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ON THE TOPIC

OFFENCES UNDER SECTION 138 OF NEGOTIABLE INSTRUMENTS ACT

(SESSIONS – I & II)

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OFFENCES UNDER SECTION 138 OF NEGOTIABLE INSTRUMENTS ACT

INTRODUCTION :

(i) The word "instrument" refers to a written document by virtue of which a right is created in favour of some individual. In order to understand the meaning of the term "negotiable instrument", it is important to know the meaning of the term "negotiable". An instrument is considered to be "negotiable" when it can be freely transferred from one party to another for some value and in good faith and the party to that instrument can sue in his own name. It is important to note that the term is not explicitly defined under the Act, but Section 13 of the NI Act, 1881 gives an inclusive definition that a negotiable instrument means a bill of exchange, promissory note, or a cheque that is payable on order or otherwise.

Negotiable instruments are of following kinds :-

1. Promissory notes

2. Bill of Exchange

3. Cheque

Section 138 of Act deals with dishonour of cheques. It has no concern with dishonour of other negotiable instruments.

(ii) WHAT IS A CHEQUE?

Section 6 of the N.I. Act defines a Cheque as a bill of exchange drawn on a specified banker and not expressed to be payable otherwise then on demand and it includes the electronic image of a truncated cheque and a cheque in electronic form.

Explanation I:- For the purpose of this section the expressions -

(a) a cheque in the electronic form " means a cheque drawn in electronic form by using any computer resource and signed in a secure system with digital signature (with or without biometrics signature) and asymmetric crypto system or with electronic signature , as the case may be;

(b) a truncated cheque means a cheque which is truncated during the course of a clearing cycle, either by the clearing house 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

Explanation II:-For the purposes of this section, the expression clearing house means the clearing house managed by the Reserve Bank of India or a clearing house recognized as such by the Reserve Bank of India.

Explanation III:-For the purposes of this section, the expression "asymmetric crypto system", computer resource", "digital signature", "electronic form" and electronic signature " shall have the same meanings respectively assigned to them in the Information Technology Act,2000'.

OFFENCE UNDER SECTION 138 N.I.ACT - INGREDIENTS AND CASE LAW:

INGREDIENTS :

The ingredients of the offence as contemplated under Sec. 138 of the Act are as under:

1. The cheque must have been drawn for discharge of existing debt or liability.
2. Cheque must be presented within 3 months or within validity period whichever is earlier. The Reserve Bank of India vide Notification No, DBOD.AML BC.No.47/14.01.001/ 2011-12 has made the period of validity of a cheque to be three months from 01.04.2012. Hence, as of

now, the cheque has to be presented within three months from the date on which it was drawn.

3. Cheque must be returned unpaid due to insufficient funds or it exceeds the amount arranged.

4. Fact of dishonour be informed to the drawer by notice within 30 days.

5. Drawer of cheque must fail to make payment within 15 days of receipt of the notice.

Hon'ble Supreme Court in ***Nishant Aggarwal v. Kailash Kumar Sharma,*** reported in ***AIR 2013 SUPREME COURT 2634,*** interpreted Section 138 of the NI Act and laid down that Section 138 has five components, namely:

1. drawing of the cheque;

2. presentation of the cheque to the bank;

3. returning the cheque unpaid by the drawee bank;

4. giving notice in writing to the drawer of the cheque demanding payment of the cheque amount; and

5. failure of the drawer to make payment within 15 days of the receipt of the notice.

As is seen from the ruling in ***Dattatraya v. Sharanappa , 2024 SCC OnLine SC 1899***, the NI Act, 1881 enlists three essential conditions that ought to be fulfilled before the said provision of law can be invoked:

- Firstly, the cheque ought to have been presented within the period of its validity.

- Secondly, a demand of payment ought to have been made by the presenter of the cheque to the issuer,

- Lastly, the drawer ought to have had failed to pay the amount within a period of 15 days of the receipt of the demand.

As per the explanation annexed to section 138 of the Act, "debt or other liability" means a legally enforceable debt or other liability.

EXISTENCE OF LEGALLY ENFORCEABLE DEBT:

- For the commission of an offence under section 138, the cheque that is dishonoured must represent a legally enforceable debt not only on the day when it was drawn but also on the date of its maturity/presentation.
- If a cheque presented for collection of total value of the cheque without endorsing the part payment made by drawer (section 56 of N.I.Act), is dishonored no offence under section 138 would be attracted, as held in ***Dasharathbhai Trikambhai Patel vs. Hitesh Mahendrabhai Patel, (2023) 1 SCC 578, dt. 11.10.2022.***
- In ***Somnath vs. Mukesh Kumar, 2015(4) Law Herald 3629 (P&H)*** it was held by Hon'ble High Court that the complaint under Section 138 is not maintainable when the cheque in question had been issued qua a time barred debt.

  Similarly, the Hon'ble Apex Court in ***Sasseriyil Joseph Vs Devassia 2001 Crl.J.24*** held that "a criminal prosecution under section 138, N.I. Act is not maintainable in respect of a time barred debt."
- In ***Indus Airways Pvt. Ltd &Ors v. Magnum Aviation Pvt. Ltd & Anr*** reported in ***2014 (2) Crimes (SC) 105***, the Hon'ble Supreme Court has held that where payment was made by cheque in the nature of advance payment, it indicates that at the time of drawal of cheque, there was no existing liability and as such no offence was made out.

  The same was reiterated by the Hon'ble Supreme Court in the case of ***Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Limited*** reported in ***(2016) 10 SCC 458***, wherein it was made abundantly clear that the culpability under section 138 of the Act is extinguished only when the dishonoured cheque was issued for the purpose of an advance payment.
- Further, a cheque given as a gift and not for the satisfaction of a debt or other liability, would not attract the penal consequences of the provision in the

event of its being returned for insufficiency of funds. Similarly, supari money for commission of crime is not legally recoverable debt and complaint under Section 138 is not maintainable in such a case.

- "Any liability" occurred in the section is only to mean that any kind of liability of the drawer; and not any other's liability, unless the payee, the drawer and the original debtor entered into any agreement to that effect. ***(Hiten Sagar and another vs. IMC Ltd. And another 2001 (3) Mh L.J. 659).***
- It is a common plea in most cheque dishonour cases that the cheque in question was issued as a security cheque. In the case of ***I.C.D.S. Ltd. v. Beena Shabbir & Anr.*** reported in ***AIR 2002 SC 3014,*** the Hon'ble Supreme Court has observed that even if the dishonoured cheque in question was issued as a security cheque, it will still come under the ambit of Section 138 of the Act. The only condition is that the cheque must be backed by some form of legally enforceable debt or liability towards the holder.

COGNIZANCE, LIMITATION, JURISDICTION – A STUDY:

A. DEMAND NOTICE:

(i) The Notice must be in writing and it must be issued within 30 days of receipt of information from the bank, regarding return of the cheque as unpaid. While calculating the period of 30 days, the date of receipt of information from the bank has to be excluded.

In ***K. Bhaskaran v. Sankaran*** reported in ***(1999) 7 SCC 510,*** and in ***Dalmia Cement (Bharat) Ltd. v. M/s. Galaxy Traders*** reported in ***AIR 2001SC 676,*** the Hon'ble Supreme Court held that to constitute an offence under section 138 N.I. Act, the complainant is obliged to prove its ingredients which includes the receipt of notice by the accused under Clause (b). It is to be kept in mind that it is not the 'giving' of the notice which makes the offence but it is the 'receipt' of the notice by the drawer which gives the cause of action to the complainant to file the complaint within the statutory period.

