3rd DISTRICT LEVEL WORKSHOP, KURNOOL (SEPT., 2024)

ON

"OFFENCES UNDER SPECIAL ENACTMENTS"

TOPICS:

(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 LokAdalat Award

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I take this opportunity to express my profound gratitude and deep regards to the Hon'ble Special Judge for SC ST cases - cum- VI Additional District and Sessions Judge, Kurnool Sri P. Pandu Ranga Reddy and Hon'ble Civil Judge (Senior Division), Adoni Sri G. Yagna Narayana for their exemplary guidance and monitoring.

With profound gratitude

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(a) OFFENCE UNDER SECTION 138 NI ACT – INGREDIENTS AND CASE LAW

INTRODUCTION

Negotiable Instruments have been used in commercial world since long as one of the convenient modes for transferring money. Development in Banking sector and with the opening of new branches, cheque become one of the favourite Negotiable Instruments. When cheques were issued as a Negotiable Instruments, there was always possibility of the same being issued without sufficient amount in the account. With a view to protect drawee of the cheque need was felt that dishonour of cheque he made punishable offence. With that purpose Sec.138 to 142 were inserted by Banking Public Financial Institutions and Negotiable Instruments clause (Amendment) Act, 1988. This was done by making the drawer liable for punishments in case of bouncing of the cheque due to insufficiency of funds with adequate safeguards to prevent harassment of an honest drawer.

OBJECT:

The object of this amendment Act is:

1. To regulate the growing business, trade, commerce and Industrial activities.

2. To promote greater vigilance in financial matters.

3. To safeguard the faith of creditors in drawer of cheque.

(Krishna vs. Dattatraya 2008(4) Mh.L.J.354 (Supreme Court)

However, it was found that punishment provided was inadequate, the procedure prescribed cumbersome and the courts were unable to dispose of the cases expeditiously and in time bound manner. Hence, the Negotiable Instruments (Amendment and Miscellaneous provisions Act 2002) was passed. The provisions of sec.143 to 147 were newly inserted and provisions of section 138, 141, 142 were amended.

NEGOTIABLE INSTRUMENTS ARE OF FOLLOWING KINDS :-

1. Promissory notes

2. Bill of Exchange

3. Cheque

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

INGREDIENTS:

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

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

Legally recoverable debt: In *Somnath vs. Mukesh Kumar, 2015(4) Law Herald 3629 (P&H)* it was held by Hon'ble High Court the complaint under Section 138 is not maintainable when the cheque in question had been issued qua a time barred debt. Similarly, supari money for commission of crime is not legally recoverable debt and complaint under Section 138 is not maintainable in such a case.

2. Cheque must be presented within 3 months or within validity period whichever is earlier.

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

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

5. Drawer of cheque must fail to make payment within 15 days of receipt of the notice. A mere presentation of delivery of chqeue by accused would not amount to acceptance of any debt or liability. Complainant has to show that cheque was issued for any existing debt or liability. Thus, if cheque is issued by way of gift and it gets dishonoured offence u/s. 138 of the Act will not be attracted.

THE STATUTORY PROVISIONS

The provisions of Section 138 of N.I. Act on analysis yield six elements. These are :-

1. The Drawal of the cheque by a person in discharge of a legally enforceable debt or other liability;

2. The Presentation of the cheque to the Bank within six months or within the period of its validity whichever is shorter.

3. The Return of the cheque unpaid;

4. The Giving of a notice in writing demanding payment of the amount of the cheque from the drawer within thirty days from the date of receipt of information regarding the return of the cheque unpaid;

5. The Failure of the drawer to pay the amount within fifteen days of receipt of the notice;

6. The Sentence for the offence

Proof of the first five elements as above may lead to a conviction of the drawer and then the sentence listed at (6) will follow.

The three provisos to Section 138 of the N.I. Act enact elements (2), (4) and (5) as above and for the present purpose (4) and (5) enacted in proviso (b) and (c) to Section 138 are the most important.

Proviso (b) to Section 138 of the N.I.Act contains four important aspects. It says that the notice

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

(2) must be in writing;

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

(4) must make a demand for payment of the amount of the chequedishonoured.

Proviso (c) to Section 138 of the N.I. Act contains two important aspects. It speaks of receipt of the notice by the drawer and his failure to make the payment within fifteen days of such receipt. Only thereafter cause of action for institution of a criminal complaint will legally arise.

THE PERSONS – WHO ? & WHOM ?

Going by the letter of the law one may dub a notice of demand bad by reason of the fact that the notice in writing in question was issued neither by the payee nor by the holder in due course but by a lawyer on behalf of either. In some of the High Courts such a question arose and was rightly answered by holding that notice may be issued by either of them as the case may be or by their duly appointed agent which will include a lawyer duly instructed. Indeed it is usual to go to a lawyer for drafting the notice.

It should have been very clear from the prescriptions of the proviso (b) to Section 138 of the N.I. Act that the notice has to be given to the drawer of the cheque and to none-else. This seems to require no interpretation and should not have created confusion and conflict.

THE CONTENT OF NOTICE – (WHAT ?)

Proviso (b) to Section 138 pinpoints two vital elements of the notice demanding payment. The notice must be in writing and it must demand payment of the “said amount of money” meaning the amount of the dishonoured cheque. The provision does not speak of any other requirement as to its content. The notice of demand therefore must be distinguished from a mere information regarding the dishonour.

Such an information will not be a notice and no case can be founded on such information. A telephonic demand will also not qualify as a notice, the requirement of writing being absent. Apart from the above in the early days of the offence notice demanding payment within a period either shorter or longer than the fifteen days mentioned in the proviso(c) also were held by a few High Courts to be bad. The statute does not require that any time need be mentioned in the notice to fulfill the demand. Therefore absence or existence of a shorter or longer period in the notice is irrelevant as a test of validity of the notice.

THE TIME - (WHEN ?)

A bare reading of section 138 leaves no room for any doubt that notice has to be issued within the period of time indicated in proviso (b) to Section 138 of the N.I. Act, which is now thirty days. Even if there could have been some scope for controversy as regards the nature of the information from the Bank on and from the 6th of February 2003 on coming into force of Section 146 of the N.I. Act there can be no controversy that this information from the Bank must also be in writing through a Bank slip or memo. Lastly section 9 of the General Clause Act, 1897 will come into play in counting the period of thirty days mentioned in the section. No process need be issued in a case where no mention of giving of the notice at all has been made in the complaint vide SHAKTI TRAVEL & TOURS –Vs- STATE OF BIHAR, (2002)9 SCC 415. Even in a case where ex-facie it appears from the complaint that the notice has been issued beyond the period of thirty days duly calculated no process need be issued. PREM CHAND VIJAY KUMAR –Vs- YASHPAL SINGH AND ANOTHER, (2005)4 SCC 417 decided on the 2nd May 2005 also emphasize the law that if the notice is not given within the period indicated in proviso (b) no cause of action would arise.

THE PLACE – (WHERE ?)

The place where from the notice of demand is given and the place where it is received normally do not have much importance except for the fact that these places may have in a rare case an impact on the jurisdiction of the court to try an offence under Section 138 of the N.I. Act. In K. BHASKARAN VS. SANKARAN VAIDHYAN BALAN, AIR 1999 S.C. 3762, (1999)7 SCC 510 the Supreme Court spoke thus : “ The following are the acts which are components of the said offence : (1) drawing of the cheque,

(2) presentation of the cheque to the bank,

(3) returning the cheque unpaid by the drawee bank,

(4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount,

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

It is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at five different localities. Thus it is clear, if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local areas can become the place for trial for the offence under S.138 of the Act. In other words, the complainant can choose any one of those Courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done." Thus ordinarily though the notice is issued from the place of residence or business of the payee and is addressed to the place of residence or business of the drawer as a matter of law notice will not be bad if it is issued from or served at any other place. The law requires only giving of and the receipt of the notice. The places wherefrom and whereto the notice is given and addressed would only confer jurisdiction to try the offence on the Courts there. To end this topic it is necessary to mention that in two recent decisions the Bombay High Court having quoted para 14, 15 and 16 of K. BHASKARAN reached the conclusion demonstrably different from what those paragraphs say. These decisions are reported in 2006 Cri.L.J. 3704 and 2007 Cri.L.J 115. The complainants in those two cases launched the criminal prosecution in courts having jurisdiction in the place wherefrom Notices were issued. The High Court held in those two cases that the courts in those places have no jurisdiction. In the former case the mis-reading of K. BHASKARAN (Supra) is patent and in the latter the attempted explaining of K. BHASKARAN (Supra) is difficult to understand.

