

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis



IJLRA

EDITORIAL TEAM

EDITORS

Megha Middha



Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain



Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

ANALYSIS OF THE LIABILITY OF DRAWER AND DRAWEE OF CHEQUE WITH RESPECT TO THE NEGOTIABLE INSTRUMENTS ACT, 1881

AUTHORED BY - ANITA PRAKASH PATIL
ACADEMIC YEAR 2022-23
LL.M. 2ND YEAR
MODERN LAW COLLEGE,
GANESHKHIND, PUNE, MAHARASHTRA 411007

ABSTRACT

Section Thirty of the Negotiable Instruments Act, 1881 defines the liability of the drawer wherein the drawer is required to compensate the holder of cheque in case of dishonour by the drawee. In this case, it is the drawer's but not the drawee's fault. Section Thirty-One of the Negotiable Instruments Act, 1881 defines the liability of the drawee wherein drawee is required to pay the obligated amount of money to the holder of cheque when there are sufficient funds in the drawer's account applicable to the payment of the cheque. If the drawee fails to pay the requisite amount without any lawful justification, in this case, it is the drawee's but not the drawer's fault.

In other words, laws cannot be read literally because they are open to judicial interpretation due to the subjectivity of the cases that are brought before the Judiciary. Similarly, Section Thirty and Thirty-One of the Negotiable Instruments Act, 1881 is linked to various provisions majorly being Section Six, Seven, Eight, Thirty-Five, Eighty-Seven, Ninety-One, Ninety-Two, One Hundred Thirty-Eight and One Hundred Forty-One of the Negotiable Instruments Act, 1881. Liability of the drawer is subject to dishonor of cheque. Dishonor of cheques as mentioned in Section 138 of the Negotiable Instruments Act, 1881 is due to insufficient funds in the drawer's account or due to the amount mentioned in the cheque exceeds the amount that can be paid by the bank under an arrangement between the bank and the drawer of the cheque. However, there are also other reasons for dishonor of cheques - Account Closed, Stop Payment Instructions, Refer to Drawer and Not A Clearing

Member - that are not explicitly mentioned. The need for the present study is the fact that these intricacies of the Negotiable Instruments Act, 1881 are not widely available in academia, and the author aims to consolidate such interpretations clubbed along with his interpretation and make it available to the wider mass.

I. CRITICAL ANALYSIS AND INTERPRETATION OF LIABILITY OF DRAWER OF CHEQUE

Transformation Section Thirty of the Negotiable Instruments Act, 1881 is read as follows:

“The drawer of a bill of exchange or cheque is bound, in case of dishonor by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonor has been given to, or received by, the drawer as hereinafter provided.”¹

For the purpose of this Section, Drawer is a person who makes the bill of exchange; Drawee is a person who is directed to pay a certain amount of money - to the payee or Holder of Bill of Exchange - to discharge a debt, and the drawee becomes the Acceptor of Bill of Exchange once he has signed the Bill of Exchange or communicated the same to the Holder or a person representing the holder; Payee or Holder of Bill of Exchange is the person who is in the possession of the Bill of Exchange (in his own name), and is entitled to recover the due amount from the other party; Dishonour of Cheque is defined in a two-fold manner in the Negotiable Instruments Act, 1881: Dishonour by Non-Acceptance refers to a situation wherein the Drawee is incompetent to contract² or the acceptance is qualified defeating the provisions of the Indian Contract Act, 1872, and Dishonour by Non-Payment refers to a situation wherein the drawee of the cheque makes a default in payment, i.e. fails to pay the requisite amount to the payee or holder of cheque when duly required to do so. A debt is an amount owed to another person which is legally enforceable.