In ***State of M. P. v. Hira Lal*** reported in ***(1996) 7 SCC 523*** as well as in ***Jagdish Singh v. Nathu Singh*** reported in ***AIR 1992 SC 1604,*** the Hon'ble

Supreme Court held that where the addressee manages to have the notices returned with postal remarks "refused", "not available in the house," "houselocked" and "shop closed" respectively, it must be deemed that the notices have been served on the addressee.

In ***C.C.Alavi Haji vs. Palapatty Muhammad and another*** reported in ***2007 (6) SCC 555,*** the Hon'ble Supreme Court further held that a person who does not pay within 15 (fifteen) days of receipt of the summons along with the copy of the complaint under section 138 of the N.I. Act, cannot obviously contend that there was no proper service of notice as required under section 138 of the Act.

(ii) Issuance of second demand notice :

In ***Sumitra Sankar Dutta and Another v. Biswajit Paul and Others, 2004 (3) GLT 462*** the Gauhati High Court quashed a proceeding which was initiated on the basis of a second notice issued by the complainant. The Honble High Court observed that as the first notice was returned with the postal remark "office always closed/out of station", and the second notice also got a similar response, the first notice must be deemed to have been served on the accused and hence, there was no scope for issuing second notice.

In ***TameeshwarVaishnav v. Ramvishal Gupta, 2010(1) LCR 86(SC)***, the Apex Court observed that after the notice issued under clause (b) of Section 138 of N.I. Act is received by the drawer of the cheque, the payee or holder of the cheque, who does not take any action on the basis of such notice within the period prescribed under section 138, N.I. Act, is not entitled to send a fresh notice in respect of the same cheque and, thereafter, proceed to file a complaint.

(iii) Contents of demand notice :

In ***SumanSethi v. Ajay K. Churiwal and Another, (2000) 2 SCC 380***, the Honble Apex Court has been pointed out that it is a well settled principle of law that the notice has to be read as a whole. In the notice, demand has to be made for the "said amount" i.e. cheque amount. If no such demand is made, the notice no doubt would fall short of its legal requirement. But where in addition to "said amount", there is also a claim by way of interest, cost etc. whether the notice is bad or not

would depend on the language of the notice. If in a notice while giving the breakup of the claim, the cheque amount, interest, damages etc. are separately specified, other such claims for interest, cost etc. would be superfluous and these additional claims would be severable and will not invalidate the notice. If, however, in the notice an omnibus demand is made without specifying what was due under the dishonoured cheque, the notice might fail to meet the legal requirement and may be regarded as bad.

Further, in ***Central Bank of India Vs. M/S Saxons Farms, AIR 199 S.C. 3607*** it was held that where the words "my client shall represent the two cheques again and if they are returned unpaid, the matter will be reported to police" and "kindly make the payment if you want to avoid unpleasant action of my client" were held to constitute a valid notice demanding payment of the amount of the cheques.

(iv) Notice through e-mail or whatsapp:

In the case of ***Rajendra vs. State of UP and another dt.25.01.2024*** the High Court of Allahabad held that notice send through 'e-mail or whats app', if it fulfill the requirement of section 13 of Information Technology Act, 2000 can be considered as a valid notice under section138 of N.I. Act to the drawer of the cheque, the same will be deemed to be served on the date of dispatch itself.

(v) Notice through FAX :

In ***SIL IMPORT USA –Vs- M/S EXIM AIDES SILK, AIR 1999 S.C. 1609*** where at first the notice was sent through FAX and then on advice of lawyers a notice by registered post was also sent later and the eventual complaint was filed on its basis. The complaint was held to be barred by limitation because the first notice through FAX was valid.

B. CAUSE OF ACTION:

(i) Proviso (b) to Section 138 of the N.I.Act contains four important aspects:

(1) Notice must be given by the payee or the holder in due course;

(2) Notice must be in writing;

(3) Notice must be given within thirty days of receipt of information of dishonour

(4) Payee or the holder in due course must make a demand for payment of the amount of the cheque dishonoured.

Proviso (c) to Section 138 of the N.I. Act contains two important aspects:

(1) Receipt of the notice by the drawer

(2) His failure to make the payment within fifteen days of such receipt.

Only thereafter cause of action for institution of a criminal complaint will legally arise.

In the case of ***M/s.Dalmia Cement (Bhararhi) Pvt. Ltd., vs. M/s.Galaxy Traders and Agencies and others*** *reported in* ***AIR 2001 SC 676*** it was held that mere issue of notice does not raise cause of action. Failure to make payment within 15 days by accused becomes cause of action.

As per Section 142, the complaint has to be filed within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138 of the Act.

(ii) Multiple causes of action :

In ***Sadanandan Bhadran v. Madhavan Sunil Kumar: (1998) 6 SCC 514,*** the Hon'ble Supreme Court observed that there can be only one cause of action under Section 142(b), N.I. Act. Section 142, gives cause of action a restrictive meaning, in that, it refers to only one fact which will give rise to the cause of action and that is the failure to make the payment within 15 days from the date of the receipt of the notice. Consequent upon the failure of the drawer to pay the money within the period of 15 days as envisaged under clause (a) of the proviso to Section 138, the liability of the drawer for being prosecuted for the offence he has committed arises, and the period of one month for filing the complaint under section 142 is to be reckoned accordingly.

In **Prem Chand Vijay Kumar vs. Yashpal Singh & Anr., (2005) 4 SCC 417** it was held that Dishonour of the cheque on each re-presentation does not give rise to a fresh cause of action.

But the law was settled finally overruling all the contrary views in terms of the judgment of ***MSR Leathers v. Palaniappan*** reported in ***AIR 2014 SC 642 (para No.10).*** As of now, a payee or the holder in due course has a right to present the cheque as many number of times for encashment within a period of three months or within its validity period, whichever is earlier. A prosecution based on second or successive dishonor of the cheque is also permissible so long as it satisfies the requirements stipulated under the proviso to Section 138 of the N.I.Act.

If within limitation two consecutive notices sent by payee by registered post to correct address of drawer of cheque, where first one sent within limitation period of 15 days but same was returned with postal endorsement "intimation served, addressee absent", whereas second one sent after expiry of stipulated period of limitation, then first notice would be deemed to have been duly effected by virtue of Section. 27 of General Clauses Act and Section. 114 of Evidence Act, though drawer entitled to rebut that presumption, but in absence of rebuttal, requirement of section 138 proviso (b) would stand complied with, subsequent notice should be treated only as reminder and would not affect validity of first to achieve that right of honest lender is not defeated, as held by the Hon'ble supreme court in ***N. Parameswaran Unni Vs. G. Kannan and Another*** reported in ***AIR 2017 SC 1681.***

In the case of **M/s Gimpex Private Limited vs. Manoj Goel,** ***AIR ONLINE 2021 SC 865*** the Supreme Court of India has held that once parties have voluntarily entered into a compromise agreement and agree to abide by the consequences of non-compliance of the settlement agreement, they cannot be allowed to reverse the effects of the agreement by pursuing both the original complaint and the subsequent complaint arising from such non-compliance. The settlement agreement subsumes the original complaint. Non-compliance of the terms of the settlement agreement or dishonour of cheques issued subsequent to it, would then give rise to a fresh cause of action attracting liability under Section 138 of the NI Act and other remedies under civil law and criminal law.

