SRIKAKULAM DISTRICT : WORKSHOP – III

CHAIRPERSON

HON'BLE SRI JUSTICE SUBBA REDDY SATTI GARU

JUDGE, HON'BLE HIGH COURT OF ANDHRA PRADESH,

AND ADMINISTRATIVE JUDGE, SRIKAKULAM

NODAL OFFICER

JUNAID AHMED MOULANA

PRINCIPAL DISTRICT JUDGE,

SRIKAKULAM

DATE : 21.09.2024

VENUE : DISTRICT COURT CONFERENCE HALL

SUBJECT: **"OFFENCES UNDER SPECIAL ENACTMENTS"**

TOPICS :

1. **Offences under Section 138 of Negotiable Instruments Act.**

   a). Offence under Section 138 NI Act – Ingredients & Case Law.
   b). Cognizance, Limitation, Jurisdiction – A Study.
   c). Interim Compensation and its recovery.
   d). Compounding of Offences – Execution of Lok Adalat Award.

2. **Domestic Violence Act, 2005:**

   e). Parties by whom and against whom reliefs can be sought.
   f). Types of reliefs.
   g). Execution of Orders.

3. **Protection of Children from Sexual Offences Act, 2012 – An overview:**

   h). Nature of Offences.
   i). Presumptions
   j). Compensation.

SESSION NO.I & II

TOPICS:

1. **Offences under Section 138 of Negotiable Instruments Act.**

a). Offence under Section 138 NI Act – Ingredients & Case Law.

b). Cognizance, Limitation, Jurisdiction – A Study.

Paper Presentation by-

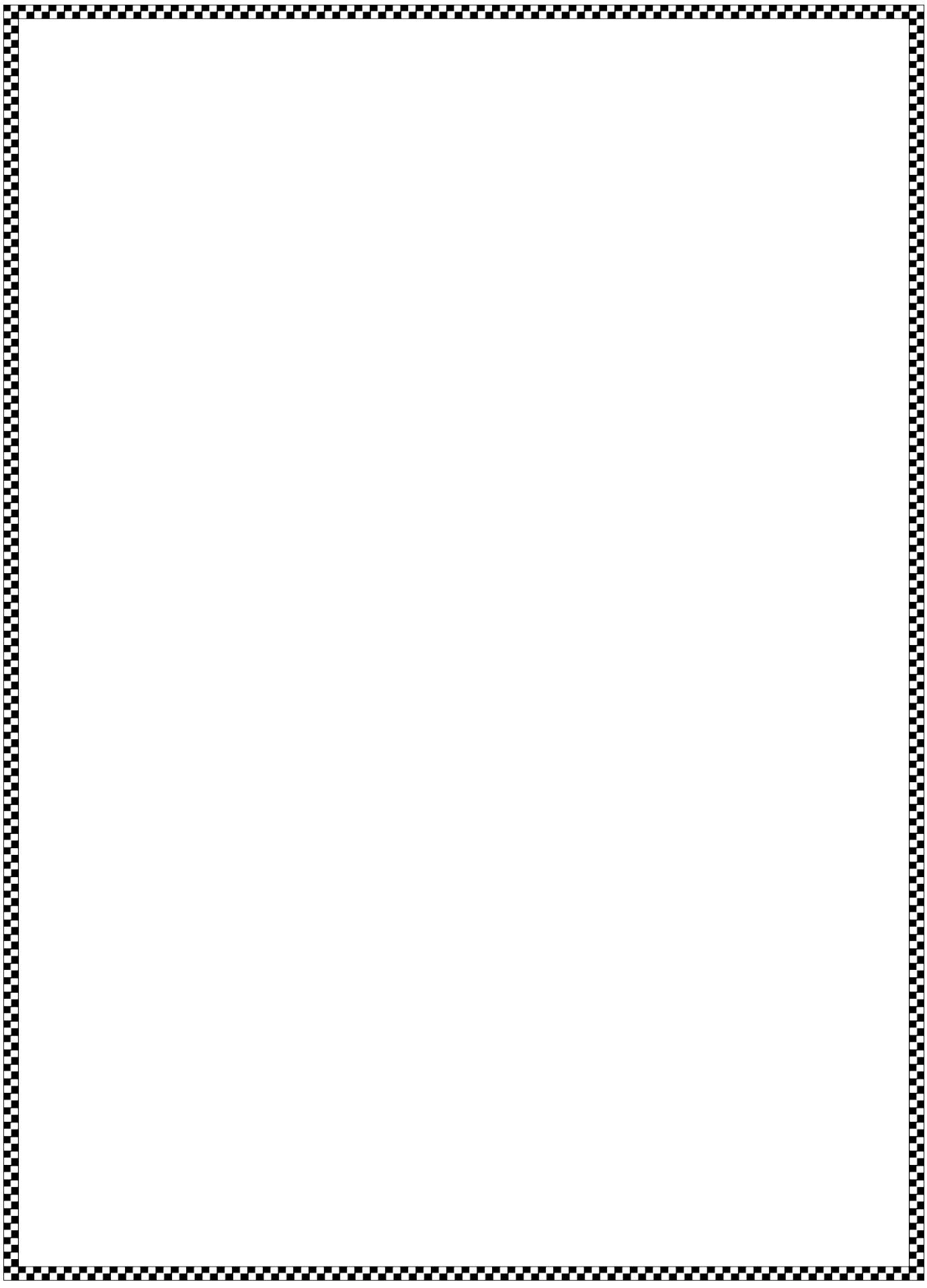
Smt. S.Mani,
Civil Judge (Junior Division),
Amadalavalasa.

c). Interim Compensation and its recovery.

d).Compounding of Offences – Execution of Lok Adalat Award.

Paper Presentation by-

Smt. Mohideen Zamruth Begum Kamaludeen
I Additional Civil Judge (Junior Division),
Srikakulam..



SESSION NO. III

TOPICS:

Domestic Violence Act, 2005:

e). Parties by whom and against whom reliefs can be sought.

f). Types of reliefs.

g). Execution of Orders.

Paper Presentation by-

Smt. D.Sri Bharani,
III Additional Civil Judge (Junior Division) – cum - Special Judicial Magistrate of I Class, Prohibition and Excise, Srikakulam.

SESSION NO. IV

TOPICS:

Protection of Children from Sexual Offences Act, 2012 – An overview:

h). Nature of Offences.

i). Presumptions

j). Compensation.

Paper Presentation by-

Sri. P.Bhaskar Rao,
III Additional District Judge – cum – Judge Family Court, (FAC) of POCSO Act Court, SRIKAKULAM.

SESSIONS-I & II

Offences under Section 138 of Negotiable Instruments Act

Paper Presentation

{Topics (a) & (b)} by

Smt **S.MANI**
Judicial Magistrate of I Class
AMADALAVALASA

{Topics (c) & (d)} by

MOHIDEEN ZAMRUTH BEGUM KAMALUDEEN
I Additional Civil Judge (Junior Division)
SRIKAKULAM

TOPICS

Offences under Section 138 of Negotiable Instruments Act

(a) Ingredients & Case Law

(b) Cognizance, Limitation, Jurisdiction – A Study

(c) Interim Compensation and its Recovery

(d) Compounding of Offences – Execution of Lok-Adalat Award

Offences under Section 138 of Negotiable Instruments Act

(a) INGREDIENTS & CASE-LAW

The main object of bringing Section 138 of Negotiable Instruments Act on statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business on Negotiable Instruments. The incorporation of the provision is designed to safeguard the faith of the creditor in the drawer of the cheque, which is essential to the economic life of a developing country like India. The provision of Section 138 of the Negotiable Instruments Act has been introduced with a view to curb cases of issuing cheques indiscriminately by making stringent provisions and safeguarding interest of creditors. This aspect has been stated in the decision reported in **Vinaya Devanna Nayak Vs Ryot Seva Sahakari Bank Ltd.,**[1] by quoting the Judgment in **"Electronic Trade and Technology Development Corporation Ltd. Vs. Indian Technologists and Engineers.**[2] The provision under section 138 of Negotiable Instruments Act is intended to prevent dishonesty on the part of the drawer of negotiable instruments is issuing cheques without sufficient funds or with a view to inducing the payee or holder in due course to act upon it.

[1] The essentials to constitute an offence under section 138 of Negotiable Instruments Act—

a) A person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account.

[1] AIR 2008 SC 716
[2] (1996) 2 SCC 739

b) The cheque should have been issued for the discharge in whole or in part of any debt or other liability.

c) That cheque should have been 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.

d) The cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank.

e) The payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque, within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.

f) The drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

Being cumulative, it is only when all the aforementioned ingredients are satisfied, then the person who had drawn the cheque can be deemed to have committed an offence under section 138 of Negotiable Instruments Act.

[2] The essentials to constitute an offence under section 138 of Negotiable Instruments Act were discussed by the Hon'ble Apex Court in case of

Dashrathbhai Trikambhai Patel Vs. Hitesh Mahendrabhai Patel,[3] dated 11.10.2022.

[3] **Validity period of cheque**

Under the Act, the cheque is valid for a period of six months or its date of validity. The statutory period of six months has to be reckoned from the date on which it was drawn or with in period of its validity whichever earlier.

In **Shri Ishar Allay Steels Lt. Vs. Jayaswals Neco Limited**,[4] it was held by the Hon'ble Apex Court that to make an offence under section138 of Negotiable Instruments Act, it is mandatory that the cheque is presented to "the bank" within a period of six months from the date on which it is drawn or with in the period of its validity, whichever is earlier. When a postdated cheque is written or drawn, it is only a bill of exchange. The postdated cheque became a cheque under the Act on the date which is written on the said cheque and the six months period has to be reckoned, for the purposes of Section 138 of the Act, from the said date. Section 72 of the Act provides that a cheque must in order to charge the drawer, be presented at the bank upon which it is drawn before the relation between the drawer and his banker has been altered to the prejudice of the drawer. The payee of the cheque has the option to present the cheque in any bank including the collecting bank where he has his account but to attract the criminal liability of the drawer of the cheque such collecting bank is obliged to present the cheque in the drawee or payee bank on which the cheque is drawn with in the period of six months from the date on which it is shown to have been issued.

[4] **Revalidation of cheque**

[3] 2023 1 SCC 578
[4] AIR 2001 SC 1161

There is no bar to revalidate the cheque. It is always open to a drawer of a negotiable instrument to voluntarily revalidate a Negotiable Instrument including a cheque which was held in case law in **Veera Exports Vs. T.Kalavathi.**[5] It is always a question of fact whether the alteration was made by the drawer himself or whether it was made with the consent of the drawer. It requires evidence to prove the aforesaid question whenever it is disputed. As per section 87 of the Negotiable Instruments Act. Any material alteration of negotiable instrument renders the same void as against anyone who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties. Alteration by endorsee any such alteration, if made by an endorsee, discharges his indorse from all liability to him in respect of the consideration thereof, the provisions of this section 87 are subject to those of sections 20,49, 86 and 125.

[5] **Account Closed**

When a cheque issued in an "account closed" would come with in the Section 138 of the Negotiable Instruments Act and it has been settled by the Hon'ble Apex Court in **NEPC Micon Ltd. Vs.Magna leasing Ltd.**[6] where a cheque is returned by the bank unpaid on the ground that the account is closed, it means cheque is returned unpaid on the ground that the amount of money standing to the credit of that account is insufficient to honour the cheque. Closure of the account would be an eventuality after the entire amount in the account is withdrawn and there is no amount in the credit of that account on the relevant date when the cheque was presented for honouring the same. The expression

[5] AIR 2002 SC 38
[6] AIR 1994 SC 1952

"the amount of money standing to the credit of that account is insufficient to honour the cheque is a genus of which the expression that account being closed is species and it would certainly be an offence under section 138 as there was insufficient or no fund to honour the cheque in that account. Further cheque is to be drawn by a person for payment of any amount of money due to him on an account maintained by him with a banker and only on that account cheque should be drawn. Thus would be clear by the provisos (a)(b) and (c), secondly, proviso (c) gives an opportunity to the drawer of the cheque to pay the amount within 15 days of the receipt of the notice as contemplated in proviso (b). **In Nagaraja Upadhyana Vs Sanjeevan,**[7] wherein the Hon'ble High Court of Andhra Pradesh held that on the date of issuance of disputed cheque, the account of the accused in the bank had been close at the instance of the bank and not at the instance of the accused provision of Section 138 of Negotiable Instruments Act is not attracted in this case and dismissed appeal. In **N.A.Issac Vs Jeeman P.Abraham and Another,**[8] wherein it was held by the Hon'ble Apex Court that it is now well settled that Section 138 of the Negotiable Instruments Act is applicable even when a cheque is issued from an already closed account. **In M/s.Laxmi Dyechem Vs.State of Gujarat and Others,**[9] **27.11.2012.** The Hon'ble Apex Court by quoting the Judgment in **Vinod Tanna and another Vs Zaher Siddiqui and others,**[10] it was held that dishonour of cheque on a ground that the signature of the drawer of the cheque do not match the specimen signatures available with the bank, would not attract the penal provisions of section 138 of the Negotiable Instruments Act.