7. THE SERVICE – (HOW ?)

As already indicated provisos (b) and (c) to Section 138 of the N.I. Act contain two most vital ingredients of the offence under the said section. Not only giving of the notice but also the receipt of the notice has to be proved by the complainant. Following the principles of interpretation that penal statutes should be strictly construed in the early days of enactment of the offence under Section 138 of the N.I. Act, the Courts required strict proof of actual service of the notice demanding payment of the amount of the cheque on the drawer. No quarter was given to constructive or deemed service which was recognized as valid by reason of the provisions of Section 27 of the General Clauses Act 1897 and/or illustration (f) to Section 114 of the Evidence Act in Civil cases under Rent Control legislation in relation to notice on the Tenant by the Landlord or under Specific Relief Act to show readiness and willingness to perform the agreement to sell and purchase respectively in HARCHARAN SINGH –Vs- SHIVRANI (1981)2 SCC 535 and in JAGDISH SINGH –Vs- NATHU SINGH, (1992) 1 SCC 647. Gradually the principles of strict construction began giving way to purposive construction based on the Mischief Rule enunciated in Heydon's case by the English Common Law

Court. Perhaps one of the earliest cases employing the principles of purposive construction in explaining Section 138 of the N.I. Act is *MADHU –Vs- OMEGA PIPES LTD., (1994) 1 AnLT (Cri.) 603* from the Kerala High Court where occurs the following :-

" If receipt or even tender of the notice is indispensable for giving the notice in the context of clause (b) an evader would successfully keep the postal article at bay atleast till the period of fifteen days expires. Law shall not help the wrongdoer to take advantage of his tactics. Hence the realistic interpretation for the expression "giving notice" in the present context is that, if the payee has dispatched notice in the correct address of the drawer reasonably ahead of the expiry of fifteen days, it can be regarded that he made the demand by giving notice within the statutory period. Any other interpretation is likely to frustrate the purpose for providing such a notice". Deemed or constructive service of notice has been judicially recognized by the Supreme Court in following decisions. These decisions are briefly considered hereunder. In K. BHASKARAN –Vs- SANKARAN VAIDHYAN BALAN, AIR 1999 S.C. 3762, (1999)7 SCC 510 decided on the 29th September, 1999 the notice sent by registered post was returned to the complainant on 15.02.1993 with the endorsement "unclaimed". Four other endorsements on the postal article were – "3.02.1993, 04.02.1993, 05.02.1993 – addressee absent 06.02.1993 information served on addresses house". Apart from the negative finding as regards territorial jurisdiction the Trial Court acquitted the accused holding that as the accused did not receive the notice no cause of action arose. The High Court set aside the acquittal and convicted the accused. The Supreme Court concurred with the conviction though not with the sentence. The crucial question about the service of notice has been considered by the Supreme Court at great length from para 17 to 25 (in SCC) and deemed service was approved with the help, among others, of the provision of Section 27 of the General Clauses Act, 1897. Para 20 of the Judgment reads 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 must be borne in mind that the court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure." It was finally held by the Supreme Court that when a notice is returned "as unclaimed such date would be the commencing date in reckoning the period of 15 days" envisaged under proviso (c) to Section 138 of the N.I. Act. This would however be subject to the right of the drawer to rebut the presumption of service by evidence. In SRIDHAR M.A. –Vs. METALLOY N STEEL CORPORATION, (2000)1 SCC 397 decided on the 27th January 1998, the Trial Court acquitted the accused holding that he did not get notice. The High Court set aside the acquittal proceeding on the basis of deemed service.

Sounding a note of caution the Supreme Court observed thus :- “Although, in appropriate case deemed service is to be accepted by the Court, as indicated in the decision of this Court reported in State of M.P. –Vs- Hiralal, (1996)7 SCC 523, but it may also be noted that such presumption of deemed service is not a matter of course in all cases and deemed service is to be accepted in the facts of each case. Considering the facts of the present case, it appears to us that the appellant is entitled to benefit of doubt as to whether such service, in fact, has been effected on the appellant.” Incidentally (1996)7 SCC 523 is a short order relating to service of notice on the respondent under the provision of Supreme Court Rules. In V. RAJA KUMARI –Vs- P. SUBBARAMA NAIDU AND ANOTHER, (2004) 8 SCC 774 decided on the 2nd November 2004 the complaint contained the statement that the notice was returned with an endorsement that the door of the house of the accused was locked. The Trial Court holding that the mandatory notice was not served dismissed the complaint. The High Court reversed the order. The Supreme Court reiterated the statement of law enunciated in K. BHASKARAN (Supra) as regards deemed service. In D. VINOD SHIVAPPA –Vs. NANDA BELLIPPA. (2006) 6 SCC 456 decided on the 25th of May 2006 the Supreme court had again an occasion to deal with the concept of deemed service. There the notices of demand in five out of seven cases were returned with the endorsement “party not in station, arrival not known”. In the other two cases the notices were returned with the endorsement, “addressee always absent during delivery time. Hence returned to the sender”. The Magistrate issued process. The recourse to Section 482 Cr.P.C. in the High Court failed. The Supreme Court reiterated the law as in K. BHASKARAN (Supra) and V. RAJA KUMARI (Supra) and summed up the law as to deemed service thus :- “The question as to whether there was deemed service of notice, in the sense that the endorsement made on the returned envelope was a manipulated and false endorsement, is essentially a question of fact and that must be considered in the light of evidence on record.” Recently (Judgment dated May 18, 2007) a Three Judge Bench of the Supreme Court in C.C. ALAVI HAJI VS PALAPETTY MUHAMMED & ANR, 2007 (7) SCALE 380 considered the question of deemed service afresh. The Three Judge Bench reiterated the view expressed in K. BHASKARAN (Supra) and D. VINOD SHIVAPPA (Supra) and implied that – “absence of any averments in the complaint to the effect that the accused had a role to play in the matter of non receipt of legal notice, or that the accused deliberately avoided service of notice”- would not make the complaint non-maintainable.

OFFENCES UNDER SECTION 138, N.I. ACT TO BE TRIED SUMMARILY

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

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

Does the failure of the complainant to mention the existence of a legally enforceable debt or liability vitiate the case of the prosecution?

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

The Plea of Security Cheque : It is a common plea in most cheque dishonour cases that the cheque in question was issued as a security cheque. However, let me point out that the words "security cheque" do not necessarily disprove the case against the accused. The expression "security cheque" is not a statutorily defined expression in the Act. Moreover, the Act does not per se carve out an exception in respect of a "security cheque".

In the case of I.C.D.S. Ltd. v. Beena Shabbir & Anr. reported in AIR 2002 SC 3014, the Hon’ble Supreme Court has observed as follows. "The commencement of the Section stands with the words "where any cheque". The above noted three words are of extreme significance, in particular, by reason of the user of the word "any" the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well" Thus, even if the dishonoured cheque in question was issued as a security cheque, it will still come under the ambit of Section 138 of the Act. The only condition is that the cheque

must be backed by some form of legally enforceable debt or liability towards the holder.

Cheque Issued as Advance Payment Will Not Attract Culpability under section 138, N.I. Act :

In Indus Airways Pvt. Ltd & Ors v. Magnum Aviation Pvt. Ltd & Anr reported in 2014 (2) Crimes (SC) 105, the Hon'ble Supreme Court has held that where payment was made by cheque in the nature of advance payment, it indicates that at the time of drawal of cheque, there was no existing liability and as such no offence was made out.

In a recent judgment [Sampelly SatyanarayanaRao v. Indian Renewable Energy Development Agency Limited reported in (2016) 10 SCC 458], the Hon'ble Supreme Court has had the occasion to analyze the judgment of Indus Airways (supra). The Hon'ble Supreme Court has made it abundantly clear that the culpability under section 138 of the Act is extinguished only when the dishonoured cheque was issued for the purpose of an advance payment.

Liability of Guarantor under section 138, N.I. Act :

What happens if a guarantor issues a cheque on behalf of the principal debtor and the same gets dishonoured? Will the guarantor be liable for prosecution under section 138, N.I. Act. The answer will have to be in the affirmative. Let me enunciate why. Section 138, N.I. Act penalizes the dishonour of any cheque which has been issued in the discharge of the whole or part of "any debt or other liability". And the liability of the guarantor and principal debtor is coextensive. Hence, the guarantor cannot escape liability under section 138, N.I. Act if he has issued a cheque for the discharge of the liability of the principal debtor. The matter came up for consideration before the Gauhati High Court in the case of Don Ayengia v. State of Assam & Another (Cri. Apl. No. 10 of 2012). The Gauhati High Court answered the question " Whether a person indemnifying the holder of a cheque can be said to have legally enforceable debt or other liability towards the holder of the cheque when the payer defaults in payment of the cheque amount under section 138, N.I. Act?' in the negative. The High Court held that no person can be convicted or prosecuted in a proceeding under Section 138 of the N.I. Act, who indemnifies the principal debtor for his liability towards the complainant unless such guarantor enters into an agreement with the holder of the cheque.

However, an appeal was preferred against this judgment before the Hon'ble Supreme Court of India and the judgment and order of the Gauhati High Court was set aside. The matter gets cleared up once and for all if we consider the judgment of I.C.D.S. Ltd. v. Beena Shabbir & Anr. reported in AIR 2002 SC 3014. The Hon'ble Supreme Court held therein. "The language of the Statute depicts

the intent of the lawmakers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability, there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act. "Any cheque' and 'other liability' are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the Statute. Any contra interpretation would defeat the intent of the Legislature. The High Court, it seems, got carried away by the issue of guarantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act."

APPLICABILITY OF LIABILITY UNDER SECTION 138, N.I. ACT FOR A TIME BARRED DEBT: Prosecution under section 138, N.I. Act is only maintainable against a legally enforceable debt. A time barred debt, however, is a not a legally enforceable debt. The Hon'ble Apex Court has also held in Sasseriyil Joseph Vs Devassia 2001 Crl.J.24 held that " a criminal prosecution under section 138, N.I. Act is not maintainable in respect of a time barred debt.

Sec. 139: Presumption in favour of holder It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability. Similarly, Section 118 (a), N.I. Act provides as follows: Presumptions as to Negotiable Instruments. — Until the contrary is proved, the following presumption shall be made:— (a) of consideration —that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration; However, there has been some amount of dispute as to when the presumption under section 118 (a) and especially the one under section 139, N.I. Act start to run. The law as it stands now after " Rangappa Vs. Sri Mohan " reported in (2010) 11 SCC, the Apex Court has made it clear that " once the issuance of the cheque is admitted or proved, the trial court is duty bound to raise the presumption that the dishonoured cheque placed before it was indeed issued in discharge of a legally enforceable debt or liability of the amount mentioned therein

The presumption is a rebuttable one; it is up to the accused to prove that the cheque in question had not been issued in discharge of a legally enforceable debt or liability.

The Issue of Financial Competence of Complainant

In John K. Abraham v. Simon C. Abraham & Anr. reported in (2014) 2 SCC 236, the Hon'ble Supreme Court has observed in Paragraph 9 that in order to draw the presumption under sections 118 and 139 of the Act, the burden is cast heavily

upon the complainant to show that he had the requisite funds for advancing the money to the accused. In Basalingappa vs. Muudibasappa (Criminal Appeal No. 636 of 2019), the Hon'ble Supreme Court observed that a complainant in a cheque bounce case is bound to explain his financial capacity, when the same is questioned by the accused, by leading evidence to that effect. However, Rangappa (supra) would prevail over both John K. Abraham (supra) and Basalingappa (supra) in so much so that it as it has been decided by a full bench as opposed to John K. Abraham (supra) and Basalingappa (supra) which have been decided by division benches. Moreover, Rangappa (supra) has extensively discussed the issues of presumption and how it comes to play vis a vis a dishonoured cheque. Furthermore, the observations in John K. Abraham (supra) andBasalingappa (supra) are more in the domain of obiter being guided by the peculiar factual matrices of those cases.

