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## NEWS LETTER | Dishonour of Cheques - COVID 19 - Pandemic Impact

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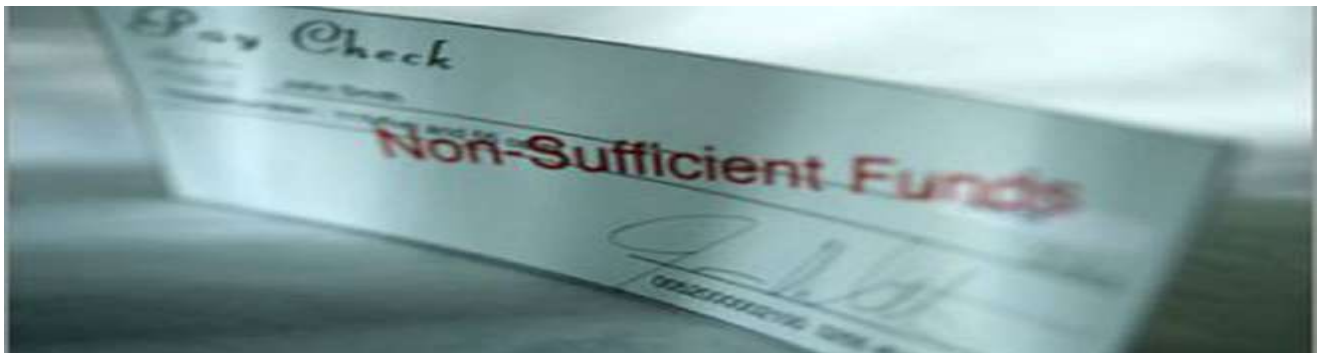
In recent times PSP Legal has been instrumental in shaping the Real Estate & Commercial Law Jurisprudence of our country. At PSP, through our practice goals, we have been able to **create and preserve value** in providing legal services. Our principle of operation is the partners' personal commitment and their responsibility for content and result. PSP aims to provide these services promptly with particular emphasis on quality.



### Subject Introduction

Due to the ongoing lockdown due to the Pandemic Covid-19, we as a nation are suffering from unique difficulties. Previously, the crises would be limiting itself to disrupting the functioning of either the judiciary, or the legislative or executive. However, in today's scenario, the unprecedented decision of the Ministry Of Home Affairs while exercising its powers under the Section 10(2)(i) of the Disaster Management Act, 2005 in its capacity as the Chairman, imposing a countrywide lockdown in order to contain Covid-19 has resulted in the rise of a peculiar situation, where the country while honouring the decision made, is trying to maintain its basic functions. Considering the COVID-19 lockdown, there may be numerous individuals who have been unable to present issued cheques to their respective banks within the period of the validity, owing to logistical difficulties.

Further, parties to commercial transactions who were expected to maintain sufficient balance for the period of the validity of cheques issued by them stand at peril. In case the validity periods of the cheques are extended, the issuer of the cheque will be expected to maintain sufficient balance for the extended period too, which he might not have contemplated while issuing the cheque. This newsletter, examines available remedies, if any, for individuals so affected in both the scenarios.



The Dishonour of Cheque as defined under **S138 of the Negotiable Instruments Act, 1881** is

“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 discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid...”.

Hence, the **key ingredients** for dishonour of cheque are:-

- (i) Cheque is drawn by the drawer on an account maintained by him with a banker;**
- (ii) The said cheque amount is in discharge of legally enforceable debt or liability payable; and**
- (iii) The cheque is returned unpaid for insufficiency of funds or that the amount exceeds the arrangement made with the bank, the offence considered to be committed the moment the cheque is returned unpaid. The same was drafted with the intention to penalise the individual and as such the punishment for the same may be up to 2 years of imprisonment or penalty, or both.**

However, the statute provides us with only **2 reasons** for the dishonour of cheque i.e.