[6] **<u>Stop Payment</u>**

[7] 2007 CRLJ 3800
[8] 2005 (1) Crl.Court Cases 119
[9] 2012 (13) SCC 375
[10] (2002) 7 SCC 541

In **MMTC Limited and another Vs Medchal Chemical and Forma Pvt. Ltd.**[11] wherein the Hon'ble Apex Court observed that if the accused shows that the stop payment instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there were sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at they drawee bank and that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of the cheque for encashment, then offence under Section 138 would not be made out, the important thing is that the burden of so proving would be on the accused. By virtue of Section 139, the court has to presume that the cheque was received by the holder for the discharge in whole or in part of any debt or liability. The above position was reconfirmed by Supreme Court in 2012 in the matter of Laxmi Dyechem Vs State of Gujarat.

[7] **Blank Signed Cheque is issued**

In **Moideen Vs Johny,**[12] it has been held by the Hon'ble High Court of Kerala in paragraph 6 that even if a blank cheque is issued as security, the person in possession of the blank cheque can enter the amount of the liability and present it the bank. When a blank cheque is issued by one to another, it gives an authority on the person to whom it is issued, to fill up at the appropriate stage with the necessary entries regarding the liability and to present it to the bank. Even if the body of the cheque is filled in different ink by some person other than the accused still the instrument will be valid and complaint is maintainable under Section 138 of Negotiable Instruments Act held by the Hon'ble High Court of Delhi in Ravichopra Vs. State and another. Section 20 of Negotiable Instrument

[11] (2002) 1 SCC 234
[12] 2007 (1) Civil Court cases 220 (Kerala)

Act talks about inchoate stamped instruments and states that if a person signs and delivers a paper stamped in accordance with the law and either wholly blank or have written there on an incomplete Negotiable Instrument such person thereby gives prima facie authority to the holder thereof to make or complete as the case may be upon it the negotiable instrument for any amount specified therein and not exceeding the amount covered by the stamp. Section 49 permits the holder of the negotiable instrument endorsed in blank to fill up the said instrument by writing upon the endorsement a direction to pay any other person as endorsee and to complete the endorsement in to a blank cheque, it makes it clear that by doing that the holder does not thereby incurred the responsibility of an endorsed. Section 118 of the Negotiable Instruments Act which sets out various presumption has to negotiable instrument. The presumption is of consideration, as to date, as to time of acceptance, as to transport, as to endorsement, as to stamp.

[8] In **Krishna Janardhan Bhat Vs Dattatraya G. Hegde**,[13] in para 21 it was held by the Hon'ble Apex Court that the proviso appended to section 138 of the Negotiable Instruments Act provides for legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of Negotiable Instruments Act 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 accused may discharge his burden on the basis of the materials already brought on records and he has a constitutional right to maintain silence.

As per Section 118 (a) of Negotiable Instruments Act, until the contrary is proved, the presumption that every Negotiable Instrument was made or drawn for consideration and that every such instrument, when it has been accepted,

[13] (2008) 4 SCC 54

indorsed, negotiated or transferred was accepted indorsed, negotiated or transferred for consideration.

[9] In **Bharat Barrel and Drum manufacturing Company Vs. Amin Choud Payrelal**,[14] interpreting Section 118 (a) of the Act opined that once execution of the promissory note is admitted, the presumption under section 118 (a) would arise that it is supported by consideration such a presumption is rebuttable presumption. The defendant can prove the non-existence of consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as on matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of negotiable instrument. The burden on the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In case, whether the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under section 118 (a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt.

[10] In **Rangappa Vs. Sri Mohan**,[15] it was held by the Hon'ble Apex Court that presumption mandated by Section 139 of the Act does indeed include the existence of a legally recoverable debt or liability. Since presumption under section 139 is rebuttable presumption it is open to accused to raise a defence

[14] AIR 1999 SC 1008
[15] AIR 2010 SC 1898

wherein existence of a legally recoverable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. Section 139 of the Act is an example of reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of Negotiable Instruments. The test of proportionality should guide the construction and interpretation of reverse onus clauses and accused can not be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. It is settled position that when an accused has to rebut the presumption under section 139, the standard of proof for doing so is that of "Preponderance of Probabilities". Therefore, if the accused is able to raise a probable defence which created doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can reply on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own. Since the accused did admit that the signature on the cheque was his, the statutory presumption comes in to play and the same has not been rebutted even with regard to the materials submitted by the complainant.

(b) COGNIZANCE, LIMITATION, JURISDICTION – A STUDY

[11] As per Section 142 of Negotiable Instruments Act. [Notwithstanding anything contained in the Code of Criminal Procedure, 1973

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

(b) Such complaint is made within one month of the date on which the cause of action arises under clause(c) of the proviso to section 138;

[Provided that the cognizance of a complaint may be taken by the court after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making a complaint within such period]

(c) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.

The term "Complainant" is not defined under the code section 142 of Negotiable Instruments Act requires a complaint under Section 138 of that Act, to be made by the payee (or by the holder in due course). It is thus evident that in a complaint relating to dishonour of a cheque (which has not been endorsed by the payee in favour of any one) it is the payee is a company, necessarily the complaint should be filed in the name of company. A company can be represented by an employee or even by a non employee authorised and empowered to represent the company either by a resolution or by a power of attorney. Section 138 of Negotiable Instruments Act mandates that payee alone whether a corporeal person or incorporeal person shall be the complainant.

[12] In **A.C.Narayanan Vs. state of Maharastra** wherein it was held by the Hon'ble Apex Court that while holding that there is no serious conflict between the decisions in the decisions of this Court in **M.M.T.C. Ltd. and Another vs. Medchl Chemicals and Pharma (P) Ltd. and Another**,16 and **Janki Vashdeo Bhojwani and Another vs. Indusind Bank Ltd. and Others**[17] It clarified the position and answer the questions in the following manner:

[16] (2002) 1 SCC 234
[17] (2005) 2 SCC 217

(i) Filing of complaint petition under Section 138 of Negotiable Instrument Act through power of attorney is perfectly legal and competent.

(ii) The Power of Attorney holder can depose and verify on oath before the Court in order to prove the contents of the complaint. However, the power of attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.

(iii) It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power of attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

(iv) In the light of section 145 of N.I Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under section 138 of the N.I Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant of his witness upon oath for taking the decision whether or not to issue process on the complaint under section 138 of the Negotiable Instruments Act.

(v) The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person.

[13] In **Yogendra Pratap Singh Vs. Savitri Pandey & Another**,[18] it was held that Section 142 of the Negotiable Instruments Act prescribes the mode and so also the time within which a complaint for an offence under Section 138 of the

[18] AIR 2015 SC 157

Negotiable Instruments Act can be filed. A complaint made under Section 138 by the payee or the holder in due course of the cheque has to be in writing and needs to be made within one month from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. The period of one month under Section 142(b) begins from the date on which the cause of action has arisen under clause (c) of the proviso to section 138. However, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within the prescribed period of one month, a complaint may be taken by the Court after the prescribed period. The payee or the holder in due course of the cheque may file a fresh complaint within one month from the date of decision in the criminal case and, in that event, delay in filing the complaint will be treated as having been condoned under the proviso to clause (b) of section 142 of the Negotiable Instruments Act. This direction shall be deemed to be applicable to all such pending cases where the complaint does not proceed further. It was already held that a complaint filed before the expiry of 15 days from the date of receipt of notice issued under clause (c) of the proviso to section 138 is not maintainable, the complainant cannot be permitted to present the very same complaint at any later stage. His remedy is only to file a fresh complaint; and if the same could not be filed within the time prescribed under section 142 (b), his recourse is to seek the benefit of the proviso, satisfying the Court of sufficient cause.

[14] The cause of action in the case of dishonour of cheque will arise only on failure to make payment within 15 days of the receipt of notice. In **M/S. Saketh India Limited And Others Vs. M/S. India Securities Limited**,[19] wherein the Hon'ble Apex Court held that Ordinarily in computing the time, the rule observed is to exclude the first day and to include the last. Applying the said rule, the period of one month for filing the complaint will be reckoned from the day

[19] AIR 1999 SC 1090

immediately following the day on which the period of 15 days from the date of the receipt of the notice by the drawer, expires. **In Parameswaran Unni Vs G.Kannan**,[20] wherein it was held by the Hon'ble Apex Court that it is clear from section 27 of General clauses Act 1897 and section 114 of the Indian Evidence Act, 1872 that once notice is sent by register post by correctly addressing to drawer of cheque, service of notice is deemed to have been effected. Then requirement under proviso(b) of section 138 of NI Act stands complied, if notice is sent in prescribed manner. However the drawer of cheque is at liberty to rebut this presumption. **C.C. Alavi Haji vs Palapetty Muhammed & Another**,[21] wherein it was held by the Hon'ble Apex Court that when the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with. Insofar as the question of disclosure of necessary particulars with regard to the issue of notice in terms of proviso (b) of Section 138 of the Act, in order to enable the Court to draw presumption or inference either under Section 27 of the General Clauses Act or Section 114 of the Evidence Act, is concerned, there is no material difference between the two provisions. Therefore, it is needless to emphasise that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque. It is well settled that at the time of taking cognizance of the complaint under Section 138 of the Act, the Court is required to be prima facie satisfied that a case under the said Section is made out and the aforenoted mandatory statutory procedural requirements have been complied with. It is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the

[20] 2017 CRLJ 2838
[21] (2007) 6 SCC 555

postman was incorrect. this interpretation of the provision would effectuate the object and purpose for which proviso to Section 138 was enacted, namely, to avoid unnecessary hardship to an honest drawer of a cheque and to provide him an opportunity to make amends. The entire purpose of requiring a notice is to give an opportunity to the drawer to pay the cheque amount within 15 days of service of notice and thereby free himself from the penal consequences of Section 138.

In **D. Vinod Shivappa Vs Nanda Belliappa on 25 May, 2006**, it was held by the Hon'ble Apex Court that one can also conceive of cases where a well-intentioned drawer may have inadvertently missed to make necessary arrangements for reasons beyond his control, even though he genuinely intended to honour the cheque drawn by him. The law treats such lapses induced by inadvertence or negligence to be pardonable, provided the drawer after notice makes amends and pays the amount within the prescribed period. It is for this reason that Clause (c) of proviso to Section 138 provides that the section shall not apply unless the drawer of the cheque fails to make the payment within 15 days of the receipt of the said notice. As noticed above, the entire purpose of requiring a notice is to give an opportunity to the drawer to pay the cheque amount within 15 days of service of notice and thereby free himself from the penal consequences of Section 138.

