DISTRICT JUDICIARY
ANANTHAPURAMU

“OFFENCES UNDER SPECIAL ENACTMENTS”

PAPER PRESENTATIONS

WORKSHOP-III

YEAR-2024

Offence under Section 138 of Negotiable Instrument Act

Special emphasis on

(a) Offence under Section 138 of Negotiable instrument Act ingredients and case Law

(b) Cognizance, Limitation, jurisdiction – a study

(c) Interim compensation and its recovery.

(d) Compounding of offence – execution of Lok-Adalath Award.

Presented by:

Smt. B.Nirmala,
Additional Civil Judge (Senior Division)
Ananthapuramu.

Introduction

The Negotiable Instrument Act 1881 (hereafter referred as N.I. Act) was originally drafted in 1866 by the third Indian Law Commission and introduced in December 1867 in the counsel and it was referred to Selection Committee. The draft prepared for the 4th time was introduced in the counsel and was passed into law in 1881 being the Negotiable Instrument Act (Act No.26 of 1881).

The word Negotiable means “Transferable by delivery and instrument in means in written document by which a right is created in favour of some person or persons. Thus the term Negotiable Instrument literally means a written document which creates a right in favour of somebody and is freely transferable.

In view of decision ***Vinaya Devanna Nayak vs Ryot Sewa Sahakari Bank Limited reported in AIR 2008 SC 716***, wherein the Hon’ble court held that “ in the world of business, the cheque, as a negotiable instrument, was losing its credibility because of lack of responsibility on the part of drawer. To bring back the credibility, to inculcate faith in the efficacy of the banking operations in transacting business on Negotiable instrument in general to bring the erring drawer to book, so that such irresponsibility is not perpetuated, to protect the honest drawer, to safeguard the payee who is almost a loser, this section was brought on statue.”

Further in view of decision ***Birsingh vs Mukesh Kumar reported in (2019) 4 SCC 197***, wherein the Hon’ble court held that “" If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who

signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the **26** cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted."

The enactment of Negotiable Instrument Act Section 138 to 142, chapter XVII were inserted in the Act vide section 4 of Banking, Financial Institution and Negotiable instrument Laws (Amendment) Act, 1988 (Act 66 of 1988). these sections came into force with effect from 29.03.1959. Subsequently, the Negotiable Instrument Act in the year 2015 (inserting of sub section in explanation 1 (a), explanation III in Section 6, Section 142(2) and 142-A of N.I Act) and in the year of 2018 (insertion of Section 143A and Section 148 of Negotiable Instrument Act).

Negotiable Instruments are of following kinds.

1. Promissory notes

2. Bill of Exchange

3. Cheque.

Section 138 of Act deals with dishonor of cheque. It has no concern with dishonor of other negotiable instruments.

Section 6 of 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 purposes 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 recognised as such by the Reserve Bank of India.

Explanation III.—For the purposes of this section, the expressions "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.

- **Kinds of Cheques**:

In view of decision ***Nitin Chadha vs. M/s Swastik Vegetable Products Pvt. Ltd. & Anr., 2015(3) RCR (Civil) 872 (P&H)*** the Hon'ble High Court explained the kinds of cheques as under:

1. Open cheque: The issuer of the cheque would just fill the name of the person to whom the cheque is issued, writes the amount and attaches his signature and nothing else. This type of issuing a cheque is also called bearer type cheque also known as open cheque or uncrossed cheque. The cheque is negotiable from the date of issue to three months. The issued cheque turns stale after the completion of three months. It has to be revalidated before presenting to the bank.

2. Bearer cheque: Same as Open Cheque

3. Crossed cheque: It is written in the same as that of bearer cheque but issuer specifically specifies it as account payee on the left hand top corner or simply crosses it twice with two paralled lines on the right hand top corner. The bearer of the cheque presenting it to the bank should have an account in the branch to which the written sum is deposited. It is safest type of cheques.

4. Account Payee cheque: Same as Crossed Cheque

5. Self cheque: A self cheque is written by the account holder as pay self to receive the money in the physical form from the branch where he holds his account.

6. Pay yourself cheque: The account holder issues this type of crossed cheque to the bank asking the bank to deduct money from his account into bank's own account for the purpose of buying banking products like drafts, pay orders, fixed deposit receipts or for depositing money into other accounts held by him like recurring deposits and loan accounts.

7. Post dated cheque: A PDC is a form of a crossed or account payee bearer cheque but post dated to meet the said financial obligation at a future date.

8. Local cheque: A local cheque is a type of cheque which is valid in the given city and a given branch in which the issuer has an account and to which it is connected. The producer of the cheque in whose name it is issued can directly go to the designated bank and receive the money in the physical form. If a given city's local cheque is presented elsewhere it shall attract some fixed banking charges. Although these type of cheques are still prevalent, especially with nationalised banks. It is slowly stated to be removed with at par cheque type.

9. At par cheque: With the computerisation and networking of bank branches with its head quarters, a variation to the local cheque has become common place in the name of at par cheque. At par cheque is a cheque which is accepted at par at all its branches across the country. Unlike local cheque it can be presented across the country without attracting additional banking charges.

10. Banker's cheque: It is a kind of cheque issuedby the bank itself connected to its own funds. It is a kind of assurance given by the issuer to the client to alley your fears. The personal account connected cheques may bounce for want of funds in his account. To avoid such hurdles, sometimes, the receiver seeks banker's cheque.

11. Traveller's cheque: They are a kind of an open type bearer cheque issued by the bank which can be used by the user for withdrawal of money while touring. It is equivalent to carrying cash but in a safe form without fear of losing it.

12. Gift cheque: This is another banking instrument introduced for gifting money to the loved ones instead of hard cash."

The ingredients of offence under Section 138 of N.I. Act:-

Though Section 138 of N.I. Act penalizes the dishonor of a cheque, however, dishonor of cheque is, by itself, not an offence under section 138 of

N.I. Act. To became an offence, the following ingredients have to be fulfilled. They are:

- Cheque is issued by drawer
- The payee/holder presents it for payment
- The collecting bank informs payee / holder about dishonor of cheque
- The payee or the holder in due course of a cheque should have given notice demanding payment within 30 days from the drawer in respect of information of dishonor of cheque from the bank
- Notice can be served by ordinary post or even telegram.
- The drawee is liable only if he fails to make payment within 15 days of such notice period.
- The payee or holder in due course of the cheque dishonored should have made a complaint within one month of cause of action arising out of Section 138.

There is time frame in respect of offence under section 138 of Negotiable Instrument Act:-

Section 138 proviso (a): the cheque has to be presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, 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. Hence as of now, the cheque has to be presented within **three months** from the date on which it was drawn.

Section 138 proviso (b): the payee or holder in due course of a cheque has to make a demand for payment of the amount due by giving a notice in writing to the drawer of the cheque within 30 days of receipt of information by him from the bank regarding the dishonor of the cheque.

Section 138 proviso (c): the drawer of cheque has to fail to make the payment of the amount to the payee or holder in due course within 15 days of the receipt of said notice.

Section 142: the complaint has to be filed within one month on the date on which the cause of action arises under clause (c) of the Proviso to Section 138 of N.I Act.

In view of decision ***Saketh India Ltd., vs Indian Securities Ltd., reported in (1999) 3 SCC Page 1***, "it was held by the Hon'ble Supreme Court that ordinarily in computing time, the rule observed is to exclude the first day and to include the last, and 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. The 15th day is to be excluded for counting the period of one month. 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."

Further in view of decision ***Indra Kr.Patodia vs Reliance Industries Ltd., reported in AIR 2013 SC 426,*** wherein the Hon'ble court held that " 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.

Presumptions:-

There is presumptions under Section 118 and 139 of the Negotiable Instruments Act in favour of holder of the cheque. Until contrary is proved, presumption is in favour of holder of cheque that it has been drawn for discharge of debt or liabilities. However, it is rebutable one and accused can rebut it without entering into witness box, through cross examination of the prosecution witnesses. Complainant is not absolved from liability to show that

cheque was issued for legally enforceable debt or liability. Burden on accused in such case would not be as light as it is in the cases under sec.114 of the Evidence Act.

In case of " ***Goa Plast Pvt. Ltd. vs. Shri ChicoUrsula D' Souza 1996 (4) All MR 40***" wherein the Honurable court held that "relations between accused and complainant were of employee and employer. No evidence led to show that accused was liable to pay any due or part thereof and thus liability was not proved. Similarly, it was not proved that the cheque was given towards those liabilities. Accused much prior to presentation of cheques to the Bank had appraised the complainant that he was not liable to pay any amount, and therefore, stopped payment. Bombay High Court had observed that complainant failed to prove that cheque was issued for discharge of legal liabilities.

Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139. It merely raises a presumption in favour of holder of the cheque that the same has been issued for discharge of any debt or other liability.

The cheque must have been drawn for discharge of existing debt or liability.

- **Legally recoverable debt:**

In view of decision ***Somnath vs. Mukesh Kumar, 2015(4) Law Herald 3629 (P&H)*** it was held by Hon'ble High Court the complaint under Section 138 is not maintainable when the cheque in question had been issued qua a time barred debt.

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

In view of ***decision A. Yesubabu vs D. Appala Swamy And Anr. on 29 August, 2003***, wherein the Hon'ble court held that " 21. A perusal of above provision makes clear that a fresh period of limitation shall be computed from the time when the acknowledgement was so signed. Even assuming for a moment that the accused gave the cheque in the year 1990 i.e. on 02.4.1990 acknowledging the previous debt, even that acknowledgement of debt is also time-barred on the facts of the case inasmuch as the cheque in question was issued 3 years later, i.e., on 25.8.1994. Therefore, the complainant cannot legally enforce the liability under Ex. P1 and Ex. P2 receipts. Therefore, the findings of both the Courts below that the complainant has proved his case against the accused for the offence under Section 138 of the Negotiable Instruments Act cannot be sustained and the conviction and sentence recorded against the appellant-accused has to be set aside."

- Complainant has to show to the Court that he had capacity to lend huge amount to the accused.

In view of decision ***Basalingappa vs Mudibasappa on 9 April, 2019*** where in the Honourable court held that" 29. High Court without discarding the evidence, which was led by defence could not have held that finding of trial court regarding financial capacity of the complainant is perverse. We are, thus, satisfied that accused has raised a probable defence and the findings of the trial court that complainant failed to prove his financial capacity are based on evidence led by the defence. The observations of the High Court that findings of the trial court are perverse are unsustainable. We, thus, are of the view that judgment of the High Court is unsustainable."

Section 142 as amended by the amendment Act of 2015:

1) Where Cheque is delivered for collection through an account- where payee maintains the account.
2) Where cheque is presented for payment by the payee otherwise through an account- where drawer maintains the account.

◆ **NOTICE:-**

Notice must be in writing informing the cheque has been returned unpaid also a demand of cheque amount must be made and it should be within 30 days from receipt of information of dishonor.

On the issue of deemed service, the Hon'ble Supreme Court has in C.C. Alavi Haji v. Palapetty Muhammad & Anr reported in (2007) 6 SCC 555 held as follows. :"According to Section 114 of the (Evidence) Act, read with illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the General Clause Act 1897 Act, is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Act is extracted below:

Meaning of service by post - Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression served by post, whether the expression serve or either of the expressions give or send or any other expression is used, then, unless a different intention appears, the service shall

be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that the notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business."

In C.C. Alavi Haji (supra), 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.

- **Who can file the complaint:-**

The cases under the N.I. Act have a distinction from other criminal cases in the fact that locus standi to prosecute is an essential requirement for the trial. Payee or holder in due course is a competent person to file complaint. Complaint must be by corporal person capable of making physical appearance in court. In case of company and firm natural person should represent it. Complaint can be filed by Power of Attorney Holder.

A complaint under Section 138 of the Act can be filed only 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. When the payee is a natural person, he can himself file the complaint or can do the same through his authorized representative in whose favour he has given the power of attorney or authority letter. But when the payee or the holder in due course, as the case may be, is an artificial or juristic person, such as a partnership firm, body corporate or a company constituted under the Companies Act, the question may arise as to who would file the complaint, in as much as, the firm or the company being a juristic person is not capable of coming to the court. Therefore, whenever a complaint is filed by a firm or company or a juristic person, it must be represented by a natural person who would be the defacto complainant for the purpose of the trial.

Where the payee is a proprietary concern :

The complaint can be filed by

i. the proprietor of the proprietary concern, describing himself as the sole proprietor of the "payee"

ii. the proprietary concern describing itself as a sole proprietary concern, represented by its sole proprietor; and

iii. the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor."

Where the payee is a partnership firm :

Every partner is an agent of the firm and his other partners for the purpose of business of the firm and the acts of every partner bind the firm and his partners, unless, of course, the partner had, in fact no authority to act for the firm and his other partners.

Thus, 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. However, a question may arise as to whether a single partner can grant Power of Attorney to a representative to file a complaint. Sections 9, 12(a), 12(b), 18 and 19 of the Partnership Act, 1932 clearly empowers 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.

Whether a partner of an unregistered firm can file a complaint U/sec.138 of N.I. Act?

The said issue came before 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***) Whereas the Hon'ble High Court held that " the Negotiable Instruments Acts specifically laid down that the debt or other liability means Legally enforceable of Legal liability 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 of 138 NI Act."

Where the Payee is a Company :

When the payee or holder in due course happens to be a company, then the question arises as to who may file the complaint. The Hon'ble Apex Court been held in" ***Dale & Carrington Investment (P) Ltd. and Another v.***

P.K. Prathapan and Others" reported in (2005) 1 SCC 212, that company being an incorporeal juristic person, acts through its Board of Directors and the Board of Directors takes decisions on the activities of the company by adopting resolutions in its meetings as per the memorandum and articles of the company. It does not require pointing out here that a single director cannot act on his own on behalf of the company. His actions require ratification from the Board. The Board of Directors of the complainant company will have to take a resolution whereby the person who is likely to act as the de facto complainant would have to be granted a Power of Attorney to do so.It is pertinent to mention here that the Power of Attorney as well as the Board Resolution will have to be adequately proved during the course of the trial or the complaint will cease to be maintainable.

In view of the decision ***M/s TRL Krosaki Refactories Ltd., vs SMS Asia Pvt., Limited and another (2022) 7 SCC 612)***, wherein the Hon'ble court held that "when a company is the payee of cheque based on which a complaint is filed under Section138 of N.I. Act, the complainant necessarily should be the company which would be represented by an employee who is authorized. In such a case the primafacie indication in the complaint and sworn statement of either oral or affidavit, that the complaint is represented by authorized person who has knowledge would be sufficient."

Lack of Authorization is a Curable Defect :

The Hon'ble Supreme Court held in ***M.M.T.C. Ltd. and Another v. Medchl Chemicals and Pharma (P) Ltd. And Another reported in (2002) 1 SCC 234***, the Hon'ble Supreme Court has held that, the only eligibility criteria prescribed by Section 142 N.I. Act for maintaining a complaint under section 138 is that the complainant must be the payee or the holder in due course. However, 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.

In view of decision ***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.

When Can the Functions of a Power of Attorney Holder be Further Delegated?

In view of the decision ***A.C. Narayanan and Anr. v. State of Maharashtra and Ors reported in AIR 2014 SC 630,*** wherein the Hon'ble court held that " has made it clear 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.

Power of Attorney Holder Must Have Personal Knowledge of the Transaction

In view of decision ***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."