(iii) Cases where offence is not made out:

1. When cheque returned as defective one (Babulal vs. Khilji 1998 (3) Mh L.J. 762)

2. When no notice is given to company and cheque is drawn by company (P.Raja Rathinalm vs. State of Maharashtra 1999 (1) Mh.L.J. 815)

3. Cheque is given as a gift.

4. Complainant was not a payee.

5. Signature of drawer on the cheque is incomplete. (Vinod vs. Jahir 2003 (1) Mh L.J. 456.)

C. COGNIZANCE

(i) Section 142: Cognizance of offences:- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), -

i. no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

ii. such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138.

iii. Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period;

iv. no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.

It was held in ***SIL Import, USA v. Exim Aides Silk Exporters*, (1999) 4 SCC 567** that cause of action would arise soon after completion of the offence, and the period of limitation for filing the complaint would simultaneously start running.

(ii) Is it possible to take cognizance once again, when it is contended by the accused that the issue of process on the basis of sworn statement by way of affidavit is improper?

No, because once cognizance is taken rightly or wrongly, the remedy that is available is only by challenging the same either before the Sessions Court or High Court. Magistrate cannot take cognizance twice. Refer the decisions reported in ***AIR 1976 SC 1672 Devarapalli Lakshminarayana Reddy vs V. Narayana Reddy*** and ***AIR 2004 SC 4674 Adalat Prasad vs. Rooplal Jindal.***

(iii) Whether cognizance can be taken immediately after filing of the complaint, when it is noticed that there is delay in filing complaint?

Cognizance cannot be taken immediately after filing of the complaint, when it is noticed that there is delay in filing complaint, because, if there is delay in filing complaint, it would be proper to issue notice to the accused, of delay condonation application and after deciding delay condonation application, to take cognizance, as per the decision reported in ***AIR 2008 SC 1937 P. K. Choudhury v. Commander.*** Similar view was expressed in ***K.S. Joseph vs. Philips Carbon Black Ltd. and another, 2016(2) RCR (Criminal) 788 (SC)***

D. LIMITATION :

(i) Period of limitation for filing a complaint in respect of the offence under section 138, N.I. Act :

This being a special legislation certain time limit has been laid down and they should be strictly followed. Any lapse in adhering to the schedule, shall take away a cause of action under section 138 of N.I Act. One has to keep in mind the limitations and follow them strictly to prosecute the drawer of cheque:

- Cheque should be presented to the bank for encashment within its validity period (03 months).
- Within thirty days from the receipt of return memo indicating reason of dishonour, a notice should be sent demanding the amount of dishonored cheque.

- If the drawer does not pay the amount of dishonoured cheque within fifteen days, a complaint thereafter should be filed within one month in the relevant court of Metropolitan Magistrate/Judicial Magistrate as the case may be, having jurisdiction as per Sec. 142.

In the case of ***Saketh India Ltd. v. Indian Securities Ltd.*** *reported in* ***(1999) 3 SCC 1****,* it was held by the Hon'ble Supreme Court that ordinarily in computing the period of limitation:

1. The first day must be excluded and the last day must be included

2. The period of one month will be reckoned from the day immediately following the day on which the period of 15 days from the date of receipt of notice by the drawer expires.

3. The 15th day is to be excluded for counting the period of one month.

4. The month employed in the Act has not been defined anywhere in the N.I. Act and the same means a British Calender Month and not lunar month, by following the definition given in Sec. 3 (35) of the General Clauses Act meaning thereby that a month means only a period of 30 days.

Saketh India Ltd. (supra) was taken up for reconstruction in ***Econ Antri Ltd. v. Rom Industries*** reported in ***AIR 2013 SC 3283.*** The Hon'ble Supreme Court affirmed the judgment in Saketh India Ltd. (supra) by holding that for the purpose of calculating the period of one month which is prescribed under Section 142(b) of the N.I. Act, the period has to be reckoned by excluding the date on which the cause of action arose.

The Apex Court held in ***Indra Kr. Patodia v. Reliance Industries Ltd.*** reported in ***AIR 2013 SC 426****,* For computing the period of limitation, one has to consider the date of filing of the complaint or initiation of criminal proceedings and not the date of taking cognizance by the Magistrate.

In case of an application filed for condonation of delay, it is necessary to issue notice to accused before issuing process, as held in ***Sajjan Kumar Jhunjhunwala VS. Eastern Roadways Pvt. Ltd.*** reported in ***ILR 2006 Kar 3771.***

If sufficient grounds are shown and made out, then the period spent in conducting the case before wrong Court can be condoned, as held in the case of ***Charanjit Pal Jindal Vs L.N. Metalics, 2015-5 SCALE 16***.

(ii) How to calculate limitation period of 15 days in case if notice returned unclaimed?

Whether notice is returned as unclaimed it indicates that the addressee is very much available in the given address, but he is not interested to receive it. Therefore, if the sender has dispatched the notice by post with correct address on the cover and the same is returned as unclaimed, then such date when it is returned is the date on which it is deemed to have been served on the drawer.

(iii) Duty of Court in respect of a complaint filed before the cause of action accrues:

A complaint filed before expiry of 15 days from the date of receipt of notice issued under section 138 proviso(c) is not maintainable. The complainant cannot be permitted to present the very same complaint at any later stage. He has to file a fresh complaint, if the same could not be filed within the time prescribed under section 142 (b), his recourse is to see the benefit of proviso, satisfying the court with sufficient cause.

(iv) Calculation of limitation in case no details as to date of service of notice are given in the complaint:

It is obligatory for the complainant to give the particulars of service of statutory notice in complaint. However in the case of ***C.C.Alavi Haji vs. Palapatty Muhammad and another*** reported in***2007 (6) SCC 555,*** it was held that if the notice is sent through post, though no date is mentioned in the complaint, even then the court can presume under section 114 of Indian Evidence Act and section 27ofGeneral Clauses Act, that such notice could have been delivered in the ordinary course of business. (In case of such service 30 days from the date of issuance of notice can be considered has sufficient for affecting the service in regular course of business).

(v) Whether a complaint can be filed after expiry of period of limitation?

As per section 142 (1) (b) proviso, the cognizance of a complaint may be taken by the court after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making a complaint within such period. (Notice to accused is mandatory).

E. JURISDICTION :

(i) ***K. Bhaskaran v. Sankaran, (1999) 7 SCC 510*** and later ***Dashrath Rupsingh Rathod v. State of Maharashtra & Anr., AIR 2014 SC 3519*** have addressed the issue of territorial jurisdiction of courts trying offences under sections 138, N.I. Act.

However, to clarify the issues of jurisdiction, the Parliament enacted The **Negotiable Instruments (Amendment) Act, 2015** to decisively lay down the territorial jurisdiction of courts deciding cases under section 138, N.I. Act . The amendment was made in Section 142 (2), N.I. Act which reads as follows:

The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction :

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

In ***Bridgestone India (P) Ltd. v. Inderpal Singh*****, (2016) 2 SCC 75,** it was held that Section 142(2)(*a*), amended through the Negotiable Instruments (Amendment) Second Ordinance, 2015, vests jurisdiction for initiating proceedings for the offence under Section 138 of the Negotiable Instruments Act, inter alia, in the territorial jurisdiction of the court, where the cheque is delivered for collection (through an account of the branch of the bank where the payee or holder in due course maintains an account).