Thus, if the defence brings on record credible material challenging the financial competence of the complainant, only then the complainant would have to discharge the burden of proving his financial competence else the presumption under section 139 will fail. Otherwise, a mere suggestion or question on the financial competence of the complainant will not suffice in rebutting the presumption under section 139, the burden of which remains on the defence.

The Hon'ble Apex Court held **in Bir Singh vs. Mukesh Kumar (Criminal Appeal No. 230231 of 2019)** as follows : "If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted."

Rebuttal : Now, the question arises as to how the accused shall discharge this burden. The Apex Court It has been held in Hiten P Dalal v. Bratindranath Banerjee reported in (2001) 6 SCC 16 that a mere plausible explanation given by the accused is not enough to rebut the presumption and the accused has to necessarily disprove the prosecution case by leading cogent evidence that he had no debt or liability to issue the said cheque. The Hon'ble Supreme Court in the case of Rangappa (supra) has further clarified the issues in the following terms: "Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility

of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard of proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a 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 creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely 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. Thus, it appears that the prosecution can fail if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability. And it is not necessary for the accused to take the witness stand in his favour. He can rely upon the prosecution evidence in order to raise his defence. I want to add here that the accused is not expected to rebut the presumption beyond all reasonable doubt. The standard of disproof is only on the level of preponderance of probabilities. The nature of burden of proof has been succinctly laid down by the Hon’ble Supreme Court in M.S. Narayana Menon v. State of Kerala and Another reported in AIR 2006 SC 3366, wherein the Hon’ble Supreme Court held that the initial burden is upon the accused to rebut the presumption under section 139 of the Act. Only in the event of discharging the said initial burden, the onus shifts to the complainant.

Only the Drawer is Liable under section 138, N.I. Act It is only the drawer of the dishonoured cheque who can be prosecuted under section 138, N.I. Act and no one else. If the dishonoured cheque has been issued out of a joint account and only one of the account holders has signed it, the said issue was decided in Aparna A. Shah v. Sheth Developers Private Limited and Another reported in (2013) 8 SCC 71, wherein the Hon’ble Supreme Court has held that each and every joint account holder cannot be prosecuted unless he has signed the cheque

APPLICATION OF 138 BY JUDICIAL PRONOUNCEMENTS:-

1. Insufficient funds

2. Exceeds arrangements- funds are sufficient but, the amount mentioned in the cheque exceeds the arrangement made with the bank.

3. Payment stopped by drawer- SomNath Versus State of Punjab and another 2008(1) RCR(Criminal) 273 (P&H).

4. Account already closed. Jitender Poddar Versus Prem Nath Sharma 1994(3) RCR(Criminal) 353(P&H), Jaspal Singh Bedi Versus State of Punjab 2005(1) RCR(Criminal) 78m (P&H).

5. No such account. Sandeep Mehra alias Babi Versus Chander Parkash Madan 2015 ACD 166 (P&H).

6. Stop payment. M/s Gupta Rice and General Mills Versus M/s. Meerut Agro Mills Ltd. And another 2011(3) Law Herald 2690

7. Signature differ. Charanjit Singh Chawla Versus State of Punjab 2009(2) RCR (Criminal) 690 (P&H).

8. Refer to drawer. M/s Lily hire purchase pvt. Ltd vsDarshanLal 1997(1)RCR Cr 580

9. Not arranged for. VK Bansalvs State of Haryana 2011(1) Law Herald 396

10. Account not in the name of accused- Section 138 not made out- A person must have drawn cheque on account maintained by him- JugeshSehgal Versus Shamsher Singh Gogi 2009(3) RCR(Criminal) 712 (SC).

IMPORTANT CASE LAWS ON SECTION 138 OF THE ACT:

1. In Krishan Lal More and another vs. M/s Bibby Financial Services India Pvt. Ltd. And another, 2016(2) RCR (Criminal) 603 (P&H) it was held by the Hon'ble High Court that the provision of Section 202 Criminal Procedure Code are not applicable to the complaints filed under Section 138 of the Negotiable Instrument Act.

2. In Ashok Kumar vs. Jagdish Ram alias Jagdish Rai, 2016(2) RCR (Criminal) 281 (P&H) it was held by the Hon'ble High Court that in case of acquittal of accused in cheque dishonour case by trial Magistrate, appeal against acquittal is not maintainable before Sessions Court. Complainant can approach High Court seeking leave to appeal.

3. In Rajan Singhal vs. State of U.T. Chandigarh and Ors., 2015(4) RCR (Criminal) 809 (P&H) it was held by the Hon'ble High Court that when accused issues a cheque drawn on an account which is already closed, mala fide intention was clear in the case. Both offences of cheating under Section 420 IPC and

Section 138 of NIT Act are made out and accused can prosecuted for both the offences.

4. In Vishal Sharma vs. Balkaran Singh, 2015(4) RCR (Criminal) 916 (P&H) and Yogender Pratap Singh vs. Savitri Devi, 2014 (4) CCC 305 (SC) it was held by the Hon'ble Court that the Complaint filed before expiry of 15 days from the date of receipt of notice by the accused is not maintainable.

5. In Damodar S. Prabhu Vs. Sayed Babalal H., 2010(2) RCR (Criminal) 851 (SC) it was held by Hon'ble Supreme Court that if parties compound the offence in trial court accused will have to pay 10% of cheque amount as cost of compounding. Cost of compounding will be 15% in High Court and 20% in Supreme Court. However, in Madhya Pradesh State Legal Services Authority vs. Prateek Jain and another, 2014(4) RCR (Criminal) 178 (SC) it was held by the Hon'ble Supreme Court that where settlement is made in LokAdalat, the LokAdalat can waive the same for reasons to be recorded.

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

7. In C.C. AlaviHeji Vs. Pala Petty Muhammed, 2007(3) SCC (Criminal) 236 it was held by the Hon'ble Supreme Court that defence that no notice under Section 138 proviso (b) has been served cannot be taken without depositing cheque amount within 15 days of receipt of summons of court along with copy a complaint.

8. In K.S. Joseph vs. Philips Carbon Black Ltd. and another, 2016(2) RCR (Criminal) 788 (SC) it was held by the Hon'ble Supreme Court that the delay in filing of complaint under Section 138 of the Act cannot be condoned without notice to the accused.

9. In K.A. Abbas H.S.A. Vs. Sabu Joseph, 2010 (3) RCR (Civil) 187 (SC), the Hon'ble Supreme Court upheld the sentence of default to suffer imprisonment in default of payment of compensation awarded against the accused. In this case, the accused was convicted and was sentenced till rising of the court and was ordered to pay compensation of Rs.5 lacs and in case of default to suffer three months simple imprisonment.

10. In CRIMINAL PETITION No.1594 of 2020 of Hon’ble High Court of Andhra Pradesh rendered by THE HON’BLE SMT. JUSTICE VENKATA JYOTHIRMAI PRATAPA major question that has arisen for consideration is that:

Whether Accused can be permitted to file an affidavit in lieu of Examination-in-Chief, as the provision under Section 145 (1) of NI Act only entails a complainant

to tender evidence in such a mode? The question is answered in the negative that accused cannot be permitted to file an affidavit in lieu of Examination-in-Chief.

THE CONCLUDING COMMENTS

It is hoped that before the offence under Section 138 of the N.I. Act sheds the teens or soon thereafter it will receive further illumination from the Supreme Court atleast as regards the persons entitled to notice in a prosecution against a Company and as regards service of notice. The decisions considered in this anniversary summary do not deal with a case where neither the acknowledgment card nor the envelope is returned. The twofold presumption under Section 27 of the General Clauses Act could still be called to aid in such cases. Though deemed service is permissible and may suffice for purposes of taking cognizance by the Trial Court it carries the risk of failure at the conclusion of the trial. It is for the Parliament to enact measures to relieve this dilemma of the complainant.

(b) COGNIZANCE, LIMITATION, JURISDICTION –A STUDY

The Cognizance
Sec 142 of the NI Act deals with cognizance of the offence

142. Cognizance of offences.—1 [(1)] Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),— (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: 2 [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.]. 3 [(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,— (a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or (b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated. Explanation.—For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.

When should the Magistrate take Cognizance?

Before recording sworn statements of the complainants and his witnesses, the magistrate should take cognizance of offence. Refer ILR 1998 Kar 666 – Mahadeva Vs. Papireddy, 1997 (4) KLJ 23-Vishwa Cement Products Vs. KSFC, AIR 2000 SC 2946 – Narsingdas Tapadia Vs. Goverdhan Das Partani. In Gulam Haidar Ali Khan v. Managing Partner, Shirdi Sai Finance Corporation, 2006 (6) ALJ 700 Andhra Pradesh High Court Revision case is filed against the order of the Learned Magistrate. An application was filed under section 138 of the N.I Act by the Petitioner to discharge him on the ground that procedure prescribe under section 200 Cr.P.C is not followed by the Learned Magistrate while taking cognizance of the offence and petitioner contends that he is entitled for discharge and further proceedings shall not be conducted. The Learned Magistrate after hearing both parties dismissed the application by observing that

"the respondent gave the affidavit on oath, basing on the affidavit, complaint was taken on file, the petitioner did not raise the said objection at the first instance and he raised the said objection when the matter is coming up for defence evidence. The petition is filed at the fag end of the case. In the result petition is dismissed".

The petitioner's counsel in this case submitted that as per section 200 Cr.P.C., the sworn statement of the complainant and the witnesses and such other witnesses present shall be recorded before taking cognizance of the offence and as the Learned Magistrate failed to follow the procedure, the court shall not take cognizance of the offence. Therefore, he is liable to be discharged.