In view of decision ***Kirshna Texport & Capital Markets Ltd vs Ila A Agrawal & Ors on 6 May, 2015*** wherein the Honourable Supreme court held that "16. In our view, Section 138 of the Act does not admit of any necessity or scope for reading into it the requirement that the directors of the Company in question must also be issued individual notices under Section 138 of the Act. Such directors who are in charge of affairs of the Company and responsible for the affairs of the Company would be aware of the receipt of notice by the Company under Section 138. Therefore neither on literal construction nor on the touch stone of purposive construction such requirement could or ought to be read into Section 138 of the Act. Consequently this appeal must succeed. The order passed by the High Court is set aside. Since the matter was at the stage of considering application for leave to appeal and the merits of the matter were not considered by the High Court, we remit the matter to the High Court for fresh consideration which may be decided as early as possible. Concluding so, we must record that the decision of the Division Bench of the Madras High Court in B. Raman & Ors. Vs. M/s. Shasun Chemicals and Drugs Ltd. (supra) was incorrect and it stands overruled. The appeal is allowed in these terms."

- Offence under Section 138 N.I. Act to be tried summarily:-

For offence punishable under Section 138 of Act, the judicial Magistrate Ist Class shall try the offence summarily and the provisions of section 285 to 288 of B.N.S.S (Sec262 to 265 of Cr.P.C) shall apply.

Section 285 of B.N.S.S (Sec.262 Cr.P.C). provides the procedure provided for trial of summons case shall be followed.

Procedure in trial of summons case :

1. On appearance of accused notice of accusation to be served.

2. Evidence of prosecution

3. Section 351 B.N.S.S (Sec. 313 Cr.P.C.)

4. Evidence of defence

5. Judgment of acquittal or conviction- which shall include

(a) Substance of evidence

(b) Brief statement of reasons for the findings

However in case of conviction in a summary trial, the Magistrate can pass a sentence of imprisonment for a term not exceeding one year and an amount of fine not exceeding Rs.5000/-.

In view of decision **J.V. Bahurani v. State of Gujarat reported in (2014) 10 SCC 494, it has been observed by the Hon'ble Supreme Court as follows:**

"Sub-section (1) of Section 143 of the N.I. Act makes it clear that all offences under Chapter XVII of the N.I. Act shall be tried by the Magistrate 'summarily' applying, as far as may be, provisions of Sections 262 to 265 of Code of Criminal Procedure. It further provides that in case of conviction in a summary trial, the Magistrate may pass a sentence of imprisonment for a term not exceeding one year and a fine exceeding Rs.5,000/-. Sub-section (1) of Section 143 of the N.I. Act further provides that during the course of a summary trial, if the Magistrate is of the opinion that the nature of the case requires a sentence for a term exceeding one year or for any other reason, it is undesirable to try the case summarily, he must record the reasons for doing so and go for a 'regular trial'. Thereafter, the Magistrate can also recall any witness who has been examined and proceed to hear or rehear the case.

The accused shall not be permitted to file his chief examination evidence in the form of affidavit in view of the law in **CRIMINAL PETITION**

No.1594 of 2020 wherein the Honourable court held that “13. In that view of the matter, the Petitioner being Accused cannot be permitted to file an affidavit in lieu of Examination-in-Chief, as the provision under Section 145 (1) only entails a complainant to tender evidence in such a mode. When the language of the provision is clear and plain, and provides only for one meaning, it should be understood that the Act speaks for itself. Accordingly, point is answered. As such, the present petition is liable to be dismissed.”

◆ **Cause of action:**

Cause of action arises when notice is served on the drawer and drawer fails to make payment of the amount of cheque within 15 days. Limitation to file complaint is one month from the date of cause of action. However, by Amendment Act of 2002 court is empowered to take cognizance of the offence even if complaint is filed beyond one month by condoning the delay if sufficient cause is shown. It has been held in various other cases that 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.).

◆ **Status of accused**:

It is the only drawer of the dishonoured cheque who can be prosecuted under Section 138 of N.I. Act and no one else.

In view of decision ***Ashok Shekharamani and Ors vs State of A.P. and another, Crl.Appeal No.897 of 2023 dt.03.08.2023***, wherein the Hon'ble court held that "Section 141 provides for constructive liability. It postulates that a person, in charge of and responsible to the company, in the context 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 punishable under Section 138 of N.I. Act who are responsible for the conduct of its business."

- **Punishment**:-

After amendment of 2002 the imprisonment that may be imposed may extended to two years, while fine may extended to twice the amount of cheque. However, the trial is conducted in summary way, then Magistrate can pass sentence or imprisonment not exceeding one year and amount of fine exceeding Rs.5000/-. There is no limitation for awarding compensation.

In view of decision ***Dilip vs Kotak Mahendra Company Ltd., 2008 (1) Mh.L.J 22,*** wherein the Hon'ble court held that "the amount of compensation sought to be imposed must be reasonable and not arbitrary. Before issuing a direction to pay compensation the capacity of accused to pay the same must be judged. An enquiry in this behalf even in summary way may be necessary. Sub section 3 of Section 357 does not impose any limitation but powers thereunder should be exercised only in appropriated cases. Ordinarily it should be lesser than the amount which can be granted by the Civil court upon appreciation of evidence. A criminal case is not a substitution for Civil suit.

- **Discharge of the accused :-**

In view of decision ***Subramanium Sethuraman vs State Of Maharashtra & Anr on 17 September, 2004*** wherein the Honourable Apex court held that "The next challenge of the learned counsel for the appellant

made to the finding of the High Court that once a plea is recorded in a summons case it is not open to the accused person to seek a discharge cannot also be accepted. The case involving a summons case is covered by Chapter XX of the Code which does not contemplates a stage of discharge like Section 239 which provides for a discharge in a warrant case. Therefore, in our opinion the High Court was correct in coming to the conclusion once the plea of the accused is recorded under Section 252 of the Code the procedure contemplated under Chapter XX has to be followed which is to take the trial to its logical conclusion."

In view of decision **Iris computers Ltd .Vs. Askari Infotech Pvt .Ltd** where in the Honourable court held that " It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provisions of Sections 200 and 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking Section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of the Code."

Cognizance, Limitation, jurisdiction – a study:

Section 142 of the N.I. Act creates bar against taking cognizance of the offence under Section 138 of the N. I. Act except upon complaint in writing by payee or holder in due course. Complaint may be instituted by Power of Attorney Holder. However, if the holder of Power of Attorney has merely lodged complaint without being aware of the facts, then recording the statement of payee becomes imperative. Once Magistrate is satisfied that there is proper compliance of the proviso to Sec.138 N. I. Act and jurisdictional conditions are fulfilled, Magistrate shall issue the process. Service of summons by speed post or approved courier is recognized by Sec. 144 of N.

I. Act. If accused does not appear in response to summons or remains absent subsequent, a coercive process needs to be taken by the court. 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. It is common experience that in cases under Section 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. Though the provision contained in Sec.143 of the N. I. Act provides that cases under Section 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.

Before recording sworn statements of the complainants and his witnesses the Magistrate should take cognizance of offence.

Once cognizance is taken rightly or wrongly, the remedy that is available is only by challenging the same either before the Sessions court or before Hon'ble High court. When there is delay in filing the complaint, delay condonation application and after deciding delay condonation application cognizance has to be taken.

In view of decision ***P.K. Chowdary vs Commander, 48 BRTF (GREF)*** wherein the Honourable court held that "A Court of law cannot take cognizance of an offence, if it is barred by limitation. Delay in filing a complaint

petition therefore has to be condoned. If the delay is not condoned, the court will have no jurisdiction to take cognizance. Similarly unless it is held that a sanction was not required to be obtained, the court's jurisdiction will be barred."

The Magistrate Courts shall invariably register the cases under Section 138 of Negotiable Instruments Act initially as Summary Trial Cases . If all the above are duly complied, the Magistrates shall take cognizance of the offence on the date of filing itself without any delay and shall invariably register the case. All the Magistrate Courts trying the cases under Section 138 of Negotiable Instruments Act shall invariably follow the directions of the Hon'ble Supreme Court in Indian Banks Association Vs. Union of India, (2014) 5 SCC 590 as appended to this Practice Guidelines vide 'Annexure-A'.

In the decision of ***Indian Bank Association and others vs Union of India and others, reported in AIR 2014 Supreme Court 25 28***, general directions have been given by the Hon'ble Apex Court that " 21. Many of the directions given by the various High Courts, in our view, are worthy of emulation by the Criminal Courts all over the country dealing with cases under Section 138 of the Negotiable Instruments Act, for which the following directions are being given:-

DIRECTIONS:

1) Metropolitan Magistrate/Judicial Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinize the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons.

2) MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. Court, in appropriate cases, may take the assistance of the police or the nearby Court to serve notice to the

accused. For notice of appearance, a short date be fixed. If the summons is received back un-served, immediate follow up action be taken.

3) Court may indicate in the summon that if the accused makes an application for compounding of offences at the first hearing of the case and, if such an application is made, Court may pass appropriate orders at the earliest.

4) Court should direct the accused, when he appears to furnish a bail bond, to ensure his appearance during trial and ask him to take notice under Section 251 Cr.P.C. to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for re- calling a witness for cross-examination.

(5) The Court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be conducted within three months of assigning the case. The Court has option of accepting affidavits of the witnesses, instead of examining them in Court. Witnesses to the complaint and accused must be available for cross-examination as and when there is direction to this effect by the Court.

22. We, therefore, direct all the Criminal Courts in the country dealing with Section 138 cases to follow the above-mentioned procedures for speedy and expeditious disposal of cases falling under Section 138 of the Negotiable Instruments Act."

Jurisdiction

Considering the ingredients of Section 138 of N.I. Act referred in the decision K.Bhaskaran vs Shankaran reported in 1999 SC 3762, the Hon'ble Court had given jurisdiction to initiate the prosecution at any one of the following places.

1. Where the cheque is drawn

2. Where payment had to be made

3. Where cheque is presented for payment

4. Where cheque is dishonored

5. Where notice is served upto drawer.

However recently in case of Roopsingh Rathod vs State of Maharastra, the Hon'ble Appex court has addressed the issue of territorial jurisdiction of the courts trying offences under Section 138 of N.I. Act.

However, to increase the credibility of cheques as financial instruments and to clarify the issue of jurisdiction, the Parliament has enacted the Negotiable instruments (Amended Act) 2015. The amended Act of 2015, amended Section 142 to decisively play down the territorial jurisdiction of the courts deciding the cases under Section 138 of N.I. Act.

The amendment made in Section 142 (2) of N.I. Act reads as follows:

(2)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.

Explanation.— For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.

The offence under section 138 of N.I. Act is the result of series of Acts. The place of issuance of cheque, place of dishonor, place of receipt of notice,

place wherein the complainant and accused resides. In view of amendment under Section 142 of Negotiable Instrument Act, jurisdiction lies to the court wherein the complainant bank situated.

In view of decision ***Nishant Agarwal vs Kilash Kumar Sharma reported in 2013 (9) JT 188***, wherein the Hon'ble court held that " 16. Thus it is clear, if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the Act. In other words, the complainant can choose any one of those courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done. As the amplitude stands so widened and so expansive it is an idle exercise to raise jurisdictional question regarding the offence under Section 138 of the Act."

The court which has no jurisdiction has to return the complaint for proper presentation before jurisdictional court instead of dismissing the complaint.

Limitation

The period of limitation has to be counted from the date of receipt by the payee of the information from the bank. The cause of action arises on the 16th day of receipt of demand notice by the drawer and complaint should be filed within one month from that date. Section 142 of N.I. Act has prescribed an outer limit of one month for filing of a complaint from the date the cause of action arises.

In view of decision ***Saketh India Ltd., vs Indian Securities Ltd., 1999 (3) SCC 1,*** wherein the Hon'ble Supreme court held that "ordinarily in computing time, the rule observed is to exclude the first day and to include the last, and 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. The 15th day is to be excluded for

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

In view of decision ***Econ Antri Ltd., vs Rom Industries Ltd., AIR 2013 SC 3283***, wherein 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 N.I. Act, the period has to be reckoned by excluding the date on which the cause of action arose.

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.

Interim compensation and its recovery.

The court can make use Section 395 of B.N.S.S (Sec.357 (3) of Cr.P.C) and award compensation and also can impose sentence if the accused failed to payup the compensation so awarded.

In all the cases where the accused is found guilty of the offence under Section 138 of Negotiable Instruments Act, the Court shall consider awarding the compensation to the complainant party in view of the provisions under 138, 143 of Negotiable Instruments Act and Section 395 of B.N.S.S (Sec. 357 Cr.P.C.) The Court must exercise the power and discretion to compensate the injury suffered by the complainant (vide Hari Kishan Vs. Sukhbir Singh, (1988) 4 SCC 551). The Court shall also keep in mind the decisions of the Hon'ble Apex Court in this regard rendered in R.Vijayan Vs Baby, AIR 2012 SC 528 and Suganthi Suresh Kumar Vs. Jagdeeshan , (2002) 2 SCC 420. 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. (vide K.A.Abbas Vs Sabu Joseph (2010) 6 (2012) 8 SCC 230 and R.Mohan Vs. A.K.Vijaya Kumar, SCC 721.)

In view of decision ***H. Pukhraj vs D. Parasmal on 6 August, 2014*** where in the Honourable Apex court held that "6. Again, in R. Vijayan vs. Baby & Anr.2 this Court considered the same question. This Court also examined the need to award compensation to the complainant. This Court was of the opinion that the traditional view that the criminal proceedings are for imposing punishment on the accused, either punishment or fine or both, and there is no need to compensate the complainant, particularly if the complainant is not a victim in the real sense, but is a well-to-do financier or financing institution, gives rise to difficulties and complications. This Court further observed that in those cases where the discretion to direct payment of compensation is not exercised, it causes considerable difficulty to the complainant, as invariably, by the time the criminal case is decided, the limitation for filing civil cases would have expired. This Court further observed that as the provisions of Chapter XVII of the NI Act strongly lean towards grant of reimbursement of the loss by way of compensation, the courts should, unless there are special circumstances, in all cases of conviction, uniformly exercise the power to levy fine upto twice the cheque amount keeping in view the cheque amount and the simple interest thereon at nine per cent per annum as the reasonable quantum of loss and direct payment of such amount as compensation. This 2 (2012) 1 SCC 260 Court further observed that the direction to pay compensation by way of restitution in regard to the loss on account of dishonour of the cheque should be practical and realistic which would mean not only the payment of the cheque amount but interest thereon at a reasonable rate."

Section 143-A: In all trials under Sec.138 of Negotiable Instruments Act, when the accused is claiming for a regular trial, the Court may order to direct

the accused to pay the interim compensation to the complainant which shall not exceed 20% of the amount of cheque (Section 143-A). Such interim compensation shall be paid within 60 days from the date of order and the Court is competent to extend that time for further 30 days. In case of acquittal, the Court shall direct the complainant to repay the interim compensation amount with the bank interest rate to the accused within 60 days from the date of judgment and this time can also be extended for further 30 days. Interim compensation may be recovered as if it were a fine under Section 461 of B.N.S.S, 2023 (Sec.421 Cr.P.C). This interim compensation amount shall be adjusted against the final compensation ordered by the Court under Section 395 of B.N.S.S, 2023 (Sec.357 Cr.P.C) at the time of judgment.

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

The plea of interim compensation can be made only after the accused has pleaded not guilty, not before that stage.

The complainant claim interim compensation when the cause of action arises after 01.09.2018.

In view of decision ***G. J Raja Vs Tejraj Surana, reported in (2019) 19 SCC 469,*** Hon'ble Apex Court has held that "Sec. 143A of the Act is prospective and confined to cases where offences were committed after the introduction of sec. 143A , that is the cases wherein the cause of action arises after 01.09.2018."

In view of decision ***V Krishnamurthy Vs Diary 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 co-operates 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."

• Where the remedy lies for the complainant if the accused failed to pay the compensation? •

In view of decision ***Noor Mohammad Vs. Khurram Pasha , Crl.Appeal No. of 2022 , dt 2.08.2022)(SC)***, wherein the Hon'ble court held that "In case, the 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 u/Section 461 B.N.S.S (sec. 421 of Cr.P.C) , so the accused cannot be fastened with any other disability including denial of right to cross examine the witnesses examined on behalf of the complainant."