When the Court notices that it has no jurisdiction to try the case, then it has to return the complaint for proper presentation before the jurisdictional Court instead of dismissing the complaint. It was held so in the case of ***Canara bank Financial Services Limited v. Pallav Sheth, 2001 (5) Supreme 305.***

PROCEDURE :

A. WHO CAN FILE THE COMPLAINT ?

(i) A complaint under section 138 of the Act, **in case of a natural person,** can be filed by the Payee of the dishonoured cheque or by the Holder in due course as mandated by Section 142 of the Act. However, this requirement has been qualified with an addendum. The complaint under section 138 of the Act can be filed by the payee through his power of attorney holder/duly authorized representative as held in ***Sankar Finance and Investment v. State of A.P. & Others*** *reported in* ***(2008) 8 SCC 536.***

(ii) A right of legal heirs of the complainant to continue the prosecution:

In the case of ***Jimmy Jahangir Madan vs. Bolly Cariyappa Hindley (dead) by L.Rs, Crl.Appeal No.1222 -23 of 2002, dt.04.11.2004***. The Supreme Court held that death of complainant pending the proceedings, his legal heirs can continue the proceedings. (Application under section 302 of Cr.P.C)

(iii) In case of a proprietary concern, the complaint can be filed:

- By the proprietor of the proprietary concern, describing himself as the sole proprietor of the "payee";
- The proprietary concern describing itself as a sole proprietary concern, represented by its sole proprietor; and
- The proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor.

(iv) In case of a partnership firm, any of the active partners can institute a complaint under section 138, N.I. Act on behalf of the partnership firm. The partnership firm can also authorize a Power of Attorney holder to prosecute a

complaint on its behalf. The question of launching a valid criminal prosecution under section 138 of N.I. Act with the aid of power of attorney is no more *res integra* in view of the authoritative judgment of the Hon'ble Supreme Court in ***A.C. Narayanan v. State of Maharashtra and Another*** reported in ***AIR 2014 SC 630.*** Furthermore, Sections 9, 12(a), 12(b), 18 and 19 of the Partnership Act, 1932 clearly states that even a single partner can also file a complaint on behalf of the firm or he may authorize a Power of Attorney holder to do so on behalf of the firm and it would not be necessary that all the partners would have to sign the Power of Attorney.

(v) The situation **in case of an unregistered partnership firm** was addressed by Hon'ble High Court of Telangana and State of Andhra Pradesh in ***M/s Sri Sai Karuna Finance and Enterprises represented by its Manager Vs. N. Sandhya Rani and another*** (Cr.M.P.No.452/2006, dated 24.10.2018) wherein it was held that the Negotiable Instruments Acts specifically laid down that the debt or other liability means Legally enforceable debt or other liability and it has to be in the nature of Civil Suit because the debt or other liability cannot be recovered by filing a criminal case and when there is a bar of filing a suit by unregistered firm, the bar equally applies to criminal case as laid down in explanation to section 138 of NI Act.

(vi) When a company is the payee of a cheque based on which a complaint is filed under section 138 of the Act, the complainant necessarily should be the company which would be represented by an employee who is authorized. In such a case, a prima facie indication in the complaint and sworn statement of either oral or affidavit, that the complainant is represented by authorized person who has knowledge would be sufficient. It wsa held so in the case of ***M/S Trl Krosaki Refractories Ltd. vs M/S Sms Asia Private Limited***, reported in (2022) 7 SCC 612.

(vii) Other relevant cases :

The Hon'ble Supreme Court in ***M.M.T.C. Ltd. and Another v. Medchl Chemicals and Pharma (P) Ltd. And Another*** reported in ***(2002) 1 SCC 234*** held that in case of a company, if the *de facto* complainant did not have authority in the initial stage, still the company can, at any stage, rectify that defect at a subsequent

stage, and the company can send a person who is competent to represent it. Hence, lack of authorization is a curable defect.

In ***Samrat Shipping Co. Pvt. Ltd. v. Dolly George*** *reported in* ***(2002) 9 SCC 455***, the Hon'ble Supreme Court termed the dismissal of the complaint at the threshold by the Magistrate on the ground that the individual through whom the complaint was filed had not produced the resolution of the Board of Directors of the Company authorizing him to represent the Company before the Magistrate to be not justified and termed this exercise to be "too hasty an action".

A three Judge Bench of the Hon'ble Supreme Court in ***M/S Haryana State Co.Op. Supply and Marketing Federation Ltd. v. M/S Jayam Textiles and Another*** *reported in* ***AIR 2014 SC 1926*** held that the dismissal of the complaint for mere failure to produce authorization would not be proper and an opportunity ought to be granted to produce and prove the authorization.

In ***A.C. Narayanan and Anr. v. State of Maharashtra and Ors*** reported in ***AIR 2014 SC 630*** has further made it clear that while it is permissible for the Power of Attorney holder or for the legal representative(s) to file a complaint and/or continue with the pending criminal complaint for and on behalf of payee or holder in due course, however, it is expected that such Power of Attorney holder or legal representative(s) should have knowledge about the transaction in question so as to able to bring on record the truth of the grievance/offence. It has been further clarified that there is no reason as to why the attorney holder cannot depose as a witness. Nevertheless, an explicit assertion as to the knowledge of the Power of Attorney holder about the transaction in question must be specified in the complaint. It is further held that sub delegation of functions *vis a vis* filing of a complaint is only permissible when the same is duly and explicitly mentioned in the authority granted to the delegator.

B. AGAINST WHOM CAN THE COMPLAINT BE FILED?:

(i) It is only the drawer of the dishonoured cheque who can be prosecuted under section 138 of the Act and no one else.

(ii) Offence by companies – vicarious liability of directors:

In case of ***K. Shrikant Singh vs. North East Security Ltd. and others, J.T. 2007 (9) SC 449,*** Hon'ble Apex court observed that vicarious liability on the part of a person must be pleaded and proved and not inferred.

Section 141 provides for constructive liability. It postulates that a person incharge of and responsible to the company, in the conduct of the business of the company shall also be deemed guilty of the offence. The drawer can be a company, a firm or an association of individuals, but only those directors, partners or officers can be held responsible for the offence under section 138 of the Act or responsible for the conduct of its business. As held in ***Ashok Shekaramani and others vs. State of A.P. and another, Crl.Appeal No.879 of 2023, dt.03.08.2023***.

Liability depends on the role one place in the affairs of the company and not on designation or status. A managing director or joint managing director would admittedly be incharge of the company and responsible to the company for the conduct of its business by virtue of the office they hold. For making other directors (executive) of a company liable for the offences committed by the company under section 141, there must be specific averments against the director showing as to how and in what manner the director was responsible for the conduct of the business of the company, as held in the case of ***Sunita Palita and others vs. M/s. Panchami Stone Quarry, SLP (Crl.)No.10396/2019, dt.01.08.2022***.

In case of ***Aparna A Shaha vs. Sheth Developers Pvt. Ltd., 2014 (1) Mh L.J.*** Apex court took a view that Joint Account holder cannot be prosecuted unless cheque was signed by each and every person who was Joint Account holder. In this case the cheque was signed by husband of the appellant. Apex court quashed the proceeding against the appellant. Court observed that as a natural corollary each and every joint account holder must sign the cheque before they were considered for criminal action under sec. 138 of the N.I. Act.

In ***Standard Chartered Bank vs. State of Maharashtra and others etc., 2016(2) RCR (Criminal) 778 (SC)*** it was held by the Hon'ble Supreme Court that the complaint under Section 138 is not maintainable without making company a party.

