

CHEQUES- NEW LEGAL DIMENSIONS

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ABSTRACT

Cheques are negotiable instruments which help in obviating the inconvenience and danger of making large cash payment in money. The new definition of cheque includes the electronic image of a truncated cheque and its electronic form. Laws have been made more stringent to add more value to this negotiable instrument.

Introduction

There is no documentary evidence as on today about the early history of cheque, which is one of the important kinds of negotiable instruments. Experts believe that history of cheque originated from the Roman civilization as early in 352 B.C. The wide spread usage of cheque started in the early 15th century and soon spread over across the globe between 16th and 17th century. Gradually, the cheque became widely and popularly accepted as negotiable instrument in settlement of trade and commerce transactions. One unique problem which existed then and continues to exist today, is movement of this instrument amongst the bankers, so that collection of money through cheques becomes easier, faster, and at the same time ensuring its culture and credibility. Partial solution to the problem of movement of cheque was found through the usage of electronic clearing houses and using magnetic ink characters (MICR) at the bottom of cheque. Despite the solution, the culture and credibility of issuance of cheque vis a vis its movement and clearance finally depends on the funds position in the accounts of the drawer of the cheque

Cheques are negotiable instruments which

help in obviating the inconvenience and danger of making large cash payments in money. 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 consequently, the Act encompassed all the needs of that time and even the future. Hence, there was no need to amend these laws for over a hundred years

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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 purported to be a complete code in itself with respect to the dishonour of cheques and deals with various aspects of dishonour of cheques. Aspects that are dealt with here are:-

- What is encompassed by the offence of dishonour of cheques;
- The quantum of punishment for committing of such an offence;
- Offences committed by companies;
- Procedure to file complaint before the Court

An amendment Bill was further introduced on 24th July, 2001, which was later referred to a Standing Committee of the Parliament on Finance for further consideration. After considering the recommendations of Standing Committee the Lok Sabha passed the Negotiable Instruments (Amendments and Miscellaneous Provisions) Act, 2002 (55 of 2002), which came into force w.e.f. 6 th February 2003. Some of the important features of the 2002 Amendment Act, which should give cheer to affected parties are:

- (i) The period within which the payee should give notice to the drawer, extended to 30 days against 15 days earlier;
- (ii) Maximum jail term for offences enhanced to two years from one year;
- (iii) The trials, as far as practicable, should be continued from day to day, consistently with the interests of justice, until conclusion;

- (iv) Endeavour is to be made to conclude the trial within six months from the date of filing of the complaint;
- (v) A copy of the summons issued by a Magistrate to an accused or witness can also be served through special post or empanelled courier;
- (vi) The evidence of a complainant may be given by him in an affidavit and be read in evidence, and the Court, if it thinks fit, shall on application of the prosecution or the accused, summon and examine any person giving evidence on affidavits (with exceptions); and
- (vii) Offences under the Act will be compoundable.

The Amendment Act also provides solace to nominee directors; they shall not be liable for prosecution under the Act. There is more cheer for non-executive directors. The Supreme Court has held that when a person chooses to file a criminal complaint for dishonor of cheque against a company director, he has to specifically show that the director of the company was in charge of and responsible to the company for the conduct of the business of the drawer company. This amendment also sought to synchronize and harmonize the provisions of the Negotiable Instruments Act with that of Information Technology Act 2000 and the Bankers' Books Evidence Act 1891. The highlights of the Amendments made in the Negotiable Instruments Act 1881 are briefly summarized here below

1. New Definition of Cheque

Under section 6, a cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic

form. Here, a **Cheque in the electronic form** means a cheque which contains the exact mirror image of a paper cheque, and is generated, written and signed in a secure system ensuring the minimum safety standards with the use of digital signature (with or without biometrics signature) and asymmetric crypto system. The definition also includes the electronic image of a truncated cheque. In general sense the word 'truncated' means deformed, disfigured, mutilated, twisted etc., where as in the Negotiable Instruments Act, the **truncated cheque** means a cheque which is truncated during the course of a clearing cycle, either by the clearing house (managed or recognized by the RBI) or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing. Here the process of truncation requires the banker to convert the cheque data into electronic form for the purpose of safekeeping or to return the cheques at the request of the banker or to provide information on cheques as and when requested. However, in the normal process of collection, drawers do not receive back the cancelled cheque. Hence system of imaging reduces the risk of payment against forged or altered cheques and may provide digital image of cheques that have been paid.

2. Presentment for payment

Under new-sub section (1) of section 64, if an electronic image of a truncated cheque is presented for payment, the drawee bank is entitled to demand any further information regarding the truncated cheque from the bank holding the truncated cheque in case of any reasonable suspicion about

the genuineness of the apparent tenor of instrument. If the suspicion is that of any fraud, forgery, tampering or destruction of the instrument, bank is entitled to further demand the presentment of the truncated cheque itself for verification. However, the truncated cheque so demanded by the drawee bank shall be retained by it, if the payment is made accordingly.

3. Delivery of instrument on payment or indemnity in case of loss

As per the new sub-sections (2) & (3) to section 81, if a certificate is issued on the foot of the printout of the electronic image of a truncated cheque by the banker who paid the instrument, it shall be prima facie proof of such payment, and the banker shall be entitled to retain such truncated cheque.

4. Material Alteration on truncated cheque

As per new sub-section 2 to section 89 where there is any difference in apparent tenor of electronic image and the truncated cheque shall be a material alteration and it shall be the duty of the bank or the clearing house to ensure the exactness of the apparent tenor of the cheque while truncating and transmitting the image. Also, the bank or clearing house have to verify from the party who transmitted the image to it, that the image so transmitted and received by it is exactly the same.