Section 148 - Power of Appellate court to grant interim compensation. The above provision is analogous to Section 143 (a) of the Act. The amount deposited can be released to the complainant with condition to refund it back with interest, pending appeal.

Section 138 of Act can be imposed only in terms of provisions of the Act, when fine is not imposed, compensation can be paid for loss or injury caused to the complainant by reason of commission of such offence. The fine can be recovered under Section 461 B.N.S.S (Sec.421 of Cr.P.C), Section 471 B.N.S.S (Section 431 of Cr.P.C) provides for legal fiction in terms whereof any money other than a fine shall be recovered as if it were a fine. Section 357 (2) would be attracted in such situation. There does not appear to be any reason as to why the amount of compensation should be held to be automatically payable, although the same is only to be recovered as if a fine has been imposed.

Compounding of offence – Execution of Lok-Adalath Award:

Section 147 of the Act, enables the parties to compound all the offences made punishable under the Act. Award passed by Lok-Adalath can be

executed before a Civil court as if it was passed by a Civil Court. In case of settlement of the case in any of these two modes, the award shall be drawn. In case of settlement before Lok Adalat, the parties shall be informed about the mode of execution of the award as per the Legal Services Authorities Act, 1987 by way of filing Execution Application, while treating that award as a decree.

In view of decision ***K.N.Govindan Kutty Menon Vs. C.D. Shaji*** , it is observed by the Hon'ble Appex court that "in view of language used in Section 21 of the Legal Service Authority Act, every award of the Lok adalat shall be deemed to be a decree of civil court and as such it is executable by that court."

In view of decision ***Arun Kumar Vs. Anitha Mishra and others, Crl Appeal No. 1580 / 2019 dt 18.10.2019*** , wherein the Hon'ble court held that complaint U/Sec.138 N.I.Act is maintainable against dishonour of cheque issued pursuant to lok adalat award."

Further in view of decision ***Sri Somasekhar Reddy vs Smt. G.S. Geetha in WP.No.23519/2018***, Hon'ble court held that " depending on the terms of compromise arrived at before Lok-Adalath it can be enforced as a Civil decree or in terms applicable provisions of Cr.P.C including that under Section 431 of Cr.P.C, if so provided in the compromise. In the event of default of a compromise arrived at before the Lok-Adalath, this court or trial court can on an application made by the complainant set-aside the compromise arrived at before the Lok-Adalath, restore the complaint on its file and proceed with the complaint or enforce the compromise as per the terms of compromise including by issuing of an FLW under Section 431 of the Cr.P.C."

On the date of first appearance of the accused or on the date to which the appearance of the accused is scheduled, the Magistrate Court shall furnish the copies of complaint and documents to the Accused, enquire about his capacity to engage counsel (or appoint a legal aid counsel for the accused

having no capacity to engage counsel) and then shall inform him about the guidelines in ***Damodar S.Prabhu Vs. Sayed Babalal H., (2010) 5 SCC 663*** Wherein the honourable Supreme court held that “An application for compounding made after several years not only results in the system being burdened but the complainant is also deprived of effective justice. In view of this submission, we direct that the following guidelines be followed:-

THE GUIDELINES

(i) In the circumstances, it is proposed as follows:

(a) That directions can be given that the Writ of Summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.

(b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the Court deems fit.

(c) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.

(d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount.

Let it also be clarified that any costs imposed in accordance with these guidelines should be deposited with the Legal Services Authority operating at the level of the Court before which compounding takes place.

In view of decision ***Madhya Pradesh State Legal Services Authority Vs. Prateek Jain, (2014) 10 SCC 690,*** Wherein the honourable Supreme

court held that “17. We are also conscious of the view that the judicial endorsement of the above quoted guidelines could be seen as an act of judicial law-making and therefore an intrusion into the legislative domain. It must be kept in mind that Section 147 of the Act does not carry any guidance on how to proceed with the compounding of offences under the Act. We have already explained that the scheme contemplated under Section 320 the CrPC cannot be followed in the strict sense. In view of the legislative vacuum, we see no hurdle to the endorsement of some suggestions which have been designed to discourage litigants from unduly delaying the composition of the offence in cases involving Section 138 of the Act. The graded scheme for imposing costs is a means to encourage compounding at an early stage of litigation. In the status quo, valuable time of the Court is spent on the trial of these cases and the parties are not liable to pay any Court fee since the proceedings are governed by the Code of Criminal Procedure, even though the impact of the offence is largely confined to the private parties. Even though the imposition of costs by the competent court is a matter of discretion, the scale of costs has been suggested in the interest of uniformity. The competent Court can of course reduce the costs with regard to the specific facts and circumstances of a case, while recording reasons in writing for such variance. Bonafide litigants should of course contest the proceedings to their logical end. Even in the past, this Court has used its power to do complete justice under Article 142 of the Constitution to frame guidelines in relation to subject-matter where there was a legislative vacuum.” It is clear from the reading of the aforesaid para that the Court made it clear that framing of the said guidelines did not amount to judicial legislation. In the opinion of the Court, since Section 147 of the Act did not carry any guidance on how to proceed with compounding of the offences under the Act and Section 320 of the Code of Criminal Procedure, 1973 could not be followed in strict sense in respect of offences pertaining to Section 138 of the Act, there was a legislative

vacuum which prompted the Court to frame those guidelines to achieve the following objectives:

(i) to discourage litigants from unduly delaying the composition of offences in cases involving Section 138 of the Act;

(ii) it would result in encouraging compounding at an early stage of litigation saving valuable time of the Court which is spent on the trial of such cases; and

(iii) even though imposition of costs by the competent Court is a matter of discretion, the scale of cost had been suggested to attain uniformity.

At the same time, the Court also made it abundantly clear that the concerned Court would be at liberty to reduce the costs with regard to specific facts and circumstances of a case, while recording reasons in writing for such variance."

The honourable Supreme court further held that "Therefore, in those matters where the case has to be decided/settled in the Lok Adalat, if the Court finds that it is a result of positive attitude of the parties, in such appropriate cases, the Court can always reduce the costs by imposing minimal costs or even waive the same. For that, it would be for the parties, particularly the accused person, to make out a plausible case for the waiver/reduction of costs and to convince the concerned Court about the same. This course of action, according to us, would strike a balance between the two competing but equally important interests, namely, achieving the objectives delineated in Damodar S. Prabhu (supra) on the one hand and the public interest which is sought to be achieved by encouraging settlements/resolution of case through Lok Adalats."

If the Court is satisfied that there is an element of settlement of the case, then it shall refer the case to Lok-Adalat or Mediation in accordance with the scheme prepared by NALSA.

In case of not settling the issue before the Lok Adalat or the Mediation, the case shall be posted for framing notice or the examination of the accused

under Section 274 of B.N.S.S (Sec 251 of Cr.P.C) about the accusation level against him. In case of denial of the accusation, the accused shall be called upon to file a defence statement in writing with supporting reasons. Then the Court shall consider the scope of calling the complainant for further chief examination for making documents and for cross examination on behalf of the accused.

Once the matter is compromised, then it must end in acquittal of the accused. There is no question of granting installments and acquitting the accused. The offence under Section 138 of the Act is preliminarily a Civil wrong. Burden of proof is on the accused in view of presumption under Section 139 but standard of such proof is preponderance of probabilities. The same has to be normally tried summarily as per the provisions of summery trial under Cr.P.C. But with such variations as may be appropriate to proceed under chapter 22 of the Act. Principal of Section 281 of B.N.S.S (Sec.258 Cr.P.C) will apply and court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect. The object of the provision being preliminarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subjected to appropriate compensation as may be found acceptable to the parties or the court. Though compounding requires consent of both parties, even in absence of such consent, the court, in the interest of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.

In view of decision ***Meters and instruments Pvt., Ltd., and another vs Kanchan Mehta reported in (2018) 1 SCC 560***, wherein the Hon'ble court held that " 18. From the above discussion following aspects emerge:

i) Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is “preponderance of probabilities”. The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

ii) The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

iii) Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.

iv) Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C. to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C. With this approach, prison sentence of more than one year may not be required in all cases.

v) Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank’s slip being prima-facie evidence of the dishonor of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C. The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having

regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances.

19. In view of the above, we hold that where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings in exercise of its powers under Section 143 of the Act read with Section 258 Cr.P.C. As already observed, normal rule for trial of cases under Chapter XVII of the Act is to follow the summary procedure and summons trial procedure can be followed where sentence exceeding one year may be necessary taking into account the fact that compensation under Section 357(3) Cr.P.C. with sentence of less than one year will not be adequate, having regard to the amount of cheque, conduct of the accused and other circumstances."

Section 138 Negotiable Instruments Act, the Section 281 of B.N.S.S (Sec 258 of the Cr.P.C) is not applicable to the complaints under Section 138 of the N.I. Act. As far as closing of case under Section 281 of B.N.S.S (Sec. 258) is concerned, the view taken in Meters and instruments case has been overruled in the case of Expeditious Trial of cases under Sec.138 NI Act.

Suo Moto writ petition (Crl) 2 of 202 reported in -2021 SCC online SC 325. the Honourable Apex court held that "20. Section 143 of the Act mandates that the provisions of summary trial of the Code shall apply "as far as may be" to trials of complaints under Section 138. Section 258 of the Code empowers the Magistrate to stop the proceedings at any stage for reasons to be recorded in writing and pronounce a judgment of acquittal in any summons case instituted otherwise than upon complaint. Section 258 of the Code is not applicable to a summons case instituted on a complaint. Therefore, Section 258 cannot come into play in respect of the complaints filed under Section 138 of the Act. The judgment of this Court in Meters and Instruments (supra) in so far as it conferred power on the Trial Court to discharge an accused is not good law. Support taken from the words "as far as may be" in Section 143 of the Act is inappropriate. The words "as far as may be" in Section 143 are used only in respect of applicability of Sections 262 to 265 of the Code and the summary procedure to be followed for trials under Chapter XVII. Conferring

power on the court by reading certain words into provisions is impermissible. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. The Judge's duty is to interpret and apply the law, not to change it to meet the Judge's idea of what justice requires. The court cannot add words to a statute or read words into it which are not there.

While issuing summons, the Courts shall see that the summons are properly addressed and sent by post and also to the e-mail address of the accused furnished by the complainant. The Court, shall also consider to take the assistance of the Police or the nearby Court to serve summons or warrants to the accused. For appearance of the accused, a short date shall be fixed. If the summons is received back un-served, immediate follow up action be taken. The courts shall treat the service of summons in one complaint under Section 138 forming part of a translation, as deemed service in respect of all the complaints filed before the same court relating to dishonor of cheques issued as part of the said transactions.

Till this stage, the case shall be treated as Summary Trial Case, but not as a regular Summons or Calendar Case. After examining the above aspects the Court shall consider the scope of converting the case as a regular Summons/Calendar case. If the Court is of the view that the case requires a through and detailed trial or where the case warrants imposition of grave punishment or where multiple connected civil/criminal cases are pending, it shall record the reasons for converting the case into a regular Summons or Calendar Case (CC-NI). The recording of reasons at this stage shall always be mandatory in vide Directions of the Hon'ble supreme Court in its Constitutional Bench decision, dated 16.04.2021 in Suo Motu Writ Petition (Crl.) No.2 of 2020.

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.

The Magistrate Courts shall make every endeavour to complete the trial of these cases within the statutory prescribed time limit of six (6) months. After closure of the complainant side evidence, the accused shall be called upon to answer the incriminate material available in the case of the complainant against him under Section 351 of B.N.S.S (Sec.313 Cr.P.C) and his detailed answers for the said questions shall be recorded. The accused shall be permitted to file a defence statement in view of the provisions under Section 351 of B.N.S.S (Sec.313 Cr.P.C) at this stage. In case the accused choses to adduce evidence, the accused shall not be permitted to file his chief examination evidence in the form of affidavit. However, the accused can be permitted to enter into the witness box after obtaining necessary permission from the Court under Section 353 of B.N.S.S (Sec.315 Cr.P.C). However, this permission from the Court is not mandatory when the accused intends to examine any other person as his witness. After recording the evidence of both parties, the arguments shall be heard by the Court and the Court shall pronounce the judgment within three days (excluding the day of hearing the final arguments.)

In all the cases where the accused is found guilty of the offence under Section 138 of Negotiable Instruments Act, the Court shall consider awarding the compensation to the complainant party in view of the provisions under 138, 143 of Negotiable Instruments Act and Section 395 of B.N.S.S, 2023 (Sec.357 Cr.P.C). The Court must exercise the power and discretion to compensate the injury suffered by the complainant. 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 143-A: In all trials under Sec.138 of Negotiable Instruments Act, when the accused is claiming for a regular trial, the Court may order to direct the accused to pay the interim compensation to the complainant which shall not exceed 20% of the amount of cheque (Section 143-A). Such interim compensation shall be paid within 60 days from the date of order and the Court is competent to extend that time for further 30 days. In case of acquittal, the Court shall direct the complainant to repay the interim compensation amount with the bank interest rate to the accused within 60 days from the date of judgment and this time can also be extended for further 30 days. Interim compensation may be recovered as if it were a fine under Section 461 of B.N.S.S, 2023 (Sec.421 Cr.P.C). This interim compensation amount shall be adjusted against the final compensation ordered by the Court under Section 395 of B.N.S.S, 2023 (Sec.357 Cr.P.C) at the time of judgment.

PAPER PRESENTATION ON PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

J.Sujin Kumar,
II Additional Junior Civil Judge,
Ananthapuramu

"When centuries old obstructions are removed, age-old shackles are either burnt or lose their force, the chains get rusted, and the human endowments and virtues are not indifferently treated and emphasis is laid on "free identity" and not on "annexed identity", and the women of today can gracefully and boldly assert their legal rights and refuse to be tied down to the obscurant conservatism." ….Hon'ble Apex Court in ***Shamima Farooqui v. Shahid Khan*****,(2015)5 SCC 705**

I:- Introduction :- The objective of the D.V. Act lays down that "An Act to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto." The Hon'ble High Court of Andhra Pradesh in **Giduthuri Kesari Kumar Vs State of Andhra Pradesh, 2015 SCC Online Hyd, 18** emphasized that *"When the statement of objects and reasons of D.V.Act is perused, it was felt by the law framers the phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under Section 498A of the Indian Penal Code but civil law does not however address this phenomenon in its entirety. It was with this observation the Legislature proposed to enact the Domestic Violence Act keeping in view the rights guaranteed under Articles 14, 15 and 21 of the Constitution to provide for a remedy under the civil law (Emphasis Supplied) which is intended to protect the women from being a victim of domestic violence and to prevent the occurrence of domestic violence in the society*" .

The Hon'ble Bombay High Court in the case of **Ishpal Singh Kahai v. Ramanjeet Kahai, 2011 SCC Online Bom 412** reiterated that the *object of the DV Act is to grant statutory protection to victims of violence in the domestic sector who had no proprietary rights. The Act provides for security and protection of a wife irrespective of her proprietary rights in her residence. It aims at*

protecting the wife against violence and at the prevention of recurrence of acts of violence.

II. Key Definitions under the Domestic Violence Act:

- **Aggrieved Person**

According to the definition provided under the DV Act in Section 2(a), an "aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent. Therefore, any woman who is or has been in a domestic relationship is entitled to make a complaint invoking provisions of the Act.