- (i) Insufficient amount; and**
- (ii) Exceeds the amount arranged.**

However, with the passage of time and with the development in the law, the courts have enlarged the scope of the interpretation as to what will encompass the reasons for the said dishonour the same are included but not limited to;

- (i) Payment Stopped (MMTC Ltd. v. Medchl Chemicals and Pharma (P) Ltd. (1998) 3 SCC 249);**
- (ii) Account Closed/No such Account (NEPC Micon Ltd. v. Magma Leasing Ltd. (1999) 4 SCC 253);**
- (iii) Signatures mismatch (Laxmi Dyechem v. State of Gujarat(2012) 13 SCC 375).**

Although the statute does not specify the **number of times we can dishonour the said cheque**, however, as per the three judge-bench judgment passed by the Hon'ble Supreme Court of India the cheque can be presented multiple times, as long as it meets the criteria of S138, **(MSR Leathers v. S. Palaniappan, (2013) 1 SCC 177A)**

## STATUTORY NOTICE- A MANDATORY REQUIREMENT

Clause (b) of Section 138 NI Act, specifies a timeline in which a mandatory notice is to be sent to the drawer whose cheque has been dishonoured. The said notice is to be sent within 30 days from the date of receipt of the information. This 30 day timeline excludes the first day i.e. the day on which the information has been received, and includes the last day of the said time period **(ECON Antri vs ROM Industries (2014) 11 SCC 769).**

Pursuant to the directions of the Government of India, only the essential services and the services permitted by the government are open. In the initial stage of the lockdown the postal/courier services were not functioning, however, owing to the fact that the mandatory filing of KYC form with the bank ensures that your mobile number is registered with your account. This gives you the advantage of receiving messages from the bank in case of any transaction/dishonouring of the cheque. Due to this, now-a-days, our reliance on the receipt of the "Return Memo" from the bank has reduced considerably. Therefore, it must be kept in mind that as an individual, we can rarely rely on the argument that we did not receive the information from the bank regarding the dishonour of the cheque so presented by us.

Hence, the limitation of sending the statutory notice starts from the date of receipt of information of the cheque dishonour.



### DEEMED SERVICE

As mentioned above, the timeline of 30 days is adhered to strictly and as such according to the **Section 27 of the General Clauses Act, 1897 and Section 114 of the Evidence Act, 1872** states that once notice is sent by registered post by correctly addressing to the drawer of the cheque, the service of notice is deemed to have been effected.

Furthermore, the Supreme Court of India in plethora of cases has held that when a notice is sent by registered post and is returned with postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station" or "intimation served, addressee absent", due service has to be presumed. **(C.C. Alva Haji v. Palapetty Muhammed and Anr (2007) 6 SCC 555).**

However, with the advancement of technology, and the reliance on the electronic mediums, the statutory notice can be sent via email by your legal counsel if you have the **email address of the "Accused/Drawer"**.

### **The details to be provided to your lawyer for the same are:-**

- (i) Correct details of the Accused/Drawer;
- (ii) Nature of transaction;
- (iii) Total liability, if any;
- (iv) Details of the Cheque issued towards the legal liability;
- (v) Payment of the same is part or complete.

It is to be noted that more than one cheque can be mentioned in one statutory notice if the said cheques are issued by the same person in furtherance to the same transactions.

## FILING OF THE COMPLAINT

Once the statutory notice is sent within time to the Addressee/Accused, and whether the same is delivered or not delivered and returned back with the comments as mentioned herein above, the notice, will considered served. The timeline for filing of the Complaint however, differs, i.e. if the post/email is delivered to the Accused/Addressee, then according to the statute the Accused/Addressee is given 15 days from the date of receipt of the said notice to make the payment/revert via reply to the said notice. Once, the said 15 days have lapsed and no revert/payment has been received, one can initiate the steps for filing of the Complaint. The limitation for the same is 30 days from the date of such return.

In case the notice is NOT delivered and is returned back with the comments mentioned hereinabove, then the 15 days' timeline will not be considered, and the date for initiating the filing of the Complaint within 30 days will begin from the date of such return of the post.

