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## **A Quick Guide to Action on Bouncing of Cheques**

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Bouncing of a cheque invites criminal prosecution under section 138 of The Negotiable Instruments Act, 1881. Punishment for the offence under section 138 of NI Act is imprisonment up to two years or fine which may extend to twice the cheque amount or both. The offence is bailable, compoundable and non-cognizable.

Essential ingredients of an offence under the section can be summed up as follows:

1. A person must have drawn a cheque on a bank account maintained by him.
2. The cheque should have been issued in discharge, in whole or in part, of any debt or other liability.
3. The cheque has been presented to the bank within the period of its validity.
4. The cheque is returned by the bank unpaid, either because of funds insufficient or it exceeds the amount arranged to be paid.
5. The payee makes a demand for the payment by giving a notice in writing, within 30 days of the receipt of information by him from the bank.
6. The drawer fails to make payment of the said amount of money within 15 days of the receipt of the said notice.
7. Complaint is made within one month of the date on which the cause-of-action arises.

The following exception is notable:

Cheque issued in terms of a compromise agreement, not to satisfy any debt or payment due, is not covered by section 138 of NI Act. (Lalit Kumar Sharma & Anr vs State of Uttar Pradesh & Anr dated 06.05.08 MANU/SC/2079/2008). Two cheques were issued by the directors of a company and they were prosecuted. Meanwhile, there was a settlement under which Rs 5 lakh was to be paid to the creditor. However, this cheque also bounced, leading to another prosecution. The Allahabad High Court rejected their plea to quash the proceedings. But on appeal, the Supreme

Court stated that the latter cheque was issued in terms of a compromise agreement and not to satisfy any debt or payment due. Therefore, the second instance would not invite prosecution under Section 138. The High Court judgment was set aside.

Section 141 of NI Act outlines conditions in cases of offences by companies. The following points are important:

- ❑ Every person at the time the offence was committed, was in charge of, and was responsible for the conduct of the business of the company is liable to be prosecuted. In other words, directors, secretary and officers of the company may be liable.
- ❑ The company is also liable to be prosecuted
- ❑ If a person proves that the offence was committed without his knowledge or he exercised all due diligence to prevent the commission of such offence, he will escape prosecution.
- ❑ A person nominated as a Director of a company by virtue of his holding any office or employment in the Central or State Government or a financial corporation owned or controlled by the Central Government or the State Government enjoys exemption from prosecution.
- ❑ Company includes partnership firms.

When action is not taken against first dishonor and cheque is presented twice and complaint is filed against second dishonor, complaint is maintainable. However, the prosecution is only for the last time the cheque bounced and there cannot be multiple prosecutions for various times the cheque is returned.

**The following special points need to be also considered:**

- An offence in terms of section 138 is committed even if the cheque is returned on the ground of “closure of the account”
- Return of cheque unpaid with the advice “account operation jointly, other Director’s signature required”, amounts to dishonor of the cheque within the meaning of sec. 138
- In case a cheque is returned with the comments “Refer to drawer” it will be a matter of evidence to prove that the drawer had sufficient funds at the time of

return of cheque and that the bank returned the cheque for some reason other than lack of funds.

- If a cheque is returned due to its payment being stopped by the drawer, it will be necessary to prove that the drawer had sufficient funds in his account at the time of return of cheque and the stoppage was for some other justifiable reason.
- Absence of Mens rea (criminal intent) is not a permissible defense in bouncing of cheque.

**For filing of a complaint the following points should be kept in mind:**

- Complaint in writing should be filed by payee or holder in due course.
- Complaint can be filed by an advocate / power of attorney or by a duly authorized agent of the complainant
- In case of a company, a person duly authorized in a meeting of Board of Directors of the Company should file the complaint.
- Complaint to be filed before Judicial Magistrate of the first class or before a Metropolitan Magistrate. In most district courts, there are designated magistrates to deal with NI Act cases. Please check the applicable magistrate based on the location of the office of the complainant.
- Complaint should be made within 30 days of the date of cause of action, which is when the drawer fails to make payment of the demanded amount of money within 15 days of the receipt of the notice issued by payee / holder of cheque.
- If there is delay in filing of the complaint, the Magistrate can condone the delay.