In **M. Palani v. Meenakshi, 2008 SCC Online Mad 150**, the Hon'ble High Court of Madras held that the *amount or period of time lived together by the petitioner and respondent is not necessary in terms of that the petitioner and respondent should live or have lived together for a particular period of time. Hence, application by lady, for maintenance, from a man with whom she shared a close relationship is maintainable.*

Recently the Hon'ble Supreme in **Juveria Abdul Majid Patni v. Atif Iqbal Mansoori and another**, **2014 (10) SCC 736,** held that even if after obtaining the *decree of divorce, the wife who had shared the household in the past but was no longer residing with the husband, can file a petition under Section 12 of the DV Act if subjected to domestic violence seeking relief under Section 18 to 23 of the DV Act.* Further more the Hon'ble Apex Court in **Krishna Bhattacharjee v. Sarathi Choudhury, (2016) 2 SCC 705** observed that *judicial separation does not change the status of the wife as an "aggrieved person" under Section 2(a) read with Section 12 and does not end the "domestic relationship" under Section 2(f). It stated that judicial separation is mere suspension of husband-wife relationship and not a complete severance of relationship as happens in divorce.*

- **Domestic Relationship**

According to Section 2(f) of DV Act, "domestic relationship" means a relationship between two persons living in a shared household. Domestic relationship can be through marriage such as wives, daughters-in-law, sisters-in-law, widows and any other members of the family; or blood relationship such as mothers, sisters or daughters; and other domestic relationships including through adoption, live-in relationships, and women in bigamous relationship or victims of legally invalid marriages.

In **Indra Sarmav. V.K.V Sarma, (2013) 15 SCC 755,** Hon'ble Supreme Court stated that the word domestic relationship means a relationship that has some inherent or essential characteristics of marriage though not a marriage that is legally recognized. Expression "relationship in the nature of marriage" cannot be construed in the abstract. It is to be taken in the context in which it appears and to be applied bearing in mind the purpose and object of DV Act as well as meaning of the expression "in the nature of marriage".

In ***Harini H Vs. Kavya H and others, 2021 SCC Online Kar 12988 ,*** the Hon'ble High Court of Karnataka held that the complaint which was filed by a wife under Protection of Woman from Domestic Violence Act is not maintainable against the *extra marital partner of husband.*

Recently the Hon'ble Supreme Court in **Prabha Tyagi Vs Kamlesh Devi, 2022 (8) SCC 900** held that it is not mandatory for the aggrieved person, when she is related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family, to actually reside with those persons against whom the allegations have been levelled at the time of commission of domestic violence. If a woman has the right to reside in the shared household under Section 17 of the D.V. Act and such a woman becomes an aggrieved person or victim of domestic violence, she can seek reliefs under the provisions of D.V. Act including enforcement of her right to live in a shared household.

It was also held that that there should be a subsisting domestic relationship between the aggrieved person and the person against whom the relief is claimed vis-à-vis allegation of domestic violence. However, it is not necessary that at the time of filing of an application by an aggrieved person, the domestic relationship should be subsisting. In other words, even if an aggrieved person is not in a domestic relationship with the respondent in a shared household at the time of filing of an application under Section 12 of the D.V. Act but has at any point of time lived so or had the right to live and has been subjected to domestic violence or is later subjected to domestic violence on account of the domestic relationship, is entitled to file an application under Section 12 of the D.V. Act

- **Domestic Incident Report**

Section 2 (e) of DV Act defines a domestic incident report as "a report made in the prescribed form on receipt of a complaint of domestic violence from an aggrieved person." The purpose of this report is to give a glimpse of

incidents of domestic violence with the aggrieved in a precise, unbiased manner.

In ***Prabha Tyagi v. Kamlesh Devi*, (2022) 8 SCC 90, the Hon'ble Apex Court *held that*** *Section 12 does not make it mandatory for a Magistrate to consider a domestic incident report filed by a Protection Officer or service provider before passing any order under the DV Act. It is clarified that even in the absence of a domestic incident report, a Magistrate is empowered to pass both ex parte or interim as well as a final order under the provisions of the DV Act.* Thus it is manifest that filing of Domestic Incident Report is not mandatory to deal with cases under the present Act. So, the said fact would not affect the reliefs prayed by the petitioner

- **Shared Household**

According to Section 2(s) of DV Act 2005, a shared household is where the aggrieved person or a woman lives in a domestic relationship, either singly, or along with the man against whom the complaint is filed. It might also suggest a household where a lady had resided in a domestic relationship before being expelled. This could apply to a variety of circumstances, regardless of whether the respondent owns or rents the home. It also includes a household that the aggrieved person and the respondent may jointly possess or separately hold, as well as any rights, titles, or interests therein. The right of a woman to live in a shared household is recognized by the DV Act. This means that a woman cannot be ousted from such a household other than by following the legal process. In the event that she is necked out , she may be brought back with a court order.

- **Domestic Violence**

"Domestic violence" means not only physical violence but also other forms of violence such as emotional violence, mental violence, sexual violence, financial violence and other forms of cruelty that may occur within a household. The definition runs in accordance with afore terms. It also defines the meaning of terms physical abuse, sexual abuse, verbal and emotional abuse, and economic abuse. It further enunciates that the overall facts and circumstances of the case shall be taken into consideration in order to determine whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under the said section.

The Hon'ble High Court of Tripura, in **Ramendra Kishore Bhattacharjee vs. Smt.Madhurima Bhattacharjee [Crl.Rev.P.No.36 of**

2020] " Denial *of maintenance allowance to the wife obviously causes* ***'economic abuse'*** *to her within the meaning of domestic violence as under Section 3 of the DV Act".*

III. Parties by whom and against whom the reliefs can be sought:-

Any aggrieved woman who is or has been in a domestic relationship with the respondent and who claims to have been the victim of domestic violence by the respondent may seek assistance in accordance with the provisions of this Act. Any adult male perpetrator who commits a violent act can be reported by a woman.

The Supreme Court in **Hiral P. Harsora v. Kusum Narottamdas Harsora, (2016) 10 SCC 165** struck down the word , "adult" male from the definition of "respondent" stating that it is not based on any intelligible differentia having rational nexus with object sought to be achieved. The Supreme Court also explained in the said case that the categories of persons against whom remedies under the DV Act are available include women and non-adults. Expression "respondent" in Section 2(q) or persons who can be treated as perpetrators of violence against women/against whom remedies under the DV Act are actionable cannot be restricted to expression "adult male person" in Section 2(q). Thus, remedies under the DV Act are available even against a female member and also against non-adults.

a) Filing of an application under D.V.Act

An aggrieved woman may in order to file a complaint for domestic violence may: Approach the police station and register the complaint, or File a complaint to a Protection Officer or Service Provider, or Directly approach the Magistrate. The duties of the police officers, Protection officer, Service Provider, or the Magistrate is laid down under Section 5 of the Act. It states that, upon receipt of complaint they shall inform the aggrieved person—

(a) of her right to make an application for obtaining a relief by way of a protection order, an order for monetary relief, a custody order, a residence order, a compensation order or more than one such order under this Act;

(b) about availability of services of service providers;

(c) about availability of services of the Protection Officers;

(d) about her right to free legal services under the Legal Services Authorities Act, 1987 ;

(e) about her right to file a complaint under Section 498-A of the Indian Penal Code , wherever relevant”

b) **Jurisdiction of Courts**

Which Court can decide the case Section 27 of the DV Act provides that a first class magistrate or metropolitan court shall be the competent court to grant a protection order and other orders under the DV Act and to try offences under the Act within the local limits of which

(a) the person aggrieved permanently or temporarily resides or carries on business or is employed; or

(b) the respondent resides or carries on business or is employed;

or (c) the cause of action has arisen.

In **Shyamlal Devda v. Parimala, (2020) 3 SCC 14**, the Hon’ble Supreme Court held that petition under DV Act can be filed in a court where “person aggrieved” permanently or temporarily resides or carries on business or is employed.

IV. Reliefs available under the Domestic Violence Act

The remedies available under the DV Act as provided from Section 18 to 23 for the aggrieved person are as follows:

- **Protection orders (Section 18):**

The Magistrate after giving the aggrieved person and the respondent an opportunity of being heard and if satisfied that domestic violence has taken place or is likely to take place may pass a protection order and prohibit the respondent from (a) committing any act of domestic violence; (b) aiding or abetting in the commission of acts of domestic violence; (c) entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person; (d) attempting to communicate in any form, whatsoever, with the aggrieved person, including personal, oral or written

or electronic or telephonic contact; (e) alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her stridhan or any other property held either jointly by the parties or separately by them without the leave of the Magistrate; (f) causing violence to the dependants, other relatives or any person who give the aggrieved person assistance from domestic violence; (g) committing any other act as specified in the protection order.

- **Residence Order (Section 19)**

The Magistrate may pass a residence order in favour the applicant

a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;

(b) directing the respondent to remove himself from the shared household;

(c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;

(d) restraining the respondent from alienating or disposing off the shared household or encumbering the same;

(e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or

(f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require.

The High Court of Madras in **M. Muruganandam v. M. Megala, 2010 SCC Online Mad 6012** opined that the Act contemplates two types of reliefs viz. (a) right to reside in shared household; and (b) right to seek residence orders under Section 19 of the Act.

It was held that Section 19(1) of the Act empowers Magistrate to pass variety of residence order. Shared household would come into picture only when relief is sought in terms of Sections 19(1)(a) to (e) of the Act.

Aggrieved woman can seek orders to enable her to continue to reside in shared household or protection order to enable her to reside in shared household, then property, which is subject-matter, should be shared household. Aggrieved woman can seek relief of alternate accommodation in terms of Section 19(1)(f) of the Act and in such case concept of shared household would not be attracted. Expression “shared household” occurring in Section 19(1)(f) of the Act is just for purpose of enabling aggrieved woman to seek alternative accommodation, which would be on par with shared household that she enjoyed at some point of time,

- **Monetary Relief (Section-20)**

Under Section 20 of DV Act, an order for monetary relief can be passed by the court in case a woman has incurred expenditure as a result of violence. This may include expenses incurred by a woman on obtaining medical treatment, any loss of earnings, damage to property, etc. The aggrieved person can also claim for maintenance from her male partner.

The Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but is not limited to,—

(a) the loss of earnings;

(b) the medical expenses;

(c) the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under Section 125 of the Code of Criminal Procedure, 1973 or any other law for the time being in force.

The provision further states that the monetary remedy offered must be sufficient, fair, and reasonable and must be in line with the aggrieved person's usual quality of life. The Magistrate may order the employer or a debtor of the respondent to directly pay the aggrieved party or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent in the event that the respondent fails in part to make payment in

accordance with the monetary order. This amount may be adjusted towards the monetary relief payable by the respondent.

It is germane to mention that as per the Judgment of Hon'ble Supreme Court in **Rajnesh Vs Neha, 2021 (2) SCC 324**, every court is bound to consider and adjust maintenance which was awarded to petitioner in previous maintenance proceedings for giving financial relief under D.V.Act.

- **Custody Orders (Section 21)**

The Magistrate may grant temporary custody of the children to the aggrieved woman or any person making an application on her behalf. This is to prevent a woman from being separated from her children, which itself is an abusive situation. Section 21 also states that the Magistrate may, at any stage of hearing of the application for protection order or for any other relief under this Act grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent. However, the Magistrate may refuse such visit to such child or children, if it feels that any visit to the child or children by the respondent may be harmful.

- **Compensation Orders (Section 22)**

The Magistrate may on an application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by that respondent.

- **Magistrate's power to grant interim and ex parte orders (Section 23)**

Section 23 gives power to the Magistrate to pass such interim order as he deems just and proper and also if the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under Section 18, Section 19, Section 20, Section 21 or, as the case may be, Section 22 against the respondent.

The Hon'ble Supreme Court in **Rajnesh Vs Neha, 2021 (2) SCC 324**, made it as a mandatory to both parties to files their Affidavit of Disclosure of Assets and Liabilities annexed as Enclosures I, II and III as may be applicable, in all maintenance proceedings, including pending proceedings before the

concerned Family Court / District Court / Magistrates Court, as the case may be, throughout the country.

V) **Execution of orders:-**

a) Breach of Protection order passed under section 18 of D.V.Act: Section 30 of D.V. Act provides penalty for the breach of protection order by the respondent . It states that a breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both. Moreover section 31 of D.V.Act makes offence as non bailable and cognizance.

A question as to whether Section 31 of The Protection of Women from Domestic Violence Act, 2005 (for short 'the DVC Act') which prescribes penalty for breaching 'protection order' under section 18 of the Act, be extended to prosecution for beach of orders of maintenance and compensation granted by the Court under Sections 20 and 22 respectively was answered by the Hon'ble High Court of Telangana in Judgement of **C.D. Ravindernath Vs Srilatha and another, Criminal Petition No. 7027 of 2022, dated 28-04-2023,** wherein it was held that only breach of protection order is a punishable offence under section 30 of D.V.Act and not every violation of order entails in prosecution of respondent under section 31 of D.V.Act. However the Hon'ble High Court of Madhya Pradesh in **Surya Prakash v. Smt.Rachna, 2018 CRI.L.J 2545** and Hon'ble Karnataka High Court in the judgment of **Vincent Shanthakumar v. Smt.Christina Geetha Rani, 2015 CRI.L.J 1874** held that the Court can invoke provisions under Section 31 of the Act for breach of monetary relief orders also .

b) **Breach of orders passed granting monetary reliefs to the aggrieved person:** As the term "monetary relief" is not included in this Section and thereby taking out of the operation of Section 31 of the Act of 2005 any breach of an order of monetary relief. An applicant, in whose favour the order of monetary relief has been passed, has to apply to the Magistrate for seeking execution of the order as per Section 20 of the Act of 2005. A reading of Section 20 of the Act of 2005 reveals that exhaustive procedure for the execution of monetary relief has not been laid down in this section because sub-sections (4) and (5) of Section 20 provide the consequences to an order of monetary relief. Sub-section (6) of Section 20 of the Act of 2005 entitles the Magistrate to direct

the employer or debtor of the respondent to directly pay to the aggrieved person or to deposit with the Court a portion of wages or salaries or debt due or accrued to the creditor of the respondent towards the monetary relief payable by the respondent.

However, this provision is limited to the person who may have accrued credit or is a salaried person, but in case of a self-employed person, this provision would be of no help. So it would be worthwhile to refer Section 28 of the Act of 2005, which lays down that the courts shall be governed by the general provisions of the Code of Criminal Procedure in relation to the proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 as well as for the offence under Section 31 of the Act of 2005. Sub-section (2) of Section 23 of the Act of 2005 provides for a procedure to be laid down by the court on its own for the disposal of an application under Section 12 or sub-section (2) of Section 23 of the Act of 2005. The procedure, which the court can adopt is limited to the disposal of the application, but for execution of the order, a resort has to be had to the general provisions of the Code of Criminal Procedure. The provisions of the Code of Criminal Procedure in relation to execution of the order under Section 125 Cr.P.C. have to be resorted to by the courts for giving force to the order of monetary relief.

Thus it is evident if the order is passed under Section 12 or 23 of the Act of 2005 for directing the monetary relief, the Court, after the period provided for appeal is over, shall suo motu issue warrant of recovery for recovery of the monetary relief directed to be paid and in the event of warrant for recovery not being satisfied then the consequence of sending the respondent to civil jail, as per the procedure provided under Section 125 Cr.P.C., shall be resorted to.

VI) **Conclusion**

Although this Act's primary goal of safeguarding women against domestic abuse has been achieved, certain of its specific provisions still need to be amended for effective and expeditious execution of orders/benefits. The victims of domestic violence have access to civil remedies attributable to this law. Before the enactment of this law, a woman had no other choice except to turn to the civil courts in order to pursue any legal remedies, including child custody, all types of injunctions, and maintenance. As a result, the DV Act has undoubtedly brought about the essential reform in the system. despite the fact that the Act offers a wide range of remedies to address the problem of domestic violence, its definition and application still need to be redefined and proper safeguards must

be enumerated for preventing the misusage of this Act, which is legislated with an solemn object of prevention of domestic violence within domestic household.

