

Demand Notice in Cases of Dishonour of Cheques: Issues and Challenges

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Introduction

The banking sector is deemed to be one of the most vital sectors for the economy to be able to function. Its importance as the “lifeblood” of economic activity, in collecting deposits and providing credits to states and people, households and businesses is undisputable. In all economic systems, banks have the leading role in planning and implementing financial policy. Today, it performs a number of functions for its customers. Out of those functions, keeping money as custodian and making payment on behalf of the customer is the most important one. Once the customer gets his account opened in the bank, a fiduciary relation is established among them.

Making payment on presentment of cheque needs a great precaution. It is so because, if the payee duly presents the cheque and still the bank does not make payment, the bank becomes liable as its misconduct amounts to commit defamation of the drawer of the cheque in the eyes of payee. On the other hand, if the bank wrongly makes payment on presentment of cheque, it has no way to recover the money. Thus, dishonour of cheque is a very serious issue. To hold a person criminally liable for it, some prior conditions are mandatory to be fulfilled. Issuing demand notice is one of them.

Dishonour of Cheque under the Negotiable Instruments Act

Law on the dishonour of cheque is mentioned in Chapter XVII (from section 138 to 142) of the Negotiable Instruments Act 1881. This chapter has been amended from time to time with the requirement of society. The latest amendment has been brought in 2018. Section 138 defines the offence of dishonour of cheque as under:

“138. Dishonour of cheque for insufficiency, etc., of funds in the account-

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

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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 provision of this Act, be punished with imprisonment for a term which may extend 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 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 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.”²

Ingredients of Offence of Dishonour of Cheque

In *Dashrath Rupsingh Rathod v. State of Maharashtra*, the Honourable Supreme Court has described the following ingredients of the offence of dishonour of cheque:

1. The cheque should have been issued for the discharge, in whole or part, of any debt or other liability
2. The cheque should have been presented within a period of six months or within its validity period whichever is earlier.

² As amended by the Negotiable Instruments (Amendment) Act, 2002

3. The payee or holder in due course should have issued a notice in writing to the drawer within 30 days of the receipt of information by him from the Bank regarding the return of the cheque as unpaid.
4. After receipt of the said notice from the holder in due course, the drawer should have failed to pay the cheque within 15 days of receipt of the said notice.³

Sending Demand Notice is Condition Precedent for Completion of Offence of Dishonour of Cheque

Service of notice of demand and failure to pay in spite of notice are condition precedent for the application of Section 138. In absence of notice, the question of taking cognizance comes to an end *ab initio*. In order to fasten criminal liability on a person, the requirement of law has to be fulfilled. Therefore, where there is not service of the notice of demand, no prosecution and cognizance would be permissible.⁴ Thus, mere return of the cheque unpaid by the bank on the presentment of cheque for encashment does not and cannot constitute an offence under Section 138. The rule remains the same even if the drawer of cheque is company. Unless a demand notice is given to its drawer, the prosecution is bound to fail even on this sole ground. Looking to the language employed in clauses (b) and (c) of Section 138, it may unequivocally be concluded that service of notice by any mode of the mode which may be by refusal also, is necessary to constitute an offence under section 128 of the Negotiable Instruments Act.

What is Notice of Dishonour

Section 138(b) of the Negotiable Instruments Act, 1881 provides for the demand notice in case of dishonour of cheque. It provides that the payee or holder of the cheque, as the case may be, makes a demand for the making payment of the said amount of money by giving a notice in writing, to the drawer of cheque, within 30 days of the receiving of intimation by him from the bank regarding the return of the cheque as unpaid. Thus, the said provision provides that if the holder of the cheque receives information from the Bank that the cheque has been dishonoured, he should within 30 days makes a demand to the drawer for payment.

³ (2014) 9 SCC 129

⁴ M.M.malik v. Prem Kumar, 1991 Cr LJ 2594 (P&H)

Who is Liable to Send Demand Notice

Upon dishonour of cheque, the payee or holder of cheque must give notice that the instrument has been so dishonoured to all other parties whom the holders seeks to make severally liable and to some one of several parties whom he seeks to make jointly liable thereon. If the cheque has been issued by the company, the notice must be issued to the company and every other person who was involved in the concerned commercial activities in pursuance of which cheque was issued.

