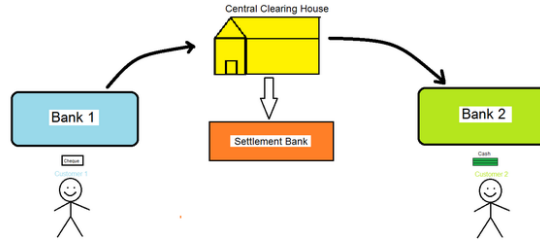




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## DISHONOUR OF ELECTRONIC FUNDS TRANSFER & CHEQUE DISHONOUR: A STEP-BY-STEP GUIDE FOR LEGAL RECOURSE



By: M.S.Yatnatti: Editor and Video Journalist Bengaluru: According to financial experts, The law relating to negotiable instrument is the law of commercial world legislated to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another. In the absence of such instruments, including a cheque, the trade and commerce activities, in the present day would, are likely to be adversely affected as it is impracticable for the trading community to carry on with it the bulk of the currency in force. The negotiable instruments are in fact the instruments of credit being convertible on account of legality of being negotiated and are easily passable from one hand to another. To achieve the objectives of the Act, the legislature has, in its wisdom thought it proper to make such provisions in the Act for conferring such privileges to the mercantile instruments contemplated under it and provide special penalties and procedure in case the obligations under the instruments are not discharged.

RBI Guidelines on Dishonour of electronic funds transfer for insufficiency of funds in the bank account :Reserve Bank of India vide its circular no. DOC/2011-12/191 DPSS. O.PD.No.497/02.12.004/2011-12 issued on 21 September 2011 have highlighted that section 25 of the Payment and Settlement Systems Act, 2007 accords the same rights and remedies to the payee (beneficiary) against dishonour of electronic funds transfer instructions for insufficiency of funds in the account of the payer (remitter), as are available to the payee under section 138 of the Negotiable Instruments Act, 1881.The sub-section (5) of the section 25 of the Payment and Settlement Systems Act, 2007 provides for punishment of two years and twice the amount of electronic funds transfer instruction, or both for dishonour of such electronic funds transfer on par with the penalties stipulated for dishonour of cheques under the Negotiable Instruments Act, 1881.This information is published to boost the confidence of customers in electronic payments by allaying any apprehensions on the rights and remedies available to payees against dishonour of electronic funds transfer instructions.

What is the process for clearing a cheque in India?: Reportedly The clearing process Starts with the deposit of a cheque/other clearing instruments in bank 1. The bank 1 arranges the cheques submitted to it for clearing bank wise and presents it in the clearing house. Upon receipt of the cheques/other instruments, they are passed for payment if the funds are available and the banker is satisfied about the genuineness of the instrument. The said cheque/other clearing instruments is then passed for payment to the beneficiary customer in bank 2.

The cheques that are unpaid are returned to the presenting bank through another clearing called the Return Clearing.Central Clearing House: The clearing house is a voluntary association of banks under the management of a bank where the settlement accounts are maintained. Wherever Reserve Bank of India has its office (and a banking department), the clearing house is managed by it. In the absence of an office of the Reserve Bank, the clearing house is managed by the State Bank of India, its associate banks and in a few cases by public sector banks.Settlement Bank: The aggregate amount or value of cheques presented by a bank 1 on bank 2 represents the claim by that bank 1 on bank 2. Similar claims are made by all the banks on every other bank in the clearing. A net settlement is arrived at the clearing house and the debit or credit position of the bank is determined. These are booked in their current accounts maintained by the settling bank.A typical cheque is credit to the beneficiary's bank account on the 3 working day, here 1st day would be the day of deposit of cheque, 2nd day clearing and 3rd day for crediting the same.