IMPORTANT JUDGMENTS ON D.V.ACT:

- **S.R.Batra Vs. Smt.Taruna Batra Civil Appeal No.5837 of 2006 Dated 15.12.2006 (2007) 3 SCC 169 Supreme Court.**

In this case, the Supreme Court with reference to definition of shared household under sec.2(s) of PWDV Act.2005 held that the definition of 'shared household' in Section 2(s) of the Act is not very happily worded, and appears to be the result of clumsy drafting requires to be interpreted in a sensible manner. The Court further held that under Sec. 17(1) of the PWDV Act wife is only entitled to claim a right to residence in a shared household, and a 'shared household' would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member. In the case, the property in question neither belonged to the husband nor was it taken on rent by him nor was it a joint family property of which the husband was a member. It was the exclusive property of mother of husband and not a shared household. However this judgment has been over ruled by the Supreme Court in Very Recent judgment in the case of Satish Chander Ahuja Vs. Sneha Ahuja Civil Appeal No.2483 of 2020 dated 15.10.2020.

- **Vimlaben Ajitbhai Patel Vs. Vatsalben Ashokbhai Patel and Ors. (2008) 4 SCC 649 Supreme Court**.

In this case, the Supreme Court had occasion to consider the provisions of Act, 2005. The question which came for consideration in the above case has been noticed in paragraph 14 of the judgment, which is to the following effect:- "14. The questions which arise for consideration are: (i) Whether in the facts and circumstances of the case, the property of Appellant 1 could have been sold in auction? and (ii) Whether in a case of this nature, the bail granted to the appellants should have been directed to be cancelled?" In the above case, the complaint was filed by third respondent against her husband and appellant's father-in-law and mother-in-law under Sections 406 and 114 of Indian Penal Code. The bail granted to the appellants was cancelled. Proceedings under Section 82 Cr.P.C. were initiated attaching the properties of the appellant. The learned Metropolitan Magistrate asked the District Magistrate to auction the attached properties. The properties of the appellant was auctioned and the Supreme Court in the above case has held that the provisions of the Hindu

Adoptions and Maintenance Act, 1956 that maintenance of a wife, during subsistence of marriage, is on the husband and on the applicant to maintain the daughter-in-law arises only when the husband has died. In paragraphs 21 and 22 following was laid down:- “21. Maintenance of a married wife, during subsistence of marriage, is on the husband. It is a personal obligation. The obligation to maintain a daughter-in-law arises only when the husband has died. Such an obligation can also be met from the properties of which the husband is a co-sharer and not otherwise. For invoking the said provision, the husband must have a share in the property. The property in the name of the mother-in-law can neither be a subject matter of attachment nor during the lifetime of the husband, her personal liability to maintain his wife can be directed to be enforced against such property. Wholly uncontentious issues have been raised before us on behalf of Sonalben (wife). It is well settled that apparent state of affairs of state shall be taken as real state of affairs. It is not for an owner of the property to establish that it is his self acquired property and the onus would be on the one, who pleads contra. Sonalben might be entitled to maintenance from her husband. An order of maintenance might have been passed but in view of the settled legal position, the decree, if any, must be executed against her husband and only his properties could be attached but not of her mother-in-law. In paragraph 27, the Supreme Court further held:- The Domestic Violence Act provides for a higher right in favour of a wife. She not only acquires a right to be maintained but also there under acquires a right of residence. The right of residence is a higher right. The said right as per the legislation extends to joint properties in which the husband has a share. In paragraph 28, the Supreme Court noticed the judgment passed in S.R. Batra Vs. Taruna Batra. The Supreme Court held that the High Court erred in cancelling the bail of the appellants. Allowing the appeal, following directions were issued:- Having regard to the facts and circumstances of this case we are of the opinion that the interest of justice shall be subserved if the impugned judgments are set aside with the following directions: (i) The property in question shall be released from attachment. (ii) The 3rd respondent shall refund the sum of Rs 1 lakh to the respondent with interest @ 6% per annum. (iii) The amount of Rs 4 lakhs deposited by the 1st respondent shall be refunded to him immediately with interest accrued thereon. (iv)The 3rd respondent should be entitled to pursue her remedies against her husband in accordance with law. (v) The learned Magistrate before whom the cases filed by the 3rd respondent are pending should bestow serious consideration of disposing of the same, as expeditiously as possible. (vi)The 3rd respondent shall bear the

costs of the appellant which are quantified at Rs 50,000 (Rupees fifty thousand) consolidated.

In the above case, the Supreme Court has held that property of mother-in-law cannot be attached since the maintenance of wife during the married life is on the husband.

- **D. Veluswamy Vs. D. Patchaiammal (Crl.Appeal No.2028-2029 of 2010)** Supreme Court.

In this case the Supreme Court has given, a wider meaning to an “aggrieved person” under sec. 2 (a) of the PWDV Act 2005. The Court enumerated five ingredients of a live in relationship as follows: 1.Both the parties must be as husband and wife and are recognized as husband and wife in front of society 2.They must be of a valid legal age of marriage 3.They should qualify to enter into marriage eg. None of the partner should have a souse living at the time of entering into relationship.4.They must have voluntarily cohabited for a significant period of time 5.They must have lived together in a shared household. The Supreme Court also observed that not all live-in-relationships will amount to a relationship in the nature of marriage to get the benefit of PWDV Act. To get such benefit the conditions mentioned above shall be fulfilled and this has to be proved by evidence.

- **Sandhya Manoj Wankhade Vs. Manoj Bhimrao Wankhade (2011) 3 SCC 650 Supreme Court.**

In this case it has been held by the Supreme Court that the term “respondent” includes the term “female relative” .The legislature never intended to exclude female relative of the husband or male partner from the ambit of a complaint that can be made under the provisions of the Act.

- **Deoki Panjhiyara Vs. Shashi Bhushan Narayan Azad & Anr. Crl.Appeal No.2032-2033 of 2012 decided on 12.12.2012 Supreme Court.**

In this Case the Hon’ble Supreme Court has observed that the respondent before us had claimed (before the trial court as well as the High Court) that the marriage between him and the appellant solemnized on 4.12.2006, by performance of rituals in accordance with Hindu Law, was void on account of the previous marriage between the appellant with one Rohit Kumar Mishra. In support thereof, the respondent relied on a marriage certificate dated 18.4.2003 issued under Section 13 of the Special Marriage Act, 1954. Acting solely on the basis of the

aforesaid marriage certificate the learned trial court as well as the High Court had proceeded to determine the validity of the marriage between the parties though both the courts were exercising jurisdiction in a proceeding for maintenance. However, till date, the marriage between the parties is yet to be annulled by a competent court. What would be the effect of the above has to be determined first inasmuch as if, under the law, the marriage between the parties still subsists the appellant would continue to be the legally married wife of the respondent so as to be entitled to claim maintenance and other benefits under the DV Act, 2005. Infact, in such a situation there will be no occasion for the Court to consider whether the relationship between the parties is in the nature of a marriage admittedly, both the appellant and the respondent are governed by the provisions of the Hindu Marriage Act, 1955. Section 11 of the Hindu Marriage Act makes it clear that a marriage solemnized after the commencement of the Act "shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions so specified in clauses (i), (iv) and (v) of Section 5."

While considering the provisions of Section 11 of the Hindu Marriage Act, 1955 this Court in Yamunabai v. Anantrao has taken the view that a marriage covered by Section 11 is void-ipso-jure, that is, void from the very inception. Such a marriage has to be ignored as not existing in law at all. It was further held by this Court that a formal declaration of the nullity of such a marriage is not a mandatory requirement though such an option is available to either of the parties to a marriage. It must, however, be noticed that in Yamunabai there was no dispute between the parties either as regards the existence or the validity of the first marriage on the basis of which the second marriage was held to be ipso jure void. In the present case, however, the appellant in her pleadings had clearly, categorically and consistently denied that she was married to any person known as Rohit Kumar Mishra. The legitimacy, authenticity and genuineness of the marriage certificate dated 18.4.2003 has also been questioned by the appellant. Though Section 11 of the aforesaid Act gives an option to either of the parties to a void marriage to seek a declaration of invalidity/nullity of such marriage. In the present case, if according to the respondent, the marriage between him and the appellant was void on account of the previous marriage between the appellant and Rohit Kumar Mishra the respondent ought to have obtained the necessary declaration from the competent court in view of the highly contentious questions raised by the appellant on the aforesaid score. It is only upon a declaration of nullity or annulment of the marriage between the parties by a competent court that any consideration of the question whether the parties had lived in a

“relationship in the nature of marriage” would be justified. In the absence of any valid decree of nullity or the necessary declaration the court will have to proceed on the footing that the relationship between the parties is one of marriage and not in the nature of marriage.

- **Indra Sarma Vs. V.K.V.Sarma (Crl.A. No.2009 of 2013) decided on 26.11.2013 Supreme Court**.

The case in hand is a land mark judgment which defined the scope and ambit of Sec. 2 (f) of PWDV Act 2005. In this Case it has been held that a woman who was in a live-in relationship with a married man for 14 years was not accorded the fruits of the Protection of Women from Domestic Violence Act, 2005.It is further held that such a live-in relationship fell outside the purview of 'relationship in the nature of marriage. While arriving at this conclusion, which has far-reaching implications on rights of aggrieved persons in non-matrimonial relationships, the Supreme Court laid down various criteria for the purpose of determining as to what kind of relationships would fall within the ambit of the expression 'relationship in the nature of marriage' as worded in the section2(f) of PWDV Act.2005.

- **Preeti Satija Vs. Raj Kumari and Anr 2014 SCC Online Del 188 Delhi High Court.**

In this judgment the Division Bench of the Delhi High Court laid down following:- Crucially, Parliament's intention by the 2005 Act was to secure the rights of aggrieved persons in the shared household, which could be tenanted by the Respondent (including relative of the husband) or in respect of which the Respondent had jointly or singly any right, title, interest, or “equity”. For instance, a widow (or as in this case, a daughter in law, estranged from her husband) living with a mother-in-law, in premises owned by the latter, falls within a “domestic relationship”. The obligation not to disturb the right to residence in the shared household would continue even if the mother-in-law does not have any right, title or interest, but is a tenant, or entitled to “equity” (such as an equitable right to possession) in those premises. This is because the premises would be a “shared household”. The daughter-in-law, in these circumstances is entitled to protection from dispossession, though her husband never had any ownership rights in the premises. The right is not dependent on title, but the mere factum of residence. Thus, even if the mother-in-law is a tenant, then, on that ground, or someone having equity, she can be injected from dispossessing the daughter in law. In case the mother in law is the owner, the obligation to allow the daughter in law to live in the shared household, as long as the matrimonial relationship between her

and the husband subsists, continues. The only exception is the proviso to 19(1) 72 (b), which exempts women from being directed to remove themselves from the shared household. No such exception has been carved out for the other reliefs under Section 19, especially in respect of protection orders. Had the Parliament intended to create another exception in favor of women, it would have done so. This omission was deliberate and in consonance with the rest of the scheme of the Act. There can be other cases of domestic relationships such as an orphaned sister, or widowed mother, living in her brother's or son's house. Both are covered by the definition of domestic relationship, as the brother is clearly a Respondent. In such a case too, if the widowed mother or sister is threatened with dispossession, they can secure reliefs under the Act, notwithstanding exclusive ownership of the property by the son or brother. Thus, excluding the right of residence against properties where the husband has no right, share, interest or title, would severely curtail the extent of the usefulness of the right to residence. The other aspect, which this Court wishes to highlight, is that the 2005 Act applies to all communities, and was enacted “to provide more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family”. The right to residence and creation of mechanism to enforce is a ground breaking measure, which Courts should be alive to. Restricting the scope of the remedies, including in respect of the right to reside in shared household, would undermine the purpose of this enactment. It is, therefore, contrary to the scheme and the objects of the Act, as also the unambiguous text of Section 2(s), to restrict the application of the 2005 Act to only such cases where the husband alone owns some property or has a share in it. Crucially, the mother-in-law (or a father-in-law, or for that matter, “a relative of the husband”) can also be a Respondent in the proceedings under the 2005 Act and remedies available under the same Act would necessarily need to be enforced against them.

8. **Navneet Arora Vs. Surender Kaur and Ors 2014 SCC Online Del 7617 Delhi High Court**.

In this case the Court had considered the various aspects of Domestic Violence Act, 2005. Dealing with right of residence and following was held:- “ It may be highlighted that the Act does not confer any title or proprietary rights in favour of the aggrieved person as misunderstood by most, but merely secures a ‘right of residence’ in the ‘shared household’. Section 17(2) clarifies that the aggrieved person may be evicted from the ‘shared household’ but only in accordance with the procedure established by law. The legislature has taken care to calibrate and

balance the interests of the family members of the respondent and mitigated the rigour by expressly providing under the proviso to Section 19(1) that whilst adjudicating an application preferred by the aggrieved person it would not be open to the Court to pass directions for removing a female member of the respondents family from the “shared household”. Furthermore, in terms of Section 19(1)(f), the Court may direct the respondent to secure same level of accommodation for the aggrieved person as enjoyed by her in the “shared household” or to pay rent for the same, if the circumstances so require. The seemingly ‘radical’ provisions comprised in the Protection of Women from Domestic Violence Act, 2005 must be understood and appreciated in light of the prevalent culture and ethos in our society. The broad and inclusive definition of the term ‘shared household’ in the Protection of Women from Domestic Violence Act, 2005 is in consonance with the family patterns in India, where married couple continue to live with their parents in homes owned by parents.”

- **Hiral P. Harsora and others Vs. Kusum Narottamdas Harsora and others, (2016) 10 SCC 165 Supreme Court.**

In this Case the Supreme Court has struck down the expression “adult male”. The Supreme Court held that “adult male person” restricting the meaning of respondent in Section 2(q) to only “adult male person” is not based on any intelligible differentia having rational nexus with object sought to be achieved. Hence, it is now permissible under definition of Section 2(q) to include females also. Consequently, the respondent can also be a female in domestic relationship with the aggrieved person. The next definition, which is relevant to be noticed is Section 2(s), which defines shared household. Shared household is defined in following words:- "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.

- **Shalu Ojha Vs. Prashant Ojha SLP (Crl.) no. 3935 of 2016 dated 23.07.2018** Supreme Court.

In this case, matrimonial relationship was strained between petitioner wife and respondent husband resulting in multiplicity of legal proceedings. Petitioner filed

a case claiming remedies under Protection of Women from Domestic Violence Act, 2005, trial court awarded an interim maintenance of Rs 2,50,000 and compensation of Rs. 1,00,000. In appeal filed against the award, the Session Court reduced maintenance to Rs. 50,000. Appeal preferred by respondent husband was dismissed and SLP was also dismissed. While appeal was still pending before High Court, petitioner wife preferred appeal before Supreme Court challenging order passed by Sessions court. The court held that proceedings under Protection of Women from Domestic Violence Act, 2005, are summary proceedings in nature, petitioner wife was allowed to file a suit under provisions of Hindu Adoptions and Maintenance Act, 1956 or section 125 of CrPC, 1973 where both parties can present their evidences before competent court. Respondent husband was directed to continue paying maintenance of Rs. 50,000 per month.

- **Kunapareddy @ Nookala Sanka Bala ji Vs.Kunaparddy Swarna Kumari & Anr. (Crl.Appeal No.516 of 2016 decided on 18.04.2016 Supreme Court**.

The major issue that arises for consideration in the instant case is whether a court dealing with the petition/complaint filed under the provisions of the Protection of Women from Domestic Violence Act, 2005 can allow amendments. The dispute was also in nature of proceeding i.e. whether it was of civil or criminal nature. The main contention of the herein appellant was that Section 28 of DV Act says proceedings under this act should be governed by Cr.P.C and because Cr.P.C does not allow amendments and allowing amendments under C.P.C is violation of the provision, therefore the Trial Court and High Court was mistaken in allowing the amendments. It was held by the Supreme Court that the order passed for amendments by the Trial Court was rightly upheld by the High Court. The court said that it cannot be said that the court dealing with the application under the DV Act has no power and/or no jurisdiction to allow the amendment of the said application.