It is further submitted in this case that section 145 of the Act made it very clear that evidence can be adduced on the affidavit and there is no necessity to record the sworn statement of the complainant as the amendment to the section was introduced for expeditious disposal of the cases filed under section 138 of the Act. So it is clear that because of the non-obstante clause in the section 145, despite of any provision in the Cr.P.C. to the contrary the evidence of a complainant can also be given on affidavit in any enquiry, trial or other proceeding of Cr.P.C. The word "proceeding" is a term of wide amplitude, which includes procedural steps to be taken in Cr.P.C. Accordingly initial statement under section 200 Cr.P.C. which is a procedural step, can be given on affidavit.

It is also observed that affidavit can be used a evidence, if law specifically permits. Since section 145 of the Act permits filing of the affidavit, the Magistrate was right in accepting the same and taking cognizance of the offence, but the learned Magistrate in the impugned order did not mentioned that under section 145 of the Act the filing of the affidavit is permitted, due to that a doubt has arisen in the mind of the petitioner, therefore, he approached this court.

In view of the above discussion it is clear that filing of affidavit is permissible under law and the complainant may give his evidence on an affidavit, but however, the court may if it thinks fit and shall on the application of the prosecution on the accused summon and examined any person giving evidence on affidavit as to the facts contained therein.

In Indian Bank Association & Ors vs Union Of India & Anr on 21 January, 2014 one of the directions was given as follows:

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

Can the Court take cognizance if notice is not served on the drawer?

No. Refer (1999) 8 SCC 221 – Central Bank of India Vs. Saxons Farms, AIR 2002 SC 182 – MMTC Ltd., Vs. Medchi Chemicals & Pharma Pvt. Ltd.,

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

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

JURISDICTION:

Considering ingredients of sec.138 referred above Hon'ble Apex Court in case of *K. Bhaskaran vs. Shankaran AIR 1999, SC 3762,* had given jurisdiction to initiate the prosecution at any of the following places:

1. Where cheque is drawn.

2. Where payment had to be made.

3. Where cheque is presented for payment

4. Where cheque is dishonoured.

5. Where notice is served upto drawer.

However, recently in case of *Dashrath Rupsingh Rathod vs. State of Maharashtra, reported in MANU /SC/ 0655/ 2014* interpreted various provisions of Sec.138 of Negotiable Instruments Act and held,

i) An offence under Section 138 of the Negotiable Instruments Act, 1881 is committed no sooner a cheque drawn by accused on an account being maintained by him in a bank for discharge of debt/liability is returned unpaid for insufficiency of funds or for the reason that the amount exceeds the arrangement made with the bank.

ii) Cognizance of any such offence is however forbidden under Section 142 of the Act except upon a complaint in writing made by payee or holder of cheque in due course within a period of one month from the date of cause of action accrues to such payee or holder under clause (c) of proviso to Section 138.

iii) iii) Cause of action to file a complaint accrues to a complainant /payee/ holder of a cheque in due course if, (a) the dishonoured cheque is presented to the drawee bank within a period of

Unlike other statues, the Amendment Act of 1988 did not expressly specify territorial jurisdiction of the court in which Section 138 cases are to be filed by the aggrieved complainant. As the legislature has left fallow the area of territorial jurisdiction of cheque bounce cases, different Benches of the Supreme Court at different times started cultivation into that area by using their own divergent methods, which made the area so much infertile that when in 2015, the legislature entered into that area, it also got confused and failed to meet the object with

which Sections 138 to 142 were inserted in the NI Act, 1881 and also failed to cope up the present demand casted by digitalisation and globalisation.

The first case on territorial jurisdiction aspect of cheque bounce cases was of a two-Judge Bench in K. Bhaskaran v. Sankaran Vaidhyan Balan, wherein, after observing that offence under Section 138 can be completed only after concatenation of the following acts:

(1) drawing of cheque;

(2) presentation of cheque to the bank;

(3) returning the cheque unpaid by the drawee bank;

(4) giving notice to drawer by demanding payment; and

(5) failure of drawer to make payment within 15 days of receipt of notice, the Court held that the complainant can file case in any of court having jurisdiction over any of those local areas within the territorial limits of which any one of aforesaid five acts was done. To arrive at this conclusion, the Court relied upon Sections 177 to 179 of the Code of Criminal Procedure, 1973 (for short, "CrPC"). Thus, a liberal, and in my opinion, substantially proper approach was adopted by the Supreme Court in K. Bhaskaran case.

But, in *Harman Electronics (P) Ltd. v. National Panasonic (India)(P) Ltd.*, 2-Judge Bench held that the court within whose limits, notice was issued cannot have territorial jurisdiction as it is the communication of notice which would give rise to a cause of action, and not issuance of notice. Thus, one of the acts laid in K. Bhaskaran case was plucked out in Harman Electronics case. It is to be noted that before Harman Electronics case, in Shamshad Begum v. B. Mohammed, another 2-Judge Bench by following K. Bhaskaran case held that the court from whose limits, notice was sent has jurisdiction. Shamshad Begum case was not even discussed in Harman Electronics case. Nonetheless, in Nishant Aggarwal v. Kailash Kumar Sharma, Escorts Ltd. v. Rama Mukherjee, and FIL Industries Ltd. v. Imtiyaz Ahmed Bhat, the 2-Judge Bench followed K. Bhaskaran case and held that the court within whose limits cheque has been presented by the payee through his account has jurisdiction**. Hence, as the ratio decided in K. Bhaskaran case was shifting like pendulum from one corner to another over territorial jurisdiction of courts to deal with cheque bounce cases, a 3-Judge Bench was called upon to solve this conundrum**. Therein came the judgment of a 3-Judge Bench in Dashrath Rupsingh Rathod v. State of Maharashtra, which made matters worse by holding that only that court will have jurisdiction wherein the drawer maintains the bank account i.e. the drawee bank. To overrule the ratio laid in K. Bhaskaran case, Dashrath Rupsingh observed that the moment when cheque is dishonoured by the drawee bank (bank of the

drawer), offence under Section 138 gets attracted, hence as the offence is committed at the place of drawee bank, the court situated therein will have jurisdiction. For arriving at this conclusion, it gained much of the strength from a previous judgment of a 3-Judge Bench in Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd., which held that the word "bank" in Section 138 means only a drawee bank and the cheque has to be presented by the payee within the limitation period of six months at such drawee bank. Although Ishar Alloy case was not on the point of territorial jurisdiction, which was observed even in Dashrath Rupsingh case, but still it relied upon Ishar Alloy case by stating that "when a court interprets any statutory provision, its opinion must apply to and be determinate in all factual and legal permutations and situations"and "that Ishar Alloy is only case which was decided by a three-Judge bench and therefore was binding on all smaller Benches" and it is "logically correct".

In my opinion, reliance on Ishar Alloy case was wholly untenable as firstly, Ishar Alloy never discussed the point of territorial jurisdiction nor it was called to do so and it is well-settled rule that only that case can be relied by a subsequent Bench, which was decided on similar facts or atleast similar legal proposition, hence Ishar Alloy interpretation of the word "bank" was purely for limitation period purposes, for which I gain strength from the 2015 Amendment which allowed jurisdiction in court where the payee maintains an account. Secondly, even assuming reasons given by Dashrath Rupsingh for reliance on Ishar Alloy to be correct, it should be noted that K.T. Thomas, J. who wrote for the 2-Judge Bench in K. Bhaskaran case also part of 3-Judge Bench in Ishar Alloy case, the judgment of which was authored by R.P. Sethi, J. Hence, if K.T. Thomas, J. wanted to reverse his own opinion expressed in K. Bhaskaran case or if he wanted to dissent from R.P. Sethi, J.'s opinion, then he would have authored his own judgment, which could not be found. It is for the reason that the 3-Judge Bench in Ishar Alloy case knew that it was deciding the aspect of limitation and not territorial jurisdiction. Thirdly, now for practical purposes the ratio of Ishar Alloy became infructuous because in that case of 20th century, cheque was presented by the payee in his account but it did not reach the drawer's account within six months, which now, in the 21st century, is not the case due to digitalisation of entire banking system wherein cheque reaches the drawee bank, through electronic mode, within 2 to 4 days of presenting

Although Dashrath Rupsingh is partly correct in saying that an offence is committed the moment cheque is dishonoured at the drawee bank, but it is to be noted that as per Section 142(1)(b) of the NI Act, 1881, prosecution can be initiated only after accrual of "cause of action" under clause (c) of the proviso to Section 138 i.e. when drawer fails to make payment within fifteen days of receipt of the notice. The whole purpose of mandatory issuance of "statutory notice" by the payee is to inform the drawer that the cheque which he gave got dishonoured

and if he pays back the cheque amount, then the payee will not initiate any case against him and cause of action does not survive. This can be found from the fact that the payee can present the cheque any number of times despite dishonour within six/three months from date of issuance. But Dashrath Rupsingh would take none of these and held that civil law concepts like “cause of action” cannot be applied into criminal law. In my opinion, this interpretation was wholly wrong as Section 138 of the NI Act, 1881 is a hybrid version of civil and criminal law. It is exactly for this reason, the legislature in its wisdom has used the civil law term of “cause of action” for the offence under Section 138 of the NI Act, 1881, which cannot be found in other penal statues. My views gain strength from the observations of the Supreme Court in R. Vijayan v. Baby, wherein it was observed that: 16 cases arising under Section 138 of the Act are really civil cases masquerading as criminal cases.… Chapter XVII of the Act is a unique exercise which blurs the dividing line between civil and criminal jurisdictions. It provides a single forum and single proceeding, for enforcement of criminal liability (for dishonouring the cheque) and for enforcement of the civil liability (for realisation of the cheque amount) Also, in Harman Electronics case the Court gave a go-by only to one of the principles of K. Bhaskaran case i.e. place from where notice was issued does not give rise to cause of action, which was correct because under no branch of law, place from where notice is issued gives rise to cause of action, and Harman Electronics case did not overrule the rest of the four principles of K. Bhaskaran case, which held the field till Dashrath Rupsingh was decided. Even the legislature has not accepted the Dashrath Rupsingh view, that immediately within a year of the judgment, it came up with an amendment in the year 2015 stating that only that court will have jurisdiction where the payee maintains his account if he presents through his account (generally happens with cross-cheques) or where it is not presented through the payee’s account, then the court where the drawer maintains his account has jurisdiction. Now the problem with the 2015 Amendment is that it has not been drafted as per the present practical needs. **Till a decade ago, for all of the bank transactions, an individual had to physically visit the bank, therefore for his/her convenience whenever the account-holder shifted his/her residence or place of business he/she used to transfer his/her bank account from one branch to another or open a new account in the bank nearer to their locality, but, now after digitalisation, most of the banking transactions are taking place digitally and online through service providers like, PhonePe, Paytm, Google Pay, etc. Hence, people are not showing much interest in transferring or opening new bank account. For example, if A maintains an account in a bank having a branch in Chennai but due to job/business purposes he has shifted to Delhi, he can easily do banking transactions online and also, present even the cross-cheque at par in all branches of that bank without compulsorily going to his branch in Chennai. But, if the cross-cheque is dishonoured, as per the 2015 Amendment, he has to initiate Section 138 complaint only in**