Record the dishonoured payment:Follow these steps to account for the transactions in your bank account.:Find and [delete the original payment received](#) from the bank account or original invoice. This removes the payment from the invoice changes its status back to awaiting payment. [Create a receive money transaction](#) for the amount of the original payment received. Choose an account such as Dishonoured Customer Payments to code the amount to. If you don't have one on your Chart of Accounts, [create a new one](#). Reconcile this receive money transaction to the customer payment received in your bank account.[Create a spend money transaction](#) for the reversal. Code this to the same account as the receive money transaction created in step 2 above. Reconcile this receive money transaction to the reversed payment in your bank account.[add a note](#) against the invoice.When the replacement customer payment clears, you can reconcile it to the unpaid invoice. Charge the customer for bank fees incurred:Follow these steps if you want your customer to reimburse you for any bank fees charged:When the bank charges appear on your bank statement, [create a spend money transaction](#) and code it to an account such as Bank Fees.Advise the customer that they owe you money for the bank charges incurred.When they pay you, [create a receive money transaction](#) and code this to the same account as the spend money transaction created in step 1 above.

Reportedly President of India has promulgated Negotiable Instruments (Amendment) Ordinance, 2015 (6 of 2015) . Last week the Union Cabinet, chaired by the Prime Minister Shri Narendra Modi, had given its approval for the proposal to promulgate the Negotiable Instruments (Amendment) Ordinance, 2015. The amendments to the Negotiable Instruments Act, 1881 ("The NI Act") are focused on clarifying the jurisdiction related issues for filing cases for offence committed under section 138 of the NI Act. The clarification of jurisdictional issues may be desirable from the equity point of view as this would be in the interests of the complainant and would also ensure a fair trial. The clarity on jurisdictional issue for trying the cases of cheque bouncing would increase the credibility of the cheque as a financial instrument. This would help the trade and commerce in general and allow the lending institution, including banks, to continue to extend financing to the economy, without the apprehension of the loan default on account of bouncing of a cheque.

[The Negotiable Instruments \(Amendment\) Ordinance, 2015](#): The Negotiable Instruments (Amendment) Ordinance, 2015 was promulgated on June 15, 2015. The Negotiable Instruments (Amendment) Bill, 2015 was passed by Lok Sabha on May 13, 2015 and is currently pending in Rajya Sabha. The Ordinance amends the Negotiable Instruments Act, 1881. The Act defines promissory notes, bills of exchange, cheques and specifies penalties for bouncing of cheques and other violations. Key features of the Ordinance include:The Ordinance amends the Act to regulate the jurisdiction of courts for cases of cheque bouncing, such that in a case of cheque bouncing:If the cheque is delivered for collection to the account of the payee, the jurisdiction lies in the area of the bank branch where the payee maintains an account, or If the payee presents a cheque to a bank in any other way, the jurisdiction lies in the area of the bank branch where the drawer (person who writes the cheque) maintains an account. All cases regarding cheque bouncing which were pending in any court, before this Ordinance came in force, will be transferred to a court with appropriate jurisdiction. If the payee has filed a complaint against the drawer of a bounced cheque in a court with the appropriate jurisdiction, all subsequent complaints against that person regarding cheque bouncing will be filed in the same court. This will be irrespective of whether the cheque was delivered for collection or presented at a bank branch within the territorial jurisdiction of that court. If more than one case is filed by the same payee against the same drawer before different courts, the case will be transferred to the court with the appropriate jurisdiction, before which the first case was filed. The Bills also amends the definition of 'cheque in the electronic form'. Under the Act, this was defined as a cheque containing the exact mirror image of a paper cheque and generated in a secure system using a digital signature. The definition has been amended to mean a cheque drawn in electronic medium using any computer resource and which is signed in a secure system with a digital signature and asymmetric crypto system (pair of a public key and private key to create a digital signature), or electronic system. The definitions of 'computer resource', 'digital signature', 'electronic system' and 'asymmetric crypto system' are the same as those assigned to them in the Information Technology Act, 2000.