- **Samir Vidyasagar Bhardwaj Vs. Nandita Samir Bhardwaj (Crl. Appeal No.6450/2017 decided on 09.05.2017 Supreme Court.**

In this Case the Hon'ble Supreme Court has observed that the respondent filed a petition under Sec 27(1)(d) of the Special Marriage Act for divorce against the appellant in the family court in Mumbai. The respondent sought relief – directing the appellant to move out of the matrimonial home and hand over the vacant possession of the same to respondent and to pay a maintenance of Rs.1,00,000 and other consequential reliefs apart from seeking dissolution of marriage. It is a

proved fact that the concerned flat was purchased in the joint names of the appellant and respondent. The family court arrived at a finding that prima facie material was available on record to accept the allegation of the respondent wife on domestic violence. The Judge concerned had exercised his discretion under Section 19(1)(b) of the Domestic Violence Act which provides that the Magistrate on being satisfied that domestic violence has taken place can remove the spouse from the shared household. The appellant husband appealed to High Court contending that the final relief sought in the main petition could not have been granted at interim stage and also being co-owner of the flat, he cannot be ousted. The High Court declined to interfere with the order. Supreme Court also decided that the family court has correctly applied its discretion on Section 19(1)(b) of DV Act.

- **Manmohan Attavar Vs. Neelam Manmohan Attavar, (2017) 8 SCC 550 Supreme Court.**

In this case it has been held that PWDV Act.2005 has been enacted to create an entitlement in favour of the woman of the right of residence. A reading of the aforesaid provisions shows that it creates an entitlement in favour of the woman of the right of residence under the "shared household" irrespective of her having any legal interests in the same. The direction, inter alia, can include an order restraining dispossession or a direction to remove himself on being satisfied that domestic violence had taken place. Now, we proceed to notice certain provisions of Act, 2005, which are relevant for determination of the issues as arisen in the present appeal. According to Section 2(a) “aggrieved person” means any person, who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent. “Domestic Relationship” has been defined in Section 2(f) in following words:- 2(f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. The expression “respondent” is defined in Section 2 (q) in following words:- 2(q) "respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.

- **Vaishali Abhimanyu Joshi Vs. Nana Saheb Gopal Joshi (C.A.No.6448 of 2017) decided on 09.05.2017 Supreme Court.**

In the above case, the appellant was married with one Abhimanyu with whom she was residing in suit Flat No.4, 45/4, Arati Society, Shivvihar Colony, Paud Fata, Pune. The husband filed a suit for divorce against the appellant. The father-in-law filed a suit in Small Cause Court for mandatory injunction praying that defendant be directed to stop the occupation and use of the suit flat. The appellant filed a written statement in the suit claiming that although the flat bears the name of the respondent but she is residing in the suit flat. She filed a counter claim claiming that flat is a shared household and the suit be dismissed. The counter claim was rejected by the Judge, Small Cause Court, against which revision as well as the writ petition was dismissed. The Supreme Court noted the question, which arose for consideration in the above case in paragraph 16, which is to the following effect:- As noted above, the only question to be answered in this appeal is as to whether the counter claim filed by the appellant seeking right of residence in accordance with Section 19 of the 2005 Act in a suit filed by the respondent, her father-in-law under the Provincial Small Cause Courts Act, 1887 is entertainable or not?. Whether the provisions of the 1887 Act bar entertainment of such counterclaim, is the moot question to be answered? . After noticing the provision of Section 26 of the Act, the Supreme Court made following observations. Section 26 of the Act is a special provision which has been enacted in the enactment. Although Chapter IV of the Act containing Section 12 to Section 29 contains the procedure for obtaining orders of reliefs by making application before the Magistrate whereas steps taken by the Magistrate and different categories of reliefs could be granted as noted in Sections 18 to 22 and certain other provisions. Section 26 provides that any relief available under Sections 18 to 22 may also be sought in any legal proceedings, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent. Section 26 is material for the present case since the appellant has set up her counterclaim on the basis of this section before the Judge, Small Cause Court. Section 26 is extracted below: “26. Relief in other suits and legal proceedings.—(1) Any relief available under Sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act. (2) Any relief referred to in subsection (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court. (3) In case any relief has been

obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief. There cannot be any dispute that proceeding before the Judge, Small Cause Court is a legal proceeding and the Judge, Small Cause Court is a civil court. On the strength of Section 26, any relief available under Sections 18 to 22 of the 2005 Act, thus, can also be sought by the aggrieved person. The Supreme Court held that Section 26 has to be interpreted in a manner to effectuate the purpose and object of the Act. The Supreme Court held that the determination of claim of the aggrieved person was necessary in the suit to avoid multiplicity of proceedings. The Supreme Court laid down following . Section 26 of the 2005 Act has to be interpreted in a manner to effectuate the very purpose and object of the Act. Unless the determination of claim by an aggrieved person seeking any order as contemplated by the 2005 95 Act is expressly barred from consideration by a civil court, this Court shall be loath to read in bar in consideration of any such claim in any legal proceeding before the civil court. When the proceeding initiated by the plaintiff in the Judge, Small Cause Court alleged termination of gratuitous licence of the appellant and prays for restraining the appellant from using the suit flat and permit the plaintiff to enter and use the flat, the right of residence as claimed by the appellant is interconnected with such determination and refusal of consideration of claim of the appellant as raised in her counterclaim shall be nothing but denying consideration of claim as contemplated by Section 26 of the 2005 Act which shall lead to multiplicity of proceedings, which cannot be the object and purpose of the 2005 Act. We, thus, are of the considered opinion that the counterclaim filed by the appellant before Judge, Small Cause Court in Civil Suit No. 77 of 2013 was fully entertainable and the courts below committed error in refusing to consider such claim.

- **Lalita Toppo Vs. The State of Jharkhand & Anr. (Crl.Appeal No.1656 of 2015 decided on 30.10.2018 Supreme Court.**

In this case the appellant Lalita Toppo claimed maintenance under the provisions of the Protection of Women from Domestic Violence Act, 2005 despite the fact that she was not a legally wedded wife and thus was not eligible to claim maintenance under Section 125 of the Code of Criminal Procedure, 1973. It is held that the maintenance can be claimed under Domestic Violence Act, 2005 even if the claimant is not a legally wedded wife. Such relief cannot be allowed under section 125 of CrPC. The bench expanded the definition of the term “domestic violence” contained in Section 3(a) of the D.V Act, 2015 to include economic abuse as domestic violence. Further, the court held that the estranged

wife or live-in-partner would be entitled to extra relief under the provisions in Section 3(a) of the D.V Act, 2005 than what is provided under Section 125 of the Cr.P.C.

- **Kamlesh Devi Vs. Jai Pal & Ors. SLP (Crl.)Diary No.34053 of 2019 Decided on 04.10.2019 Supreme Court.**

This special leave petition was directed against an order dated 16th September, 2016 passed by the High Court of Punjab & Haryana at Chandigarh, dismissing Criminal Revision No.609/2015, filed by the petitioner under Section 401 of Cr.P.C .By a judgment dated 22nd October, 2012 the Judicial Magistrate (First Class) dismissed a complaint filed by the petitioner under the provisions of the Protection of Women from Domestic Violence Act.2005.An appeal filed by the petitioner against the said judgment and order has been dismissed. The revisional application filed by the petitioner under Section 401 of the Criminal Procedure Code for quashing the appellate order of the Sessions Judge and the judgment and order of the Judicial Magistrate (First Class) has been dismissed by the order impugned in the special leave petition. It has been held in the present case that the High Court has rightly found in effect that the ingredients of domestic violence are wholly absent in this case. The petitioner and the respondents are not persons living together in a shared household. There is a vague allegation that the respondents are family members. There is not a whisper of the respondents with the petitioner .They appear to be neighbour, hence the Supreme Court has dismissed the Petition.

- **P.Rajkumar & Anr. Vs. Yoga @ yogalakshmi (Crl.Appeal No.1613/019 dated 23.10.2019.Supreme Court.**

In this case the appellants has assailed an order dated 06.03.2015 passed by the High Court dismissing the criminal revision, declining to interfere with the order dated 20.01.2015 affirming order dated 28.09.2012 for grant of Rs.10,000/- as maintenance to the respondent in proceedings under section 20 of the Protection of Women from Domestic Violence Act, 2005.It was argued by the appellants that the claim for maintenance under section 20 of the Act was specifically negatived by the judicial magistrate as such the Magistrate could not have simultaneously ordered for maintenance in a pending proceeding under section 125 of Code of Criminal Procedure (for short, the ‘Cr.P.C.’) over which he had no jurisdiction. It was also submitted that the respondent has since remarried. On behalf of the respondent Court’s attention was drawn to the interim order dated 12.10.2018 for payment of all arrears of maintenance. He however did not dispute the fact that

the respondent has since remarried on 10.02.2019.It is held that admittedly, the respondent was denied any monetary compensation under section 20 of the Act by the learned Magistrate. Once the learned Magistrate declined to grant maintenance for reasons specified, it was not open for him to assume jurisdiction in a proceeding under section 125 of the Cr.P.C. which was not pending before him and was a completely independent proceeding to direct grant of maintenance under the same. The two being independent proceedings, the learned Magistrate wrongly assumed jurisdiction under Section 125 Cr.P.C in a proceeding under the Act. In effect, what the magistrate directly declined to the respondent, he granted indirectly by observing that till the proceedings under section 125 of Cr.P.C. is not decided, the appellants shall pay maintenance at a rate of Rs.2,000/- per month to the respondent. The order is without jurisdiction and therefore wholly unjustified and unsustainable. The respondent never challenged the order of the learned Magistrate declining monetary relief under section 20 of 3 the Act. The parties are however agreed that the amount of maintenance which has already been paid under the impugned orders shall not be recovered and also that any amount lying in deposit in the family court may be withdrawn by the respondent. The impugned orders, with the aforesaid exception, are set aside.

- **Ajay Kumar Vs. Lata @ Sharuti & Ors. (Crl.Appeal)No.617 of 2019 decided on 08.04.2019 Supreme Court.**

In this case the first respondent filed a petition under Section 12 of the Act inter alia for the purpose of seeking an award of maintenance. The complaint contains a recital of the fact that after her marriage, the complainant and her spouse resided at a house which constitutes ancestral Hindu Joint Family Property. She and her husband resided on the ground floor of the residential accommodation. The appellant and the deceased spouse of the first respondent jointly carried on a business of a kiryana store at Panipat from which, it has been alleged, each had an income of about Rs 30,000 per month. The complaint alleges that at the death of Vijay Kumar, the first respondent was pregnant and that she gave birth to a child on 31 January 2013. The travails of the first respondent are alleged to have commenced after the death of her spouse and she was not permitted to reside in her matrimonial home. The learned Trial Judge by an order dated 3 July 2015 granted monthly maintenance in the amount of Rs 4,000 to the first respondent and Rs 2,000 to the second respondent. The award of maintenance was directed against the appellant who was carrying on the above business together with the deceased spouse of the first respondent. This order of the

Judicial Magistrate, First Class, Panipat dated 3 July 2015 was confirmed by the Additional Sessions Judge, Panipat on 14 August 2018. The High Court, in a petition filed by the appellant, affirmed the view. Hence these proceedings came to be instituted under Article 136 of the Constitution of India. Under the provisions of Section 20(1), the Magistrate while dealing with an application under sub Section (1) of Section 12 is empowered to direct the respondent(s) to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of domestic violence. This may include but is not limited to an order for maintenance of the aggrieved person as well as her children, if any, including an order under or in addition to an order for maintenance under Section 125 of the CrPC or any other law for the time being in force. The expression “respondent” is defined in Section 2(q) as follows:- 2(q) “respondent” means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner; The substantive part of Section 2(q) indicates that the expression “respondent” means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom relief has been sought. The proviso indicates that both, an aggrieved wife or a female living in a relationship in the nature of marriage may also file a complaint against a relative of the husband or the male partner, as the case may be. Section 2(f) defines the expression “domestic relationship” thus: 2(f) “domestic relationship” means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family; Section 2(f) defines the expression ‘domestic relationship’ to mean a relationship where two persons live or have lived together at any point of time in a shared household when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are members living together as a joint family. The expression “shared household” is defined in Section 2(s) as follows:- 2(s) “shared household” means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a house hold whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have

any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household; All these definitions indicate the width and amplitude of the intent of Parliament in creating both an obligation and a remedy in the terms of the enactment. In the present case, at this stage, it would be sufficient to advert to the contents of paragraph 10 of the complaint which read as follows:- “10. That the marriage between the Complainant No. 1 and Sh. Vijay Kumar Jindal was settled through Sh. Narender Jain S/o. Late Sh. Rameshwar Dass R/o Haryana SchoolWali-Gali, VIII, Inder Garhi, Tehsil Gohana, Distt. Sonepat, and before marriage he (Mediator namely Sh. Narender Jain) told that previously there was a residential house situated near Railway Fathak, Jatal Road, Panipat, which was constructed by Sh. Mai Dhan (Grandfather of Sh. Vijay Kumar Jindal and Respondent No. 2) and after the death of said Sh. Mai Dhan, his son Sh. Brahmanand Jindal (Father of Sh. Vijay Kumar Jindal and Respondent No. 2) became the owner in possession of the said house and later on Sh. Brahmanand Jindal, sold away the said house and purchased H No. 149, Eight Marla Colony, Kranti Nagar, Near Radha Krishna Mandir, Panipat in the name of his wife Smt. Rajo Devi (Respondent No. 1) about 8 years ago. Thus the said house i.e. H No. 149, Eight Marla Colony, Kranti Nagar, Near Radha Krishna Mandir, Panipat is ancestral Joint Hindu Family property / residential house standing in the name of Respondent No. 1 qua the present complainants.” In paragraph 12 and 13, it has been averred as follows:- “12. That after marriage between the Complainant No. 1 and Sh. Vijay Kumar Jindal, the Respondents provided the ground floor of H No. 149, Eight Marla Colony, Kranti Nagar, Near Radha Krishna Mandir, Panipat to the newly wedded couple (i.e. Complainant No. 1 and Sh. Vijay Kumar Jindal) and they kept all dowry articles, house hold articles etc. mentioned above in the said residential accommodation (ground floor of said house) and she (i.e. Complainant No. 1) also consummated her marriage with her husband in the Ground floor of said house and Kirti Jindal (Complainant No. 2) was born out of the said wedlock. It is pertinent to mention here that all dowry articles, istridhan, household articles, furniture etc. etc. are still kept in said house / matrimonial house of Complainant No. 1 and the golden ornaments and jewelry etc., all are yet in possession of the Respondents. 13. That it is worthwhile to mention here that after the marriage of Complainant No. 1, both brother Sh. Vijay Kumar Jindal and Ajay Kumar Jindal were running their joint business of M/s. Ajay Kumar Vijay Kumar Kiryana Store, at Jatal Road, Sanjay Chowk Panipat, very smoothly and both brothers were taking / deciding Rs. 30,000/- P.M. each, out of the

income of the said business, for the maintenance of their respective families. However after the death of Sh. Vijay Kumar, the Respondent No. 2 has been running the said business and the Complainants are equally entitled to the amount which the respondent No. 2 has been deducting from the said joint business or at least Rs. 30,000/- P.M. which the Complainant No. 1 has been receiving during the life time of Sh. Vijay Kumar Jindal." At the present stage, there are sufficient averments in the complaint to sustain the order for the award of interim maintenance. Paragraph 10 of the complaint prima facie indicates that the case of the complainants is that the house where the first respondent and her spouse resided, belong to a joint family. The appellant and his brother (who was the spouse of the first respondent and father of the second respondent) carried on a joint business. The appellant resided in the same household. Ultimately, whether the requirements of Section 2(f); Section 2(q); and Section 2(s) are fulfilled is a matter of evidence which will be adjudicated upon at the trial. At this stage, for the purpose of an interim order for maintenance, there was material which justifies the issuance of a direction in regard to the payment of maintenance. However, we clarify that the present order as well as orders which have been passed by the courts below shall not come in the way of a final adjudication on the merits of the complaint in accordance with law. The arrears shall be paid over within a period of four months from today by equal monthly installments.