5. Duty of Banker.

As per new explanation to section 131, it is the duty of the banker who receives payment based on an electronic image of a truncated cheque held by him, to verify the prima facie genuineness of the cheque to be truncated and any fraud, forgery or tampering apparent on the face of the instrument that can be verified

with due diligence and ordinary care.

6. Penalty for dishonour

The penalty under section 138 on account of the dishonour of cheque for insufficiency, etc., of funds in the account of the drawer the term has been increased to two years (previously one year). In addition, the period of giving demand notice to the drawer of the cheque has been increased to thirty days from fifteen days as earlier.

7. Nominee Director, not liable

As per new proviso to section 141, if a person is nominated as a director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, he shall not be liable for prosecution under the provisions of this Act.

8. Cognizance of offences

According to the new proviso to section 142, the court can now take cognizance of a complaint even after the prescribed period (one month), if the complainant had a valid cause and satisfies the court for not filing a complaint within the said period.

9. Trial of cases

As per new section 143 all offences shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of sections 262 to 265 of the Criminal Procedure Code, 1973 shall apply to such trials. Where as in the case of any conviction in a summary trial, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an

amount of fine exceeding five thousand rupees. Also, when at the commencement of, or in the course of, a summary trial under this section, if it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner as provided in the Criminal Procedure Code, 1973. This section also provides for consistent hearing of the case until its conclusion and speedy disposal within six months from the date of filing the complaint.

10. Service of summons

As per the new section 144 not withstanding any thing contained in the Code of Criminal Procedures 1973, a Magistrate issuing a summons to an accused or a witness may direct 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 or by such courier services as are approved by a Court of Session. In case, where an acknowledgment purporting to be signed by the accused or the witness or an endorsement purported to be made by any person authorised by the postal department or the courier services that the accused or the witness refused to take delivery of summons has been received, the Court issuing the summons may declare that the summons has been duly served.

11. Evidence on affidavit

A new section 145 in the Act, states,

the complainant may be given on affidavit and may, subject to all just exceptions be read as evidence in any enquiry, trial or other proceeding under the Code of Criminal Procedure, 1973. Further, the Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.

12. Bank's slip, a prima facie evidence

As per new section 146, the Court shall, in respect of every proceedings, on production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved.

13. Offences now compoundable

Every offence punishable under this Act is now compoundable (Section 147).

The amendments are by and large necessary to ensure that negotiable instruments are cleared fast and accepted electronically and at the same time the electronic clearance system is accepted as an instrument of evidence while prosecuting the offender. One hope that the changes made would focus and bring significance to the new adage "Once a Drawer always the Drawer, not a Bouncer".

Some landmark cases

In a recent widely-reported judgment, the Supreme Court held that if a person issuing a post-dated cheque stops payment by giving instructions to the drawer of the bank before the due date of payment, he will be liable for penal consequences. "If stoppage of payment of a post-dated cheque is permitted to take the case out of the purview of the Act, it will

amount to allowing the party to take advantage of his own wrong ...the faith, which the legislature had desired that such instrument should inspire in commercial transactions, would be completely lost if parties were allowed to interdict payment by issuing instructions to banks to stop payment of cheques".

It is a well-accepted principle, that bounced cheques, to come under the purview of the Act, should have been issued in satisfaction of a debt or liability. The Supreme Court has held that a particular High Court erred in holding that the burden of proving the consideration for a dishonoured cheque was on the complainant.

The Kerala High Court has held, "It is only where a dishonour of a cheque was due to bad faith and deliberate intention to cheat, a magistrate would be justified in awarding rigorous imprisonment. It should be in the rarest of rare cases".

The Apex Court observed in its judgment cited first above that "in today's world where use of cash in day-to-day life is almost getting extinct and people are using negotiable instruments in commercial transactions and plastic money for their daily needs as consumers, it is all the more necessary that people's faith in such instruments should be strengthened rather than weakened" — very significant observations indeed!

Common Guidelines

The legal remedy is to take an action under Section 138-A of the Negotiable Instruments Act, 1881, however before that, it is advised to use some common steps:

1. First contact the party personally, (meeting or telephonically) and ascertain the reason of the bouncing of the cheque. The party may pay you the amount in a few days time.

2. In case the party (party means an individual, firm or company or any other body required to be registered) gives you another cheque which also bounces or does not pay on one pretext or the other, you have to take the following legal steps, when the cheque has been dishonoured for any reason similar to "insufficient funds"
 - Issue a notice of demand to the person issuing the cheque, within 15 days from the date of bouncing, giving the party a time of 15 days to pay, further stating that, in case of default in making the payment, action shall be taken U/S 138-A of the Negotiable Instruments Act, 1881. (preferably let an advocate draft this for you - not only the draft is likely to be more proper but shall also carry weightage).
 - In case the party does not pay, within the stipulated period of 15 days from the receipt of the notice, you are free to lodge a complaint in the court of the magistrate where the cheque was bounced (i.e. where your bank is) or where the party resides or has business. The complaint can be lodged within 30 days of the expiry of the period given for payment. It has to encompass the signatory of the bounced cheque and other responsible persons for the issuance of the cheque, in case it is issued by anybody other than an individual.
3. In case the reason for the bouncing of the cheque given by the bankers is other than those similar to "insufficient funds", if you believe the party is actually not interested in actually paying you, you are advised to contact a suitable lawyer at the earliest.
4. In case the party seems to actually defraud you of the funds, under the amended laws, you can make a complaint to the police for cheating and also where appropriate criminal breach of trust, with a request to recover the amount
5. In any case, when you are sure that the person issuing the cheque is legally bound to pay, you can always file a civil suit for the recovery of that amount, amongst other dues.

Always Check the costs involved viz-a-viz the benefit i.e. the amount of cheque, and any interest that you are likely to gain, before going into the litigation. Costs may include some hidden costs

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