Background :The Section 138 of the NI Act deals with the offence pertaining to dishonour of cheque for insufficiency, etc., of funds in the drawer's account on which the cheque is drawn for the discharge of any legally enforceable debt or other liability. The section 138 of the NI Act provides for penalties in case of dishonour of cheques due to insufficiency of funds in the account of the drawer of the cheque. The object of the NI Act is to encourage the usage of cheque and enhancing the credibility of the instrument so that the normal business transactions and settlement of liabilities could be ensured. Various financial institutions and industry associations have expressed difficulties, arising out of the recent legal interpretation of the place of jurisdiction for filing cases under Section 138 to be the place of drawers' bank by the Supreme Court. To address the difficulties faced by the payee or the lender of the money in filing the cases under Section 138 of the NI Act, because of which, large number of cases were stuck, the jurisdiction for offence under Section 138 has been proposed to be clearly defined. Accordingly, the Negotiable Instruments (Amendment) Bill, 2015 ("the Bill") in Parliament was introduced in Lok Sabha on 6th May, 2015 and considered and passed by Lok Sabha on 13th May, 2015. However, since the Rajya Sabha was adjourned sine die on 13th May, 2015, the Bill could not be discussed and passed by that House and the Bill could not be enacted. The Bill provides for filing of cases only by a court within whose local jurisdiction the bank branch of the payee, where the payee delivers the cheque for payment is situated. Further, where a complaint has been filed against the drawer of a cheque in the court having jurisdiction under the new scheme of jurisdiction, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court, irrespective of whether those cheques were presented for payment within the territorial jurisdiction of that court. Further, it has been provided that if more than one prosecution is filed against the same drawer of cheques before different courts, upon the said fact having been brought to the notice of the court, the court shall transfer the case to the court having jurisdiction as per the new scheme of jurisdiction. In view of the urgency to create a suitable legal framework for determination of the place of jurisdiction for trying cases of dishonour of cheques under section 138 of the NI Act, the Government has decided to amend the law through the Negotiable instruments (Amendment) Ordinance, 2015. The objective is to ensure that a fair trial is conducted keeping in view the interests of the complainant by clarifying the territorial jurisdiction for trying the cases for dishonour of cheques. The Ordinance is similar to the Bill in the sense that the substantive principle for determination of the jurisdiction of the cases under section 138 of the NI Act remains the same, except that two distinct situations of payment of cheque (i) by submitting the same for collection through an account or (ii) payment of a cheque otherwise through an account, that is, when cheques are presented across the counter of any branch of drawee bank for payment, are covered under the Ordinance.

ANALYSIS:Subsequent to the Ordinance, the jurisdiction to hear complaints under Section 138 of the Act now vests with the court within whose jurisdiction the bank branch of the payee is situated. Further, in terms of Section 142A of the Act, all subsequent complaints under Section 138 of the Act against the same drawer shall be filed before the same court, regardless of the place where the cheques were presented for payment. This position is a clear departure from the position laid down by the Apex Court in the *Dashrath Singh*.In our opinion, the position pursuant to the Ordinance balances the interests of the payee and drawer. If the jurisdiction is determined by reference to the place where the cheque is presented for payment, in the event that the drawer issues several cheques drawn on different banks in different locations to the payee, the payee will not have to file complaints in all the courts within whose jurisdiction the cheques are drawn. Further, since the court under the amended Section 142 of the Act will have jurisdiction to try all subsequent complaints against the drawer, the interests of the drawer and the payee are thereby sufficiently balanced. The Ordinance also clarifies the position with respect to the cheques payable at par at all branches of the drawer bank, as the place where the bank of the accused is situated or where the cheque is dishonoured no longer holds relevance. It is also relevant to note that by amending Explanation I to Section 6 of the Act, the deficiencies relating to the meaning of the expression "a cheque in the electronic form" have been removed.

Cheques are used in almost all transactions such as re-payment of loan, payment of salary, bills, fees, etc. A vast majority of cheques are processed and cleared by banks on daily basis. Cheques are issued for the



reason of securing proof of payment. Nevertheless, cheques remain a reliable method of payment for many people. On the other hand, it is always advisable to issue crossed "Account Payee Only" cheques in order to avoid its misuse. A cheque is a negotiable instrument. Crossed and account payee cheques are not negotiable by any person other than the payee. The cheques have to be deposited into the payee's bank account. Legally, the author of the cheque is called 'drawer', the person in whose favour, the cheque is drawn is called 'payee', and the bank who is directed to pay the amount is known as 'drawee'. However, cases of cheque bounce are common these days. Sometimes cheques bearing large amounts remain unpaid and are returned by the bank on which they are drawn.