To Whom is The Demand Notice Should Be Given

To create the liability on any person, it is very much necessary that demand notice must be issued within due time and to right person. If it is not issued to right person and the complainant wants to make him liable, the legal proceeding initiated on his initiation is bound to fail. The notice may be given to a duly authorized agent of the person to who it is required to be given where he is dead to the legal representative where he has been declared insolvent- to his assignee.

Various Modes of Sending Demand Notice

There is no clarity as to way to be adopted to send the demand notice.. Further, since the issuance of the same is a statutory prerequisite to the filing of criminal complaint, legal professionals always prefer to walk the safe path of service of a hard copy. Adding to that the lack of judicial precedent on service through electronic modes, there was not much scope for creativity. Further, since service has to be effected through a notice issued within 30 days of dishonour of cheque, it leads to many unscrupulous drawers of such dishonoured cheques to simply evade service through clever and conniving means for a short period of one month and they were free from the criminal liability associated with the Negotiable Instruments Act, 1881. While this issue of evasion of service has been addressed and discussed in plenty of judgments and certain safeguards granted, no concrete resolution came to the fore.

Since the advent of modern technology and easy accessibility, it made no logical sense that service through electronic means would be rendered invalid even before the direction of the Honourable Apex Court. As there is a strict timeline for completion of the service of demand

notice in the case of a dishonoured cheque, it also seems unreasonable that the intention of the legislators was to restrict the timeline further by half a day i.e. till the end of the working day of the nearest post office. The 30 days' timeline indicates that the aggrieved party should be granted an opportunity till the end of the 30th day by the clock to safeguard its rights and interests against the criminal breach by the accused.

In this regard, the Information Technology Act, 2000 which reads as below:

Legal recognition of electronic records.—Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is—

(a) rendered or made available in an electronic form; and

(b) accessible so as to be usable for a subsequent reference.⁵

In light of the above-detailed facts and circumstances, it is amply clear that the intention of the legislature was never to restrict the service of demand notices for dishonour of cheques to only physical modes. But due to the lack of an explicit amendment in the Negotiable Instruments Act, 1881 it has been a trend in the legal community to take the conservative route. Since Section 138 imputes criminal liability upon the issuer of the cheque for dishonour, in a cost-benefit analysis the fear of improper service leading to dismissal of the criminal complaint rides high and hence, the provisions of the Information Technology Act, 2000 have not been taken advantage off. The decision of the Supreme Court is thus a gust of fresh air and a much needed leap for cheque dishonour complaints to keep up with the fast-changing times and will increase the effectiveness of the remedy thereby rendering greater justice.

The notice of Dishonour can be sent by registered post. In the case of *SIL Import, USA v. Exim Aides Silk Exporters*, the delivery of notice through Fax was acknowledged. It was

⁵ See Section 4

observed that the date of delivery of fax message cannot be ignored for the purposes of computing the period of limitation and accrual of the cause of action.⁶

What is the Object of Sending Notice?

Giving and service of demand notice is mandatory in as much as the completed cause of action for making a complaint for an offence under Section 138 raises if no payment is made by the drawer within 30 days of the receipt of such notice. The object of issuing notice is to give a chance to the drawer of the cheque is to rectify his omission and also to protect an honest drawer.

In *Central Bank of India v. Saxons Farms*, the Supreme Court held that the object of the notice is to give a chance to the drawer of cheque to rectify his omission and also to protect an honest drawer. The service of notice of demand in clause (B) of Section 138 is a condition precedent for filing a complaint under Section 138 of Negotiable Instruments Act.⁷

There is No Prescribed Form of Sending Demand Notice

Section 138 of the Negotiable Instruments Act makes the demand notice mandatory to be sent. The section becomes silent after it and does not make any provision as to the format in which it should be drafted. Thus, there is no prescribed Form of Notice. In the case of *Central Bank of India v. Saxons Farms*⁸, it was observed that the requirement is that notice shall be given in writing within thirty days of receipt of information from the bank regarding return of the cheque as unpaid and in the notice a demand for payment of the amount of the cheque has to be made.