the court where his bank branch is located in Chennai, which means he has to bear the legal expenses for the lawyers in Chennai, spend his time and money in travelling from Delhi to Chennai each time he is summoned to attend the court, which one cannot say how many times he has to attend. Now, as the statute has conferred the territorial jurisdiction and as it is well settled that once the statute confers jurisdiction, courts cannot dilute it but are bound to follow it, hence, it is urged that Parliament comes up with an amendment to the NI Act, 1881 and confers the territorial jurisdiction on the courts trying cheque bounce cases by following the principles set out in K. Bhaskaran case, with only the court from where notice is issued being the exception as declared in Harman Electronics case. Also, if the creditor initiates complaint against the same drawer from multiple courts just to harass him, such accused always has the remedy of transfer application as enunciated in Chapter 31 from Sections 406 to 412 CrPC.

PERIOD OF LIMITATION FOR FILING A COMPLAINT IN RESPECT OF THE OFFENCE UNDER SECTION 138, N.I. ACT :

Sec. 142, N.I. Act has prescribed an outer limit of one month for filing of a complaint from the date the cause of action rises.

In the case of Saketh India Ltd. v. Indian Securities Ltd. reported in (1999) 3 SCC 1, it was held by the Hon'ble Supreme Court that ordinarily in computing time, the rule observed is to exclude the first day and to include the last, and the period of one month will be reckoned from the day immediately following the day on which the period of 15 days from the date of receipt of notice by the drawer expires. The 15th day is to be excluded for counting the period of one month. The month employed in the Act has not been defined anywhere in the N.I. Act and the same means a British Calender Month and not lunar month, by following the definition given in Sec. 3 (35) of the General Clauses Act meaning thereby that a month means only a period of 30 days. Saketh India Ltd. (supra) was taken up for reconstruction in Econ Antri Ltd. v. Rom Industries reported in AIR 2013 SC 3283. The Hon'ble Supreme Court affirmed the judgment in Saketh India Ltd. (supra) by holding that for the purpose of calculating the period of one month which is prescribed under Section 142(b) of the N.I. Act, the period has to be reckoned by excluding the date on which the cause of action arose.

The Apex Court held in " Indra Kr. Patodia v. Reliance Industries Ltd. reported in AIR 2013 SC 426, For computing the period of limitation, one has to consider the date of filing of the complaint or initiation of criminal proceedings and not the date of taking cognizance by the Magistrate. **SUCCESSIVE PRESENTATION OF CHEQUES** In Sadanandan Bhadran v. Madhavan Sunil Kumar: (1998) 6 SCC 514, the Hon'ble Supreme Court observed that there can be only one cause of action under Section 142(b), N.I. Act. Section 142, gives cause of action a

restrictive meaning, in that, it refers to only one fact which will give rise to the cause of action and that is the failure to make the payment within 15 days from the date of the receipt of the notice. Consequent upon the failure of the drawer to pay the money within the period of 15 days as envisaged under clause (a) of the proviso to Section 138, the liability of the drawer for being prosecuted for the offence he has committed arises, and the period of one month for filing the complaint under section 142 is to be reckoned accordingly. However, the Hon'ble Apex Court has Sadanandan Bhadran (supra) been overruled in MSR Leathers v. S.Palaniappan reported in AIR 2014 SC 642 (para No.10). As of now, a payee or the holder in due course has a right to present the cheque as many number of times for encashment within a period of Three months or within its validity period, whichever is earlier. A prosecution based on second or successive dishonor of the cheque is also permissible so long as it satisfies the requirements stipulated under the proviso to Section 138 of the N.I. Act

Cheque Issued as Advance Payment Will Not Attract Culpability under section 138, N.I. Act :

In Indus Airways Pvt. Ltd & Ors v. Magnum Aviation Pvt. Ltd & Anr reported in 2014 (2) Crimes (SC) 105, the Hon'ble Supreme Court has held that where payment was made by cheque in the nature of advance payment, it indicates that at the time of drawal of cheque, there was no existing liability and as such no offence was made out. In a recent judgment [Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Limited reported in (2016) 10 SCC 458], the Hon'ble Supreme Court has had the occasion to analyze the judgment of Indus Airways (supra). The Hon'ble Supreme Court has made it abundantly clear that the culpability under section 138 of the Act is extinguished only when the dishonoured cheque was issued for the purpose of an advance payment.

In *N. Harihara Krishnan vs. J. Thomas*(*CRIMINAL APPEAL NO. 1534 OF 2017*)Hon'ble Supreme Court has heldthatOffence Under SEC.138 NI Act Is Person Specific. Concept Of 'Taking Cognizance Of The Offence And Not The Offender' Not Appropriate In Cheque Case. It was also clarified that the general concept under Cr.P.C that cognizance was taken against the offence and not against the offender was not appropriate in prosecution under NI Act

(c) Interim Compensation and its Recovery under NI Act

Background:

Section 143-A was introduced to tackle delays in resolving cheque dishonour cases. This provision, along with Section 148, aims to ensure expeditious resolution while balancing the interests of both parties.Sections 143A was inserted in the year 2018 by way of amendment which has been made enforceable by the central Govt, w.e.f. 01.09.2018 vide Notification No.S.O.3995 (E),dated 16 August,2018.

Section 143A reads thus:

143A. Power to direct interim compensation.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, 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 per cent. 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 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.

Quantum of Compensation The amount of the interim compensation shall not exceed 20% of the amount of the cheque.

Interim Compensation Cannot Be Granted Without Giving An 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. It was held in criminal petition no. 3555 of 2022 *Sri Himanshu Gupta vs V Narayana Reddy* (Karnataka High Court)

Prospective or Retrospective ?

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. It was held in Criminal Appeal No.1160 of 2019 G.J. Raja vs. Tejraj Surana (supreme court of India)

The provisions of said section 143A can be applied or invoked only in cases where the offence under section 138 of NI Act was committed after the introduction of said section 143A the court observed in the above ruling. Therefore, this provision is not applicable when the court has taken cognizance of the offense before the amendment came into effect. Section 143A is only applicable when the court has taken cognizance of the offense after the amendment.

Stage when compensation to be awarded?

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. It was held in Criminal revision no. 1431 of 2019 *Somnath Chatterjee vs Hossain Mallick* (Calcutta High Court)

Time frame for paying interim compensation ? Under Section 143A (3) of NI 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

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 Thank You

In ***RAKESH RANJAN SHRIVASTAVA vs THE STATE OF JHARKHAND & ANR decided on March 15, 2024****:*

The Supreme Court of India revisited the provisions of Section 143-A of the Negotiable Instruments Act, 1881, shedding light on the discretionary power of courts in granting interim compensation in cheque dishonour cases. In para 7.1 of the judgment it was mentioned as follows: In the statement of objects and reasons, it was stated that unscrupulous drawers of the cheques prolong the proceedings of a complaint under Section 138 by filing appeals and obtaining a stay. Therefore, injustice is caused to the payee of a dishonoured cheque, who has to spend considerable time and resources in Court proceedings to realise the value of the cheque. It was further observed that such delays compromise the sanctity of the cheque transactions. Therefore, it was proposed to amend the N.I. Act to address the issue of undue delay in the final resolution of the cheque dishonour cases.

The Court clarified that the use of the term "may" in Section 143-A implies discretion rather than mandate. Interim compensation, if ordered, should be proportionate and consider factors such as the prima facie case made by the complainant, the financial circumstances of the accused, and the plausibility of the defense.

Key Considerations:

iv) Prima Facie Evaluation: ***"A direction to pay interim compensation can be issued, only if the complainant makes a prima facie case."*** Courts must assess the merits of both the complainant's case and the defense presented by the accused before ordering interim compensation. The mere presumption under Section 139 of the N.I. Act is not sufficient grounds for such an order.

v) Financial Distress: The financial situation of the accused should be taken into account. The quantum of interim compensation should be reasonable and take into consideration the accused's ability to pay.

vi) Plausible Defense: If the defense presented by the accused appears prima facie plausible, courts may exercise discretion in refusing interim compensation.

Court's Directive:

The Court emphasized that the factors mentioned above are not exhaustive, and each case may present unique circumstances. Courts must provide brief reasons for their decisions, ensuring all relevant factors are considered.

Implications:

The judgment underscores the importance of fair and just application of the law in cheque dishonour cases. It prevents undue hardship to the accused while ensuring timely resolution for complainants.

Interim Compensation: Mandatory or Directory?

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 It was held in Criminal Writ Petition No. 48/2022 *Ashwin Ashok rao Karokar Vs Laxmikant Govind Joshi* (Bombay High Court)

There is no doubt that the word “may” ordinarily does not mean “must”. Ordinarily, “may” will not be construed as “shall”. But this is not an inflexible rule. The use of the word “may” in certain legislations can be construed as

"shall", and the word "shall" can be construed as "may". It all depends on the nature of the power conferred by the relevant provision of the statute and the effect of the exercise of the power. The legislative intent also plays a role in the interpretation of such provisions. Even the context in which the word "may" has been used is also relevant.