In **K. Bhaskaran Vs. Sankaran Vaidhyan Balan & Another**, considering the question with particular reference to scheme of Section 138 of the Act, it was held that failure on the part of the drawer to pay the amount should be within fifteen days of the receipt of the said notice. Giving notice in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address and for the drawer to comply with Clause (c) of the proviso. Emphasizing that the provisions contained in Section 138 of the Act

required to be construed liberally, it was observed thus: If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It should not be an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure. 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 a 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. It was held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available" in the house or "house locked" or "shop closed" or addressee not in station, due service has to be presumed. It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under section 138 of the act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

[15] Considering the ingredients of section 138 of the Negotiable Instruments Act, the **Hon'ble Apex Court in case of K.Bhaskaran Vs. Shankaran**,[22] has given jurisdiction to initiate the prosecution at any of the following places. Where

[22] AIR 1999 SC 3762

cheque is drawn, where payment has to be made, where cheque is presented for payment, where cheque is dishonour, where notices is served in **Dashrath Rupsingh Rathod Vs State Of Maharashtra & Another**,[23] in which various provisions of 138 Negotiable Instruments Act were interrupted and held an offence under Section 138 of Negotiable Instrument Act, 1881 is committed and cheque drawn by the accused on an account being maintained by him in a bank for discharge of debt or liability in returned unpaid for insufficiency of funds or for the reason that the amount exceeds the arrangement made by the bank as per section 142 a complaint has to be made in writing by the payee or holder of the cheque in due course within a period of one month from the date the cause of action accrues to such payee or holder under clause (c) of proviso to Section 138. The cause of action to file a complaint accrues to a complainant or payee or holder of a cheque in due course if the dishonoured cheque is presented to a drawee bank within a period of six months from the date of this issue, if the complainant demanded payment of cheque amount within 30 days of receipt of information by him from the bank regarding the dishonour of cheque and if the drawee has failed to pay the cheque amount within 15 days receipt of notice. The general rule stipulated under section 177 of Cr.P.C. applies to cases under section 138 of Negotiable Instruments Act. Prosecution in such cases can therefore be launched against the drawee of the cheque only before the court within whose jurisdiction the dishonour take place except in situation where the offence of dishonour of the cheque punishable under section 138 is committed along with other offences in a single transaction within the meaning of Section 220 (1) r/w 184 of Cr.P.C. or is covered by the provisions of Section 182 (1) r/w Section 184 and 220 thereof. As per Negotiable Instrument (Amendment) Ordinance, 2015, Section 142(2) is introduced by way of an ordinance 2015 with effect from 15.06.2015.

[23] AIR 2014 SC 3519

[16] As per the Section 142 (2) of Negotiable Instruments Act 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 they case may be maintains the account.

As per the proposed amendment, where the bank of the payee or holder in due course situates in which he maintains account, shall have jurisdiction to entertain a case under the section 138 of Negotiable Instruments Act.

Conclusion for Topics (a) & (b)

Cognizance—

* Section 142 of the Negotiable Instruments Act forbids the Magistrate from taking cognizance of the offence if the complaint was not filed within one month of the date on which the cause of action arose. Completion of the offence is the immediate forerunner of rising of cause of action. In other words, cause of action would arise soon after completion of the offence, and the period of limitation for filing the complaint would simultaneously start running. See - ***SIL Import, USA v. Exim Aides Silk Exporters***.[24]

[24] (1999) 4 SCC 567

Period of Limitation—

* The Negotiable Instruments Act, 1881 enlists three essential conditions that ought to be fulfilled before the said provision of law can be invoked. See – **Dattatraya v Sharanappa**.[25]

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

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

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

  These principles and pre-requisites stand well established through Judgment of the Hon'ble Apex Court in ***Sadanandan Bhadran* v. *Madhavan Sunil Kumar***.[26]

* There is an explicit limitation of 30 days, for filing the complaint which will be reckoned from the day immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawer, expires, as per Section 142 (b) of the Negotiable Instruments Act, 1881 to initiate proceedings under Section 138 of the NI Act, 1881.

Jurisdiction—

* **Section 142(2)(*a*) of the Negotiable Instruments Act, amended through the Negotiable Instruments (Amendment) Second Ordinance, 2015** vests jurisdiction for initiating proceedings for the offence under Section 138 of the Negotiable Instruments Act, inter alia, in the territorial jurisdiction of the court, where the cheque is delivered for collection (through an account

[25] 2024 SCC OnLine SC 1899
[26] 1998 INSC 433

of the branch of the bank where the payee or holder in due course maintains an account). See - ***Bridgestone India (P) Ltd. v. Inderpal Singh***.[27]

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Paper presentation (Topics (a) & (b) by—

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(c) INTERIM COMPENSATION AND ITS RECOVERY

Interim Compensation under **Section 143A** of Negotiable Instruments Act in the year 2018 by way of amendment which has been made enforceable by the Central Government, w.e.f. 01.09.2018 vide Notification No.S.O.3995 (E), dated 16 August 2018.

Section 143(A) of Negotiable Instrument Act 1881 empowers the court to direct for interim compensation pending trial of dishonour of cheque cases. This section envisages that—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Court trying an offence under section 138 may order the drawer of the cheque to pay interim compensation to the complainant-

(a) in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint; and

(b) in any other case, upon framing of charge.

(2) The interim compensation under sub-section (1) shall not exceed twenty percent of the amount of the cheque.

(3) The interim compensation shall be paid within sixty days from the date of the order under subsection (1), or within such further period

[27] (2016) 2 SCC 75

not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque.

(4) If the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

(5) The interim compensation payable under this section may be recovered as if it were a fine under section 421 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) The amount of fine imposed under section 138 or the amount of compensation awarded under section 357 of the Code of Criminal Procedure, 1973 (2 of 1974), shall be reduced by the amount paid or recovered as interim compensation under this section.

[2] **Compensation mandatory or discretionary?**

The Bombay high court in Ashwin ***Ashokrao Karokar Vs Laxmikant Govind Joshiin***,[28] held that the provisions of section 143-A of the Negotiable Instruments Act, 1881 are directory and not mandatory as a discretion was conferred upon the Court, to either grant or not to grant interim compensation.

[3] **Quantum of Compensation**

The amount of the interim compensation shall not exceed 20% of the amount of the cheque is the mandate of section 143(A)(2).

[4] **Hearing of Accused**

The High court of Karnataka in ***Sri Himanshu Gupta vs V Narayana Reddy***,[29] held that Interim Compensation cannot be granted without giving an

[28] Criminal Writ Petition No. 48/2022 – Disposed on 7.7.2022
[29] Criminal Petition No.3555 of 2022 – Disposed on 26.5.2022

opportunity of hearing to accused. Under Section 143-A of the Negotiable Instruments Act, the court can direct payment of interim compensation even without the complainant making an application praying for the same, but not without following the principles of natural justice.

[5] **Prospective or Retrospective?**

In **G.J. Raja vs. Tejraj Surana**,[30] he Hon'ble Supreme Court Held that Section 143A is prospective in nature and confined to cases where offences were committed after the introduction of Section 143A i.e. after 01.09.2018.

[6] **Stage when compensation to be awarded?**

The High Court of Calcutta in ***Somnath Chatterjee Vs. Hossain Mallick***,[31] held that No mandatory disposal of Section 143A application before examination of accused under Section 251 CrPC But after he pleads not guilty to the accusation made in the complaint.

The Hon'ble Supreme Court in ***Pawan Bhasin Vs. State of UP***,[32] observed, as is evident from plain reading of Section 143A (1)(a), it is only where the accused "pleads not guilty" of the accusation made in the complaint that interim compensation under Section 143A (1) can be granted.

[7] **Time frame for paying interim compensation?**

Under Section 143 A (3) of N.I. Act, the interim compensation shall be paid within sixty days from the date of the order under sub-section (1), or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque.

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[30] AIR 2019 SUPREME COURT 3817
[31] Criminal revision no. 1431 of 2019 – Disposed on 8.2.2023
[32] 2023 Live Law (SC) 537

[8] **Failure to pay compensation whether entails any disability?**

The Hon'ble Supreme court in **Noor Mohammed Vs. Khurram Pasha,**[33] held that section143 (A) nowhere contemplates that an accused who had failed to deposit interim compensation could be fastened with any other disability including denial of right to cross-examine the witnesses examined on behalf of the complainant.

[9] **How to recover awarded interim compensation Under Section 143A (5) of NI Act?**

The interim compensation payable under this section may be recovered as if it were a fine under section 421 of the Code of Criminal Procedure, 1973 (2 of 1974). Complainant to repay If the accused is acquitted. If the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rate within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

The Bombay High Court in **Guljama Shah Jahir Shah Vs. Shri Sadguru Kaka Stone Crusher,**[34] noted that the purpose of introducing Section 143A of the NI Act was to curtail the delaying tactics used by unscrupulous individuals who issued dishonoured cheques. The amendment of 2018 aimed to address the issue of undue delay in resolving such cases, saving time and resources for payees. The court clarified that interim compensation is awarded at a stage where the accused has pleaded not guilty to the charges. In such cases, even if the conditions in section 143 A are met, not awarding interim compensation at the maximum rate of 20 percent would undermine the purpose of Section 143 A. The

[33] Criminal Appeal arising out of SLP No.2872/2022 – Disposed on 2.8.2022
[34] Criminal Writ Petition No.83/2023 – Disposed on 2.3.2023

court said that if there are doubts about the fulfillment of any of these conditions, the magistrate could reduce the interim compensation or refrain from granting it altogether. "once the factors enumerated in clauses (a) to (d) above are satisfied/ fulfilled, then those are reasons enough and thus case for awarding interim compensation exists. In such circumstances, the learned Magistrate will be fully justified in awarding 20% interim compensation", said the court. Further, the court proposed that in cases where interim compensation is granted and the trial resulted in the accused's acquittal, an additional condition could be imposed. This condition would require the complainant to provide an undertaking to deposit the amount of interim compensation, along with interest, if the accused was acquitted. Thus, the court dismissed the petition and directed the complainant to give an undertaking to deposit the amount of interim compensation along with interest at 6 percent per annum if the accused is acquitted.

The High Court of Kerala in ***Faizal Abdul Samad Vs. A.N. Sasidharan & Another,***[35] observed that If a court of law decided to order the maximum limit prescribed in Section 143 A (2) of N.I. Act, as far as the interim compensation is concerned, it is the duty of the court to give reasons for the same. Similarly if the learned magistrate is giving interim compensation of 1% of the cheque amount or 2% or 3% of the cheque amount as the case may be, the reason should be mentioned. A discretion is given to the learned magistrate to determine the amount that is to be ordered as interim compensation. When discretion is given to a court of law, it should be judiciously decided. In such circumstances, a speaking order is necessary especially in a case where the maximum 20% of the interim compensation is ordered by the learned magistrate as prescribed under Section 143 A of the N.I. Act. Similarly, if the interim compensation ordered is below 20% of the cheque amount, then also a reason should be mentioned.

[35] Crl.M.C. No. 8132 of 2023 – 17.11.2023

Therefore, without giving reason for fixing 20% of the cheque amount as interim compensation, which is the maximum limit prescribed under Section 143 A (2) of N.I. Act, that order cannot be treated as an order made after applying the mind and exercising the discretionary jurisdiction.

In a recent decision of Hon'ble Supreme Court in ***Rakesh Ranjan Shrivastava v. State of Jharkhand***,[36] the observations and directions of the Hon'ble Apex Court are to the following effect—

* This is a criminal appeal against Jharkhand High Court's order dismissing the challenge to the Trial Court and Sessions Court's decision for payment of interim compensation of Rs. 10,00,000/- to the respondent under Section 143-A of the Negotiable Instruments Act, 1881.

* The Division Bench of Abhay S. Oka and Ujjal Bhuyan, JJ. set aside the impugned judgments for non-application of mind.

* The Court laid down several factors which must be considered by the Courts while exercising discretionary power under Section 143-A of the Negotiable Instruments Act, 1881 ('N.I. Act').

* In this case respondent moved an application under Section 143-A of the N.I. Act seeking a direction to the accused to pay 20 per cent of the cheque amount as compensation. The Trial Court vide order dated 07-03-2020 allowed the application and directed the accused to pay an interim compensation of Rs. 10,00,000/- to the respondent within a period of 60 days. The Sessions Court affirmed the order in a revision application. The Jharkhand High Court dismissed the

[36] 2024 SCC Online SC 309, Decided on: 15-03-2024

challenge against the Trial Court's and Sessions Court's order by the impugned judgment. Hence, the present criminal appeal.

