

DISHONOURRED CHEQUES AND LEGAL WRECKS: SPEEDY DISPOSAL WITHOUT BRAKES



WEDNESDAY WISDOM
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1. What is a cheque[1]?

Section 6 of the Act states A "cheque" is like a special kind of instrument that you can use to pay for things. It's a written note that says you want to withdraw some money from your bank, and it's addressed to your bank. The definition of a cheque also includes a picture of a cheque on a computer or phone, and even a cheque that only exists in electronic (digital) form. So, it's not just a physical piece of paper – it can also be a digital version. A cheque is drawn for the amount payable by the Drawer in favor of the Payee[2] in discharge of the services provided by the Payee.

2. How is the cheque realized?

The Payee must present the cheque to the Payee account holder bank for processing and payment within its validity 3 (three) months from the date the Cheque is drawn[3]. The Cheque can be presented any number of times within its validity if notice is not issued for dishonor of cheque on any earlier date for dishonor of cheque.

3. How does one conclude that a cheque is dishonored?

When a cheque is dishonored for insufficient balance, payment stopped by Drawer or exceeds arrangement in the bank, the bank that the cheque is drawn on (Drawer's Bank) will promptly send a Cheque Return Memo stating the reason to the bank of the person who was supposed to get the money. According to Section 138 of the Act, the law clearly states that dishonor of cheque due to insufficient funds in the account or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank is an offence.

[1]The article reflects the general work of the authors and the views expressed are personal. No reader should act on any statement contained herein without seeking detailed professional advice.

[2]Section-7 of NI Act "Payee".—The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the "Payee".

[3]RBI Notification: RBI/2011-12/251DBOD.AML BC.No.47/14.01.001/2011-12-Validity of cheque is changed from 6 months to 3 months

4. What are the specific requirements that should be adhered to while sending demand notice after receipt of return memo by the payee?

To initiate legal proceedings under this section it is mandatory for the Payee to:

- Send statutory notice for dishonor of cheque and demand the payment of said amount within 30 days from the date of receiving Return Memo/Intimation from the Bank.
- Ensure that the notice should specifically contain a demand for payment of the dishonoured cheque amount payable by Drawer to Payee.
- The Drawer/Notice needs to make the payment within 15 days from the date of receipt of the Notice.
- Record the cause of action appropriately.
- The notice should be addressed to the Drawer of the cheque and incase the drawer is a company, then the Notice to be addressed to the Company and its Directors/Managing Directors and officials. In case the drawer is the partnership firm, the Notice to be issued to Partnership Firm and its Partners.
- The Notice should be sent by Registered Post/Speed Post. In addition, the Notice may also be issued by various modes such as e-mail, WhatsApp etc.

In Dolma Devi vs. Roshan Lal[4], the Respondent had issued a post-dated cheque for Rs.3,00,000/- on 14 September 2004. The complainant deposited the cheque on 07 March 2005, but it was dishonoured on 24 March 2005. Despite issuance of legal notice, the accused failed to pay, leading to filing of complaint for dishonor of cheque before the Trial Court. The trial court rejected the complaint for two reasons i.e., delay in filing the complaint and the notice being invalid as the cheque was presented to the drawee bank after the six-month validity period (Earlier the validity of cheque was for six months). The Appellant filed an appeal against the Trial Court judgment before High Court of Himachal Pradesh which was dismissed.

Along with the delay factor, the Hon'ble High Court also analyzed the notice to state that in the Notice there was no specific demand for making the payment and thus the notice was invalid. The Court quoted the relevant para of the notice issued by the Respondent which was as follows:

"3. That my client presented the aforesaid cheque through P.N.B. Jachh thrice to your bank, i.e. H.P. State Co-operative Bank Branch Beri at Bilaspur on dated 73 2005 which has been returned on dated 243-05 with the remarks of serialno.13 of Memorandumas such you willfully and deliberately assured my client for payment knowingly that you have insufficient fund in your account as such your aforesaid acts fall under the ambit of section 138 of the Negotiable Instrument Act.

