

Dishonouring of a Cheque u/s 138

A cheque is a type of bill of exchange and is a negotiable instrument. It is used for making payments without any need to carry cash. A Dishonoured Cheque is a Cheque that is not credited by the Bank for numerous reasons including: The signature does not match; the account on which the cheque is drawn has insufficient funds, the date is invalid – i.e. the presentation of the cheque 6 months from the date on the cheque.

The dishonouring of a cheque u/s 138 is considered a criminal offence, if anyone draws a cheque on an account, maintained by him with a banker, to pay someone else money and the cheque bounces, that person is guilty of having committed an offence under the Section 138, if the following conditions are involved:

- The cheque should have been drawn to discharge a legally-enforceable debt or other liability, either wholly or partially.
- The cheque should have bounced because the amount of money standing to the credit of that account is insufficient to honour the cheque or because it exceeds the amount arranged to be paid from that account by an agreement made with that bank. However, if, for example, a cheque bounces because the signature on the cheque does not match one in the Bank's records, Section 138 is not applicable.
- The cheque should have been presented within period of six months or within period of its validity, whichever is earlier.
- 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 cheque as unpaid.
- 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.
- On non-payment of the amount due on a dishonoured cheque within fifteen days of the receipt of notice by the drawer, the complaint should have been filed within one month from the date of expiry with the grace time of fifteen days, before a Metropolitan Magistrate or someone not below the rank of a Judicial Magistrate, First Class. The cognizance of a complaint may be taken by the court after the prescribed period, if the complaint satisfies the court that he had sufficient case for not making a complaint within the specified period.
- The Offence under this Act is compoundable (A compoundable offence is one which can be settled privately).

Some terms as specified above:

- **Drawer:** The maker of the cheque (he who signs the cheque) is called the 'drawer'
- **Drawee:** The person thereby directed to pay is called the 'drawee'
- **Payee-** The person named in the instrument to whom or to whose order the money by instrument is directed to be paid is called the 'payee'.

A person who commits an offence under Section 138 may be punished with imprisonment for up to two years, or with a fine which may extend to twice the amount of the cheque, or with both.

However, no one can be punished unless the cheque has been presented to the bank within six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

Defence that can be taken in regard to dishonoured cheque cases:

If the matter is examined critically, then the following may be a line of defence that may be taken are as follows:-[35]

1. Absence of a legally-enforceable debt or liability.
2. The cheque was not returned for the reasons constituting an offence.

3. The complaint was not as per time period provided in Sections 138 and 142, i.e. the plea of limitation.
4. Absence of legal notice of 15 days.
5. Lack of Jurisdiction.
6. No return of cheque to the payee.

The RBI has suggested some cheque-writing guidelines and even impact of cheque dishonour with effect from 1st July 2010 with reference to the following circular:-

RBI Guideline on Cheque-Writing - Impact on Cheque Dishonour:

One should change his cheque-writing behaviour as the RBI's new cheque writing Guideline has become effective on and from the 1st July, 2010. Section 1.8 of the Annexure to RBI Circular DPSS.CO.CHD.No.1832/04.07.05/2009-2010 dated February 22, 2010 specifically deals in "Prohibiting alterations / corrections on cheques". The Section is reproduced hereunder:

"Prohibiting alterations / corrections on cheques: No changes / corrections should be carried out on the cheques (other than for date validation purposes, if required). For any change in the payee's name, courtesy amount (amount in figures) or legal amount (amount in words), etc., fresh cheque forms should be used by customers. This would help banks to identify and control fraudulent alterations."

As such, the bank will return or reject a cheque having alteration on: (i) Payee's name, (ii) Amount in figures and (iii) Amount in words. However, in terms of the said Section, the date alteration will be allowed.

Impact of the new guideline: One must be very careful in writing a cheque, as any casual mistake will result in dishonouring of the cheque by the bank and such dishonour will result in loss, both in terms of time and money.

Other aspects of the new cheque-writing guideline: In the case of the dishonouring of a cheque under certain circumstances, Section 138 (Dishonour of cheque for insufficiency of funds in the accounts etc.) of THE NEGOTIABLE INSTRUMENTS ACT, 1881 is attracted. The Section provides for punishment to the drawer of the cheque being dishonoured under the circumstances specified in the Section.

Now this is to see whether the dishonouring of a cheque by the bank in view of the aforesaid guideline also attracts Section 138 or not. We shall have to wait till such when a cheque dishonour arises and the matter is decided in the Hon'ble Court.