Notice Must Make Demand

To create liability of the accused, it is necessary that the payee or holder in due course has issued the demand notice on getting information that the cheque has got dishonoured. Not only intimation, it must make demand for making payment. In *Harbinder Singh v. Suman Rani*, it has been held that where the notice asked the drawer to explain why criminal proceedings

⁶ (1999) 4 SCC 567

⁷ (1999) 8 SCC 221

⁸ *ibid*

should not be launched against him, but did not expressly demand payment, it was held that the notice did not comply with the requirement u/Section 138 of NI Act.⁹

When is Issue of Demand Notice Deemed as Completed

In a recent case of 2015 in *M/S. Jayalakshmi Textiles v. S.K. Kolandasamy*, the Madras High Court was confronted with a similar issue and observed that when the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of clause (b) of proviso to Section 138 of the Act stands complied with. It is needless to emphasize that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque.¹⁰

Latest Judicial Trends regarding Demand Notice in Cases of Dishonour of Cheques

Section 138 of the Negotiable Instruments Act becomes silent after saying that issuing of demand notice is a condition precedent for the offence of dishonour of cheque. It does not say anything about its format, way of service etc. So, in absence of clear provisions, there is no uniformity in the judicial practice regarding these aspects of demand notice and the High Courts and Honourable Supreme Court decide the matter applying their own mind according to the facts and circumstances of each case. In *A.K.Bhaskaran v. K.G.Sheeba*, it has been held:

"It is trite law that drawing or execution of a cheque becomes complete only by delivery. Unless there is delivery of cheque, no liability could be fastened on the drawer. This is what Section 46 of the N.I.Act signifies and is how definition of 'holder' in Section 8 of the said Act becomes significant."¹¹

In *Nandkishor Shamkant Sonar v. Dipak Divakar Kulkarni*, the accused challenged the criminal proceeding and one of the grounds taken was that the demand notice sent by the complainant was returned to him and since this fact itself is mentioned in the complaint, there could not have been any question of taking cognizance. The High Court observed "when the notice is sent by registered post and is returned with a postal endorsement 'refused' or 'not

⁹ ([1996]87 Comp Cas 135

¹⁰ Criminal Revision Case No.733 of 2010

¹¹ (CRL.A.No.782 OF 2006 date of judgment-18/12/2019)

available in the house' or 'house locked' or 'shop closed' or 'addressee not in station', it has to be presumed under Section 27 of the General Clauses Act that it was a due service. It is conspicuous that it is not that the situations include only positive act of 'refusal' endorsed by the postman but even where the endorsements read that the 'house is locked' or 'not available in the house' or 'shop is closed' or 'addressee not in station' which are passive in nature give rise to the presumption under Section 27 of the General Clauses Act".¹²

It would be then easier for anybody to first issue a cheque in discharge of a liability and then avoid the prosecution by simply leaving the address and kill the time of thirty days so that no prosecution could thereafter be launched. It is under these peculiar facts, such an endorsement about the Petitioner having not found at the address and having started residing at a different town made by the postman is nothing but a one more contingency in the line of the above contingencies like endorsement of 'refused', 'not available in the house', 'house locked' etc. I find no discernible difference in the situation in the matter in hand and these categories of endorsements".¹³

The purport of providing for clause (C) in the Proviso to Section 138 of the Negotiable Instrument Act is to enable the drawer to rectify his mistake and make payment and thereby avoid impending prosecution, it cannot be said that the legislature intended to provide him some opportunity to avoid the prosecution by issuing the cheque and then leaving the address so that there would be no compliance regarding service of notice after the cheque was dishonored.¹⁴

In *M/s.Rajhans Cloth House v. Annappa Fakira Manjalkar*, Matter reached the High Court which upheld the acquittal giving following reasons:

"At the outset, it does appear that the complainant failed to prove the notice sent by producing the original of the notice. What was produced is only the photo copy. Moreover, the postal acknowledgment card also has not been produced to prove that notice has been served on the accused. Moreover, the complainant has also not produced any invoice that proves that there was a legally enforceable debt to the complainant because the invoice which has produced does

¹² Criminal Writ Petition No. 1715 of 2018 (decided on 18.10.2019)

¹³ ibid

¹⁴ ibid

not indicate anywhere the name of the sole proprietary M/s.Rajhans Cloth House and that document did not have any evidence to prove that the complainant had received the goods mentioned in the document".¹⁵

In *Maxworth Realty India Ltd vs M.K.Veerendra Babu*, it has been held thus:

"The reason for creating vicarious liability is plainly that a juristic entity i.e., a Company would be run by living persons who are in charge of its affairs and who guide the action of that Company and if such juristic entity is guilty, ultimately it is the persons who are responsible for its affairs and they must be held responsible and convicted".¹⁶

It has further been held:"Keeping in view the aforesaid ratio, as the Company being a legal entity, it cannot acquire knowledge as a human being, knowledge of a Company actually means, knowledge of the people who are having control over such Company. Generally it is the Chairman or Managing Director of a Company who will be having knowledge. As per the definition, the Managing Director is a person who is entrusted with substantial power of the management of the affairs of the Company. Notice served on the Managing Director would thus imply that the Company is made aware of the dishonour of the cheque and of the demand for payment of the dishonoured cheque as contemplated under Section 138 of the N.I. Act. When the statutory notice is issued to the Chairman and Managing Director of the Company and when both Company and the Managing Directors are the persons who are at the helms of the affairs of the Company, Company is vicariously liable. Under such circumstances, the contention of the learned Senior Counsel that there is no cause of action as the notice has not been served, is not having any force and the same is liable to be rejected."¹⁷

In *Vani Agro Enterprises v. State of Gujarat*, it is laid down that even if one legal demand notice is issued for several cheques, separate cases may be filed.¹⁸

¹⁵ Criminal Appeal No.976 of 2002 (decided on 17.10.2019)

¹⁶ Cr. Revision Petition No. 1407/2018(decided on 13.09.2019)

¹⁷ *ibid*

¹⁸ Special Leave Petition (Criminal) Diary No.35524/2019(decided on 05.09.2019)

Conclusion

The dishonour of cheque is a very serious problem. It continuously knocks the door of criminal justice. Initially, it was considered to be a civil wrong. It was covered under the offence of cheating under Section 420 of Indian Penal Code, only if the intention of deceit may be proved. Later on, it was realized that existing law is not enough to curb the wrong of dishonour of cheque. So, Chapter XVII was added in the Negotiable Instruments Act. Through it, Sections 138 to 143 were inserted. With the passage of time, new changes were required to be brought in the Act. Presently, the number of sections has reached to 148. Section 138 defines the offence of dishonour of cheque. It provides for the conditions precedent for commission of offence of dishonour of cheque. Issuance of demand notice after getting information from the bank that the payment may not be made on presentment of cheque, for the reasons mentioned in the section itself, is very much necessary.

A 30 days' prior notice must be issued to the drawer of the cheque demanding the money. Thus, the purpose of issuing the demand notice is to give opportunity to the drawer to pay cheque amount within the stipulated time and free himself from penal consequences under Section 138 of the Negotiable Instruments Act. Section 27 of the Act of 1881 provides for the presumption as to notice. If the demand notice was correctly addressed and the drawer returned the same, the statutory presumption comes into play that the notice is considered to be duly served. Once payee gives demand notice, he forfeits his right to present the cheque. The burden of proof of service of notice lies on the complainant. No proceeding may be launched on the basis of defective notice. Complaint filed on the basis of second notice is maintainable. Thus, issuing demand notice is a very important aspect of the offence of dishonour of cheque and it should be carefully issued so that it may not become the basis of quash of proceeding.