[4] Criminal Appeal No.346 of 2011

You are, therefore, intimated through this legal notice that you have committed an offence under section 138 of the Negotiable Instrument Act for which you should be penalized with cost and consequences in that event you shall be responsible for all cost and consequences arising out of the litigation.”

The Hon’ble High Court observed that though Notice was issued for dishonor of Cheque but there was no specific demand for the payment of the dishonoured cheque amount and hence it did not meet the statutory requirement under the law.

5. What legal remedies are available for the payee, after issuance of notice if the payment is not received?

When the drawer fails to fulfill the payment obligation within a specified period of 15 days from the date of receipt of the notice, the Complaint under section 138 of the Act can be filed. This is a specific remedy for cheque dishonor and can be parallelly pursued along with other legal remedies available to the Payee.

The complaint under section 142 of the Act shall be filed within 1 month of the date on which cause of action arises under section 138(c) of the Act. For computing the period of one month as provided under Section 142(b) of the Act, the first day on which the cause of action has arisen has to be excluded.[5]

6. How can the timelines for filing of cheque bouncing complaint be understood?

Let us understand the cause of action with example:

A is a manufacturer of equipment and has purchased raw materials from B. A issues a cheque in favour of B dated 1st February 2023.

Cheque required to be presented by A within 3 months to the drawee or payee account holder bank i.e., on or before 30th April 2023.

Cheque is deposited by A before 30th April 2023 and the return memo is received from the Bank for insufficient funds as per return memo dated 5th April 2023. Upon receipt of the return memo on 5th April 2023 the notice should be issued within 30 days from the date of receiving Return Memo or intimation from Bank i.e., on or before 5th May 2023.

If the notice for the dishonor of a cheque is issued on 4 May 2023 and if the same is received by Notice on 10th May 2023, then according to the provisions of Section 138 of the N.I. Act, the drawer need to make the payment within 15 days from the date of receipt of the notice i.e., on or before 25th May 2023.

[5] Section 9 of the General Clauses Act, 1897 and Section 12 of Limitation Act, 1963

In case the drawer fails to make payment on or before 25th May 2023 the cause of action arises on 26 May 2023 i.e., expiry of 15 days from notice.

For calculating one month's period contemplated under Section 142(b) to file a written complaint, the date 26 May, 2023 has to be excluded and therefore the complaint shall be filed on or before 26 June 2023.

The Supreme Court in its ruling in M/S. Econ Antri Ltd vs M/S. Rom Industries Ltd. & Anr[6], reasserted its decision in Saketh India Ltd[7] that when calculating the one-month period stipulated under Section 142(b)[8] of the Act, the date on which the cause of action arose should be excluded from the reckoning. The Court affirmed that the computation of the prescribed period should commence from the day following the date on which the cause of action originated.

It's emphasized that the term "month" within the framework of the Negotiable Instruments Act (N.I. Act) adheres to the definition provided in Sec. 3 (35) of the General Clauses Act. The Act doesn't explicitly define "month," and as per this definition, a month is construed as a British Calendar Month, equivalent to 30 days, and not a lunar month. The Supreme Court in H. P. Vs. M/s. Himachal Techno Engineers[9], examined the meaning of the word 'month' and held that a month does not refer to a period of 30 days but refers to the actual period of a calendar month. It was clarified that if the month is April, June, September or November, the period comprising the month will be 30 days; if the month is January, March, May, July, August, October or December, the month will comprise of 31 days; but if the month is February, the period will be 29 days or 28 days depending upon whether it is a leap year or not.

[6] (2014) 11 SCC 769

[7] Saketh India Ltd. & Ors. v. India Securities Ltd. (1999) 3 SCC 1

[8] 142 (b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138

[9] 2010 AIR SCW 5088

7. Where can the complaint be filed?

After the 2015 amendment (after inserting Sub-section – 2) the territorial jurisdiction is limited to the Payee-Bank. The amendment stands as under:

“(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction:

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation— For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.”

In essence, the place where the cheque is delivered has not much meaning, but significance is given to the text “for collection through an account” which means, delivery of the cheque takes place where the cheque was issued and presentation of the cheque will be through the account of the payee or holder in due course, and the latter place is decisive to determine the question of jurisdiction.