In ***Gunamala Sales Pvt. Ltd. v. Anu Mehta*** *reported in* ***AIR 2015 SC 1072,*** the Apex Court held that it is necessary to aver in the complaint filed under section 138 read with sec. 141, N.I. Act that at the relevant time when the offence was committed, the directors were in charge and were responsible for the conduct of the business of the company.

In ***Mainuddin Abdul Sattar Shaikh Vs. Vijay D. Salvi, 2015(3) RCR (Criminal) 593 (SC)*** it was held by Hon'ble Supreme Court that when an employee of a company issues a cheque on his personal account for discharging the liability of the company, the company/its directors are not liable under Section 138 of the Act. Personal liability of employee was upheld.

In the case of ***Rajesh Viren Shah v. Redington (India) Limited****, reported in* ***(2024) 4 SCC 305*** the Supreme Court ruled that a director who had resigned before the issuance of a bounced cheque cannot be prosecuted under Section 138 and 141 of the Negotiable Instruments Act.21 Feb 2024

(iii) Complaint against proprietary concern:

A court can make a proprietor an accused if a proprietary concern maintains an account and a cheque is drawn from it. This is because a proprietary concern is not a separate entity from its proprietor, and the proprietor is the principal offender.

In the case of ***H.N.Nagaraj vs. Suresh Lal Heera Lal, 2022 SCC OnLine Kar 1785*** it was held that in a proceeding under section 138 of the Act, the arraying of a proprietor as an accused or a proprietary concern represented by the proprietor would be sufficient compliance with the requirements under section 138, the proprietor and the proprietary concern is not required to be separately arrayed as a party accused.

Further, in the case of ***Konala Bhavani vs. State of A.P. and another*** reported in ***2023 SCC online 3605,*** it was held that a proprietary concern is not a company within the meaning of section 141. A sole proprietor can be held liable under section 138 of the Act for the dishonour of cheque drawn by him on his bank

account, thus, there will be no vicarious liability on his employee who is authorized signatory.

(iv) What happens if a guarantor issues a cheque on behalf of the principal debtor and the same gets dishonored?

The Hon'ble Supreme Courtin the case of ***I.C.D.S. Ltd. v. Beena Shabbir & Anr.*** reported in ***AIR 2002 SC 3014*** held "The language of the Statute depicts the intent of the law-makers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability, there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act. 'Any cheque' and 'other liability' are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the Statute. Any contra interpretation would defeat the intent of the Legislature".

C. TRIAL PROCEDURE :

(i) Section 145 (1) of the Act permits the recording of evidence of complainant on affidavit. Even evidence of accused and witnesses can be recorded on affidavit. This was for expedite disposal of the cases. Bank slips are held as a primary evidence and admissible directly. Accused are given effective opportunity to defend the case. Considering presumptions under sec.118 and 139 of the N.I. Act effective opportunity is to be given to accused to cross examine the witnesses.

(ii) Offences under section 138, n.i. Act to be tried summarily:

In the case of ***Meters and Instruments Pvt. Ltd., vs. Kanchan Mehata*** reported in ***(2018)1 SCC 560*** it was held that every complaint filed under section 138 of N.I Act shall initially be registered as summary trial case.

It is common experience that in cases u/s 138 of N.I. Act evidence is recorded by one Judicial Officer and before delivery of Judgment he is transferred, in such situation the successor has to proceed with denovo trial.

In ***Nitinbhai Saevatilal Shah and another vs. Manubhai Manjibhai Panchal and another, 2011(4) RCR (Criminal) 149 (SC)*** it was held by the

Hon'ble Supreme Court in summary trial of complaint under Section 138 of the Act, if the Magistrate who recorded the evidence is transferred, the successor Judge cannot pronounce judgments on basis of evidence recorded by his predecessor. He has to try case de novo.

Though the provision contained in Sec.143 of the N. I. Act provides that cases u/s.138 are to be tried in summary way, they should be tried as a regular summons cases. If it appears to the Magistrate that nature of case is such that sentence of imprisonment for a term exceeding one year may have to be passed, or that it is for any other reasons undesirable to try the case summarily, Magistrate shall after hearing the parties record and order to that effect and try the case as a regular summons case.

However, in case of ***Mehsana Nagarik Sahakari Bank Ltd. vs. Shreeji CAB company ltd. and others 2014 Cr.L.J. 1953***, the apex court held that if evidence is recorded in full and not in summary manner, then evidence recorded by predecessor can be acted upon. Similarly, in ***J.V. Baharuni v. State of Gujarat*, (2014) 10 SCC 494**, it was held that if the case in substance was not tried in a summary way, though was triable summarily, and was tried as a summons case, it need not be heard de novo and the succeeding Magistrate can follow the procedure contemplated under Section 326(1) of the Code.

Magistrate has the discretion under Section 143 of the NI Act either to follow a summary trial or summons trial. In case the Magistrate wants to conduct a summons trial, he should record the reasons after hearing the parties and proceed with the trial in the manner provided under the second proviso to Section 143 of the NI Act. Such reasons should necessarily be recorded by the trial court so that further litigation arraigning the mode of trial can be avoided.

(iii) Procedure for registration of complaint:

i) Section 142 stipulates that a complaint filed for the offence under section 138 of the Act shall be in writing.

ii) The complainant shall make a disclosure in his sworn affidavit that no other complaint has been filed in any other court in respect of the same transaction.

iii) Every such complaint shall be scrutinized on the same day, and if it is accompanied by an affidavit and the affidavit along with the documents filed if any are found to be in order, court can take cognizance.

In ***Indra Kumar Patodia Vs. Reliance Industries Ltd.,*** reported in ***AIR 2013 SC 426*** it was held that complaint without the signature of complainant is maintainable when it is verified by the complainant and the process is issued by the Magistrate after due verification.

(iv) Procedure under section 200 Cr.P.C vis-a-vis section 145of N.I. Act:

Before registering a complaint under section 138, Magistrate is not mandatorily obliged to call upon the complainant to remain present before the court, nor to examine him or his witnesses upon oath for taking decision whether or not to issue process. Sworn affidavit filed along with the complaint can be considered as his sworn statement for the purpose of section 200 Cr.P.C.

(v) Inquiry under section 202 of Cr.P.C:

In ***Vishwakalyan Multistate Credit Co Op Society Ltd. Vs Oneup Entertainment Prvt. Ltd., 2023 LiveLaw (SC) 706*** it was held by the Hon'ble Supreme Court that where an accused resides beyond the jurisdiction of court, it shall follow section 202 (1) Cr.P.C to decide whether or not there is sufficient ground for proceeding against the accused. For that purpose, the court shall not insist for the presence of complainant or his witnesses, the court may rely upon the affidavits filed by complainant and his witnesses and in suitable cases he can examine the documents for ascertaining the sufficiency of grounds for proceeding against the accused under section 302 Cr.P.C.

(vi) Service of summons:

i) As per section 144, the court can issue summons to the accused either by post or by an appropriate courier service.

ii) In order to avoid delay in service of summons, it may be desirable that complainant gives his bank account number and if possible e-mail ID of accused.

iii) If e-mail ID is available with bank where accused has an account, such bank, on being required should furnish such e-mail ID to the payee of cheque.

Correct address:

The court should see that summons must properly be addressed to accused and sent by post as well as by e-mail address given by the complainant. In appropriate cases it may take the assistance of the police or nearby court to serve summons on accused. For appearance, a short date be fixed. If summons is received back unserved, immediately follow up action be taken.

