice is mandatory. The main problem is the serving of the notice to the accused as accused makes all efforts to avoid the receipt of the notice. In order to deal with such situations, the courts have evolved a principle called as deemed service of a notice under section 138(b). The legal position regarding deemed service of a notice U/s 138(b) has been that whenever a notice is sent by the payee to the drawer of the cheque and the said notice is refused to be taken or the addressee deliberately avoids its service, there is deemed to be service of the same <sup>[20]</sup>.

#### v) Filing of Complaint

A fair reading of Section 138 of the Act together with its proviso will make it clear the cause of action for initiating proceedings would complete when the drawer of the cheque fails to make the payment within fifteen days of receipt of the notice. The offence would be deemed to have been committed only from the date when the notice period expired <sup>[21]</sup>. A complaint under section 138 is to be filed within one month of the date on which the cause of action arises. The day on which cause of action occurs is to be excluded for reckoning the period of limitation for filing a complaint U/s 138 of the Act <sup>[22]</sup>.

#### vi) Jurisdiction

Hon'ble Apex Court in case of *K. Bhaskaran vs. Shankara* <sup>[23]</sup>, had given jurisdiction to initiate the prosecution at any of the following places.

1. Where cheque is drawn.
2. Where payment had to be made.
3. Where cheque is presented for payment
4. Where cheque is dishonoured.
5. Where notice is served upto drawer.

However, in its recent decision in *Dashrath Rupsingh Rathod v. State of Maharashtra & Anr.* <sup>[24]</sup>, the Supreme court held that in cases of dishonour of cheque, only those courts within whose territorial limits the drawee bank is situated would have the jurisdiction to try the case.

Subsequently, many people had raised difficulties about this judgment. This is so because the payee of the cheque had to file the case at the place where the drawer of the cheque has a bank account. However, now the legal position has completely changed with above new Ordinance, i.e., the Negotiable Instruments (Amendment) Ordinance, 2015, which has been promulgated by the President on 15 June 2015, and which has immediately come into force with effect from 15 June 2015. The above Supreme Court judgment is now of no consequence since this Ordinance supersedes it, clarifying jurisdiction related issues for filing cases of offence committed under Sec 138. The main amendment included in this is the stipulation that the offence of rejection/return of cheque u/s 138 of NI Act will be enquired into and tried only by a Court within whose local jurisdiction the bank branch of the payee, where the payee

presents the cheque for payment is situated <sup>[25]</sup>.

The jurisdiction of filing cheque dishonour cases under Section 138 of the N.I. Act is now changed by the above Ordinance as under:

- Now a cheque bouncing case can be filed only in the court at the place where the bank in which the payee has account is located.
- Secondly, once a cheque bounce case has been filed in one particular court at a place in this manner, subsequently if there is any other cheque of the same party (drawer) which has also bounced, then all such subsequent cheque bounce cases against the same drawer will also have to be filed in the same court (even if the payee present them in some bank in some other city or area). This will ensure that the drawer of cheques is not harassed by filing multiple cheque bounce cases at different locations. So, even multiple cheque bounce cases against the same party can be filed only in one court even if payee presents the cheques in different banks at different locations.
- Thirdly, all cheque bounce cases which are pending as on 15 June 2015 in different courts in India, will be transferred to the court which has jurisdiction to try such case in the manner mentioned above, i.e., such pending cases will be transferred to the court which has jurisdiction over the place where the bank of the payee is located. If there are multiple cheque bounce cases pending between the same parties as on 15 June 2015, then all such multiple cases will be transferred to the court where the first case has jurisdiction as per above principle.

Thus, this new Ordinance now introduces some clarity and uniformity in the matter of cheque dishonour cases. This Ordinance takes care of the interests of the payee of the cheque while at the same time also taking care that the drawer of the multiple cheques is not harassed by filing multiple litigations at different locations to harass him (if more than one cheque has bounced). This Ordinance supersedes the Supreme Court decision dated 1 August 2014 [*Dashrath Rupsingh Rathod v. State of Maharashtra*, (2014) 9 SCC 129] or any other judgment / decision of any court (Supreme Court or High Courts) on this issue <sup>[26]</sup>.

#### vii) Punishment

Bouncing of a cheque invites criminal prosecution under section 138 of the Negotiable Instruments Act, 1881. Punishment for the offence under Section 138 of NI Act is imprisonment up to two years or fine which may extend to twice the cheque amount or both. The offence is bailable, compoundable and non-cognizable.

#### viii) Civil Action

The payee may also initiate money recovery procedure in a jurisdictional civil court apart from prosecuting the drawer for criminal offence.

#### Conclusion

Bounced cheques are one of the most common offences plaguing the financing world. According to the Supreme Court, there are over 40 lakhs such pending cases in the country. Although, there have been a few amendments in the Act which has made the Act, a self contained statute, wherein provisions have been made to check the delays and to ensure speedy justice with more deterrent punishment, yet the problem of

cheque bouncing is not decreasing. Moreover, the law is unnecessarily complicated and there is lack of provisions for forcing the appearance of the accused in the court. Though the amendments to the Negotiable Instruments Act, 1881 are helpful in dealing with the offence of bouncing of cheque, they are not fully proved successful in stopping the offence.

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