The primary liability is that of the drawee of the cheque to pay the holder of the cheque or the payee. In order for this to succeed, the cheque has to be presented to the drawee bank. In case the drawee bank fails to make the obligated payment, there is an implied assumption, promise and liability of the drawer that he will compensate the drawee for the default in payment. This default in payment, as

¹ The Negotiable Instrument Acts, 1881 s. 30, No. 26, Acts of Parliament, 1881 (India)

² The Indian Contract Act, 1872 s. 11, No. 09, Acts of Parliament, 1872 (India)

explicitly written in the Negotiable Instruments Act, 1881 may arise due to two facts: Firstly, it might be due to the insufficiency of funds in the drawer's account. Secondly, it might be due to the amount mentioned on the cheque that has exceeded the agreement made between the bank (drawee) and the drawer. In this context, agreement refers to a situation wherein due to insufficiency of funds in the drawer's account, he has utilized the overdraft (credit) facility given by his bank called as "Exceeds Arrangement". However, this credit facility has a certain permissible limit. In an arrangement wherein the cheque amount has exceeded the permissible overdraft limit amount, the cheque is said to be dishonoured. Considering other side of the spectrum, in case where the overdraft facility has been completely utilized by the drawer after the agreement but before the cheque is honoured, the cheque is said to be dishonoured. The expressions "insufficiency of funds" and "exceeds arrangement" are technically different but essentially same: Bottomline being the funds in the drawer's account are incapable and insufficient to honour the cheque. However, there are other causes of dishonour of cheque - not explicitly mentioned in the Negotiable Instruments, 1881 - that are as follows –

a. "Stop Payment or Instructions for the Stoppage of Payment -" The Supreme Court of India observed that in case of notice to the payee, before presentment for payment, to not to issue the cheque for payment, and after the aforesaid notice, the cheque is presented even after the drawer's instructions, the cheque is said to be dishonoured that attracts liability under Section 138 of the Negotiable Instruments Act, 1881.³

b. "Bank Account Closed -" It refers to a situation wherein the drawer has closed his account even though it was operational while the cheque was issued. This situation is called as "Account Closed". It shows that the drawer has no intention to honour the cheque and it attracts liability under Section 183 of the Negotiable Instruments Act, 1881.

c. "Refer to the Drawer -" It is a courteous way, adopted by the drawer's bank, intimated to the holder of cheque or the payee, that the cheque cannot be honoured to insufficient funds in the drawer's account. The payee or the holder of cheque is asked to approach the drawer for the same.

³ Modi cements Ltd. v. Kuchil Kumar Nandi, AIR 1998 SC 1057. See also, M/s M. M. T. C. Ltd. v. M/s Medchl Chemicals and Pharma (P) Ltd, AIR 2002 SC 182; M/s Electronic Trade & Technology Development Corporation Ltd. v. M/s Indian Technologist and Engineer (Electronic) Pvt. Ltd, AIR 1996 SC 2339

d. “Post Dated Cheques - ” A “Post-Dated Cheque” is a bill of exchange which is drawn or made. This Bill of Exchange becomes a “Cheque” when it is payable on demand, i.e., a debt when demanded to be paid by the payee . When such a bill of exchange becomes a cheque, only then the liability under Section 138 of the Negotiable Instruments Act, 1881 is attracted.

Before all the aforesaid causes of dishonour of a cheque are taken into consideration, one needs to ensure the following –

- a. The cheque was presented to the bank by the payee or the holder of the cheque at the payee’s bank or the drawer’s bank , within six months from the date on which it was drawn or its validity period, whichever is earlier;
- b. The payee or the holder of the cheque sends a notice of dishonour to the drawer, within thirty days, after receipt of information from the bank regarding the cheque being dishonoured;
- c. The drawer fails to make payment of the requisite amount within fifteen days after receipt of such notice.