* The object of Section 143-A, the Court noted that Section 143-A was brought in by Act No.20 of 2018 with effect from 1-09-2018 to address the issue of undue delay in the final resolution of the dishonour of cheque cases.

* The Court noted that Section 148 was inserted in the N.I. Act with the same amendment. Section 148 provides that in an appeal preferred by the drawer of the cheque against conviction under Section 138, the Appellate Court may order the appellant to deposit such a sum which shall be a minimum 20 per cent of the fine or compensation awarded by the Trial Court.

* The Court on perusal of Section 148 (1) said that it clarifies that the amount payable under Section 148 (1) is in addition to interim compensation paid by the appellant/accused under Section 143-A.

* Whether Section 143-A (1) of the N.I Act, which provides for the grant of interim compensation, is directory or mandatory? The Court explained that the use of the word "may" in certain legislations can be construed as "shall", and the word "shall" can be construed as "may", depending on the nature of the power conferred by the relevant provision of the statute and the effect of the exercise of the power.

* The Court said that non-payment of interim compensation by the accused does not take away his right to defend and the interim compensation amount can be recovered from him treating it as fine.

* Explaining the ways to recover the interim compensation amount, the Court said that the Trial Court by issuing a warrant for attachment and sale of the movable property of the accused can recover the same, or the Court is vested with the power to issue a warrant to the District Collector authorizing him to realize the interim compensation amount as arrears of land revenue from the movable or immovable property, or both, belonging to the accused. Therefore, the Court said that non-payment of interim compensation fixed under Section 143-A has drastic consequences. Further, the Court said that if the movable or immovable property of the accused has been sold for recovery of interim compensation, even if he is acquitted, he will not get back his property. The Court explained that the N.I. Act does not prescribe any mode for recovery of the compensation amount from the complainant together with interest as provided in Section 143-A (4), as sub-section (4) provides for refund of interim compensation by the complainant to the accused and as sub-section(5) provides for mode of recovery of the interim compensation, obviously for recovery of interim compensation from the complainant, the mode of recovery will be as provided in Section 421 of the CrPC, which is a long-drawn process and if the complainant has no assets, the recovery will be impossible.

* The Court perused Section 148 which provides for Appellate Court's power to direct the accused to deposit 20 per cent of the compensation amount. The Court said this power can only be exercised after the accused was convicted after a full trial. Whereas the power under Section 143-A can be exercised even before the

accused is held guilty. The Court termed the order under Section 143-A (1) as a drastic order for payment of interim compensation against the accused in a complaint under Section 138, even before any adjudication is made on the guilt of the accused. Hence, the Court said that if the word 'may' is read as 'shall', it will have drastic consequences, as in every complaint under Section 138, the accused will have to pay interim compensation up to 20 per cent of the cheque amount and such an interpretation will be unjust and contrary to the well-settled concept of fairness and justice, exposing the provision to the vice of manifest arbitrariness. Therefore, the Court held that the power under Section 143-A (1) is discretionary and not mandatory.

* Factors to be considered by the Court while exercising discretion Prima facie evaluation: The Court said that while dealing with an application under Section 143-A of the N.I. Act, the Court will have to prima facie evaluate the merits of the case made out by the complainant and the merits of the defence pleaded by the accused in the reply to the application under Section 143-A(1). The presumption under Section 139 of the N.I. Act, by itself, is no ground to direct the payment of interim compensation. The reason is that the presumption is rebuttable. A direction to pay interim compensation can be issued, only if the complainant makes a prima facie case. Financial distress of the accused: The fact that the accused is in financial distress can also be considered. The Court said that if the Court concludes that a case is made out for grant of interim compensation, the Court will have to apply its mind to the quantum of interim compensation to be granted and consider various factors such as the nature of the transaction, the

relationship, if any, between the accused and the complainant and the paying capacity of the accused. Plausible Defence: The Court said that if the defence of the accused is prima facie a plausible, the Court may exercise discretion in refusing to grant interim compensation. The Court said that the factors provided above that are required to be considered are not exhaustive and there could be several other factors in the facts of a given case, such as, the pendency of a civil suit, etc. The Court also said that while deciding the prayer made under Section 143-A, the Court must record brief reasons indicating consideration of all the relevant factors.

* In the matter at hand, the Court noted that the direction to deposit Rs.10,00,000/- was without considering the issue of prima facie case and other relevant factors and said that it was without application of mind. Thus, the Court directed the Trial Court to consider the application for grant of interim compensation afresh and the amount of Rs. 10,00,000/- deposited by the accused will continue to remain deposited with the Trial Court. The Court set aside the impugned judgments.

(d) COMPOUNDING OF OFFENCES – EXECUTION OF LOK-ADALAT AWARDS

The offence under Section 138 of the Negotiable Instruments Act is compoundable after amendment and insertion of Section 147 of the Act. Section 147 of the Act facilitates compounding the offences under the Act.

The purpose of compounding the offence has been stated in the decision reported in **Vinay Devanna Nayak v. Ryot Seva Sahakari Bank Ltd**.,[37] wherein it is held that this court observed in Electronic Trade & Technology Development Corporation Ltd. V. Indian Technologists & Engineers, (1996) 2 SCC 739, the object of bringing Section 138 in the statute book is to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. The provision is intended to prevent dishonesty on the part of the drawer of negotiable instruments in issuing cheques without sufficient funds or with a view to inducing the payee or holder in due course to act upon it. It thus seeks to promote the efficacy of bank operations and ensures credibility in transacting business through cheques. In such matters, therefore, normally compounding of offences should not be denied. Presumably, Parliament also realized this aspect and inserted Section 147 by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002. (ACT 55 of 2002). The said section reads thus: S.147. Offences to be compoundable. Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compound- able. Taking into consideration even the said provision (Section 147) and the primary object underlying Section 138, in our judgment, there is no reason to refuse compromise between the parties. We, therefore, dispose of the appeal on the basis of the settlement arrived at between the appellant and the respondent.

In **K. M. Ibrahim Vs. K. P. Mohammed**,[38] the Hon'ble Apex Court held that It is true that the application under Section 147 of the Negotiable Instruments Act was made by the parties after the proceedings had been concluded before the

[37] AIR 2008 SC 716
[38] AIR 2010 SC 276

Appellate Forum. However, Section 147 of the aforesaid Act does not bar the parties from compounding an offence under Section 138 even at the appellate stage of the proceedings. Accordingly, we find no reason to reject the application under Section 147 of the aforesaid Act even in a proceeding under Article 136 of the Constitution. Since the parties have settled their disputes, in keeping with the spirit of Section 147 of the Act, we allow the parties to compound the offence, set aside the judgment of the courts below and acquit the appellant of the charges against him.

In **Damodar S. Prabhu Vs. Sayed Babalal H**,[39] Hon'ble Supreme Court issued following Guidelines to compound offence in cheque bounce cases, holding that — 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.

[39] AIR 2010 SC 1907

(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.

In **Madhya Pradesh State Legal Services Authority Vs. Prateek Jain**,[40] Hon'ble Supreme Court opined that even when a case is decided in Lok Adalat, the requirement of following the guidelines contained in Damodar S. Prabhu (supra) should normally not be dispensed with. However, if there is a special/specific reason to deviate therefrom, the Court is not remediless as Damodar S. Prabhu Judgment itself has given discretion to the concerned Court to reduce the costs with regard to specific facts and circumstances of the case, while recording reasons in writing about such variance. 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.

[40] (2014) 10 SCC 690

In **K.N. Govindan Kutty Menon Vs. C.D. Shaji,**[41] the Hon'ble Supreme Court after discussing various judgments of different High courts about the execution of Lok Adalat awards in criminal or civil court or any other court, emerged following propositions:

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

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

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

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

Paper presentation (Topics (c) & (d) by—

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SESSION-III

DOMESTIC VIOLENCE ACT

Paper Presentation

By

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TOPICS

Domestic Violence Act, 2005

(e) Parties by whom and against whom reliefs can be sought

(f) Types of reliefs

(g) Execution of Orders

DOMESTIC VIOLENCE ACT, 2005

Introduction

Under the Domestic Violence Act, 2005, protection officers have been appointed by the Government to help the aggrieved woman in filing the case against her husband or against any male adult person who has committed domestic violence and who is in domestic relationship with the petitioner

Domestic violence is a major social issue in India that affects countless individuals, primarily women. It is a complicated issue rooted in societal standards, economic concerns, and gender-based power relations. Despite legislative protections and measures to prevent domestic abuse, it remains a prevalent problem with terrible repercussions. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged this. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in its General Recommendation No. XII (1989) has recommended that State parties should act to protect women against violence of any kind especially that occurring within the family.

The Protection of Women from Domestic Violence Act, 2005 was enacted by the Parliament of India 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 other related incidents. This act is a laudable piece of legislation enacted in 2005 to tackle domestic violence and to bring women's human rights into sphere of the home, which has been an important site of violence. This law provides for the issuance of protection orders that can prohibit the abuser from contacting or approaching the victim and can also provide for financial support and access to shared property.

The patriarchal setup has been deeply rooted in Indian society since time immemorial. It may be believed that this system laid the foundation stone for the abuse of women. Domestic violence affects women from every social background irrespective of their age, religion, caste, or class. It is a violent crime that not only affects a person and her children but also has wider implications for society. Although the root behind the crime is hard to decipher, certain reasons behind the violence can be traced to the stereotyping of gender roles, and the distribution of power. The definition of violence has evolved over the years to an extent it not only includes physical forms of violence but also emotional, mental, financial, and other forms of cruelty. Thus, the term domestic violence includes acts which harm or endangers the health, safety, life, limb, or well-being (mental or physical) of the victim, or tends to do so, and includes causing: physical abuse, sexual abuse, verbal abuse, emotional abuse, and economic abuse, perpetrated by any person who is or was in a domestic relationship with the victim. Before the enactment of the Protection of Women from Domestic Violence Act, 2005, the victim could approach the court under Section 498-A of the Penal Code, 1860 which provides for 'husband or relative of husband of a woman subjecting her to cruelty' wherein only a certain set of offence dealing with cruelty to married women was the only recourse. All other instances of domestic violence within the household had to be dealt with under the offences that the respective acts of violence constituted under the IPC without any regard to the gender of the victim.

Main Objective of Domestic Violence Act

To minimize the cumbersome position of law, be it procedural or substantive, the Protection of Women from Domestic Violence Act, 2005 was enacted to protect the women from acts of domestic violence. The legislative intent was further emphasized by the Hon'ble Supreme Court of India in the case

of **Indra Sarma v. V.K.V Sarma**,[42] wherein it was stated that *'the DV Act is enacted to provide a remedy in civil law for the protection of women, from being victims of such relationship, and to prevent the occurrence of domestic violence in the society'*. Other legislation's like CrPC, IPC, etc., where reliefs have been provided to women who are placed in vulnerable situations were also discussed.

(e) PARTIES BY WHOM AND AGAINST WHOM RELIEFS CAN BE SOUGHT

Aggrieved Person

According to the definition provided under the DV Act in, 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. 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, **M. Palani v. Meenakshi**.[43]

The Hon'ble Supreme Court had observed in one of the cases 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

[42] (2013) 15 SCC 755
[43] 2008 SCC Online Mad 150

husband-wife relationship and not a complete severance of relationship as happens in divorce, **Krishna Bhattacharjee v. Sarathi Choudhury**.[44]

Domestic Relationship

According to Section 2(f) of DV Act, "domestic relationship" means a relationship between two people 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. The law addresses the concerns of women of all ages irrespective of their marital status. The definition of "domestic relationship" under the DV Act is exhaustive: when a definition clause is defined to "mean" such and such, the definition is prima facie restrictive and exhaustive,

In **Indra Sarma vs. V.K.V Sarma**,[45] the 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. The 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"*.