Thus, the Complainant can file a complaint in writing within one month of the date on which the cause of action arises before Metropolitan Magistrate or a Judicial Magistrate of first class within its local jurisdiction as discussed above.[10]

[10] Section 142 of NI Act

8. Who can be held liable in case of Company?

If a company commits an offence under section 138 of the Act, both the company and the person in charge of its business at the time of the offence will be considered guilty[11]. They can be prosecuted and punished accordingly. However, if a person can successfully prove by way of leading cogent evidence that he/she had no knowledge of the offence or took all necessary steps to prevent it, such individual is not likely to be held liable for punishment under this subsection.

In Jayalakshmi Nataraj v. Jeena and Co[12]., the Court held the managing director of a company guilty under Section 138 of the Act despite her claim of not being actively involved in the company's daily operations and asserting her role as an employee with limited awareness of its affairs. The judgment rested on the principle of vicarious liability, holding the director accountable for the company's actions.

9. What is the prescribed punishment for dishonor of cheque under the Act?

Section 138 of the Act prescribes punishment for dishonoring a cheque, which includes imprisonment for up to 2 years or a fine extending to twice the cheque amount or with both.

Despite the provision for imprisonment, the court's initial focus is on compensating the complainant.

The court aims to address the financial loss suffered by the complainant due to the dishonored cheque.

The Supreme Court observed that Section 138 the Act is a civil wrong and is treated as such, and only in the presence of some special circumstances it will lead to a sentence of imprisonment imposed and not otherwise, as it is compensatory in nature[13].

In the case of *M/s Meters and Instruments v. Kanchan Mehta* (2017)[14], the Hon'ble Supreme Court reiterated and clarified that an offence under Section 138 is compensatory in nature, and the punitive element that is present in the provision is to make the compensatory mechanism more effective.

[11] Section 141 of NI Act

[12] (1996) 86 Comp Case 265)

[13] *Kaushalya Devi Massand v. Roopkishore Khore* (2011)

[14] Criminal Appeal No. 1731 of 2017

Courts prioritize compensatory measures to ensure the complainant is adequately redressed. The Hon'ble Supreme Court has made it clear that the propensity of the court should be towards compensating the victim rather than penalizing the accused in cases of Section 138[SJ1] of the Act[15]

10. What is the way forward?

Chapter XVII of the Act aims to improve the trustworthiness of cheques. However, the effectiveness of this law relies on how well it is put into action. There are concerns about how the laws about dishonored cheques are enforced. One significant issue is the large number of pending cases related to dishonored cheques.

The Hon'ble Supreme Court's in its suo motu judgement: "In Re: Expeditious Trial of Cases U/S 138 of N.I. ACT, 1881"[16] has made the following important observations:

- a) Requested the High Courts including Supreme Court to identify the pending cases u/s 138 of the N.I. Act and refer them to mediation at the earliest and to settle the disputes through mediation. This is a novel concept under criminal law and a highly welcome step.
- b) Requested the High Courts to issue practice directions to the Magistrates to record reasons before converting trial of complaints under Section 138 of the Act from summary trial to summons trial.
- c) Inquiry shall be conducted on receipt of complaints under Section 138 of the Act to arrive at sufficient grounds to proceed against the accused, when such accused resides beyond the territorial jurisdiction of the court.
- d) For the conduct of inquiry under Section 202 of the Code, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses.
- e) Has recommended that suitable amendments be made to the Act for the provision of one trial against a person for multiple offences under Section 138 of the Act committed within a period of 12 months, notwithstanding the restriction in Section 219 of the Code.

[16] SUO MOTU WRIT PETITION (CRL.) NO.2 OF 2020

f) Requested the High Courts to issue practice directions to the Trial Courts to treat service of summons in one complaint under Section 138 forming part of a transaction, as deemed service in respect of all the complaints filed before the same court relating to dishonor of cheques issued as part of the said transaction.

It is a welcome judgment towards speedy disposal of cases relating to offences under section 138 of the Act.



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