Therefore, cause of action arises when the offence is committed. And with respect to dishonour of cheque, the offence is committed when the drawer omits to pay the requisite amount within fifteen days after receipt of such notice.⁴

A person can be held liable for issuing a cheque on behalf of another when the complainant is pressing for payment. A son can issue a cheque for a debt due to his father. In the aforementioned scenario, the father was the maker of cheque that makes him the principal debtor and the son as his surety by way of Section Thirty-Seven of the Negotiable Instruments Act, 1881. If a cheque is given by a way of gift or present, the drawer cannot be held liable for dishonour. In case the Managing Director of a Company issued a cheque on his personal account to discharge the liability of the Company, the Company and the Managing Director can be made liable for dishonour of the cheque because every person who is in-charge and responsible for the conduct of the Company shall be made liable and

⁴ Amar Jothi Spinning Mills Ltd. v. B.R.B Garments, (2003) 117 CompCas 224 (Mad)

accused alongside the Company he is responsible for. It is a requirement that the Company is also made liable for dishonour of cheque in order to hold the makers of cheque, i.e. person(s) who is in-charge and responsible for the conduct of the Company liable. The person(s) who is in-charge and responsible for the conduct of the Company liable is not the drawer of cheque but the Company. It was also held that the notice served to the Company is sufficient and no notice is required to be served to the person(s) who is in-charge and responsible for the conduct of the Company. The basic requirement to hold the person(s) who is in-charge and responsible for the conduct of the Company's business and affairs, there needs to be some evidence to indicate that the person(s) was is in-charge and responsible for the conduct of the Company. Taking this into consideration, the person(s) who is in-charge and responsible for the conduct of the Company becomes the surety of the drawer of cheque, i.e., the Company by the provision of Section Thirty-Seven of the Negotiable Instruments Act, 1881 because the essential feature of the provision is that the Drawer of Cheque is the principal debtor and other parties are liable as sureties for the Drawer of Cheque.

By taking into consideration that the Drawer must receive a notice of dishonour from the Payee or the Holder of the Cheque, the scenario is variable in American Law. If the Payee or the Holder of Cheque is able to prove the fact that there was no prejudice caused to the Drawer for omitting the dispatch of the notice, an action upon the drawer is still maintainable. In English Law, notice to the drawer is not necessary in case of insufficient funds because the Drawer had no right to draw and could not be negatively affected upon non-receipt of the notice for dishonour which is defeated by Section 140 of the Negotiable Instruments Act, 1881.

The Drawer remains liable to the Payee or the Holder of the Cheque unless it is proved contrary to the presumption that the Drawer did not issue the cheque to pay a debt or discharge a liability. The Drawer is liable for compensation that is twice the value of the Cheque value. The principle of vicarious liability is not applicable for the liability of the drawers because one cannot be held criminally liable for the act of another. Both the Joint Account Holders can be prosecuted under Section 138 of the Negotiable Instruments Act, 1881 if both of them had signed the cheque. However, if only one of the Joint Account Holder had signed the cheque, only that person, considered as the Drawer, will be held liable. There arise two types of remedies with the Payee: Civil and Criminal. The payee can file a Civil Suit against the Drawer for recovery of the money. Or, the payee can file a Criminal Suit against the Drawer for cheating.

II. CRITICAL ANALYSIS AND INTERPRETATION OF LIABILITY OF DRAWEE OF CHEQUE

Section Thirty-One of the Negotiable Instruments Act, 1881 is read as follows:

“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 so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default.”

The Drawee bank is bound to pay the payee's cheque provided there are sufficient funds in the account of the Drawer and the cheque is properly drawn. If it wrongfully dishonours the cheque, it would be liable to compensate the Drawer for any loss or damage to the credit or the reputation or the integrity of the Drawer. The Customer has a right to claim damages because the relationship between the Banker (Drawee) and the Customer (Drawer) is not a debtor creditor relationship. The Banker has certain rights and duties one of it being paying the money from the customer's bank account as and when directed without any demur or protest as it is as an equitable relationship of trust.⁵ In case of a non-trader, nominal damages shall be awarded when there is no proof of special loss or damages sustained. But in the case of a trader, substantial damages shall be awarded in the absence of such aforementioned proof for special loss or damage. Mere expression of regret by the Drawee Bank is not a solution to discharge it of its liability. It is expected of the Drawee bank to honour the cheque when sufficient funds are available in the drawer's account. But if it fails to do so, the drawee bank will be liable to compensate the drawer. It is a fact and an established principle that the Drawee Bank will be brought under the tortious concept of “Strict Liability” for negligently honouring a forged cheque.