The below article provides information on what you may do if your cheque is dishonoured? Here's a step-by-step guide to the legal procedure that is available to you.

**If a cheque is dishonoured:**When a cheque is dishonoured, the drawee bank immediately issues a 'Cheque Return Memo' to the banker of the payee mentioning the reason for non-payment. The payee's banker then gives the dishonoured cheque and the memo to the payee. The holder or payee can resubmit the cheque within three months of the date on it, if he believes it will be honoured the second time. However, if the cheque issuer fails to make a payment, then the payee has the right to prosecute the drawer legally. The payee may legally sue the defaulter / drawer for dishonour of cheque only if the amount mentioned in the cheque is towards discharge of a debt or any other liability of the defaulter towards payee. If the cheque was issued as a gift, towards lending a loan or for unlawful purposes, then the drawer cannot be prosecuted in such cases.

**Legal action:** The Negotiable Instruments Act, 1881 is applicable for the cases of dishonour of cheque. This Act has been amended many times since 1881. According to Section 138 of the Act, the dishonour of cheque is a criminal offence and is punishable by imprisonment up to two years or with monetary penalty or with both. If payee decides to proceed legally, then the drawer should be given a chance of repaying the cheque amount immediately. Such a chance has to be given only in the form of notice in writing. The payee has to send the notice to the drawer with 30 days from the date of receiving "Cheque Return Memo" from the bank. The notice should mention that the cheque amount has to be paid to the payee within 15 days from the date of receipt of the notice by the drawer. If the cheque issuer fails to make a fresh payment within 30 days of receiving the notice, the payee has the right to file a criminal complaint under Section 138 of the Negotiable Instruments Act. However, the complaint should be registered in a magistrate's court within a month of the expiry of the notice period. It is essential in this case to consult an advocate who is well versed and experienced in this area of practice to proceed further in the matter.

**Fine points: Conditions for prosecution:**Legally, certain conditions have to be fulfilled in order to use the provisions of Section 138. The cheque should have been drawn by the drawer on an account maintained by him. The cheque should have been returned or dishonoured because of insufficient funds in the drawer's account. The cheque is issued towards discharge of a debt or legal liability. After receiving the notice, if the drawer doesn't make the payment within 15 days from the day of receiving the notice, then he commits an offence punishable under Section 138 of the Negotiable Instruments Act.

**Punishment & penalty:**On receiving the complaint, along with an affidavit and relevant paper trail, the court will issue summons and hear the matter. If found guilty, the defaulter can be punished with monetary penalty which may be twice the amount of the cheque or imprisonment for a term which may be extended to two years or both. The bank also has the right to stop the cheque book facility and close the account for repeat offences of bounced cheques. If the drawer makes payment of the cheque amount within 15 days from the date of receipt of the notice, then drawer does not commit any offence. Otherwise, the payee may proceed to file a complaint in the court of the jurisdictional magistrate within one month from the date of expiry of 15 days prescribed in the notice.

"138. (1) 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 [1 \* \* \*] 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 provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to [1 thrice] the amount of the cheque, or with both: (3) Notwithstanding anything contained in sub-section (1) and (2), the holder of the cheque shall retain his right to establish his claim through civil Court if whole or any part of the value of the cheque remains unrealized.] .Provided that nothing contained in this section shall apply unless- (a) the cheque has been presented to the bank within a period of six 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 [1 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 [1 thirty days] of the receipt of the said notice. [1 \* \* \*] (1A) The notice required to be served under clause (b) of sub-section (1) shall be served in the following manner- (a) by delivering it to the person on whom it is to be served; or (b) by sending it by registered post with acknowledgement due to that person at his usual or last known place of abode or business in Bangladesh; or (c) by publication in a daily Bangla national newspaper having wide circulation. [1 (2) Where any fine is realized under sub-section (1), any amount upto the face value of the cheque as far as is covered by the fine realized shall be paid to the holder.(3) Notwithstanding anything contained in sub-section (1) and (2), the holder of the cheque shall retain his right to establish his claim through civil Court if whole or any part of the value of the cheque remains unrealized.]"

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