Deemed service of summons:

Where an acknowledgment purporting to be signed by accused or an endorsement purporting to be made by a person authorized by postal authority or courier service that accused refused to take delivery of summons has been received by the court, then it may declare that summons has been duly served [section144 (2)].

Substituted service:

In the case of ***Sri K.Chandrasekhar and another vs. Mac.Charles India Limited,*** reported in ***2005(1)ALD(CRI)35*** it was held that proceeding under section 138 are quasi criminal in nature, so substituted service as provided under Cr.P.C. can be taken aid of by the complainant.

Service of summons in one complaint forming part of the same transaction to be deemed service in other complaints, relating to same transaction.

(vii) First appearance of accused:

When an accused made his first appearance in response to summons the court should direct him to furnish a bail bond to ensure his appearance during trial and ask him to take a notice under section 251 Cr.P.C to enable him to enter his defence and fix the case for defence evidence, unless he made an application under section 145 (2) for recalling the witnesses for cross examination notice.

The Magistrate can allow an accused to make even his first appearance through counsel and such discretion needs to be exercised only in rare cases and there ought to be good reasons for dispensing with the presence, as held in the case of ***Mahesh Kumar Kejriwal and another vs. Bhanuj Jindal and another*** in ***SLP No.3382of 2022 dt.18.04.2022***.

(viii) Discharge:

The Magistrate's shall not entertain any miscellaneous application for discharge of the accused as there is no provision in Cr.P.C. for discharge of an accused in a Summary Trial Case or a Summons Case in view of the law as settled in Suo Motu Writ Petition (Crl.) No.2 of 2020 titled ***In Re: Expeditious Trial of Case Under Section 138 Negotiable Instruments Act*** and ***Subramanium Sethuraman Vs State of Maharashtra, AIR 2004 SC 4711.***

It shall be kept in mind that as held in ***In Re: Expeditious Trial of Case Under Section 138 Negotiable Instruments Act,*** the Section 258 of the Cr.P.C. is not applicable to the complaints under Section 138 of the N.I. Act and the judgment in ***Meters and Instruments Private Limited Vs. Kanchan Mehta, AIR 2017 SC 4594*** is not approved to that extent.

In ***V.K. Bhat vs. G. Ravi Kishore and another, 2016(2) RCR (Criminal) 793 (SC)*** it was held by the Hon'ble Supreme Court that when complaint under section 138 of the Act is dismissed in default, it amounts to acquittal of accused under Section 256 of Cr.P.C.

(ix) Mode of adducing evidence:

Section 145(1) permits the complainant to give his evidence by way of an affidavit and it may subject to all exceptions be read in evidence in any inquiry or trial. His affidavit may also contain the formal proof of documents subject to valid objection if any raised by accused.

Court has option to accept affidavits of witnesses of both complainant and accused, instead of examining them in Open Court. They shall be available for cross examination as and when there is a direction to this effect by court.

Further in the case of ***Mandvi Cooperative Bank Ltd., vs. Nimesh B.Thakore*** reported in ***(2010) 3 SCC 83*** it was held that accused shall not be permitted to file chief examination in the form of affidavit.

(x) Examination of accused as witness:

i) Leave of the court is required as contemplated under section 315 Cr.P.C.

ii) In such petition notice to opposite party is formal as they issue is in between court and the accused.

iii) such leave of the court is not mandatory for examination of third party to the case as a witness in the defence of accused.

(xi) BURDEN OF PROOF :

(a) Presumptions:

Under Sec. 139 of the act, it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

Presumption under Section 118 (a) of the Act says until the contrary is proved, it shall be presumed that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration.

(b) Relevant case law :

The law as it stands now after ***Rangappa Vs. Sri Mohan*** reported in ***(2010) 11 SCC,*** the Apex Court has made it clear that " once the issuance of the cheque is admitted or proved, the trial court is duty bound to raise the presumption that the dishonoured cheque placed before it was indeed issued in discharge of a legally enforceable debt or liability of the amount mentioned therein. The presumption is a rebuttable one and it is for the accused to prove that the cheque in question had not been issued in discharge of a legally enforceable debt or liability.

In the case of ***Rohitbhai Jivanlal Patel v. State of Gujarat*** reported in ***2019 (5) SCALE 138***, even after purportedly drawing the presumption under Section 139 of the N.I. Act, the trial court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. The Hon'ble Supreme Court observed that this approach of the trial court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused.

The Apex Court held in ***Hiten P Dalal v. Bratindranath Banerjee*** reported in ***(2001) 6 SCC 16*** that a mere plausible explanation given by the accused is not enough to rebut the presumption and the accused has to necessarily disprove the prosecution case by leading cogent evidence that he had no debt or liability to issue the said cheque. The accused is not expected to rebut the presumption beyond all reasonable doubt. The standard of disproof is only on the level of preponderance of probabilities.

The nature of burden of proof has been succinctly laid down by the Hon'ble Supreme Court in ***M.S. Narayana Menon v. State of Kerala and Another*** reported in ***AIR 2006 SC 3366,*** wherein the Hon'ble Supreme Court held that the initial burden is upon the accused to rebut the presumption under section 139 of the Act. Only in the event of discharging the said initial burden, the onus shifts to the complainant.

In ***M.M.T.C. Ltd. &Anr. v Medchal Chemicals and Pharma (P) Ltd. & Anr.*** reported in ***(2002) 1 SCC 234***, the Hon'ble Supreme Court has held that there is no requirement under the law that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability is on the accused.

(c) Material required to discharge the burden of the complainant:

i) Documents filed by the complainant

ii) There is no dispute that the cheque has been drawn on the account of the accused.

iii) Non denial of signature of accused on the instrument.

If the above three conditions are fulfilled, then trial court has a bounded duty to raise the presumption an enumerated under section 139 of N.I.Act.

(d) Scope of presumption under section 139:

In the case of ***Krishna Janardhan Bhat vs. Dattatreya Hegde,*** reported in ***(2008) 4 SCC 54***, the Hon'ble Supreme Court held that section 139 merely raised presumption in favour of holder in due course of cheque that said cheque has been issued for discharge of any debt or other liability, so existence of legally recoverable debt is not a matter of such presumption.

Further in the case of ***Rangappa vs. Sree Mohan*** reported in ***(2010) 11 SCC 441*** the Hon'ble Supreme Court held that the presumption under section 139 extends beyond existence of legally enforceable debt or liability. Latest pronouncement on that point is 'Jain P. Jose vs. Santhosh and another, dt.10.11.2022'.

Hence when legally enforceable debt is established and proved, presumption under section 139 can be taken and conviction can be given, unless the accused rebuts such presumption through probable defence.

(e) Reverse burden on accused – standard of proof:

i) Once a presumption under section 139 is drawn, then the burden (onus of proof) shifts to accused to show that their exists no liability/debt to be supported by subject cheque.

ii) Standard of proof require to dispel the presumption is preponderance of probabilities and accused need not enter into witness box. (No adverse inference

can be drawn against the accused). As held in ***M/s.Kumar Exports vs. Sharma Carpets,*** reported in ***(2009) 2 SCC 513.***

iii) To rebut the presumption, it is open for the accused to relay on evidence let by him or he can also rely on the material submitted by the complainant. Inference of probabilities can be drawn not only from the material brought on record by the parties but also by reference to the circumstances upon which they rely.

iv) In the case of ***Kishan Rao vs. Shankar Gowda*** reported in ***(2018) 8 SCC 165*** it was held that a mere denial of debt or liability cannot shift the onus of proof from accused to complainant. All which the accused needs to establish is a probable defence.

v) In the case of ***Basalingappa vs. Mudibasappa*** reported in ***(2019) 5 SCC 418*** it was held that whether a probable defence has been established is a matter to be decided on the facts of each case on conspectus of evidence and circumstances that exists. It becomes the duty of the courts to consider carefully and appreciate the totality of the evidence and then come to a conclusion whether in the given case, accused was shown that the case of the complainant is in peril for the reason that the accused has established a probable defence.

