

Dishonour of cheque

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DISHONOUR OF CHEQUES A cheque is one form of a bill of exchange. However, all bills of exchange are not cheques. A cheque is always drawn on a bank or a banker. It is payable immediately on demand, without any days of grace. The sum that is directed to be paid should be distinctly expressed in the instrument. If there is a discrepancy between the amount stated in words and that stated in figures, then the amount stated in words shall be the amount that is ordered to be paid. As per the amendments, brought in by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002, truncated cheques and electronic cheques also fall within the purview of the definition of cheques. The Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 defines truncated cheques as those cheques, which are truncated by the clearinghouse or by the bank during the course of a clearing cycle and electronic cheques as those cheques, which contain the exact mirror image of paper cheques. In order to ensure the minimum safety standards with the use of digital signatures and asymmetric crypto system, such cheques are generated, written and signed in a secure system. When any cheque, drawn by a person for the discharge of any liability is returned by the bank unpaid, because of insufficiency of the amount of money, standing to the credit of the account on which the cheque was drawn or, for the reason that it exceeds the arrangements made by the drawer of the cheque, the cheque is said to have been dishonoured. In India, the Negotiable Instruments Act, 1881 was framed as an attempt to consolidate the law that relates to the Bills of Exchange, cheques and promissory notes. This Act is based upon English Common Law, based upon the decisions of the English Court. The Madras High Court, in the case of

Sivram vs. Jayram AIR 1966 Madras 297, held "..... in many portions the legislature while codifying has reproduced the principles of English Law as enunciated in the English discussion, rendered up to the time, besides taking such guidance as was necessary from the leading English text books like Chitty on Bills or Story on Bills." Thus, it becomes clear that these laws had their roots in English Law which prevailed at the time of the enactment of the Negotiable Instrument Act, 1881. While drafting the Act, the framers of the statute were well aware of the changing needs of the merchants. Therefore, the framers of these laws thought far ahead and so the Act encompassed all the needs of that time and even the future. Consequently, there was no need to amend these laws for over a hundred years. It was only in 1988 that a need to revise the law was felt. Therefore, on the suggestions of the Law Commission, The Banking, Public Financial Institutions and Negotiable Instruments Law (Amendment) Act, 1988 was passed by the Parliament. This Act introduced a new chapter, namely Chapter XVII (Section 138 -- Section 142), to the Negotiable Instrument Act 1881. The Chapter is described to be a complete code in itself with respect to the dishonour of cheques and deals with various aspects of dishonour of cheques such as: - What is the offence of dishonour of cheques; - The quantum of punishment for committing of such offence; - Offences committed by companies; - Procedure to file complaint before the Court etc. It also states the liabilities of the drawer and the drawee as under: The holder has a remedy against the drawer but only in cases where the cheque has been presented and payment has been refused. The drawer should be informed of non-payment immediately so as to enable him to inquire into the causes of refusal and secure his funds in the

bank. The drawer of a cheque is regarded as the principal debtor and is not absolutely discharged by the failure of the holder in making the due presentment or giving him notice of dishonour. The drawee of a cheque, having sufficient funds of the drawer in his hands, properly applicable to the payment of such cheque, must pay the cheque when duly required to do so. In default of such payment, he must compensate the drawer for any loss or damage caused by such default. E. g. If a bank fails to make the payment on a cheque drawn by an account holder even though the account holder has sufficient balance to honour the payment, then the bank is liable to compensate the drawer for any loss or damage that is caused by such default. No court that is inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class can try any offence u/s138. All the following Courts will have jurisdiction: - The Court, situated at the place where the drawer of the cheque fails to make the payment of money; - The Court situated at the place where the bank through whom the cheque was issued, is located; - The Court situated at the place where the cheque was issued or delivered. In order to proceed under Section 138, the following events should have occurred: - A cheque; - A notice of dishonour should be served within 30 days of receipt of information of dishonour of the cheque; - The drawer does not make payment within 15 days of receipt of the notice; - The complaint can be made only by the payee or holder in due course within one month of the drawer failing to make payment after 15 days of receiving notice. Exceptions: - One cannot bring an action under Section 138 for the dishonour of a cheque that is given as a gift. This section applies only when the cheque which is dishonoured was issued for the payment of a debt or