On the other hand, there can be certain situations wherein the Drawee bank may rightfully dishonour the cheque such when a Drawer closes his bank account immediately after the issue of cheque and before the presentment of cheque, dishonest intention on the part of the drawer can be inferred wherein this dishonest intention secures the Drawee from any kind of liability under dishonour of cheque because the drawer is at fault; If the amount standing credit to the account of the drawer is

⁵ Shakuntala Devi v. Punjab National Bank, (1995) ISJ Banking 115 (MP)

insufficient to meet the amount written in the cheque, the Drawee Bank is not held liable; When there exists an overdraft arrangement between the Drawer and the Drawee Bank, the Drawee Bank is liable to pay the cheque to the Payee; When there is a stale cheque, i.e. presented after the payment date, the cheque is returned and dishonoured; Therefore, any act, that is lawfully and appropriately carried out by the Drawee Bank, causes dishonour of cheque, due to the Drawer's fault, will purge Drawee's Liability under Section 138 of the Negotiable Instruments Act, 1881, and is deemed as "rightful dishonour".

Section Eighty-Five sub-clause One and Two provides protection to the drawee against order cheque and bearer cheque by discharging his liability by payment in due course. Section Eighty-Nine sub-clause One provides protection to the drawee - who has paid the amount for the materially altered cheque - by not allowing his payment to be in question and discharging his liability through such a payment.⁶ In case of an electronic image of a truncated cheque, the clearing house is responsible to verify the same from the party that the image transmitted and received by the clearing house is the same that was approved by the other party.

III. SUGGESTIONS

- a. The definition of a "Company" in Section 141 of the Negotiable Instruments Act, 1881 is restricted to anybody corporate and includes a firm or other association of individuals. This definition can be further expanded to all Companies that are incorporated in India or abroad, other Foreign Bodies Corporate, Public and Private Financial Institutions, Nationalized Banks, and Cooperative Societies. Furthermore, the term "Association of Individuals" should also include Clubs, Trusts, Hindu Joint Family, etc.
- b. It was held that the sole proprietary concern is outside the purview of Section 141 of the Negotiable Instruments Act, 1881, i.e., it is not a company within the meaning of "Company" as defined in the explanation of the section. However, Sole Proprietary concern forms a major business chain in India, and it should be separately and explicitly added in the Negotiable Instruments Act, 1881 for better transparency and uniformity by avoiding non compliance with law.

⁶ The Negotiable Instrument Acts, 1881 s. 89, No. 26, Acts of Parliament, 1881 (India).

- c. Section Eighty-Nine allows the Drawee to escape his liability in cases of materially altered cheques. This flexibility in terms of law needs to be restricted because if it is one of the duties of the Drawee Bank to know the Customer's Signature, then it casts upon a higher sense of duty on the Drawee Bank to avoid cases of material alteration through verification with the Drawer. This might widen the time gap and further perplex the situation, but it will help in avoidance of unwarranted escape of liability by the Drawee Bank. Or, the Drawee Bank can mandate an undertaking of Bona Fide from the Drawer every time he draws a cheque in order to ensure the fairness of the Negotiable Instrument.

IV. BIBLIOGRAPHY

1. R.N. Choudhary, Banking Laws, (3rd Ed. 2014).
2. K.C Shekar., Banking Theory and Practice, (20th Edition, 2007).
3. Gunjan Bhagtan & Jhanvi Pandya, Contemporary Legal Issues in Indian E Banking System, Volume 2, Issue 1, JBIL, 38-48, 2019.