- **Satish Chander Ahuja Vs. Sneha Ahuja Civil Appeal No.2483 of 2020 dated 15.10.2020 Supreme Court.**

In this land mark judgment the Hon'ble Supreme Court has held that the term "shared household" under Section 2(s) does not only mean a household of the joint family of which husband is a member or in which husband of the aggrieved person has a share. Instead, it means the household belonging to any relative of the husband with whom the women has lived in a domestic relationship.

The Court, therefore, overruled the law laid down in SR Batra v. Taruna Batra [(2007) 3 SCC 169].

- **Vineeta Sharma Vs. Rakaesh Sharma & Ors.2020 SCC online SC 641 Supreme Court.**

In this land mark judgment the Hon'ble Supreme Court has held that daughters have equal right in coparcenaries by birth and it is not necessary that the father should be living when the Hindu Succession (Amendment) Act, 2005 came into force for the daughters to get a share. The Court observed that-

*"*The conferral of right is by birth, and the rights are given in the same manner with incidents of coparcener as that of a son and she is treated as a coparcener in the same manner with the same rights as if she had been a son at the time of birth."

To ensure that this decision does not lead to reopening of earlier family settlements or partition suits already decreed, the apex court held that a registered settlement or partition suit decreed prior to December 20, 2004 (the date when the Amendment Bill was tabled in Rajya Sabha), will not be reopened.

- **Smt.S.Vanitha Vs. Deputy Commissioner, Bengaluru Urban District C.A No. 3822 of 2020 dated 15.12.2020 Supreme Court.**

The Three Judge Bench of the Hon'ble Supreme Court of India comprising of J. Dr. Dhananjaya Y Chandrachud, J. Indu Malhotra and J. Indira Banerjee had held that provisions of Maintenance and Welfare of Parents and Senior Citizens Act, 2007 cannot be invoked by in-laws to evict their daughter in law as it would deprive her of rights in a shared household under the Protection of Women from Domestic Violence Act, 2005 .It is further observed that allowing the Senior Citizens Act 2007 to have an overriding force and effect in all situations, irrespective of competing entitlements of a woman to a right in a shared household within the meaning of the PWDV Act 2005, would defeat the object and purpose which the Parliament sought to achieve in enacting the latter legislation. The law protecting the interest of senior citizens is intended to ensure that they are not left destitute, or at the mercy of their children or relatives. Equally, the purpose of the PWDV Act 2005 cannot be ignored by a sleight of statutory interpretation. Both sets of legislations have to be harmoniously construed. Hence the right of a woman to secure a residence order in respect of a shared household cannot be defeated by the simple expedient of securing an order of eviction by adopting the summary procedure under the Senior Citizens Act 2007. The Bench held that the Maintenance and Welfare of Parents and Senior Citizens Act has no overriding effect over the right of residence of a woman in a shared household within the meaning of the Protection of Women from Domestic Violence Act.

Paper Preparation by Smt T.RAJYA LAKSHMI, Spl. Judge, for Trial of Offences under POCSO Act, Ananthapuramu, on the topics of Nature of Offences, Presumptions and Compensation under Protection of Children from Sexual Offences Act, 2012.

I. Introduction:

For protecting children from sexual offences, separate statute in form of "PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT 2012" has been enacted, which came into force from 19th June, 2012 and some amendments were made in 2018 vide Act No.22 of 2018 and some in 2019 vide Act No.25 of 2019. The statute contains 9 chapters and 46 Sections.

Before the introduction of the POCSO Act, 2012, the sole legislation in India that aimed at protecting the rights of a child was the Goa's Children's Act, 2003 and Rules, 2004. Under the Indian Penal Code, 1860, child sexual abuse accounted for an offence under Sections 375, 354 and 377. These provisions neither protect male children from sexual abuse nor protect their modesty. Also, definitions of the terms like 'modesty' and 'unnatural offence' are not provided in the Code. Owing to the lack of any specific legislation, it was pivotal to establish a statute that pointedly tackles the issue of growing child sexual abuse cases in the country. With the efforts of multifarious NGOs, activists and the Ministry of Women and Child Development, POCSO Act, 2012 has been enacted.

The act when enacted in the year 2012 was applicable to all the states and Union Territories of India except the state of Jammu and Kashmir (which constituted of the regions of Jammu, Kashmir and Ladakh) which had special status by the virtue of Article 370 of the Indian Constitution. After the abrogation of Article 370 on 5th August, 2019 the special status of Jammu and Kashmir was stripped off, and since then the legislation is applicable in Jammu and Kashmir as well as in Ladakh by the act 34 of 2019.

1. Gender-Neutral Law :

Protection Of Children from Sexual Offences Act sets a neutral tone with regards to gender of the victim. Unlike other previous provisions this legislation doesn't ignore the male child victims. Under this law "any person" under the age of 18 years in considered as a child within the definition of Sec.2 (1)(d) of POCSO Act.

The Act is very exhaustive set of legislation, which defines various sexual offences and provides for constitution of Special Courts to try the cases under the Act, makes specific provision for mandatorily reporting of sexual offences on the part of various stakeholders in the society, weighty punishment for chronic sexual offences being committed on children, conducting investigation, inquiry and trial in the child friendly atmosphere and providing restorative compensation to the victim of the crime.

The POCSO Act specifies a variety of offences under which an accused can be punished. It recognizes forms of penetration other than penile-vaginal penetration and criminalizes acts of immodesty against children too. Offences under the act include:

2. Penetrative sexual assault: Section 3 of the POCSO Act defines penetrative sexual assault. As per section 3 of POCSO Act, if a person inserts his penis/object/another body part in child's vagina/urethra/anus/mouth, or asking the child to do so with him or some other person or manipulates any part of the body of child so as to cause penetration into vagina, urethra, anus or any part of the body of child or makes the child to do so with him or any other person or if he applies mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person, he is said to commit penetrative sexual assault. **Section 4** lays down the punishment which was made more stringent by the 2019 amendment.

3. <u>Aggravated penetrative sexual assault:</u> Section 5 of the POCSO Act lays down the cases in which penetrative sexual assault amounts to aggravated penetrative sexual assault. For example, penetrative sexual assaults on a child by a police officer within the vicinity of a police station, by armed forces within the limits of their area, by a public servant, by the staff of jails, hospitals or educational institutions, penetrative sexual assault on a child below 12 years, committing penetrative sexual assault on a child repeatedly, penetrative sexual assault on a child by relative, etc., are considered aggravated penetrative sexual assault and are punishable under **Section 6** of the POCSO Act.

4. <u>Sexual assault:</u> Section 7 of the POCSO Act defines sexual assault as, "Whoever, with sexual intent, touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault". **Section 8** lays down the punishment for the offence of sexual assault.

In the case of **Attorney General for India Vs. Satish and Another, 2022 (1) ALT (Crl.) 188 (SC),** the Hon'ble Apex Court held that "t*he most important ingredient for constituting the offence of sexual assault under Sec.7 of the Act is the sexual intent and not the skin to skin contact with the child and whoever does any other act with sexual intent which involves physical contact without penetration, would also be committing the offence of sexual assault under Sec.7 of POCSO Act".*

5. <u>Aggravated sexual assault:</u> Section 9 of the POCSO Act lays down the cases in which sexual assault amounts to aggravated sexual assault. For example, sexual assaults on a child by a police officer within the vicinity of a police station, by armed forces within the limits of their area, by a public servant, by the staff of jails, hospitals or educational

institutions, sexual assault on a child below 12 years, committing sexual assault on a child repeatedly, sexual assault on a child by relative, etc., are considered aggravated sexual assault and are punishable under **Section 10** of the POCSO Act.

6. Sexual harassment: Section 11 of the POCSO Act defines sexual harassment. It includes six cases which constitute sexual harassment of a child.

1. First, if anyone utters any word or makes any sound or exhibits any object with sexual intent to a child.
2. Second, if anyone makes a child exhibits his body so that it is seen by the offender or any other person.
3. Third, if any person shows any child any form or media for pornographic purposes.
4. Fourth, if anyone constantly watches or stalks a child directly or online.
5. Fifth, if anyone threatens to use a real or fabricated depiction of any part of the body of the child or the involvement of the child in a sexual act through electronic, film or digital.
6. Sixth, if anyone entices a child for pornographic purposes.

Section 12 lays down the punishment for the offence of sexual assault harassment.

7. Pornography: **Section 13** of the POCSO Act states that anyone who uses a child for pornographic purposes by either representing the sexual organs of the child or using a child in real or simulated sexual acts or representing a child indecently or obscenely in programmes or advertisements on television or on internet, commits the offence under this section and is liable in accordance with Sections 14 and 15 of the POCSO Act. In the case of ***Fatima A.S. v. State of Kerala*** **(2020)**, in a

video on social media, a mother was seen being painted her naked body above the navel by her two minor children and she alleged that the motive of the video was to teach sex education to them. The Hon'ble Apex Court observed in this case that, *"in the initial years, what the child learns from their mother will always have a lasting impression on their mind. It is usually said that the mother will be the window of the child's to the world"*. Hence the same was covered under Section 13.

8. <u>Abetment of child sexual abuse</u>: Section 16 of the POCSO Act defines the abetment of the offence. The following acts constitute abetment of offence under the POCSO Act:

- Instigating any person to commit that offence;
- Engaging in any conspiracy with one or more persons to commit any offence when any illegal act or omission takes place in consequence of that conspiracy;
- Aiding to commit that offence intentionally.

The punishment for the abetment of offence is specified under **Section 17** of the POCSO Act, 2012 according to which a person who abets the commission of an offence and the offence is executed is to be punished with the punishment that has been provided for that offence under the POCSO Act.

9. <u>Attempt to child sexual abuse</u>: Section 18 enunciates that attempt to commit any offence under the POCSO Act, 2012 is also an offence inviting either of the two following punishments:

- Imprisonment provided for that offence for a term extending upto one-half of the imprisonment for life, with or without fine;
- Imprisonment provided for that offence for a term extending upto one-half of the longest term of imprisonment with or without fine.

10. Mandatory reporting of child abuse cases: Sexual abuse cases happen behind closed doors and the elders attempt to hide these incidents due to the stigma that is attached to these crimes. Consequently, for the proper implementation of the POCSO Act, reporting of these incidents by the third parties who have the knowledge or apprehension of such offences, has been made mandatory under **Sections 19 to 22** of the POCSO Act. These laws have been made on the basis of assumptions that children are vulnerable and helpless and society has the duty to protect the interests of the children.

11. Confidentiality of the victim's identity: Section 23 of the POCSO Act provides for the procedure of media and imposes the duty to maintain the child victim's identity unless the Special Court has allowed the disclosure. Section 23(2) states, *"no reports in any media shall disclose the identity of a child including his name, address, photograph, family details, school, neighbourhood and any other particulars which may lead to the disclosure of the identity of the child"*. In the landmark case of *Bijoy @ Guddu Das v. The State of West Bengal* (2017), the Calcutta High Court reiterated the law made under Section 23 and declared that any person including a police officer shall be prosecuted if he/ she commits such a breach.

The main objective behind provisions like Section 23 is to protect the right to privacy of a child against whom any offence under the POCSO Act has been committed so as to maintain the confidentiality of the proceedings for the best interests of the child victim.

12. Child-friendly investigation and trial: Sections 24 and 26 of the POCSO Act lay down the procedure of investigation which has been formulated keeping in mind the needs of a child. The following points are taken into consideration while investigating any crime under POCSO Act:

i. The statement of the child is to be recorded at his/her place of residence and generally by a woman police officer not below the rank of Sub-Inspector.

ii. The officer who is to record the statement of the child should not be wearing a uniform.

iii. The officer should ensure that the child does not come in contact with the accused during the examination.

iv. A child is not to be detained in the police station at night.

v. The officer should ensure that the identity of the child is not revealed.

vi. The statement of the child is to be recorded in the presence of a person in whom the child has trust, for example, their parents.

vii. The statement of the child is to be recorded via audio-video electronic means.

viii. The assistance of the translators or interpreters should be taken wherever necessary.

13. <u>Medical examination of Child</u>: Section 27 of the POCSO Act lays down that;

- The medical examination of child has to be conducted in accordance with Section 164A of the Criminal Procedure Code, 1973.
- A medical examination of a girl is to be conducted by a woman practitioner.
- It should be conducted in the presence of a person in whom the child has trust, for example, his/ her parents, otherwise in the presence of a woman nominated by the head of the medical institution.

14. <u>Constitution of Special Courts</u>:

Section 28 of the POCSO Act lays down the provision regarding the designation of special courts.

As per Section 28 of the Act, the State Government shall in consultation with the Chief Justice of the High Court, by notification in the

Official Gazette, designate for each district, a Court of Session to be a Special Court to try the offences under the Act.

In our State, the State Government have constituted exclusive Special Courts in all Districts and designated a Court of Session to be a Special Court to try the offences under the Act.

Section 28 of Act says that while trying an offence under POCSO Act, Spl. Courts shall also try an offence other than the offence referred to in Sub-Section 1, with which accused may, under Cr.P.C. be charged at the same trial and it also says that the special courts also have the jurisdiction to try offences under Section 67B of Information Technology Act, 2000. Furthermore, Section 42A of Act specifies that in case of any inconsistency, the provisions of the POCSO Act would override the provisions of any other law.

15. <u>Child-friendly:</u>

The Act provides for child-friendly pre-trial and trial procedures to minimize the trauma felt by child victims and to eliminate the possibility of revictimisation at the time of trial.

POCSO Act does not define the word ‘child friendly’ but JJ Act in Section 2 (15) defines the term as ‘child friendly’ means any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child;

“Best interest of child” is defined in Section 2 (9) of JJ Act, which means the basis for any decision taken regarding the child, to ensure fulfillment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development.

The child-friendly pre-trial procedures cast duties on the police and are to be implemented at the time of reporting of offences and recording

of the child's statement. These are given in detail in Sections 19-26 of the Act.

The child-friendly procedures during the trial are to be followed by the Special Courts. They aim to ensure that the child is protected from intimidation, whether intentional or not. The child-friendly trial provisions are detailed in Section 33 – 38 of the Act.

16. <u>Sec.33 – Procedure and powers of Special Court:</u>

(1) A special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

Section 33 of Act mandates that the Special Court shall create a child friendly atmosphere while recording the evidence.

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the Court.

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the Court.

(6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

However, for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

17. Sec.35 -- Time limit for recording evidence of child and complete the trial:

Section 35 of the Act mandates that the evidence of the child shall be recorded within a period of thirty days of the Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Court and the Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.

18. Sec.36 – Child not to see accused at the time of testifying.

(1) The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.

(2) For the purpose of sub-section (1), the Special Court may record the statement of a child through video conferencing or by utilising the single visibility mirrors or curtains or any other device.

In our State, two Special Courts are provided with such facilities – one is in the unit of Metropolitan Sessions Judge, Hyderabad and another is in the unit of Warangal District. We are all aware that the Special Court at Warangal is provided with all infrastructure facilities and with a corporate look under the aegis and stewardship of His Lordship Hon'ble Sri Justice P.Naveen Rao.

19. Sec.37 – Trials to be conducted in camera:

The Special Court shall try cases in camera and in the presence of the parents or the child or any other person in whom the child has trust or confidence:

If the Special Court is of the opinion that the child needs to be examined at a place other than the Court, it shall proceed to issue a commission in accordance with the provisions of Section 284 of the Code of Criminal Procedure, 1973.

20. Sec.38 – Assistance of an interpreter or expert while recording evidence of child.

(1) Wherever necessary, the Court may take the assistance of a translator or interpreter having such qualifications, experience and on payment of such fees as may be prescribed, while recording the evidence of the child.

(2) If a child has a mental or physical disability, the Special Court may take the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed to record the evidence of the child.

Rule 5 (11) – In proceedings under Section 38, the Special Court shall ascertain whether the child speaks the language of the court adequately, and that the engagement of any interpreter, translator, special educator, expert, support person or other person familiar with the manner of communication of the child, who has been engaged to facilitate communication with the child, does not involve any conflict of interest.