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

[44] (2016) 2 SCC 705
[45] (2013) 15 SCC 755

along with the man against whom the complaint is filed. It may also imply a household where a woman has lived in a domestic relationship but has been thrown out. This may include all kinds of situations whether the household is owned by the respondent, or it is rented accommodation. It also includes a house either owned jointly by the aggrieved person and the respondent or both may have jointly or singly, any rights, titles or interests. The DV Act recognizes a woman's right to reside in a shared household. This means a woman cannot be thrown out of such a household except through the procedure established by the law. In case she is thrown out she can be brought back again after obtaining the order from the court. A woman to claim the protection of right in "shared household" has to establish-

(a) that the relationship with the opposite party is "domestic relationship", and

(b) that the house in respect of which she seeks to enforce the right is "shared household".

In Indian society, there are many situations in which a woman may not enter into her matrimonial home immediately after marriage. A woman might not live at the time of the institution of proceedings or might have lived together with the husband even for a single day in "shared household" should not be left remediless despite valid marriage.

Narrow interpretation of "domestic relationship" and "shared household" would leave many a woman in distress without remedy. Hence the correct interpretation of aforesaid definition including the right to live in "shared household" would be that words "live" or "have at any point of time lived" would include within its purview "the right to live", **Vandhana v. T. Srikanth**.[46]

[46] 2007 SCC Online Mad 553

This law does not alter the legality of ownership or transfer the ownership, and a woman cannot claim that she owns a house; it only provides emergency relief to the victim in the sense that she cannot be thrown out of her house. For claiming ownership, a woman has to follow a separate legal procedure and has to file a separate application as per the provisions of laws whichever are applicable to her situation.

Domestic Violence

"Domestic violence" is a broad term that entails not only physical beating 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 provided in Section 3 of the DV Act includes the following as acts of domestic violence: "Any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person."

The Section also defines the meaning of the term 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.

WHO CAN SEEK HELP OR CLAIM RELIEF UNDER THE DOMESTIC VIOLENCE ACT

According to the provisions of this Act, any aggrieved woman who is in a domestic relationship with the respondent and who alleges to have been subjected to the act of domestic violence by the respondent can seek help. A woman can file a complaint against any adult male perpetrator who commits an act of violence. She can also file a complaint against any male or female relatives of the husband/ male partner (for example in a live-in relationship) who has perpetrated violence.

The Hon'ble Supreme Court in **Hiral P. Harsora v. Kusum Narottamdas Harsora**,[47] struck down 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 Hon'ble 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.

[47] (2016) 10 SCC 165

Filing a Complaint of Domestic Violence

An aggrieved woman, 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) of the availability of services of service providers;

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

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

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

The Hon'ble Supreme Court emphasized that the Police has to look into the complaint made under the DV Act seriously and it cannot submit a report that no case is made out without proper verification, investigation, enquiry not only from members of family but also from neighbours, friends and others, **Santosh Bakshi v. State of Punjab**.[48]

[48] (2014) 13 SCC 25

Section 12 of DV Act

This Section deals with the **Application to Magistrate**. It states that–

(1) An aggrieved person or a Protection Officer or any other person on behalf of the **aggrieved person may present an application to the Magistrate** seeking one or more reliefs under this Act.

> Provided that before passing any order on such application, the Magistrate shall take into consideration any **domestic incident report received by him from the Protection Officer or the service provider.**

(2) The relief sought for under sub-section (1) may include a **relief for issuance of an order for payment of compensation or damages** without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent.

> Provided that where a decree for any amount as compensation or damages has been passed by any court in favor of the aggrieved person, the amount, if any, **paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree** and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.

(3) Every application under sub-section (1) shall be in such form and contain such particulars as **may be prescribed** or as nearly as possible thereto.

(4) The Magistrate shall fix the **first date of hearing**, which shall not ordinarily be beyond **three days from the date of receipt** of the application by the court.

(5) The Magistrate shall Endeavour to dispose of every application made under sub-section (1) within a period of **sixty days from the date of its first hearing**.

What is Section 12 of the DV Act?

1. It is a **social beneficial legislation** enacted to protect women from domestic violence of all kinds.

2. It provides for **effective protection of the rights of women** who are victims of violence of any kind occurring within the family.

3. The preamble of this Act makes it clear that the reach of the Act is that violence, whether physical, sexual, verbal, emotional or economic, are **all to be redressed by the statute.**

Case Law

In **Ajay Kaul & Ors. V. State of J & K and Ors.,**[49] the Hon'ble Jammu and Kashmir High Court held that - Section 12 of the DV Act per se does not hold that a Magistrate on receipt of complaint is obligated to call for a domestic incident report, before passing any order on an application. So, it is **not mandatory for a Magistrate to obtain a domestic incident report** before the Magistrate passes any order provided under various sections of the Act.

(f) TYPES OF RELIEFS

The Legislature has though it fit to segregate reliefs that can be sought under DVC Act. The reliefs that can be granted by a Court under DVC Act are mentioned under Sections 18 to 22. By applying the rule of literal construction, the words of the statute have to be understood in their natural ordinary sense in accordance with their grammatical meaning, unless it leads to some absurdity

[49] CRMC No.274/2016, IA Nos.01/2017, 01/2016 (2019)

or if the intent of the Legislature suggests otherwise. The words of the statute must given their ordinary meaning.

In the case of **B. Premanand v. Mohan Koikal,[50] in para 24 it was held -** *"The literal rule of interpretation really means that there should be no interpretation. In other words, we should read the statute as it is, without distorting or twisting its language. We may mention here that the literal rule of interpretation is not only followed by Judges and lawyers, but it is also followed by the layman in his ordinary life. To give an illustration, if a person says "this is a pencil", then he means that it is a pencil; and it is not that when he says that the object is a pencil, he means that it is a horse, donkey or an elephant. In other words, the literal rule of interpretation simply means that we mean what we say, and we say what we mean. If we do not follow the literal rule of interpretation, social life will become impossible, and we will not understand each other. If we say that a certain object is a book, then we mean it is a book. If we say it is a book, but we mean it is a horse, table or an elephant, then we will not be able to communicate with each other. Life will become impossible. Hence, the meaning of the literal rule of interpretation is simply that we mean what we say, and we say what we mean."*

Under the DV Act, as already stated supra the reliefs are segregated under different provisions from Sections 18 to 22 of the Act and there is a clear demarcation. If the legislature had intended that any breach of the order made while granting reliefs under Sections 18 to 22 be punishable under Section 31, the same would have been said in clear terms. Since there is no ambiguity in any of the reliefs that can be granted under the DVC Act and clearly demarcated, the Courts need not search for any other interpretation other than the actual

[50] 2011 (4) SCC 266

meaning of the words. Section 31 of the DVC Act prescribes penalty for breach of protection order made under Section 18. The said provision cannot be read as a penalty for residence orders under Section 19 or monetary reliefs under Section 20 or custody orders under Section 21 or compensation
order under Section 22.

As per Rule 15 (7) of Protection of Women from Domestic Violence Rules, 2006.

> "**Rule 15(7)** - *Any resistance to the enforcement of the orders of the court under the Act by the respondent or any other person purportedly acting on his behalf shall be deemed to be a breach of protection order or an interim protection order covered under the Act.*"

Rule 15 is for 'Breach of Protection Orders' granted under section 18 of the Act. Under Rule 15(7), if there is any resistance to the enforcement of the protection order as ordered by the Court either the respondent or any other person acting on his behalf can be dealt with under Section 31 of the Act.

The remedies available under the DV Act as provided from Section 18 to 22 for the aggrieved person are as follows—

PROTECTION ORDERS (SECTION 18)

Section 18 of Domestic Violence Act, 2005 empowers Magistrates to issue protection orders after assessing that domestic violence has occurred or is likely to occur. These orders are comprehensive and multifaceted, aiming to shield the aggrieved person from further harm and harassment.

Section 18: Protection Orders

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 dependents, 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.

Prohibition of Committing Acts of Domestic Violence

The foremost aspect of the protection order is the prohibition of the respondent from committing any act of domestic violence. This broad prohibition serves as a preventive measure, aiming to break the cycle of abuse and create a safer environment for the survivor.

Prohibition of Aiding or Abetting

Section 18 of Domestic Violence Act, 2005 recognizes the importance of holding not only the primary perpetrator but also those who aid or abet in domestic violence accountable. By prohibiting any involvement in the commission of such acts, the law seeks to discourage collaboration in the perpetration of violence.

Restrictions on Entering Specific Places under Section 18 of Domestic Violence Act, 2005

To ensure the safety of the aggrieved person, the Magistrate can impose restrictions on the respondent's entry into specific places. This includes the workplace of the aggrieved person and, if applicable, the school or other frequented locations if the aggrieved person is a child. These restrictions aim to create safe spaces for the survivor, free from the threat of encountering the perpetrator.

Restrictions on Communication

Effective communication restrictions are crucial in preventing further emotional distress and potential harm. Section 18 of Domestic Violence Act, 2005 prohibits the respondent from attempting to communicate with the aggrieved person through various means, including personal, oral, written, electronic, or telephonic contact. This restriction recognizes the need to sever ties that may perpetuate the cycle of abuse.

Prohibition on Alienating Assets

Economic abuse is a prevalent form of domestic violence. Section 18 of Domestic Violence Act, 2005 addresses this by prohibiting the respondent from

alienating assets without the leave of the Magistrate. This includes assets jointly held by the parties, such as bank accounts, lockers, or property. Such safeguards are vital in preserving the financial independence and security of the survivor.

Protection of Dependents and Other Relatives

Recognizing that domestic violence often has ripple effects on dependents and other relatives, Section 18 of Domestic Violence Act, 2005 prohibits the respondent from causing violence to these individuals. This broader protection ensures that the impact of domestic violence is mitigated not only for the survivors but also for those connected to them.

Compliance with the Protection Order

The catch-all provision in Section 18(g) prohibits the respondent from committing any other acts as specified in the protection order. This flexibility allows the Magistrate to tailor the protection order to the specific circumstances of the case, ensuring a comprehensive and effective safeguard for the aggrieved person.

Challenges and Implementation of Section 18 of the Protection of Women from Domestic Violence Act, 2005

While Section 18 provides a robust legal framework for protecting survivors of domestic violence, its effective implementation faces challenges. Adequate awareness, law enforcement and judicial personnel training and community outreach are essential components in realizing the intended protections.

RESIDENCE ORDER (SECTION 19)

As per **Section 19 of the Domestic Violence Act:** The Magistrate may pass a residence order-

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 the 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 proviso clause for the section states that no order shall be passed under clause (b) against any person who is a woman.

The **Hon'ble High Court of Madras** 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

Section 19(1) of the Act empowers the Magistrate to pass a variety of residence orders. 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. **Prabha Tyagi v. Kamlesh Devi**,[51] - *'Right to reside in shared household extends to foster children'.*

Section 17 recognizes the right to reside and 19 of DV Act provides residence orders to prevent the aggrieved person's dispossession as well as to prevent any act that adversely affects her peaceful occupation of the shared household.

In **Vandana V. T. Srikant Krishnamachari and Anr**,[52] held that - *'where the husband has a right, title or interest in the property for the purpose of section 17 of DV Act is shared household, it is immaterial whether the parties have cohabitated in the said property'*. In such cases, by virtue of being wife, the aggrieved woman has a dejure right of residence in shared household. A residence order is sought in cases where-

a) The aggrieved person apprehends dispossession or
b) She is already dispossessed and seeks to be restored to the shared household.

In **Ishpal Singh Kahai v. Ramanjeet Kahai, Bombay High Court**,[53] while upholding the injunctions orders by the Family Court directing the Respondent to remove himself from the shared household has made specific note on right to

[51] (2022) 8 SCC 90
[52] 2007 6 MLJ 205 (Mad)
[53] MANU/MH/0385/2011::2011(3) ALL MR 353

residence - The Human right of a person has little to do with her ownership rights in property. It is therefore immaterial to consider in whose name the matrimonial home stands. In a case of domestic violence, the court has only to appreciate the abuse and protection against such abuse.

Section 17 of the DV Act recognizes

- Right to reside in shared household irrespective of right, title or ownership over, interest over the property- **Ishpal Singh Kahai V. Mrs. Ramanjeet Kahai, Bombay High Court**. [54]

- It puts the woman's personal rights over proprietary interest of the Respondent, even if Respondent/s have title over the property.