In Madhya Pradesh, the following court fee is payable from 2011 onwards:

When the amount of dishonored cheque involved in the complaint is up to One Lakh	Five percent of the amount of dishonored cheque subject to the minimum of Rupees Two Hundred
When the amount of dishonored cheque involved in the complaint is more than Rupees One Lakh but up to Five Lakhs	Minimum Rupees Five Thousand, plus four percent on the amount in excess of Rupees One Lakh

When the amount of dishonored cheque involved in the complaint is more than Rupees Five Lakhs	Minimum Rupees Twenty One Thousand, plus three percent on the amount in excess of Rupees Five Lakhs subject to maximum Rupees One Lakh Fifty Thousand
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Please check fee applicable for the state where you intend to file the complaint.

### Summary of Procedure

- 1) A legal notice on behalf of payee is issued to the defaulter, within 30 days of dishonor of cheque, by registered post acknowledgement due. All facts including the nature of transaction, amount of loan and or any other legally enforceable debt against which the said cheque was issued and the date of deposit in bank and date of dishonor of cheque should be mentioned in the notice.
- 2) The person who has issued cheque is directed, through the notice as mentioned under 1, to make the payment of amount of dishonored cheque within 15 days. In case the said payment is made within 15 days of service of notice, the matter ends.
- 3) In case the said payment is not made within 15 days, the complainant should file a criminal case in the court within 30 days from the expiry of notice period of 15 days.
- 4) Complaint to be accompanied with affidavit and relevant documents in original.
- 5) The court will hear complainant / advocate of complainant and issue summons under section 138 of NI Act.
- 6) Summons are sent and served through police station where accused is residing. The summons can also be served by speed post or by authorized courier service and if not accepted will be treated as duly served
- 7) Police action is generally limited to only service of summons. In case accused remains absent on court date after service of summons, then warrant is sent to police station to produce accused in court.
- 8) The accused and surety to appear in court and submit documents (ownership documents of house or land owned by surety, his address proof including ration card, election identity card, photo and address proof of surety and

accused). The court will accept the surety and on signing bonds by accused and surety, the bail will be granted and accused will be released by court.

- 9) Accused / his advocate will cross examine the complainant & its witness / witnesses
- 10) Statement of accused is recorded under sec.313 of Cr.P.C. Accused will be asked to give reply to the questions and allegations against him
- 11) Witnesses of accused to prove his innocence will be produced and the evidence will be recorded by the court.
- 12) Last stage is of arguments of advocates of the complainant and of the accused.
- 13) After hearing final arguments, court will pass the judgment.
- 14) In case the accused is acquitted, the matter ends.
- 15) In case accused is convicted, the accused should immediately thereafter submit bail application and give surety and pray for time to appeal to Sessions Court. Court will direct him to immediately deposit fine as per judgment and he will be released thereafter on acceptance of bail application.
- 16) The convict may appeal to Sessions Court within one month from the date of judgment of lower court.
- 17) Criminal appeal with application for suspension of sentence and for bail will be given hearing by the district and sessions court.
- 18) The dispute may go on from District and Sessions court to High Court and then to Supreme Court.
- 19) The matter can be settled at any time between the parties. In case of any such settlement, an application should be moved before the court to compound and close the case.

#### **List of Documents to be submitted in Court with Complaint (Original)**

- ✓ Any agreement / contract between complainant & accused
- ✓ Order placed
- ✓ Invoice / Bill against which dishonored cheque was issued
- ✓ Delivery challan. Acknowledgement, if any, of goods received by the accused

- ✓ Dishonored Cheque
- ✓ Bank Memo stating reason for dishonor of cheque
- ✓ Copy of the legal notice sent to the accused
- ✓ Proof of dispatch of the above legal notice
- ✓ Postal Acknowledgment received from the accused
- ✓ Authority of competent person (Certified True Copy of Board resolution in case of filing of complaint by legal representative of a company)
- ✓ Vakalatnama in favour of the advocate

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