(f) Onus of proof when to be considered as dicharged by accused?

If the defence set by accused is probable and same is substantiated by material on record, then the onus will again be reverted back to the complainant to prove that the cheque is supported by consideration. Unless and until such presumption is dispelled by the accused, complainant need not prove any facts further for securing conviction of accused.

In the case of ***Pavan Dilip Rao Dike vs. Vishal Narendrabhai Parmar,*** reported in ***2019 (3) RCR (Criminal) 863*** it was held that no heavy burden can be placed on the complainant to prove debt. Once a presumption has been drawn against accused under section 139, the burden to prove that the cheque in question was issued for some other purpose other than discharging legal debt or liability is upon accused.

(xii) When evidence as to financial capacity of complainant is required to be adduced?

If nothing was averred in the reply notice as to the capacity of the complainant to lend the amount, at first instance the payee need not adduce evidence in that aspect as held in the case of ***Tedhi Singh vs. Narayana Dass Mahant, Crl.Appeal No.362/2022, dt.07.03.2022***.

(xiii) Examination of accused under section 313 Cr.P.C in the absence of accused:

In the case of ***Keya Mukherjee vs. Magma Leasing Ltd.,*** reported in ***AIR 2008 SC 1807*** it was held that sworn affidavit accompanied with petition shall contain:

i) A narration of facts to satisfy the court of his real difficulties to be physically present in court forgiving such answers.

ii) An assurance that no prejudice would be caused to him, in any manner, by dispensing with his personal presence during such questioning.

iii) An undertaking that he would not raise any grievance on that score at any stage of case.

(xiv) Applicability of Probation of Offenders Act:

The provisions of Probation of Offenders Act are not applicable to N.I. Act cases. There is no question of reforming a person who is found guilty of the offence. If such benefit is given, th every object of the Act will be defeated, as held in the case of ***M.V.Nalinikanth vs. M.Rameshan*** reported in ***(2009) Crl.L.J. 1703***.

(xv) Can the court award the fine exceeding the limit as compensated under section 29 Cr.P.C?

Yes. First proviso to sub section (1) of section 143 empowers the court to award fine exceeding the limit as contemplated under section 29 Cr.P.C.

It was held in ***R. Vijayan v. Baby, (2012) 1 SCC 260*** that in regard to any prosecution for offences punishable under Section 138 of the Act, a First Class

Magistrate may impose a fine exceeding Rs 5000, the ceiling being twice the amount of the cheque.

If accused is involved in number of cheque bounce cases arising out of same transaction, a joint trial can be held and the sentence ordered in those cases shall run concurrently.

If offences arise in connection with issue of cheque or with respect to different transaction, then sentences shall run consecutively.

(xvi) Compensation:

In all the cases where accused is found guilty of the offence under section 138, the court shall consider awarding compensation to complainant in view of the provisions under section 138,143 of N. I. Act and section 357 Cr.P.C. The court must exercise the power and discretion to compensate the injury suffered by complainant, as held in the case of ***Hari Kishan vs. Sukhbir Singh*** reported in ***(1988) 4 SCC 551***.

In the case of ***R.Vijayan vs. Baby*** reported in ***(2012) 1 SCC 260***:

i) Either fine or compensation, but not both.

ii) When fine forms part of the sentence, compensation out of fine amount [section 357 (1)(b) Cr.P.C, now section 395 of Bharathiya Nagarik Suraksha Sanhitha, 2023], when it does not form part of sentence, compensation under section 357 (3) Cr,P.C, now section 395 of Bharathiya Nagarik Suraksha Sanhitha, 2023.

iii) The provision for levy of fine which is linked to the cheque amount and may extend to twice of cheque amount, renders section 357 (3) virtually infructuous in so far as cheque dishonour cases are concerned. Thus, compensation out of fine amount under section 357 (1) (b) Cr.P.C is the rule.

iv) After introduction of section 143 (2) which conferred special power and jurisdiction of the magistrate to pass sentence of imprisonment extending one year and fine exceeding Rs.5,000/- in trials under chapter-17 of N.I. Act, the cealing has to the amount of fine stipulated under section 29 Cr.P.C is removed. The only cealing is twice the amount of cheque.

v) Uniformity and consistency in procedure in awarding compensation along with simple interest at 9% per annum increases the credibility of cheque as Negotiable Instrument, and also of the courts of justice.

In the case of ***K.A.Abbas vs. Sahu Joseph*** reported in ***(2010) 6 SCC 230*** and ***R.Mohan vs. A.K.Vijaya Kumar*** reported in **(2012) 8 SCC 721** it was held that the court may consider granting of installments or time to pay such compensation amount. The court may also consider to impose in default sentence on the accused in case of failure to pay the compensation (Section 64 I.P.C).

Default sentence if under gone by accused, that does not absolve him from payment of compensation. It shall be recovered from his estate as it were a fine as provided by section 431 Cr.P.C, following the procedure contemplated under section 421 Cr.P.C.

(xvii) In case of death of accused:

If the accused dies before conclusion of trial, then the complaint against him will be abated. If death takes place after conviction, then fine amount and compensation amount can be recovered from his legal heirs who are in possession of the estate of deceased. In such an event his legal heirs can challenge conviction of deceased, as held in case of ***State of Kerala vs. Narayani Amma Kamala Devi*** reported in **1962 AIR 1530**

(xviii) How can sentence can be imposed on a company?

While imposing substantial sentence, court can impose fine on the corporate body besides passing sentence of imprisonment against the officer in charge, as held in the case of ***CBI vs. Blue Sky Tie – U.P. Pvt. Ltd.,*** reported in ***2012 AIR SCW 1098***.

INTERIM COMPENSATION AND IT'S RECOVERY:

(i) Interim compensation:

The power under sub-section (1) of Section 143-A is to direct the payment of interim compensation in a summary trial or a summons case upon the recording of

the plea of the accused that he was not guilty and, in other cases, upon framing of charge.

Section 143A empowers trial court to order the drawer of the cheque to pay interim compensation not exceeding 20% of the cheque amount to the complainant.

It was held in ***Rakesh Ranjan Shrivastava v. State of Jharkhand*, (2024) 4 SCC 419** that clause (*b*) of sub-section (1) of Section 143-A will apply only when the case is being tried as a warrant case. In the case of a summary or summons trial, the power under sub-section (1) of Section 143A can be exercised after the plea of the accused is recorded.

(ii) What is the apppriate stage to file petiton for interim compensation?

In the decision of ***Pawan Bhasin vs. State of U.P., Crl.Appeal No.1807/2023, dt.*** 07.07.2023, the Hon'ble Supreme Court held that such plea can be made only after the accused has pleaded not guilty, not before that stage. Section 143 (1)(a).

(iii) When complainant claim interim compensation?

In the decision of ***G.J.Raja vs. Tejraj Surana*** reported in ***(2019) 19 SCC 469*** it was held that section 143A is prospective and confined to cases where offences were committed after the introduction of section 143A, i.e. the cases wherein the cause of action arises after 01.09.2018.