- Residence order not only contains within itself injunction for protection against her dispossession, but statutorily follows as matter of corollary, the order of injunction for removal of the violator from such household and thereafter restraining him from entering thereto.

- Such order of removal or injunction restraining him from entering in the shared household is therefore conditioned upon this abusive behavior violating the person of his wife or any woman in domestic relationship and not upon his proprietary rights therein.

- No woman may, however, be directed to remove herself from the shared household – as per Section 19(1)(b) proviso r/w Section 2(q) proviso

This Section shall be read in conjunction with the definition of the shared household. Aggrieved woman can seek relief of alternate accommodation in

[54] MANU/MH/0385/2011::2011(3) ALL MR 353

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, **M. Muruganandam v. M. Megala**.[55]

MONETARY RELIEF (SECTION 20)

Monetary relief is one of the reliefs mentioned under the Domestic Violence Act. The Magistrate is empowered under section 20 of the DV Act to pass an order of monetary relief if an aggrieved person is being subjected to economic abuse. Deprivation of all or any economic or financial resources to which an aggrieved person is legally entitled is an act of economic abuse.

According to **Section 2(k) of DV Act "monetary relief"** means the compensation which the Magistrate may order the respondent to pay to the aggrieved person, at any stage during the hearing of an application seeking any relief under this Act, to meet the expenses incurred and the losses suffered by the aggrieved person as a result of the domestic violence. 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—

[55] 2010 SCC Online Mad 6012

(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.

(2) The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.

(3) The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require.

(4) The Magistrate shall send a copy of the order for monetary relief made under sub-section(1) to the parties to the application and to the in charge of the police station within the local limits of whose jurisdiction the respondent resides.

(5) The respondent shall pay the monetary relief granted to the aggrieved person within the period specified in the order under sub-section (1).

(6) Upon the failure on the part of the respondent to make payment in terms of the order under sub-section (1), the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person 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, which amount may be adjusted towards the monetary relief payable by the respondent.

It has also been provided in the section that the monetary relief provided should be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.

In case there is a failure in part of the respondent to make payment in terms of the monetary order, the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person 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, which amount may be adjusted towards the monetary relief payable by the respondent. The aim of this provision is to ensure that women facing domestic violence have adequate financial support and are not rendered vulnerable due to their financial dependence on male members of the family. It is powerful tool for ensuring gender equality in economic terms. It does not contain any exception in favour of husband and in fact it recognizes moral and legal duty of the husband to maintain his wife.

The reliefs available under this provision can be broadly divided into two parts:

(i) Payment for losses and expenses incurred as a consequence of domestic violence.

(ii) Payment for maintenance to meet daily needs and expenses of the aggrieved person and her children.

Case Laws

1. **Rajnesh v/s Neha,[56] on November 4, 2020** - Section 20(1)(d) provides that the maintenance granted under the DV Act to an aggrieved woman and children,

[56] AIR 2021 SUPREME COURT 569

would be given effect to, in addition to an order of maintenance awarded under section 125 CrPC, or any other law in force.

2. **P. Rajkumar & Another v/s Yoga @ Yogalakshmi,[57] on October 23, 2019** - Once the 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 CrPC, which was not pending before him and was a completely independent proceedings to direct grant of maintenance under the same.

3. **Gitika Barman v/s Sanjeev Barman,[58] on October 21, 2022** - It is to be mentioned here that section 20(3) of the Protection of Women from Domestic Violence Act, 2005, is independent of the provision of Section 125 of the Code of Criminal Procedure.

4. **Ruchi Grover v/s Amit Grover,[59] on December 7, 2010** - By moving application under section 20B before the trial court under section 91 of Cr.P.C. the respondents have sought direction of the court to the complainant to file statements of her two PPF accounts (one at Delhi, and another at Dehradun), details of her balances in savings account with State Bank of India, and Centurion Bank of Punjab, and also sought to get filed details of fixed deposit receipts in the aforesaid two Banks. The account numbers are specifically disclosed in the application. Since, the petitioner has also sought direction from the Magistrate under section 20 of Protection of Women from Domestic Violence Act, 2005, which relates to monetary reliefs, the direction by the appellate court vide impugned order dated 19.11.2010, cannot be said to be illegal.

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[57] Criminal Appeal.1613 of 2019 (Arising out of SLP(CRL.) No.6997 of 2015)
[58] Criminal Revision Petition No.33 of 2020 (Gujarat High Court)
[59] Criminal Miscellaneous Application (C482) No.1183 of 2010 (Uttarakhand High Court)

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.

Section 21: Custody orders

Notwithstanding anything contained in any other law for the time being in force, 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:

> *Provided that* if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit.

Nature and Extent of Custody

The custody order passed under section 21 of the DV Act is temporary in nature. The section reads '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'. By a clear reading of the section, it is found that it is only temporary custody which can be

granted by the court and no permanent orders for custody can therefore be passed under the DV Act. Therefore, by plain reading it is understood that such an order of temporary custody can be passed only during the pendency of application u/s 12 DV Act.

In a case where subsequent proceeding under GWA was pending before another court, the court passed custody order beyond the life of the proceedings before him. In Para 15 of its Judgment in ***Dhaval Rajendrabhai Soni v. Bhavini Dhavalbhai Soni***,[60] the Hon'ble Gujarat High Court held –

> *"In essence, therefore, in any proceedings under the Act, Magistrate is empowered to grant temporary custody of the child to the aggrieved person. It can be easily appreciated that said power assumes significance when looked from angle of wife or any other woman approaching the Magistrate seeking protection against the domestic violence by husband, his family members or other relatives. A small child to a mother is extremely precious. If a mother is separated from her child, her resistance is most likely to break down. It is in this regard that the learned Magistrate is empowered to pass custody orders, notwithstanding anything contained in any other law for the time being in force. Such powers of Magistrate read with Section 23 of the Act would include power to pass interim as well as ex-parte orders. It is therefore, of great significance and importance that Magistrates while dealing with the application of an aggrieved person seeking custody of her child deal with the situation promptly and bearing in mind the objects and purpose of the Act and also bearing in mind that mother when separated from child is likely to agree to any terms and conditions,*

[60] 2011 SCC OnLine Guj 899

not to resist domestic violence from husband or other family members."

Further in para 16 it was held-

"Significantly, the Legislature has therefore, used words temporary custody and not interim custody. This is important since by virtue of Section 23 of the Act in any case, learned Magistrate has power to pass interim order which he otherwise can pass finally. The term temporary custody in Section 21 is used in juxta position to the term interim order used elsewhere in Section 23 of the Act. It thus becomes clear that learned Magistrate can pass an order of custody in favour of an aggrieved person by way of temporary measure not necessarily in the nature of interim order which can have life only upto life of the proceedings before him."

Further in para 17 it was held-

"Having said so, I cannot lose sight of the fact that nowhere under the Act learned Magistrate is permitted to pass final order of custody and any order that learned Magistrate can pass must have limited validity either in terms of time or happening of an event. Learned Magistrate cannot pass order granting permanent custody of the child to the aggrieved person."

From the above ruling it was held that child would remain with the mother till the proceedings under the Guardian and Wards Act are concluded.

However, in the recent case of ***Parijat Vinod Kanetkar & Ors. v. Malika Paruat Kanetkar & Ors.***,[61] in Para 14 of its judgment, the Hon'ble Bombay High Court held –

[61] 2016 SCC OnLine Bom 10047

> "*The purpose that this section seeks to achieve is protection of the aggrieved person, for the time being from domestic violence, which is discernible from the condition prescribed for exercise of the interim custody power under section 21 of the DV Act. The pendency or filing of an application for protection order or any other relief under the DV Act is must and in such proceeding the issue of interim custody can be raised. The reason being that it is also an issue of domestic violence as it harms the mental health of an aggrieved person who maintains a perception and is capable of demonstrating at least in a prima facie manner, that the welfare of the child is being undermined. The nature of the power is temporary and coterminous with the main application filed for protection or any other relief. It begins with filing of such main application and comes to an end with disposal of the main application or may merge with the final decision rendered in the proceeding.*"

Thus, it is clear that the custody of children under Section 21 of the Act is temporary and the order for custody can be passed during the pendency of the application under Section 12 of the Act before the Magistrate.

In re Visitation Rights of the Father under Section 21

Under Section 21, it is only an aggrieved mother who can approach the court for obtaining child custody orders. In adjudicating over the issue, it is the discretion of the court on whether the father should be granted the visitation rights. The court gives prime importance to the child's well-being and restrains the father from meeting the child if it interferes with the child's welfare in any manner.

In **Payal Sudeep Laad v. Sudeep Govind Laad & Another**,[62] Hon'ble Bombay High Court held-

> *"The proviso attached to Section 21 stipulates that if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interest of child or children, the Magistrate shall refuse to allow such visit. It was further observed that the child in the said case was already in custody of his mother. The respondent had not asked for custody of the child for the simple reason that the child is already in her custody. It is the respondent i.e. father who has sought merely visitation right to his son which right was granted to him by the Trial Court that too for limited days. In case the visitation right is not given to the petitioner, the minor child would be deprived of father's love and affection. The paramount consideration is the welfare of the child. The petitioner could not be faced to seek remedy either under the Guardians and Wards Act, 1890 and Hindu Minority and Guardianship Act, 1956, as observed by the Sessions Court as it would lead to multiplicity of litigation. The Act is a self-contained code. The endeavour of the code should be to cut short the litigation and to ensure that the child gets the love and affection of both parents i.e. mother and father. The approach of the Court should be practicable to work out the modalities in practical manner in evolving the process whereby the child suffers minimum trauma. The interpretation of the statute should be purposive."*

[62] (2019) 1 AIR Bom R (Cri) 215

In **Manoj Anslem Rebeiro vs Candace Elizebath Rebeiro**,[63] Hon'ble Supreme Court of India held-

> *"We find that whatever be the background of the case, it cannot be so acrimonious so as to deny the right of the father to see his daughter."*

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.

Section 22: Compensation Order

In addition to other reliefs as may be granted under this Act, 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.

Under Section 22 of the Act, in addition to the said reliefs under Sections 18 to 21, the Magistrate, on application being made by the respondent to pay compensation and damages for injuries which include mental torture, emotional distress caused on account of the acts of domestic violence.

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

[63] 2016 SCC OnLine SC 537

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.

(g) EXECUTION OF ORDERS

Section 28 of the DV Act provides that any relief available under the Act may be sought in any legal proceedings before a civil court, family court, or criminal court. Therefore, the wife may seek to enforce the maintenance order passed under the DV Act in a criminal court or a family court.

Section 28: Procedure

(1) Save as otherwise provided in this Act, all proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

(2) Nothing in sub-section (1) shall prevent the Court from laying down its own procedure for disposal of an application under section 12 or under sub-section (2) of section 23.

Section 128 of the CrPC provides for the mode of recovery of fines. However, it does not specifically deal with the recovery of maintenance awarded under the DV Act. In the absence of specific provisions, the general principles of execution of a decree as provided in the CPC may be followed.

Under the CPC, Rule 11 provides that where a decree is for the payment of money, the court may, on the application of the decree-holder, order execution of

the decree by any one or more of the modes provided under Rule 2 of Order 21. These modes include attachment and sale of property, arrest and detention of the judgment debtor, and garnishee proceedings.

Therefore, the wife may file a petition for execution of the arrears of maintenance in the same ongoing execution case under CrPC or DV Rules. If the court allows the petition, it may enforce the maintenance order through any of the modes provided under the CPC.

Section 31: Penalty for breach of protection order

(1) 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.

(2) The offence under sub-section *(1)* shall as far as practicable be tried by the Magistrate who passed the order, the breach of which has been alleged to have been caused by the accused.

(3) While framing charges under sub-section *(1)*, the Magistrate may also frame charges under section 498A of the Indian Penal Code (45 of 1860) or any other provision of that Code or the Dowry Prohibition Act, 1961 (28 of 1961), as the case may be, if the facts disclose the commission of an offence under those provisions.