The power under sub-section (1) of Section 143A is to direct the payment of interim compensation in a summary trial or a summons case upon the recording of the plea of the accused that he was not guilty and, in other cases, upon framing of charge. As the maximum punishment under Section 138 of the N.I. Act is of imprisonment up to 2 years, in view of clause (w) read with clause (x) of Section 2 of the Code of Criminal Procedure, 1973 (for short, 'the Cr.PC'), the cases under Section 138 of the N.I. Act are triable as summons cases. However, sub-section (1) of Section 143 provides that notwithstanding anything contained in the Cr.PC, the learned Magistrate shall try the complaint by adopting a summary procedure under Sections 262 to 265 of the Cr.PC. However, when at the commencement of the trial or during the course of a summary trial, it appears to the Court that a sentence of imprisonment for a term exceeding one year may have to be passed or for any other reason it is undesirable to try the case summarily, the case shall be tried in the manner provided by the CrPC. Therefore, the complaint under Section 138 becomes a summons case in such a contingency. We may note here that under Section 259 of the Cr.PC, subject to what is provided in the said Section, the learned Magistrate has the discretion to convert a summons case into a warrant case. Only in a warrant case, there is a question of framing charge. Therefore, clause (b) of sub-section (1) of Section 143A will apply only when the case is being tried as a warrant case. In the case of a summary or summons trial, the power under sub-section (1) of Section 143A can be exercised after the plea of the accused is recorded.

Under sub-section (5) of Section 143A, it is provided that the amount of interim compensation can be recovered as if it were a fine under Section 421 of the Cr.PC. Therefore, by a legal fiction, the interim compensation is treated as a fine for the purposes of its recovery. Section 421 of the Cr.PC deals with the recovery of the fine imposed by a criminal court while passing the sentence. Thus, recourse can be taken to Section 421 of the Cr.PC. for recovery of interim compensation.

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). (BNSS Sec.461)

Non-payment of interim compensation by the accused does not take away his right to defend the prosecution. The interim compensation amount can be

recovered from him treating it as fine. The interim compensation amount can be recovered by the Trial Court by issuing a warrant for attachment and sale of the movable property of the accused. There is also a power vested with the Court to issue a warrant to the Collector of the District authorising him to realise the interim compensation amount as arrears of land revenue from the movable or immovable property, or both, belonging to the accused. For recovery of the interim compensation, the immovable or movable property of the accused can be sold by the Collector. Thus, non-payment of interim compensation fixed under Section 143A has drastic consequences. To recover the same, the accused may be deprived of his immovable and movable property. If acquitted, he may get back the money along with the interest as provided in sub-section (4) of Section 143A from the complainant. But, if his movable or immovable property has been sold for recovery of interim compensation, even if he is acquitted, he will not get back his property. Though, the N.I. Act does not prescribe any mode of recovery of the compensation amount from the complainant together with interest as provided in sub-section (4) of Section 143A, as subsection (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. It may be a long-drawn process involved for the recovery of the amount from the complainant. If the complainant has no assets, the recovery will be impossible.

Section 143A vis-à-vis Section 148:

Sub-section (1) of Section 148 confers on the Appellate Court a power to direct the appellant/accused to deposit 20 per cent of the compensation amount. It operates at a different level as the power thereunder can be exercised only after the appellant/accused is convicted after a full trial. In the case of Section 143A, the power can be exercised even before the accused is held guilty. Sub-section (1) of Section 143A provides for passing 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. The power can be exercised at the threshold even before the evidence is recorded. In a sense, subsection (1) of Section 143A provides for penalising an accused even before his guilt is established. Considering the drastic consequences of exercising the power under Section 143A and that also before the finding of the guilt is recorded in the trial, the word “may” used in the provision cannot be construed as “shall”. The provision will have to be held as a directory and not mandatory. Hence, the word “may” used in Section 143A, cannot be construed or

interpreted as “shall”. Therefore, the power under sub-section (1) of Section 143A is discretionary.

Failure to pay compensation whether entails any disability?

The concerned provision 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. It was held in Criminal Writ Petition No. 2872/2022 *Noor Mohammed Vskhurram pasha* (Supreme Court of India)

Facts in brief are:

A complaint case was instituted by the respondent in respect of offence punishable under Section 138 of NI Act.

After the cognizance of the complaint was taken and the summons were issued, the Appellant appeared before the Court. On the very same date, an order was passed by the Trial Court directing the Appellant to deposit 20% of the cheque amount as interim compensation in terms of Section 143(A) of the Act within 60 days. The period so granted got over and on the request of the Appellant further extension of 30 days was granted but no deposit was made by the Appellant.

When the matter was taken-up for examination of witnesses, an application was made on behalf of the Appellant under Section 145(2) of the Act seeking permission to cross-examine the Respondent. In view of his failure to deposit the interim compensation as directed, the application preferred by the Appellant was found to be not maintainable and was dismissed by the Trial Court.

Subsequently, the Trial Court found the Appellant guilty for the offence and directed him to pay a fine of Rs. 7,00,000. Out of the amount, Rs.5,000/- was to be remitted to the State while the remaining Rs.6,95,000/- was directed to be made over to the Respondent as compensation under Section 357 of the Cr.P.C.

The Appellant appealed before the Additional District Judge which came to be dismissed. Thereafter, an appeal was made before the Karnataka High Court which was again dismissed.

Observations

The Court examined Section 143 (A) of the NI Act and noted that, *“after empowering the court to pass an order directing the accused to pay interim compensation under Sub-Section 1 of Section 143A, Sub-Section 2 then mandates that such interim compensation should not exceed 20 per cent of the amount of the cheque. The period within which the interim compensation must*

be paid is stipulated in Sub-Section 3, while Sub-Section 4 deals with situations where the drawer of the cheque is acquitted. Said Sub-Section 4 contemplates repayment of interim compensation along with interest as stipulated. Sub-Section 5 of said Section 143A then states "the interim compensation payable under this Section can be recovered as if it were a fine"."

"The expression interim compensation is one which is "payable under this Section" and would thus take within its sweep the interim compensation directed to be paid under Sub-Section 1 of said Section 143A," the Court observed.

The court further observed that the concerned provision 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. Any such order foreclosing the right would not be within the powers conferred upon the court and would, as a matter of fact, go well beyond the permissible exercise of power. Since the right to cross-examine the respondent was denied to the Appellant, the decisions rendered by the courts below suffer from an inherent infirmity and illegality. Therefore, we have no hesitation in allowing this appeal and setting aside the decisions of all three courts with further direction that Complaint Case No. 244 of 2019 shall stand restored to the file of the Trial Court. The Trial Court is directed to permit the Appellant to cross-examine the Respondent and then take the proceedings to a logical conclusion. With these observations the appeal is allowed by the Hon'ble Supreme Court.

The Court affirmed that, *"The method and modality of recovery of interim compensation is clearly delineated by the Legislature. It is well known principle that if a statute prescribes a method or modality for exercise of power, by necessary implication, the other methods of performance are not acceptable."*

Decision

The Court held the decisions of the three courts below as illegal and remitted the matter back to the Trial Court.The Court also directed the Appellant to deposit 20 per cent of the cheque amount as interim compensation.

Concluding Remarks:

The Amendment Act is, undoubtedly, a positive step towards ensuring the credibility of cheques. However, the Amendment Act is not without its fare share of criticism. Some people are of the view that the Act is still not stringent enough to effectively deter the defaulting drawers of the cheques. As such, harsher penalties should be imposed on the repeat offenders in the form of increased fine or prohibition on issuing cheques for a specified period. Also, express provision should be inserted for expeditious trial of the cheque bouncing cases within the prescribed time period. Nonetheless, the Amendment Act will go a long way in ensuring relief to the payee of the dishonoured cheques.

(d) COMPOUNDING OF OFFENCES – EXECUTION OF LOK ADALAT AWARD

Section 147 of the NI Act provides a broad prescription that every offence committed under the Act can be compounded. However, this Section does not provide any legislative guidance as to how and at what stage this compounding can take place. In the seminal judgment of *Damodar S Prabhu v. Sayed Babalal H,* the Supreme Court attempted to fill in the legislative vacuum. It held that the compounding of a cheque dishonour offence can be done before the trial court, the sessions court, the High Court or even the Supreme Court. Furthermore, it held that the more the accused causes delay in compounding of the offence, the higher the one-time penalty it shall have to deposit with the court allowing compounding. This judgment made it clear that compounding can very well take place post-conviction and sentencing by the trial court.

However, this judgment did not contemplate a situation where the accused would be willing to compound the matter by providing the cheque amount (and a reasonable interest and cost in addition to it too), but the complainant does not agree to compound the matter.

Leaving this issue open, the Supreme Court opened up various permutations and combinations in the hands of the complainant who could now very well abuse the quasi-criminal nature of this offence. The Court failed to envisage a situation where the complainant could demand abnormal sums of money from the accused by putting the accused in fear of potential imprisonment under Section 138 of NI Act. The complainant simply has to not provide consent for compounding, which is mandatory as per the mother provision under Section 320 of the Code of Criminal Procedure (CrPC), 1973, which regulates all forms of compounding.

In my experience, and I am sure in the experience of many other practitioners, the civil remedy of seeking recovery of the outstanding amount and the remedy under the NI Act for seeking prosecution for a cheque dishonour are pursued simultaneously by the plaintiff/complainant.

For instance, X (seller) needs to recover ₹1,20,00,000/- from Y (buyer) on the basis of the updated ledger of X. Y also hands over a cheque of ₹50,00,000/- in part discharge of its liability. X presents this cheque and the same gets dishonoured on presentation due to insufficiency of funds in Y`s account. In such cases, X shall file a civil suit for recovery of Rs. ₹1,20,00,000/- and file a Section 138 criminal complaint for dishonor of cheque of ₹50,00,000/-.