21. Age Proof –:

Section 34 of POCSO Act speaks about the procedure to be followed for determination of age of child by Spl. Courts.

Section 34 (1) of Act says that where any offence under this act is committed by a child, such chaild shall be dealt with under the provisions of Juvenile Justice (Care and Protection of Children) Act, 2015.

As per Section 94(2) of J.J. Act, 2015, Age determination shall be made by seeking evidence by obtaining:

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination by an ossification test or any other latest medical age determination test conducted.

In the case of **P.Yuva Prakash Vs. State Rep. by Inspector of Police,** in **Criminal Appeal No.1898 of 2023**, the Hon'ble Apex Court referring to Sec.34 of POCSO Act and Sec.94 of Juvenile Justice Act, 2015, observed that "*where ever the dispute with respect to age of a person arises in the context of her or him being a victim under the POCSO Act, the Courts have to take recourse to the steps indicated in Sec.94 of J.J Act and that the three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:*

i) the date of birth certificate from the school, or matriculation or equivalent certificate from the concerned examination board, if available; and in the absence thereof ;

ii) the birth certificate given by a corporation or a municipal authority or a Panchayat ;

iii) and only in the absence of (i) and (ii) above, age shall be

determined by an ossification test or any other latest medical age determination test conducted on the orders of the committee or the board.

Section 94 (2) (iii) of J.J. Act clearly indicates that the date of birth certificate from school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the corporation or municipal authority or panchayat and it is only thereafter in the absence of these such documents, the age is to be determined through an ossification test or any other latest medical age determination test conducted on orders of concerned authority i.e., committee or board or Court."

II. PRESUMPTIONS UNDER SECTIONS 29 AND 30 OF THE ACT (Reverse burden):

1. We all know that in a criminal trial, the burden of proving everything essential to the establishment of the charge against the accused always rests on the prosecution, as every man is presumed to be innocent until the contrary is proved. It means in criminal law, the fundamental principle of "presumption of innocence" is followed where the accused is presumed to be innocent until his guilt has been proved by the prosecution. It is the responsibility of the prosecution to prove the guilt of the accused beyond reasonable doubt. The Law of evidence provides the initial burden on the prosecution to prove against the accused his crime and guilt in the court of law. However, there are some laws which provide for the concept of 'reverse burden' which is opposite to the concept of presumption of innocence in favor of accused. The legal concept of reverse burden is when the responsibility of proving the innocence of the act is on the accused in contradiction to the basic principle where the initial burden lies on the prosecution. In other words, it means that the burden or onus has been shifted to accused in criminal cases. As a general rule, the basic principle is applied but, the law in certain circumstances provides for

reverse onus on accused to prove his innocence in a particular case. Such types of cases include cases of strict liability or where the offence is so grave that the burden shifts on the accused to show his part of innocence in the particular cases. Sec.29 and 30 of POCSO Act provides for the reverse burden.

2. Section 29 of the Act says that 'where a person is prosecuted' for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of the Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.

3. Section 30 (1) of the Act says that in any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

4. (2) For the purpose of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation:- In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

From a reading of 29 of the POSCSO Act, it is clear that if a person is prosecuted for committing or abetting or attempting to commit any offence u/sec.3, 5, 7 and 9 of the Act, the court shall presume that such person has committed or abetted or attempted to commit the offence as the case may be unless contrary is proved. As per Section 30 of the POCSO Act, in a prosecution for any offence under the Act, which

requires a culpable mental state on the part of accused, the court shall presume the existence of such mental state and it shall be for accused to prove the fact that he had no such mental state with respect to the act charged an offence beyond reasonable doubt and not mere preponderance of probability.

5. The objective behind the legislation is to ensure that the actual offenders are behind the bars.

6. In view of these presumptions, the question arises that whether the Court shall presume that the accused has committed the offences alleged without requiring the prosecution to prove its case?

This question is no longer res integra. In a catena of decisions, it is held that the presumption under Section 29 of the Act is not absolute. The statutory presumption would get activated or triggered only if the prosecution proves the essential basic facts. Once the foundation of the prosecution case is laid by leading legally admissible evidence, it becomes incumbent on the accused to establish from the evidence on record that he has not committed the offence or to show from the circumstances of a particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour.

In *G.S.Venkatesh v. State of Karnataka* (2020) Supreme (Kar.) 68, Hon'ble Karnataka High Court held that the use of expression "unless the contrary is proved" appearing in Section 29 makes it clear that the presumption raised under this section is rebuttable. A rebuttable presumption can be raised only when the foundational facts constituting the offence are established by the prosecution. In a criminal trial, the burden of proving everything essential to the establishment of the charge against the accused always rests on the prosecution, as every man is presumed to be innocent until the contrary is proved. In a case where an offence is committed against a child, having regard to the very nature of

the offence where it is difficult for the prosecution to prove the facts and circumstances in which the offence had taken place, the Act has cast the burden on the accused to prove the facts within his knowledge as it is easier for the innocent accused to produce evidence contrary to the case proved by the prosecution. This is called reverse burden whereby the burden is shifted to the accused to disprove the facts established by the prosecution. The question of discharging the reverse burden by the accused would arise only when the initial burden cast on the prosecution is discharged to the satisfaction of the Court. Therefore it follows that without the proof of basic facts constituting the offence charged against the accused, the accused cannot be called upon to disprove the case of the prosecution. In **Joy Vs. State of Kerala,** it is held that *"that the presumption under Sec.29 of the Act is not absolute and presumption would come into play only when prosecution is able to bring on record facts that would form the found action for the presumption*". In the case of **Dallaram Vs. State of Rajasthan,** reported in 2021 (0) Supreme (Raj) 65, it is held that, "*the presumptions under the Sec.29 and 30 of POCSO Act can only be drawn when prosecution succeeds to prove that any sexual act has been committed with victim by accused*".

7. There is a criticism that Section 29 and 30 of POCSO Act is violative of the principle of presumption of innocence where it is on the prosecution to prove the guilt of accused and not the accused to show his innocence and also violating the basic concept of fair trial where the accused is given an adequate and reasonable opportunity to prove and defend himself.

8. The Constitutional validity of Sections 29 & 30 of the POCSO Act was challenged in the case of **Justin @ Renjith Vs. Union of India,** where the accused was prosecuted under Sections 3, 7, 9 and 5 of POCSO Act. He challenged the sections 29 and 30 and contended these

sections as unconstitutional and violative of Articles 14, 19, 20(3) and Article 21 guaranteed by the Constitution of India. It was contended that since there is no provision for reverse burden in sexual offences against adults, the same in cases of sexual offences against children is discriminatory and violative of article 14 right to equality. It was also contended that Sec.29 and 30 of POCSO Act are operative against the right to remain silent enshrined under article 20(3) by imposing the burden to prove innocence. It was also contended that Sec.29 and 30 of POCSO Act took away right to be presumed innocent until proven guilty as per article 21.

9. While dealing with the question of constitutionality, the Court observed the case of **Nikesh Tara Chand Shah Vs. Union of India,** where it was held by the Hon'ble Supreme Court that since the aim of POCSO Act was to fulfill the provisions mandated under the Article 15(3) of Constitution, hence challenging the provisions that it violates the Right to equality as given under Article 14 is unreasonable and Court also observed the case of **Noor Aga Vs. State of Punjab & Ors,** where it was held that Article 20(3) is violated only when the accused is forced to testify against himself whereas in cross examination, he is only asked questions and therefore, the provisions cannot be said to violate the Article 20(3) of the Constitution.

10. After due consideration to facts and all the related case laws, the Court concluded that the Sections 29 & 30 of the POCSO Act are not unconstitutional or illegal observing that;

(1) Section 29 & 30 of POCSO Act are based on intelligible differentia treating the child victims as a class by itself and hence are not violative of Article 14. Also, POCSO Act was enacted following the mandate of Article 15(3) which allows the State to make special provisions for women and children, and therefore, cannot be challenged on grounds of Article 14.

(2) The Court also quashed the argument for the necessity of mens rea being an essential element of every offence. The Court stated that in certain acts, mens rea is implied by the very nature of the act. The same is explicitly exhibited in sexual acts, and need not be proved separately.

(3) The right under Article 20(3) could be invoked only when the accused is subjected to duress to give evidence against himself. The term 'compulsion' in Article 20(3) refers to duress only as also held by the Supreme Court in the case of State of Bombay Vs. Kathi Kalu Oghadu.

(4) Sections 29 and 30 of POCSO Act do not absolve the burden of prosecution to establish foundational facts i.e., that the victim is a child; that the alleged incident has taken place; medical evidence to support physical injury, if caused etc. and the reverse burden kicks in only post the establishment of such facts. Therefore, the right under Article 21 is not per se violated. "The insistence on establishment of foundational facts by prosecution acts as a safety guard against misapplication of statutory provisions".

(5) The Court added that the reverse burden is justifiable on the ground of predominant public interest. Limited burden on accused to establish specific facts that are exclusively within his/her knowledge are not rare in the Indian Criminal Law.

III. <u>Compensation</u>:

1. Much confusion prevails regarding the role of Special Courts in victim compensation under the POCSO Act. The question that has caused much grief to children is whether the Special Court is to merely recommend the payment of compensation to the State Government or should it determine the amount of compensation?

2. Though POCSO Act is a penal statute, it is not confined to convicting and sentencing the wrong doer only. It provides the scheme for

rehabilitation, compensation, etc., also to the victims. Utmost care has to be taken by all agencies specially Special Courts for uplifting the victim from traumatic situation. The victim must be adequately compensated at an appropriate stage. Compensation is a must to a sufferer of the crime.

3. Section 33 (8) says in appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

4. **Rule 9 of POCSO Rules:**

9.Compensation - (1) The Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the First Information Report. Such interim compensation paid to the child shall be adjusted against the final compensation, if any.

(2) The Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

(3) Where the Special Court, under sub-section (8) of section 33 of the Act read with subsections (2) and (3) of section 357A of the Code of Criminal Procedure, makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim, including the following:-

(i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;

(ii) the expenditure incurred or likely to be incurred on his medical treatment for physical and/or mental health;

(iii) loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(iv) loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(v) the relationship of the child to the offender, if any;

(vi) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;

(vii) whether the child became pregnant as a result of the offence;

(viii) whether the child contracted a sexually transmitted disease (STD) as a result of the offence;

(ix) whether the child contracted human immunodeficiency virus (HIV) as a result of the offence;

(x) any disability suffered by the child as a result of the offence;

(xi) financial condition of the child against whom the offence has been committed so as to determine his need for rehabilitation;

(xii) any other factor that the Special Court may consider to be relevant.

(4) The compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under section 357A of the Code of Criminal Procedure or any other laws for the time being in force, or, where such fund or scheme does not exist, by the State Government.

(5) The State Government shall pay the compensation ordered by

the Special Court within 30 days of receipt of such order.
(6) Nothing in these rules shall prevent a child or his parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules or scheme of the Central Government or State Government.

5. The National Legal Services Authority framed a scheme called "Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes, 2018.

But, in the scheme, it is made clear that the said scheme do not apply to minor victims under POCSO Act, 2012 insofar as their compensation issues are to be dealt with only the Special Courts under Section 33 (8) of the Act and Rule 7 (now Rule 9) of the POCSO Rules.

The words 'direct payment of such compensation' used in Section 33 (8) of the Act signify that the Special Court shall fix the quantum and direct to pay. So, by following the rules contained in Section 33 (8) of the Act and Rules 9(1) and 9(2) of the Rules, the Special Court has to fix the quantum and direct to pay compensation to the victim.

The approach of the Special Judge has to be very sensitive to see that not only the wrong doer is punished with serious punishment upon his guilt being proved but the victim is adequately compensated to get into main stream of society.

There is no limit specified in the POCSO Act or Rules on the amount of compensation that the Special Court may order. The quantum of compensation is not specified in the POCSO Act and it is based on the discretion of the judge deciding the matter. The POCSO Rules provides that while deciding the quantum of compensation, the judge must take into consideration the type, nature and severity of abuse, the extent of physical and mental harm caused to the child, expenditure incurred for medical treatment for physical and/or mental health, financial condition of

the child, etc.

In **Tekan alias Tekram v. State of Madhya Pradesh** (2016) 4 SCC 461 = AIR 2016 SC 817, which arose out of an alleged sexual intercourse committed upon a Blind and Illiterate Girl by the accused under promise of marriage, the Hon'ble Supreme Court upheld the conviction of the accused and proceeded to discuss compensation for the victim. The Hon'ble Supreme Court ordered that all the States must endeavour to follow a uniform scheme in the manner framed by the State of Goa which permits compensation of up to Rs.10,00,000/- for rape victims with disability. Since there were none to take care of the victim and she is living alone in her village, the Hon'ble Supreme Court directed the respondent-State to pay Rs.8,000/- per month till her life time, treating the same to be an interest fetched on a fixed deposit of Rs.10,00,000/-.

6. <u>Compensation to male child victims:</u>

Children are defined as persons below the age of 18 years – Act is gender neutral i.e., it recognizes that the victims and the perpetrators of the offence can be male, female, or third gender.

But, the aspect of award of compensation to the male child victims has been overlooked by most legislative schemes. However, it was addressed by the Hon'ble Delhi High Court in the Minor through Guardian Zareen v. State – WP (Crl.) 798/2015 dated 21.03.2016. The Hon'ble High Court addressed the issue of discrimination of the male child victim as well as their right to compensation and awarded compensation to the male child victim.

7. <u>Compensation to the child born out of rape:</u>

The Hon'ble Delhi High Court in *Gaya Prasad Pal @ Mukesh v. State* (2017(1) RCR (Criminal) 233 held that the child born out of rape is entitled to compensation independently of his mother.

8. Interim compensation – Multiple applications:

The Hon'ble Delhi High Court in **Mother Minor Victim No.1 & 2 Vs. State and Others** (MANU/DE/1240/2020 – WP (Crl.) 3244 of 2019 decided on 15.6.2020) held that though Rules do not indicate that multiple applications for interim compensation can be made; nonetheless, since the said provision for compensation is a beneficial provision, the same must be considered liberally.

9. Grant of compensation after disposal of case:

Rule 9(2) says, the Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

In number of cases where conviction is recorded, I have granted final compensation to victim taking into consideration of gravity of offence committed on them and physical pain and mental trauma suffered by them and also taking into consideration of social and financial status of victim's family and the Hon'ble District Legal Services Authority accepted the said order and paid the compensation to the victims.

The objective behind providing compensation is the relief and rehabilitation of the child victims and the reparation to the victims when the state has failed to protect the individuals from crimes.

Conclusion:

The POCSO Act aims to provide a legal framework to protect children from sexual abuse and exploitation by providing stringent punishments for the sexual offences against children. Despite its well intentioned objectives, the POCSO Act has faced criticism on several

fronts. Even after more than 12 years since the Protection of Children from Sexual Offences Act, 2012, the proper implementation of the act has not taken place. The first and most important task of this legislation was to expedite the resolution of cases involving sexual offenses against children; it was mandated that a case be resolved within a year of the offense's cognizance, but in most Indian states, the time taken to resolve the cases is more than double of what is mandated under the act. There's no doubt that there has been considerable improvement, but we as a society should strive for better. The pendency of cases is a problem that arises due to the huge population of India, so it should be ensured that more special courts are set up, more judges are appointed, and more support persons are engaged so that the cases are resolved quickly. Also, the courts of India and the government should take relevant measures to avoid misuse of the law, as it has been noted that many innocent people are being charged under this act even when there was a consensual relationship between the couple. If an innocent is made to spend even a day in jail, it is a failure not only for the authorities, but for the society at large.

Preparation by:

Smt. T.Rajya Lakshmi.
Special Sessions Judge,
designated for speedy trial of
Offences under the POCSO Act,
Ananthapuramu.