Case law

1. In **Shalu Ojha Vs Prashant Ojha**,[64] it was held that - Where maintenance is granted by magistrate u/s 20 of DV Act, on appeal to the court of session, the

[64] 2014 (4) RCR (Civil) 815 (SC)

session court ought not stay the execution of maintenance order. The power to grant interim orders are not always inherent in every court.

2. In **Kanchan Vs. Vikramjeet Setiya,[65] on February 13, 2012,** it was held that- Monetary relief is defined in Section 2 (k) of the Act. For execution of monetary order, passed u/s 12 petitioner has to apply u/s 20 of the Act. However, this provision is limited to the person who may have accrued credit or is a salaried person. In the case of self-employed persons, this provision will be of no help to the petitioner. Section 125 has to be resorted to non-compliance of order of monetary relief does not give rise to consequence of Section 31 of the Act.

> Direction: - all orders of monetary relief under DV Act shall be executed in the manner provided u/s 125 Cr.P.C. but with modification that no formal application shall be required.

3. In **Kanaka Raj Vs St. of Kerala and Another**,[66] it was held that- that only if the order passed by the Magistrate is a protection order or an interim protection order, the Magistrate can direct registration of case and investigate the same under Section 31 of the DV Act and even if award is passed by Lok Adalat unless made in terms of Section 18 of the DV Act, it cannot be a protection order or protection order and breach of it will not attract the offence u/s 31 of the DV Act.

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[65] Criminal Miscellaneous Petition No.123 of 2010 (High Court of Rajasthan)
[66] 2010 CRL.L.J. (NOC) 447 (KERELA)

SESSIONS-IV

Protection of Children from Sexual Offences Act, 2012 – An Overview

Paper Presentation

By

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TOPICS

Protection of Children from Sexual Offences Act, 2012 – An Overview

(h) Nature of Offences

(i) Presumptions

(j) Compensations

Protection of Children from Sexual Offences Act, 2012 (POCSO Act)

(h) NATURE OF OFFENCES

(1) Protecting children, the most fragile members of Society and the backbone of our Nation's future requires safeguarding from societal evils, particularly sexual violence, is crucial. Children deserve a safe and secure environment, free from sexual exploitation and abuse, to grow and thrive. Marching towards achievement of the said goal, on 22nd May 2012, Parliament passed the Protection of Children from Sexual Offences Act, 2012 **(POCSO Act)**, which came into force on **14.11.2012**. The objective of Special Law is to protect the children from offences of sexual assault, sexual harassment and pornography, thus provides a specialized mechanism for the adjudication of sexual crimes concerning children while prioritizing the best interests of the child. The provisions available for the sexual offences in Indian Penal Code did not make a distinction between an adult and child whereas POCSO Act deals with sexual offences against persons below 18 years with special emphasis on ensuring speedy disposal of trials in Special Children courts as well as following special procedure to keep the accused away from direct view of the child at the time of testifying.

(2) The POCSO Act provides definitions of "penetrative sexual assault" "sexual assault" and "sexual harassment". The intent to commit an offence, as defined under POCSO Act is also punishable, besides abetment of sexual abuse against a child.

(3) The POCSO Act consists of **IX** chapters and **46** sections and also provides Rules. Under Act 34/2012, the interest of the child both as a victim as

well as a witness needs to be protected. The enactment is a self-contained comprehensive legislation inter alia to provide for protection of children from the offences of sexual assault, sexual harassment and pornography. The Act provides child friendly procedure for reporting, recording of evidence, investigation and trial of offences and provision for establishment of special courts for speedy trial of such offences.

(4) Before the introduction of POCSO ACT 2012, under the Indian Penal Code child sexual abuse accounted for an offence under Sections 375, 354, and 377. These provisions neither protect male children from sexual abuse nor their modesty. Also definitions of the terms like modesty and unnatural offences are not provided in the court. 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. Hence, with the efforts of NGO's, the Ministry of Women and Child Development, POCSO Act 2012 was enforced on 14.11.2012. The act is a comprehensive legislation containing nine chapters dealing with the offences, procedure and punishment.

CLASSIFICATION OF OFFENCES MENTIONED UNDER THE POCSO ACT

- Penetrative sexual assault
- aggravated penetrative assault
- Sexual assault
- Aggravated Sexual assault
- Use of child for pornographic purposes
- Storage of Pornographic Materials Involving a Child
- Sexual Harassment are the types of offences dealt under the Act.

That being the nature of offences with which the perpetrator of the crime will be charged with, there are other heads of offences and which the persons either directly or indirectly connected with the crime or also triable as offenders under the Act. Those of the kind are mentioned below:

- Attempt
- Abetment
- Violation by Media
- False Complaints
- Failure to report/Record Cases
- Offences under Section 67-B of Information Technology Act 2000.

PENETRATIVE SEXUAL ASSAULT: Section-3 of the POCSO Act defines penetrative sexual assault and Section 4 lays down the punishment which was made more stringent by the 2019 amendment. In the case of Bandu vs The State of Maharashtra(2017), a person was committed under Sections 4 and 6 of the POCSO Act along with some provisions under the Indian Penal Code, 1860 for having committed penetrative sexual assault on a physically and mentally challenged 10-year-old girl. **The Hon'ble High Court of Sikkim, decided in Criminal Appeal No. 32/2014, dated 19.05.2015, between PRANIL GUPTA vs STATE OF SIKKIM,** the victim aged 15 years stayed with the accused and injuries were found in her genital area. The High Court relied on the statement of the accused that the accused opened her clothes and raped her 5 times in one night. The contention of the accused that he was not aware of the victim being a minor was not accepted and the accused was prosecuted under Section 3 of the POCSO Act.

Aggravated Penetrative Sexual Assault: 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 with in 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 are considered aggravated penetrative sexual assault and are punishable under Section 6 of the POCSO Act.

Sexual Assault : Section 7 of the POCSO Act defines sexual assault as, "Who ever, 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". **The Hon'ble High Court of Calcutta decided in Criminal Miscellaneous Appeal No. 13/2014, dated 01.04.2015 in between SUBHANKAR SARKAR vs STATE OF WEST BENGAL**, on medical examination of the victim, it was found that there was no evidence of penetrative sexual assault but scratch marks on the body of the victim were found which proved the use of force and thus, the accused was convicted under Section 8and 12of the POCSO Act.

Aggravated sexual assault Section 9 and 10 of the POCSO Act contain provisions regarding aggravated sexual assault on a child. **The Hon'ble High Court of Delhi decided in Criminal Miscellaneous Appeal No. 166/2016, dated 30.03.2017 in between SOFYAN vs STATE,** the accused who was a plant operator in the swimming pool area was convicted by the Trial Court under Section 10 of the POCSO and Section 354 of the Indian Penal Code, 1860 for having sexually assaulted a girl of 8 years old. The facts of the case are that when the victim was wearing her swimming costume in the changing room area, the accused approached her and inserted his hand in her swimming costume and touched her with sexual intent. The Delhi High Court rejected the argument of the accused that he was implicated falsely and the conviction was upheld.

Sexual harassment: Section 11of the POCSO Act defines sexual harassment. It includes six cases which constitute sexual harassment of a child. First, if anyone utters any word or makes any so undor exhibits any object with sexual intent to a child. Second, if anyone makes a child exhibits his body so that it is seen by the offender or any other person. Third, if any person shows any child any form or media for pornographic purposes. Fourth, if anyone constantly watches or stalks a child directly or online. 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. Sixth, if anyone entices a child for pornographic purposes

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 in decently or obscenely in programmes or advertisements on television or on internet, commits the offence under this section and is liable in accordance with Sections 14and1 5of the POCSO Act. **It was reported in 2004(1) ALD (Criminal) Page 116 decided on 04.11.2003 in between P.P.FATIMA vs STATE OF KERALA, ,** in a video on social media, a mother was seen being painted her naked body above then avel by her two minor children and she alleged that the motive of the video was to teach sex education to them. The Supreme Court of India observe 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.

NIPUN SAXENA VS UNION OF INDIA, 11 Dec 2018, 2019 2 SCC 703; 2019 1 SCC(Cri) 772 (DB)

Unfortunately, in our society, the victim of a sexual offence, especially a victim of rape, is treated worse than the perpetrator of the crime. The victim is innocent. She has been subjected to forcible sexual abuse. However, for no fault of the victim, society instead of empathizing with the victim, starts treating her as an 'untouchable'. Many times, even her family refuses to accept her back into their fold. The harsh reality is that many times cases of rape do not even get reported because of the false notions of so called 'honour' which the family of the victim wants to uphold. The matter does not end here. Even after a case is lodged and FIR recorded, the police, more often than not, question the victim like an accused. If the victim is a young girl who has been dating and

going around with a boy, she is asked in intimidating terms as to why she was dating a boy. The victim's first brush with justice is an unpleasant one where she is made to feel that she is at fault; she is the cause of the crime. If the victim is strong enough to deal with the recriminations and insinuations made against her by the police,. In Court the victim is subjected to a harsh cross-examination wherein a lot of questions are raised about the victim's morals and character. The Presiding Judges sometimes sit like mute spectators and normally do not prevent the defence from asking such defamatory and unnecessary questions. We want to make it clear that we do not, in any manner, want to curtail the right of the defence to cross-examine the prosecutrix, but the same should be done with a certain level of decency and respect to women at large. "228A. Disclosure of identity of the victim of certain offences etc.

(1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E is alleged or found to have been committed shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

(2) Nothing in sub section(1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is

(a) by or under the order in writing of the officer in charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or by, or with the authorization in writing of, the victim; or

(b) where the victim is dead or minor or of unsound mind, by, or with the authorization in writing of, the next of kin of the victim:

State of Punjab Vs Gurmeet singh (1996) 2 SCC 384 Provided that no such authorisation shall be given by the next of k into anybody other than the chairman or the secretary, by whatever name called, of any recognized welfare institution or organization. Explanation f o r the purposes of this subsection, "recognized welfare institution or organization" means a social welfare institution or organization recognized in this behalf by the Central or State Government.

(3) Whoever prints or publishes any matter in relation to any proceeding before a court with respect to an offence referred to in subsection(1) without the previous permission of such Court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

LAND MARK DECISIONS ON POCSO Act

Landmark Judgment under POCSO Act is the case of **Attorney General of India vs. Satish and others in 2021 SCC OnLine SC 42 –** wherein the Hon'ble Supreme Court overturned the decision of the Hon'ble Bombay High Court, Nagpur bench in the case of **Satish Vs State of Maharashtra in Criminal Appeal No. 161/2020, decided on 19.01.2021, the Hon'ble Bombay High Court, Nagapur bench** which held that skin-to-skin contact is a requirement for an offence of sexual assault to be established under POCSO Act. Hon'ble Supreme Court interpreted Section 7 of the POCSO Act and observed that section 7 covers both direct and indirect touch, thereby highlighting that the logic in the High Court's opinion quiet insensitively trivializes indeed legitimises a whole spectrum of undesirable behaviour which undermines a child's dignity. The Apex court

observed that the matter at hand would be an appropriate situation for using the mischief rule of statutory interpretation. It emphasises that courts must constantly interpret the law in order to prevent harm and promote the remedy.

Skin to skin contact with the child not necessary culpable mental state is sufficient to attract section 7 of POCSO Act. It was held that an act of touching sexual part of body or any other act involve in physical contact, if done with sexual intent would amount to sexual assault with meaning of section 7. Interpretation of words **"touch or physical contact cannot be restricted to skin to skin contact."** Most important ingredient for constitution of offence of sexual assault under section 7 is sexual intent or not skin to skin contact with child. All these acts were acts of sexual assault as contemplated under section 7 punishable under section 8 of POCSO Act.

Yet another land mark case is the Judgment in NIPUN SAXENA Vs UNION OF INDIA, 2019 SCC 703, in which the Hon'ble APEX COURT apart from setting tone for Investigating Agency, emphasised the need and importance of not disclosing the identity of victim right from the FIR, had also dealt with the aspect of compensation.