**Some points to be kept in mind** while initiating the Complaint under section 138 NI Act are:

- (i) Proceedings under S. 138 NI Act need not be stayed where trial in another FIR involving the parties is pending (**Mukesh Aggarwal v. State (NCT of Delhi 2019 SCC Del 6843)**)
- (ii) Section 138 NI Act proceedings not covered within the period of moratorium under Section 14 IBC (**Shah Brothers Ispat (P) Ltd. v. P. Mohanraj in Company Appeal (AT) (Insolvency) No. 306 of 2018**)
- (iii) Section 138 of NI Act and Section 420 IPC not exclusive to each other, a person can be charged with both offences simultaneously

## LIABILITY OF THE COMPANIES/PARTNERSHIP FIRM

While drafting the statutory notice as well as at the time of filing of the complaint one can refer to Section 141 of NI Act which outlines the liability of companies for the offences arising out of Section 138 NI Act. The same entails;

- (i) The company which has committed the offence;
- (ii) liability of those who were in charge of and were responsible for the business of the company; and
- (iii) Any other person who is either a director or a manager or a secretary or officer of the said company, with whose connivance or due to whose neglect, the company has committed the offence, (**Anil Hada v. Indian Acrylic Ltd**)

The said section also gives exception to the certain individuals i.e. the individual 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. Apart from the exceptions mentioned herein above, one can initiate proceedings against the Company with specific averments against its fulltime Directors responsible for the day to day functioning.



**RELIEF-SUO MOTU WRIT PETITION (CIVIL) No(s).3/2020 – Extension of Limitation Period**

Owing to the exceptional circumstances arising out of the lockdown, the Hon'ble Supreme Court of India took **Suo Motu cognizance bearing Suo Motu Writ Petition (Civil) No(s).3/2020**, and *vide* order dated 23rd March 2020 and 06th May 2020, wherein the Hon'ble Supreme Court was of the opinion that “the situation arising out of the challenge faced by the country on account of Covid-19 Virus and resultant difficulties that may be faced by litigants across the country in filing their petitions/applications/suits/ appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under Special Laws (both Central and/or State) To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings..” Which *vide* order date 6th May 2020 directed to be extended “till the date on which the lockdown is lifted in the jurisdictional area where dispute lied or where the cause of action arises shall be extended for a period of 15 days after the lifting of the lockdown”. 6th May 2020 order specifically mentions Section 138 proceedings.

As such, the limitation on all of the cases which were to be filed on or after 15.03.2020 have been extended. Therefore, no harm will be caused to the interest of the victim Complainant in this scenario. Therefore once can safely file its complaint against the Accused/Addressee once the lockdown restrictions are lifted.

**RELIEF- ADVISORY BY THE HIGH COURT OF DELHI AND THE DISTRICT COURTS**

In view of the outbreak due to the Covid-19 the Hon'ble High Court of Delhi, issued advisory dated 13.03.2020 to all of the District Courts that they should not insist upon the presence of the parties to be present. Hence, either you are the Complainant or an Accused, if you are being represented by your counsel, you need not appear. This relief is being provided in the light of the advisory of the government of India as well as by the Hon'ble Supreme Court to avoid overcrowding in the court rooms. The District Courts in furtherance of the same have directed that only the Legal Counsel be present in the court to represent the matter, only if the individual is representing himself is allowed. However, the Accused, may through his counsel appear before the appropriate court in order to ensure representation.

Moreover, the district courts have resolved that only urgent/bail matters are to be listed and heard by them, since, the Hon'ble Supreme Court through Suo Motu cognizance has ensured that the rights of the individual w.r.t the limitation will not be effected, hence all non-urgent matters have been directed to be adjourned till 17.05.2020.

**RBI GUIDELINES AND GOVERNEMENT NOTIFICATION**

Pursuant to the guidelines issued by the RBI bearing No. RBI/2019-20/186 DOR.No.BP.BC.47/21.04.048/2019-20 dated March 27, 2020, the direction regarding the Classification as Special Mention Account (SMA) and Non-Performing Asset (NPA) are as follows *“Since the moratorium/deferment/recalculation of the ‘drawing power’ is being provided specifically to enable the borrowers to tide over economic fallout from COVID-19, the same will not be treated as concession or change in terms and conditions of loan agreements due to financial difficulty of the borrower under paragraph 2 of the Annex to the Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions, 2019 dated June 7, 2019 (“Prudential Framework”). Consequently, such a measure, by itself, shall not result in asset classification downgrade”*

Such guidelines being issued by the RBI to protect the interest of the individuals will have an impact on the interpretation of the law in the upcoming days. The extent of liability and the defence which may be taken by the individual will have to be considered in the light of the financial strain being faced by the MSME's and other small lenders/borrowers. As such, the government may take some measures to provide respite to the Accused's and the Complainants of such criminal cases.

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