any other liability, which is legally enforceable. - Dishonour of a cheque on the ground that the account has been closed by the drawer of the cheque does not constitute an offence under Section 138 as the said section, contemplates dishonour of a cheque either for want of funds or for exceeding the arrangements made. However, now the Supreme Court has held that even if a cheque is dishonoured due to the bank account being closed by the drawer, it will amount to an offence under Section 138 of the Negotiable Instruments Act. Courts have expanded the scope of this section to apply to situations where the dishonour is for reasons of 'refer to drawer' i. e. where payment is stopped by the drawer; where the drawer has instructed the payee not to present the cheque; or where an account is closed after issuance of the cheque. It is important to note that the offence u/s. 138 is committed only when the cheque is dishonoured and not when it is issued. Therefore, if a drawer issues a post dated cheque and, at the time of its issuance, has no balance in his account, commits no offence if, when the cheque is presented, he arranges for such payment with the bank. Further, the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 gives discretionary powers to the Courts to take cognizance of a complaint even after one month of the time when the drawer fails to make payment after 15 days of receiving notice. However, in such cases, the complainant will have to satisfy the Court that he had sufficient cause for not making a complaint within such period. In case a person has filed suits for recovery, then he is not precluded from filing a complaint under Section 138 of the Negotiable Instruments Act and Section 420 of the Indian Penal Code. The pendency of criminal matters would not be an impediment to proceeding

with the civil suits. Though this chapter was enacted with an ultimate intention to provide quick and effective remedy, it failed in its essential purpose. In practice, it has been seen that courts have been willing to impose the full criminal sentence as regards imprisonment. When it comes to levy of monetary penalty, the courts have utilized their discretion to recover the whole amount and charge interest which is then returned to the complainant. It also levies an additional small fine, subject to its limit of double the cheque amount, which is paid to the government. Unfortunately, the practice in criminal courts belies the hopes of the law-makers. By and large, magistrates have failed to give expression to the legislative intent of securing speedy disposal to an action u/s. 138. Complaints lie in courts for years before a trial begins. Moreover, the actual trial may be drawn out for several months. According to a report published in Mumbai, nearly 70, 000 cases worth Rs. 6, 000/- crore are pending. Further, the number of cases that have added to the backlog far exceeds the number of cases that have been disposed of. This is hazardous to the economy of the country. To eradicate these problems, the Negotiable Instruments (Amendment and Miscellaneous Provisions) Bill 2001 was passed by the Parliament in December 2002. The main object of the Bill was to lay down provisions for the speedy disposal of cheque bouncing cases and to make the punishment stricter. This Amendment Act lays down provisions for conducting summary trial and disposal of the trial within six months from the date of the filing of the complaint. Some changes that have been brought into the Negotiable Instrument Act 1881 by the Amendment Act, 2002 are given below:- - The definition of Cheques in Section 6 of the Negotiable Instrument Act and