The Hon'ble Apex Court delivered judgment in Criminal Appeal No. 8662/2021, decided on 21.03.2022 in between GANGADHAR NARAYAN NAYAK & GANGADHAR vs STATE OF KARNATAKA, it was held POCSO Act under sections 2, 19, 23 & 28 and IPC 220A. Juvenile justice Act under section 74, Cr.P.C, under section 155(2) and 327(2). Appellant is an editor. A news report was published in the newspaper regarding sexual harassment of 16 years old girl with name. Victim mother lodged complaint, police registered a case under section 23 of POCSO Act. Appeal allowed by set aside of the order special court is at liberty to follow the non-cognizable procedure prescribed in the investigation.

The Hon'ble Apex court also laid down guidelines to be followed by Special Courts while trying a case under the POCSO Act, 2012, while adhering to the time stipulated for the trial of the cases and POCSO Act, as per section 35 of the Act. In this regard **the Hon'ble High Court of Bombay, Nagpur bench decided on 31.01.2018 in Criminal Writ Petition No. 68/2018 in between SHUBHAM VILAS TAYADE vs STATE OF MAHARASTRA, may be referred.**

The guidelines provided are -

* The High Courts are responsible for ensuring that cases filed under the POCSO Act are heard and decided by Special Courts and that the presiding officials of such courts are trained in child protection and psychological reaction.

* If not previously done, the Special Courts should be constituted and given the role of dealing with matters brought under the POCSO Act.

* The Special Courts should be given instructions to expedite cases by not granting superfluous adjournments and following the procedure outlined in the POCSO Act, allowing the trial to be completed in a time-bound manner or within a certain time period set forth in the Act.

* The Chief Justices of the High Courts have been asked to form a three-judge committee to control and supervise the progress of the POCSO Act cases.

* A Special Task Force will be formed by the Director-General of police or a State authority of comparable rank to guarantee that the investigation is properly handled and witnesses are presented on the dates set before the trial courts.

* The High Courts must take appropriate efforts to create a child-friendly environment in Special Courts, keeping in mind the requirements of the POCSO Act, to ensure that the spirit of the Act is upheld.

As per the Apex court judgment in between **State of Punjab vs Ramdev Singh, reported in AIR 2004 (SC) page 1298**, wherein it was directed it would be appropriate that in the Judgment the name of the victim should not be indicated under section 228A IPC, 376, 376A to 376D and under section 327(3) Cr.P.C. **Circular No.3940/OPSELL/E, dated 22.09.2019 was issued**.

Victim statement recorded under 164 Cr.P.C should be kept secret till filing of final report to avoid threat to her life.

The Hon'ble Apex Court **decided in Special Leave Petition No. 5073/2011, decided on 25.04.2014 in between STATE OF KARNATAKA, REP. BY NONAVINAKERE P.S vs. SHIVANNA @ TARKA SHIVANNA, reported in 2014 (6) Scale 30 Manu,** it was held that copy of the statement under section 164 Cr.P.C should be handed over to the Investigation officer immediately with a specific direction that the contents of such statement under section 164 of code should not be disclosed to any person till the charge-sheet/report filed under 173 of the Code is filed.

So, it is clear from the direction that in the case of Rape the statement recorded under 164 of the code of prosecutrix has to be kept in secret till the final report is filed to protect the interest of the prosecutrix and the possibility of threat to her life.

The Hon'ble Apex court observed in **Somasundaram @Somu vs. State, reported in 2021(1) ALD(Crl.)130(SC)**, that Cr.P.C 164 statement/confession

recorded before Magistrate. Value of when person giving statement resiles from same completely when examined as witness under section 157 of Evidence Act makes it clear that a statement recorded under 164 Cr.P.C can be relied upon for purpose of corroborating statements made by witness in committal court or even to contradict the same.

As defence had no opportunity to cross-examine under whose statement are recorded under 164 Cr.P.C, such statement cannot be treated as substantive evidence.

Substantive evidence is evidence rendered in court. Therefore, when a witness having made culpability of accused beyond doubt, in his statement under section 164 Cr.P.C, resiles from the same when put on witness stand in trial, in absence of any other evidence against the accused, it would be impermissible to convict the accused on basis of statement under section 164 Cr.P.C.

As per the proviso under section 228A IPC, disclosure of identity of victim of certain offences. Whose prints or publishes the name relates to offence under section 376 A to E punishable with two years and fine and offence is cognizable. Printing/Publication of S.C/High Court judgment does not amount to offence. Under section 327(2) Cr.P.C trial shall be conducted *in camera* in rape cases.

The Hon'ble High Court of Delhi, observed in between DINESH SHARMA vs STATE, it was held that offence committed during minority of victim. FIR lodged after attaining majority. However, POCSO Court can entertain the case and there is no reason to quash the proceedings.

Responsibilities of the Special Court

Under the POCSO Act, the Special Court must take the following measures at the time of the trial.

> Permit frequent breaks for the child

> Create a child-

> friendly atmosphere by allowing a family member or any person the child trust to be present

> Ensure that the child is not summoned to testify time and again

> Ensure that the dignity of the child is maintained by disallowing aggressive questioning or character assassination of the child

> Ensure the identity of the child is not disclosed during the investigation or trial. As far as possible, ensure that the trial is completed within one year from the date of taking cognizance of the offence.

> The Special Court is also in a position to order interim compensation to meet the relief and rehabilitation needs of the child, any time after the FIR is registered. This order can be passed based on an application by or on behalf of the child, or by the court itself. The compensation that is awarded is payable by the State Government from the Victims Compensation Fund or other similar schemes that have been established for compensating victims under section 357 A of the Code of Criminal Procedure and is payable within 30 days of the receipt of the order.

RIGHTS OF VICTIMS OF POCSO CASES

Availability of support person, counseling services, compensation, public and private emergency and crisis services and assist in contacting them **(Rule 4(2)(e), POCSO Act Rules, 2012)**.

The CWC may appoint a support person to aid the child and family during pre-trial and trial processes **(Rule 4(7), POCSO Act Rules, 2012)**.

The State/District Legal services Authority can also provide a support person or paralegal volunteer for pre-trial counseling and to accompany the child for recording of the statements.

Special Courts should recognize the support persons appointed by the CWC or the family directly and allow them to be present during the child's evidence. They should also allow them to also convey the child's questions and fears about the evidence recording process, **(Rule 4(2)(f), POCSO Act Rules, 2012)**.

Right to legal advice and counsel and right to be represented **(Sec.40, POCSO Act, 2012)**; and **Rule 4(2)(f), POCSO Act Rules, 2012**).

Information about the case, such as, status of investigation, arrest of the suspected offender, filing of charge-sheet, court schedule, bail, release or detention status, final verdict and sentence imposed **(Rule 4(12), POCSO Act Rules, 2012)**.

Providing interpreter when the victim does not speak the language of the court for child victims (**sec.38 of POCSO Act, 2012).**

Providing special educator if any victim is hearing or speech impaired, or has any other mental disability **(for child victims sec.38 of POCSO Act, 2012)**.

In camera proceedings – In trials involving adult female victims *in-camera* trial procedures are mandated under section 327(2), Cr.P.C, where charges pertain to sec.376 IPC; and that a woman judge or Magistrate shall conduct the *in-camera* trial as far as practicable **((sec.327(2)(proviso) Cr.P.C)**.

In trials involving child victims the Special Court shall try the case in camera, in the presence of parents of the child or any other person in whom the child has trust or confidence **(Sec.37, POCSO Act, 2012).**

Earlier in the **Sakshi vs. Union of India: (2004) 5 SCC 518 judgment**, the Supreme Court had upheld in-camera proceedings; video conferencing; providing a screen or some arrangements whereby the victim-witness does not see the accused; questions to be put in cross-examination on behalf of the accused, in so far as they relate directly to the incident, to be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language, which is clear and is not embarrassing; and allowing the victim of child abuse or rape, sufficient breaks as and when required while giving testimony in court. **All these directions from the Sakshi judgment have now been incorporated in the POCSO Act, 2012**.

(i) PRESUMPTIONS

Section 29 - Presumption as to certain offences: Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3,5,7 and 9 of this 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 contrary is proved.

Section 30 - Presumption of culpable mental state 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.

For the purpose of this section, a fact is said to be proved only 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."

Section 31: Application of Code of Criminal Procedure, 1973 to proceedings before a Special Court including the provisions as to the bail and bonds shall apply to the proceedings before a Special Court and for the purpose of said provisions the Special Court shall be deemed to be a Sessions and the person conducting prosecution before Special Court shall be deemed to be a *public Prosecutor*.

Section 42A: Act not in derogation of any other law. The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the insistency.

Section 42: Where an act or omission constitute an offence punishable under this Act and also under section 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 IPC, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence, shall be liable to punishment under this Act or under I.P.C as provides for punishment which is greater in degree.

Section 42A: The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

Section 197(1) Cr.P.C.: Explanation. For removal of doubt, it is hereby declared that no sanction shall be required in case of public servant, accused of any offence alleged to have been committed offence under section 166A, 166B, 354, 354A, 354B, 354C, 354D, 370, 375, 376, 376A, 376C, 376D or section 509 IPC.

Section 309(l) Cr.P.C.: In every enquiry or trial the proceedings shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

> Provided that when the enquiry or trial relates to an offence under section 376, 376A, 376B, 376C or 376D of IPC, the enquiry or trial shall as far as possible be completed within a period of two months from the date of filing of charge-sheet.

Section 53A of Indian Evidence Act: Evidence of character or previous sexual experience not relevant certain cases.

Section 114A of Indian Evidence Act: In a prosecution for rape under clause(a), clause(b), clause(c), clause(d), clause(e), clause(f), clause (g), Clause(h), clause), clause (j), clause(k), clause(l), clause(m) or clause(n) of sub-section (2) of section 376 of Indian Penal Code where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

(i) COMPENSATIONS

Under Section 33(8) of the POCSO Act, 2020 in addition to punishment, the special court may direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to the child for immediate rehabilitation of such child. Rule 9 of POCSO Rules, 2020 lays down the details regarding payment of compensation. The special court may direct payment of compensation in the following form:

1. Interim Compensation to meet the immediate needs of the child.

2. Final compensation taking into account the loss or injury suffered by the child as a result of the offence.

The special court may pass an order directing payment of compensation on its own or on an application made by the special public prosecutor, the child or anyone on behalf of the child. Compensation may be provided at any stage after the registration of FIR, irrespective of whether the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified. The needs and interests of child should determine amount of compensation payable. Taking a progressive and novel view of Hon'ble High Court of Delhi opined delivered in Criminal Appeal No. 527/2023 decided on 14.02.2024 in the case of X vs STATE OF NCT OF DELHI AND OTHERS (PARAS 46 to 48).

Further, as per the decision reported in **AIR 2015(SC) 518 between Suresh and another vs. State of Haryana**, the Hon'ble Apex court held that under section 357A, victim compensation scheme, it is the duty of the court to direct grant of interim compensation subject to final compensation being determined later.

The Code of Criminal Procedure (Amendment Act 2008)(No.5/2009). The said section 357A of Cr.P.C has come into force with effect from 31.12.2009.

The said new section 357A provides that—

(1) Every State Government in co-ordination with Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or her dependants who have suffered loss or injury as a result of the crime and who requires rehabilitation.

(2) Whenever a recommendation is made by the court for compensation, the District Legal Services Authority or the State Legal Services Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

(3) If the trial court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end, in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section(4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) The State or District Legal Services Authority, as the case may be to alleviate the suffering of the victim may order for immediate First Aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in-charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

Section 357B: The compensation payable by the State Government under section 357A shall be in addition to the payment of fine to the victim under section 326A or section 376D of IPC.

CONCLUSION

The Crime against women/children shall be dealt by setting up a separate desk if necessary in police stations. There should be no delay, whatsoever in registering FIRs in all cases of crimes against the children. All efforts should be made to apprehend accused named in the FIR immediately, so as to generate confidence in the victims and their family members. The cases should be thoroughly investigated and charge-sheets against the accused persons should be filed within the stipulated time. Steps may be taken not only to tackle such crime but also to deal sensitively the trauma faced by the victims of such crimes. Counselling to the victim as well as to the family may be provided by empaneling professional counsellors. General awareness about legislations relating to crime against the children and steps to setup a mechanism for the safety and protection of children, in schools and other public places is the need of the hour.

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