Given the above remedies which most sellers pursue, it is very common that the plaintiff/complainant can leverage the Section 138 trial, appellate or revision proceedings for the purposes of demanding the total amount in dispute (₹1,20,00,000/- in the above example) or possibly a much higher amount too.

As mentioned above, the judgment of *Damodar S Prabhu* enunciated that the accused can compound the offence post conviction and sentencing. Juxtaposing this situation with what has been mentioned above, there would be several situations where the accused is facing a sentence of 3, 6, 9 or 12 months under the NI Act, 1881 and now having suffered this sentence, wants to compound the offence as per *Damodar S Prabhu* guidelines. This will present the perfect situation for a complainant who now knows that the accused is at their mercy and the accused would have to mandatorily satisfy the demanded amount by the complainant in case they wish to not suffer imprisonment.

In order to provide a solution to the above stated problem, the Supreme Court in *Meters & Instruments Private Limited v. Kanchan Mehta* held that since dishonour of a cheque is primarily a civil wrong, the appropriate court can at its discretion close the proceedings when the accused has paid the cheque amount along with a reasonable interest and litigation costs. The appropriate court can exercise this power under Section 258 of Code of Criminal Procedure, 1973 (CrPC) even in those cases where the complainant does not provide consent for the compounding of the offence.

This judgment of *Meters* was followed by the High Court of Madras in *R Kalaiyarasi v C Jaipal [2018 SCC OnLine Mad 1331]* and in *M/s Som Distilleries Ltd. v State of MP* by the High Court of Madhya Pradesh. The legal position in *Meters* that compounding of a Section 138 offence can also be done without the consent of the complainant was further followed by the Delhi High Court in *Nayati Medical Pvt Ltd & Ors v. AS Pharma Pvt Ltd.* The Allahabad High Court also followed this reasoning in *Rani Gaur v State of UP.*

In contrast to the above, there was a parallel line of judgments pronounced by the Supreme Court and the High Courts stating that no proceedings under Section 138 can be closed or compounded in cases where the complainant does not consent to the same. These pronouncements include In *Re : Expeditious Trial of Cases Under Section 138 of NI Act,* wherein the Supreme Court held that Section 258 of CrPC cannot apply to prosecutions under a complaint lodged under Section 138 of the NI Act because Section 258 of CrPC only applies in any summons-case instituted otherwise than upon complaint. Essentially, the Supreme Court in this judgment stated that Section 138 proceedings cannot be closed without the consent of the complainant.

Therefore, to the extent that the *Meters* judgment relies on Section 258 of CrPC to close the proceedings, the Court *In Re: Expeditious Trial of Cases* overruled the *Meters* judgment. It is noteworthy to mention here that *In Re: Expeditious Trial of Cases* was a judgment pronounced by a Constitution Bench of five judges, whereas *Meters* was a judgment pronounced by a bench of two judges. This line of reasoning as enunciated in *In Re: Expeditious Trial of Cases* was followed by the Supreme Court in *Prakash Gupta v SEBI [(2021) 17 SCC 451].*

Most recently, in *Anuradha Kapoor & Ors v. State of Maharashtra & Ors*, the Bombay High Court adopted the line of reasoning provided in *Meters* and

compounded the offence without the consent of the complainant. Interestingly, this judgment by the Bombay High Court does notice the judgment of *In Re: Expeditious Trial of Cases* in its judgment.

Therefore, it is clear that there is a divergence of views adopted by the Supreme Court and different High Courts on the given issue at hand. I do not think there is any doubt that the present law of the land in light of the five-judge bench judgment of *In Re: Expeditious* is that compounding of an offence under Section 138 of the NI Act, 1881 cannot be done without the consent of the complainant.

Whether this position of law is desirable or not is the next question which falls for consideration. In my opinion, this position of law is severely problematic, because in the present scenario, the complainant gets arbitrary power to ask for an amount which is much higher than the cheque amount and the applicable interest on it. The present scenario is also problematic as it takes away the power from the accused to compound the cheque dishonour offence even after the accused is willing and ready to make the payment of the cheque amount along with reasonable interest and litigation costs to the complainant.

The Supreme Court seems to be absolutely right in stating that *Meters* judgment is premised on a wrong application of Section 258 of the Cr.P.C as Section 258 of CrPC cannot apply to summons cases filed through private complaints. But, the effect of such overruling of the *Meters* judgment by the Supreme Court leads to problematic consequences, giving excessive bargaining power to the complainant. Maybe a legislative amendment expanding the text and scope of Section 147 of the NI Act is one of the solutions to the given problem.

In O.P. Dholakia v. State of Haryana, (2000) 1 SCC 672, a division bench of Supreme Court had permitted the compounding of the offence even though the petitioner's conviction had been upheld by all the three designated forums. After noting that the petitioner had already entered into a compromise with the complainant, the bench had rejected the State's argument that Court need not interfere with the conviction and sentence since it was open to the parties to enter into a compromise at an earlier stage and that they had not done so. The bench had observed:

"Taking into consideration the nature of the offence in question and the fact that the complainant and the accused have already entered into a compromise, we think it appropriate to grant permission in the peculiar facts and circumstances of the present case, to compound."

Similar reliefs were granted in orders reported as Sivasankaran v. State of Kerala & Anr., (2002) 8 SCC 164, Kishore Kumar v. J.K. Corporation Ltd., (2004) 12 SCC 494 and Sailesh Shyam Parsekar v. Baban, (2005) 4 SCC 162, among other cases.

It would be apt to clarify that in view of the non-obstante clause, the compounding of offences under the Negotiable Instruments Act, 1881 is controlled by Section 147 of NI Act and the scheme contemplated by Section 320 of the Code of Criminal Procedure will not be applicable in the strict sense since the latter is meant for the specified offences under the Indian Penal Code.

Section 147 of the Negotiable Instruments Act, 1881 is in the nature of an enabling provision which provides for the compounding of offences prescribed under the same Act, thereby serving as an exception to the general rule incorporated in sub-section (9) of Section 320 of the CrPC which states that 'No offence shall be compounded except as provided by this Section'. A bare reading of this provision would lead us to the inference that offences punishable under laws other than the Indian Penal Code also cannot be compounded. However, since Section 147 was inserted by way of an amendment to a special law, the same will override the effect of Section 320(9) of the CrPC, especially keeping in mind that Section 147 of NI Act carries a non-obstante clause.

In Vinay Devanna Nayak v. Ryot Sewa Sahakari Bank Ltd., (2008) 2 SCC 305, Supreme Court had examined 'whether an offence punishable under Section 138 of NI Act which is a special law can be compounded'. After taking note of a divergence of views in past decisions, Court took the following position:

"This 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 realised this aspect and inserted Section 147 by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 (Act 55 of 2002)."

The compounding of the offence at later stages of litigation in dishonour of cheque cases has also been held to be permissible in a recent decision of this Court, reported as K.M. Ibrahim v. K.P. Mohammed & Anr., 2009 (14) SCALE 262:

"11. As far as the non-obstante clause included in Section 147 of the Negotiable Instruments Act is concerned, the 1881 Act being a special statute, the provisions of Section 147 will have an overriding effect over the provisions of the Code relating to compounding of offences-

vii) 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 Appellate Forum. However, Section 147 of the aforesaid Act does not bar the parties from compounding an offence under Section 138 of NI Act 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."

GUIDELINES ISSUED

Supreme Court guidelines on cheque bounce cases are as follows :

- That 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.

- 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.

- 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.

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

It was also clarified that any costs imposed in accordance with these guidelines should be deposited with the Legal Services Authority operating at the level of the Court before which compounding takes place. For instance, in case of compounding during the pendency of proceedings before a Magistrate's Court or a Court of Sessions, such costs should be deposited with the District Legal Services Authority. Likewise, if cost is imposed by the High Court then it should be deposited with the State Legal Services Authority and those imposed in connection with composition before the Supreme Court should be deposited with the National Legal Services Authority.

It was also directed that it should be mandatory for the complainant to disclose that no other complaint has been filed in any other court in respect of the same transaction. Such a disclosure should be made on a sworn affidavit which should accompany the complaint filed under Section 200 of the CrPC. If it is found that such multiple complaints have been filed, orders for transfer of the complaint to the first court should be given. These directions should be given effect prospectively.

Directions of the Hon'ble Supreme Court in "Indian Banks Association Vs. Union of India". (2014) 5 SCC 590. (1) Metropolitan Magistrate/Judicial Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinize the complaint and, if the complaint is accompanied by the affidavit, and affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons. (2) MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post by email address got from the complainant. Court, in appropriate cases, may take the assistance of the police or the nearby. Court to serve notice to the accused. For notice of appearance, a short date be fixed. If the summons is received back unserved, immediate follow up action be taken.

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

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

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

The Hon'ble High Court of State of ANDHRA PRADESH has issued circular ROC No.14/SO/2022, Dated:10.01.2022.

As per Orders dated 16.04.2021 of Hon'ble Hon'ble Supreme Court of India in Suo Motu Writ Petition (Crl.) No.2 of 2020 titled In Re: Expeditious Trail of Cases Under Section 138 Negotiable Instruments Act, and directed to follow the practice directions as stated below :

PRACTICE DIRECTIONS :

➔All the Magistrate Courts trying the cases under Section 138 of Negotiable Instruments Act shall invariably follow the directions of the Hon'ble Supreme Court in Indian Banks Association Vs.Union of India, (2014) 5 SCC 590

➔The Magistrate Courts shall invariably register the cases under Section 138 of Negotiable Instruments Act initially as Summary Trial Cases Negotiable Instruments (STCNI) in view of the directions of the Apex Court in Indian Banks Association Vs. Union of India, (2014) 5 SCC 590.

➔The Magistrate Courts need not insist for the personal presence of the complainant for registration of the Complaint. (vide A.C.Narayanan Vs. State of Maharashtra, AIR 2014 SC 360).