Section 13 of the Information Technology Act is amended to include truncated and electronic cheques. As a result of this change, the Information Technology Act, 2000 is made applicable to the Negotiable Instrument Act, 1881 in relation to electronic cheques and truncated cheques; - The punishment, under section 138 of the Negotiable Instrument Act, 1881, is increased from one year to two years; - The period of notice under section 138(b) has been increased from 15 days to 30 days; - Section 142 provides immunity to the nominee director from being prosecuted under Chapter XVII of Negotiable Instrument Act, 1881; - A proviso is added to Section 142 whereby the Court is given discretionary powers to waive the period of one month, prescribed for taking cognizance of the case under the Act; - The amendment inserts five new sections, namely Section 143 to Section 147. Section 143 has been inserted so that courts are given power to try the offence of cheque bouncing summarily. Through this section, the courts are also directed to conduct the trial as expeditiously as possible. Courts must also make efforts to conclude the trial within six months from the date of filing of the complaint. The new section, Section 144, lays down procedure for service of summons namely: - by serving a copy of summons to be served at the place where such accused or witness ordinarily resides or, carries on business or, personally works for gain; - by speed post; - by such courier services as approved by a Court of Sessions. Section 146 provides that the fact of dishonour will be presumed by the court on the basis of the bank's slip or memo, denoting that the cheque has been dishonoured, unless it is rebutted by other evidence. Section 147 makes the offence of cheque bouncing compoundable. The Negotiable Instruments (Amendment and

Miscellaneous Provisions) Act, 2002 prescribes imprisonment, which may extend to two years or payment of a fine, which may extend to twice the amount of the cheque or, both for an offence under section 138. In case of death of the complainant during pendency of the complaint the Magistrate can grant permission to the son of the deceased complainant to proceed with the complaint under Section 138. It is within the discretion of the trying Magistrate in a proper case to allow the complaint to continue by a proper and fit complainant if the latter is willing. CASE STUDY Lalit Kumar Sharma and Anr. Vs. State of U. P. and Anr. - May 6 2008 - Honourable Judges: S. B. Sinha and Lokeshwar Singh Panta, JJ. - Issue: Negotiable Instruments Act, 1881 Section 138 - Date Of Judgment: May 6 2008 - Case No: Appeal (crl.) 818 of 2008, SLP (Crl.) No. 4167 of 2007 An appeal was filed against the Allahabad High Court's Order. The appellants were convicted under Section 138 of Negotiable Instruments Act 1881 (the Act). Mr. X and Mr. Y were directors of a Company who took loan. The cheques were drawn on the Bank in favour of the Respondent no. 1. However, on presentation, they were returned with the remarks "insufficient fund". Therefore, the Respondent no. 2 filed a complaint against directors under section 138 of the Act and Section 420 of the Indian Penal Code. During pendency of the complaint, an endeavour was made to resolve the disputes and differences between the parties. An agreement was entered into between the parties. It was agreed that if a cheque was issued, the complaint would be withdrawn. Mr. Y issued a cheque, which was also on presentation returned with the remark "insufficient fund". It was stated that an agreement was entered into between Mr. X and the Company that the liability in question was personal. Further,

the respondent no. 2 filed another complaint with regard to the return of the said cheque against the Mr. X, Mr. Y and the appellants. The Appellants were summoned and they filed an application before the Chief Judicial Magistrate to set aside the order, which was dismissed. Therefore, a Revision Application was filed before the High Court which was dismissed and they were convicted under Section 138 of the Act. They appealed before the Apex Court. It was observed that according to the respondent, the accused persons had been equally involved in the dealing of giving and receiving the cheque. Mr. Y issued the second cheque in terms of the settlement between the parties was not in dispute. The cheque was not issued in discharge of the debt or liability of the Company of which the appellants were said to be the directors. There was only transaction between Mr. X, Mr. Y and other directors of the Company, which were punished under the Act. Therefore, the appeal was allowed. CONCLUSION: The efforts of the government are surely a positive step towards improvement of the Indian economy. The summary trial will enable the courts to speedily dispose of cheque bouncing matters. However, a point to be noted here is that it would have been more practical for the government to provide assistance to the magistrates in dealing with the complaints, regarding bouncing of cheques, by increasing the number of magistrates. Moreover, it is also doubtful that merely increasing the punishment would be effective as a deterrent. The government should seriously consider the need to ensure that the implementation of this Amendment Act should be complete and successful. For this, it is essential that an efficient infrastructure should be in place so that the problem of bounced cheques can be firmly handled.