(iv) Criteria for grant of interim compensation:

In the case of ***V.Krishna Murthy vs. Dairy Classic Ice creams Pvt. Ltd.,*** reported in ***2022 SCC online Kar 1047*** it was held that the conduct of the accused is relevant consideration while deciding the application for interim compensation. The discretion to be exercised by the magistrate is two fold, firstly whether the accused cooperates with the court for early disposal of the case, secondly, the percentage of compensation (for which cheque amount is the criteria) etc. It is not mandatory to award interim compensation in every case.

(v) Recovery of the interim compensation:

In case, accused failed to pay interim compensation, sub section 5 of section 143A states that the interim compensation payable under this section can be recovered as if it were a fine under section 421 Cr.P.C(now 461 of Bharatiya Nagarik Suraksha Sanhita, 2023), so that accused cannot be fastened with any other disability including denial of right to cross examine the witnesses examined on behalf of the complainant, as held in the case of ***Noor Mohammed vs. Khurram Pasha*** reported in ***(2022) 9 SCC 23 dt. 02.08.2022*** by Hon'ble Supreme Court.

In the case of ***Rakesh Ranjan Shrivastava v. State of Jharkhand, (2024) 4 SCC 419***, it was held that non-payment of interim compensation fixed under Section 143-A has drastic consequences. To recover the same, the accused may be deprived of his immovable and movable property. If acquitted, he may get back the money along with the interest as provided in sub-section (4) of Section 143-A from the complainant. But, if his movable or immovable property has been sold for recovery of interim compensation, even if he is acquitted, he will not get back his property.

Further, the interim compensation amount can be recovered by the trial court by issuing a warrant for attachment and sale of the movable property of the accused. There is also a power vested with the court to issue a warrant to the Collector of the District authorising him to realise the interim compensation amount as arrears of land revenue from the movable or immovable property, or both, belonging to the accused.

COMPOUNDING OF OFFENCES – EXECUTION OF LOK ADALAT AWARD:

(i) Section 147 of N.I. Act enables parties to compound all the offences made punishable under the Act.

In the case of ***Damodar S.Prabhu vs. Sayed Babulal H,*** reported in ***(2010) 5 SCC 663*** it was held that it suggests imposing costs on accused to put an end to his dilatory practices to come forward for compounding of offence. Guidelines were given that an application for composition of offence is made by accused at first or

second hearing of the case, compounding may be allowed without cost. At subsequent stage before trial court, 10% of the cheque amount shall be imposed as cost, compensation before Sessions Court or High Court, the percent shall extend upto 15% and if before Supreme Court, the percent will be 20%.

In the case of ***M.P.State Legal Services Authority vs. Prateek Jain and another*** reported in ***(2014) 10 SCC 690*** it was held that discretion was given to the courts holding that in appropriate case and on positive attitude of the parties, the court can always reduce the costs by imposing minimal cost or even waive them after recording the valid reasons for giving such relaxation after hearing the accused.

(ii) Recent decisions on compounding:

In ***Raj Reddy Kallem v. The State of Haryana & Anr.*** *reported in* ***[2024] 5 S.C.R. 203***, the Supreme Court held that "the Courts cannot compel the complainant in a cheque dishonour case to give consent for the compounding of the complaint merely because the accused has compensated the complainant."

In ***M/s. New Win Export & Anr. Vs. A. Subramaniam,*** *reported in* ***[2024] 5 S.C.R. 203*** it was held:

"The settlement agreement can be treated to be compounding of the offence. Section 320 (5) of CrPC provides that if compounding has to be done after conviction, then it can only be done with the leave of the Court where appeal against such conviction is pending.

In cases where the accused relies upon some document for compounding the offence at the appellate stage, courts shall try to check the veracity of such document, which can be done in multiple ways. When the accused and complainant have reached a settlement permissible by law and the Court has also satisfied itself regarding the genuineness of the settlement, we think that the conviction of the appellants would not serve any purpose and thus, it is required to be set aside.

Keeping in mind that the 'compensatory aspect' of remedy shall have priority over the 'punitive aspect', courts should encourage compounding of offences under the NI Act, if parties are willing to do so."

(iii) Permission to compound the offence is not necessary:

Section 147 of N.I.Act makes it clear that offence punishable under the provisions of NI Act is compoundable in nature. In ***Rameshbhai Sombhai Patel v. Dineshbhai Achalanand Rathi, 2004 SCC Online Gujarath 469***, it was held that no formal permission to compound the offence of section 138 of N.I.Act is required. If the Court satisfies that the complainant has been duly compensated, accused can be discharged in the cases of section 138 of N.I.Act.

(iv) No question of any pecuniary jurisdiction required to be considered by the Lok Adalat:

In ***M/S. Subhash Narasappa Mangrule vs Sidramappa Jagdevappa Unnad*** reported in ***AIR 2009 (NOC) 1890 (BOM)*** it was held that "Once the parties entered into compromise before the Lok Adalat, and at that time no question of any pecuniary jurisdiction was raised and/or required to be considered by the Lok Adalat. Therefore, once the award is passed, it is executable under CPC."

(v) Execution of lok adalat award:

In the case of ***Arun Kumar vs. Anitha Mishra and others,*** reported in **(2020) 16 SCC 118** it was held that complaint under section 138 is maintainable against dishonour of cheque issued pursuant to Lok Adalat Award.

Further in the case of ***K.N.Govinda Kutty Menon vs. C.D.Shaji*** reported in **AIR 2012 Supreme Court 719** Hon'ble Supreme Court made the following observations:

- In view of the unambiguous language of Section 21 of the Act, every award of the Lok Adalat shall be deemed to be a decree of a civil court and as such it is executable by that Court.

- The Act does not make out any such distinction between the reference made by a civil court and criminal court.

- There is no restriction on the power of the Lok Adalat to pass an award based on the compromise arrived at between the parties in respect of cases referred to by various Courts (both civil and criminal), Tribunals, Family court, Rent Control Court, Consumer Redressal Forum, Motor Accidents Claims Tribunal and other Forums of similar nature.

- Even if a matter is referred by a criminal court under Section 138 of the Negotiable Instruments Act, 1881 and by virtue of the deeming provisions, the award passed by the Lok Adalat based on a compromise has to be treated as a decree capable of execution by a civil court.

CONCLUSION :

The important advances in cheque dishonor cases under Section 138 of the Negotiable Instruments Act have been addressed in this paper. It is found in many cases that the accused challenged criminal complaints more on technical glitches, even though there were no sufficient funds in the bank account of the drawer to honour the cheque. In some cases, even for small amount of cheque dishonour, the accused travel up to the apex court of the country seeking justice and to save personal honour and dignity from the disgrace of getting imprisoned. Despite deterrent punishment being provided under law, complaints against cheque dishonour triggered an avalanche of litigations across the country, which remain unstoppable. Filing of frivolous complaints will be reduced to certain extent in view of the sections 143A and 148 that mandate interim compensation to the complainant payable by the accused. Non-payment of interim compensation fixed under Section 143A has drastic consequences. To recover the same, the accused may be deprived of his immovable and movable property. The judicial and legislative framework supports a pragmatic approach to cheque dishonour cases that emphasizes on settlement and recovery. Therefore, the 'compensatory aspect' of remedy shall have priority over the 'punitive aspect', courts should encourage compounding of offences under the NI Act, if parties are willing to do so.

Submitted by

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Kakinada