➔The power of attorney holder may be allowed to file the complaint, appear and depose for the purpose of issue of process for the offence under Section 138 of the NJ.Act (vide A.C.Narayanan Vs. State of Maharashtra, AIR 2014 SC 630 and Sic Tamisuddin Vs. Joy Joseph Creado. Criminal Appeal No.237 of 2012, dated 25.09.2018). An exception to the above is when the power of attorney holder of the complainant does not have a personal knowledge about the transaction, then he cannot be examined (vide Janki Vashdeo Bhojwani Vs. Indusind Bank Ltd., (2005) 2 SCC 217).

➔Recording of Complainant's sworn statement under Sec.200 Cr.P.C. is not mandatory in view of the provisions under Section 145 of Negotiable Instruments Act. (vide A.C.Narayanan Vs. State of Maharashtra, AIR 2014 SC 630). The sworn affidavit filed under Section 145 Negotiable Instrument Act can be considered in lieu of the sworn statement in view of said provision.

➔In the cases where the place of residence of the accused is situated outside the territorial limits of the Court, the Courts shall follow Section 202 Cr.P.C. which mandates the inquiry by the Court. However, the said provision is not a hurdle or barrier in respect of the cases under Section 138 of Negotiable Instruments Act in view of the Constitution Bench decision dated 16.04.2021 of the Hon'ble Supreme Court in Suo Motu Writ Petition (Crl.) No.2 of 2020 titled In Re: Expeditious Trial of Cases Under Section 138 Negotiable Instruments Act). However, the Courts shall look into and consider the affidavit of the Complainant which may be filed under Section 145 of N.I.Act and the documents filed in support of his case to arrive at sufficient grounds to proceed against the accused and to issue the process.

The compliant shall contain a statement as to computation of the amount claimed, eMail ID of the complainant/accused, bank particulars of the complainant.

➔The Courts shall insist for filing the verification affidavit as to the correctness of pleadings. (vide Damodar S.Prabhu Vs. Sayed Babalal H., (2010) 5 SCC 663).

➔If all the above are duly complied, the Magistrates shall take cognizance of the offence on the date of filing itself without any delay and shall invariably register the case. (As Summary Trial Cases Negotiable Instruments (STCNI} (vide Indian Banks Association Vs. Union of India, (2014) 5 SCC 590.)

➔The summons shall be issued to the accused by registered post/approved courier agency eMail and other approved digital/electronic mode in the prescribed format. (vide Indian Banks Association Vs. Union of India, (2014) 5 SCC 590).

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

➔The Courts shall direct the accused, when he appears to furnish a bail bond, to ensure his appearance during trial. Here the Court shall consider the request of the accused to grant time for production of such bail bonds.

➔On the date of first appearance of the accused or on the date to which the appearance of the accused is scheduled, the Magistrate Court shall furnish the copies of complaint and documents to the Accused, enquire about his capacity to engage counsel (or appoint a legal aid counsel for the accused having no capacity to engage counsel) and then shall inform him about the guidelines in Damodar S.Prabhu Vs. Sayed Babalal H., (2010) 5 SCC 663 and Madhya Pradesh State Legal Services Authority Vs.Prateek Jain, (2014) 10 SCC 690. If the Court is satisfied that there is an element of settlement of the case, then it shall refer the case to LokAdalat or Mediation in accordance with the scheme prepared by NALSA.

➔In case of settlement of the case in any of these two modes, the award shall be drawn. In case of settlement before Lok Adalat, the parties shall be informed about the mode of execution of the award as per the Leg al Services Authorities Act, 1987 by way of filing Execution Application, while treating that award as a decree (vide K.N.Govindan Kutty Menon Vs.C.D. Shaji, (2012) 2 SCC 51.)

In case of not settling the issue before the Lok Adalat or the Mediation, the case shall be posted for framing notice or the examination of the accused under Section 251 of Cr.P.C. about the accusation levelled against him. In case of denial of the accusation, the accused shall be called upon to file a defence statement in writing with supporting reasons. Then the Court shall consider the scope of calling the complainant for further chief examination for making documents and for cross examination on behalf of the accused.

➔Till this stage, the case shall be treated as Summary Trial Case, but not as a regular Summons or Calendar Case. After examining the above aspects the Court shall consider the scope of converting the case as a regular Summons/Calendar case. If the Court is of the view that the case requires a through and detailed trial or where the case warrants imposition of grave punishment or where multiple connected civil/criminal cases are pending, it shall record the reasons for converting the case into a regular Summons or Calendar Case (CCNI). The recording of reasons at this stage shall always be mandatory in view of the decision of the Hon'ble Apex Court in Suo Motu Writ Petition (Crl.) No.2 of 2020 titled In Re: Expeditious Trial of Case Under Section 138 Negotiable Instruments Act.

➔The Magistrate's shall not entertain any miscellaneous application for discharge of the accused as there is no provision in Cr.P.C. for discharge of an accused in a Summary Trial Case or a Summons Case in view of the law as settled in Suo Motu Writ Petition (Crl.) No.2 of 2020 titled In Re: Expeditious Trial of Case Under Section 138 Negotiable Instruments Act and Subramanium Sethuraman Vs State of Maharashtra, AIR 2004 SC 4711. It shall be kept in mind that as held in In Re: Expeditious Trial of Case Under Section 138 Negotiable Instruments Act, the Section 258 of the Cr.P.C. is not applicable to the complaints under Section 138 of the N.I. Act and the judgment in Meters and Instruments Private Limited Vs. Kanchan Mehta, AIR 2017 SC 4594 is not approved to that extent.

➔The Magistrate Courts shall make every endeavour to complete the trial of these cases within the statutory prescribed time limit of six (6) months.

➔After closure of the complainant side evidence, the accused shall be called upon I to answer the incriminate material available in the case of the complainant against him under Section 313 Cr.P.C and his detailed answers for the said questions shall be recorded. The accused shall be permitted to file a defence statement in view of the provisions under Section 313 Cr.P.C. at this stage.

➔In case the accused choses to adduce evidence, the accused shall not be permitted to file his chief examination evidence in the form of affidavit in view of the law in Mandvi Cooperative Bank Ltd. Vs. Nimesh B.Thakore, (2010) 3 SCC 83. However, the accused can be permitted to enter into the witness box after obtaining necessary permission from the Court under Section 315 Cr.P.C. However, this permission from the Court is not mandatory when the accused intends to examine any other person as his witness.

➔After recording the evidence of both parties, the arguments shall be heard by the Court and the Court shall pronounce the judgment within three days (excluding the day of hearing the final arguments.)

➔In all the cases where the accused is found guilty of the offence under Section 138 of Negotiable Instruments Act, the Court shall consider awarding the compensation to the complainant party in view of the provisions under 138, 143 of Negotiable Instruments Act and Section 357 Cr.P.C. The Court must exercise the power and discretion to compensate the injury suffered by the complainant (vide Hari Kishan Vs. Sukhbir Singh, (1988) 4 SCC 551). The Court shall also keep in mind the decisions of the Hon'ble Apex Court in this regard rendered in R.Vijayan Vs Baby, AIR 2012 SC 528 and Suganthi Suresh Kumar Vs. Jagdeesh(2002) 2 SCC 420. The Court may consider granting of installments or time to pay such compensation amount. The Court may also consider to impose in default sentence on the accused in case of failure to pay the compensation. (vide K.A.Abbas Vs Sabu Joseph (2010) 6 SCC 230 and R.Mohan Vs. A.K.Vijaya Kumar, (2012) 8 SCC 721.) Sec. 143A: In all trials under Sec.138 of Negotiable Instruments Act, when the accused is claiming for a regular trial, the Court may order to direct the accused to pay the interim compensation to the complainant which shall not exceed 20% of the amount of cheque (Section 143A). Such interim compensation shall be paid within 60 days from the date of order and the Court is competent to extend that time for further 30 days. In case of acquittal, the Court shall direct the complainant to repay the interim compensation amount with the bank interest rate to the accused within 60 days from the date of judgment and this time can also be extended for further 30 days. Interim compensation may be recovered as if it were a fine under Sec.421 Cr.P.C. This interim compensation amount shall be adjusted against the final compensation ordered by the Court under Sec.357 Cr.P.C. at the time of judgment.

Execution of lokadalat award :

Section 21 of the Legal Services Authorities Act, 1987 is as follows:
Section 21 : Award of Lokadalath

(1)Every award of the Lok Adalat shall be deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under sub-section (1) of section 20, the court-free paid in such case shall be refunded in the manner provided under the Court Fees Act, 1870 (7 of 1870).

(2)Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award.

Sub-section 1 starts with the wording "Every award of the Lok Adalath" Every award can be given wide interpretation and an award passed by Lok Adalath in a case referred to it by the Criminal Court can be executed as if it was decree of the Civil Court.

Whether Award passed by the LokAdalath in a case referred to it can be executed in Civil Court?

Yes. It can be executed before a Civil Court as if as it is passed by a Civil Court. Refer the decision, reported in the case of K N Govind Kutty Menon Vs C.D Shaji, arising out of SLP (C) No. 2798/2010 dated 28-11-201, reported in 2011(8) Supreme 292. However, in the decision, in the case of Sri. Somashekhar Reddy Vs Smt. G S Geetha, in WP No. 23519 of 2018(GMRES), our High Court has held that 'depending upon the terms of a compromise arrived at before loka-adalath it can be enforced as a Civil Decree or in terms the applicable provisions of Cr.P C including that under Sec. 431 of Cr.P C, if so provided in the compromise. In the event of default of a compromise arrived at before the Lok-Adalath, this court or trial Court can on an application made by the Complainant set-aside the compromise arrived at before the Lok-Adalath, restore the complaint on its file and proceed with the complaint or enforce the compromise as per the terms of the compromise including by issuing of an FLW(Fine Levy Warrant) under Sec. 431 of the Cr.PC.

What is the effect of accused depositing the cheque amount when the appeal against his conviction is pending?

When the accused deposited the cheque amount during the pendency of the appeal against the conviction, the Court remitted back the matter and complainant was allowed to withdraw the money so deposited. In such cases, the Court can either set aside the conviction or if it declines to do so, can convict the accused or impose fine. Relevant decision is reported in AIR 2000 SC 3145-M/S Cranex Ltd & another M/S Nagarjuna Finance Ltd & another.