WORK SHOP -III

IN

VIZIANAGARAM

UNIT

ON 21.09.2024

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WORK SHOP- III
IN VIZIANAGARAM
UNIT
ON 21.09.2024

Ex-Officio Chair Person of Work Shop
Hon'ble Sri Justice
T.Rajasekhar Rao
Administrative Judge

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OFFENCES UNDER SPECIAL ENACTMENTS

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PAPER PRESENTATION

OFFENCE UNDER SECTION 138 OF NI ACT: INGREDIENTS, CASE LAWS, COGNIZANCE, LIMITATION AND JURISDICTION.

Presented by :

KUM PONNURU BUJJIi,
JUDICIAL MAGISTRATE OF I CLASS (SPECIALMOBILE) -
CUM- II ADDITIONAL JUNIOR CIVIL JUDGE,
VIZIANAGARAM.

INTRODUCTION:

The Negotiable Instruments Act, 1881 was initially enacted to address laws related to Promissory Notes, Bills of Exchange, and Cheques. In 1988, the Banking, Public Financial Institutions, and Negotiable Instruments Laws (Amendment) Act inserted a new Chapter XVII into the Act, introducing Sections 138 to 142. Section 138 specifically addressed penalties for cheque dishonour due to insufficient funds. Despite these provisions, the 2002 amendments via the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act identified deficiencies in handling cheque dishonours. This led to further amendments in Sections 138, 141, and 142, and the introduction of Sections 143 to 147, aimed at expediting case resolutions through summary trials and making cases compoundable. Punishments under Section 138 were also increased from one year to two years. These reforms were designed to promote the use of cheques and enhance their reliability in business transactions. However, the Hon'ble Supreme Court's decision on August 1,

2014, in Dashrath Rupsingh Rathod v. State of Maharashtra restricted territorial jurisdiction to the court where the cheque was dishonoured, complicating the process and potentially disadvantaging complainants. This prompted concerns from various stakeholders about the impact on business practices and cheque clearing processes, particularly with the advent of the Cheque Truncation System (CTS). In response, the Negotiable Instruments (Amendment) Bill, 2015 was introduced in the Lok Sabha on May 6, 2015, and passed on May 13, 2015. Due to Parliament's adjournment, an Ordinance was promulgated on June 15, 2015. The Bill aims to amend the Act to establish fair jurisdictional principles, streamline case management, and address jurisdictional ambiguities.

2. The main object of the Act was to legalize the system by which instruments contemplated by it could pass from hand to hand by negotiation like any other goods. Another purpose of the Act was to encourage the culture of use of cheques and enhancing the credibility of the instrument.

Section 6 of NI Act:

A check is defined as "a bill of exchange drawn on a specified banker and not expressed to. be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form." The definition of a cheque in Section 6 (2) of the Act is very clear and the cheque can also be made electronically.

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3. The terms are used when a check is written for the benefit of others and taken to the bank to receive cash and bounce. If the check is returned due to insufficient funds, penal sanctions will be imposed under Section 138 of the Negotiable Instruments Act, of 1881. If the check is returned because insufficient funds have arrived from the drawer, this will be a violation of Section 138 of the NI Act.

The Hon'ble Court in the case of ***Dalmia Cement Bharat Limited v. M/s Galaxy Traders and Agencies Limited and others*** **stated** that "The negotiable instruments are the instruments of credit being convertible on account of the legality of being negotiated and are easily transferable from one person to another. The legislature, in its wisdom, did consider this point that a provision in the Act be conferred which would have the privileges concerning the mercantile instruments considered under it and provide special penalties and procedures in case the obligations under the instruments are not discharged."

4. <u>INGREDIENTS OF THE OFFENCE UNDER SECTION 138, N.I. ACT :</u>

Though section 138, N.I. Act penalizes the dishonour of a cheque, however, dishonour of a cheque is, by itself, not an offence under section 138 of the N.I. Act. To become an offence, the following ingredients have to be fulfilled:

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1. Drawing of the cheque.

2. Presentation of the cheque to the bank.

3. Return of the cheque unpaid by the drawee bank.

4. Issuance of notice in writing to the drawer of the cheque demanding payment of the cheque amount. Failure of the drawer to make the payment within 15 days of receipt of the notice.

Further, the judgment of Jugesh Sehgal v. Shamsher Singh Gogi, (2009) 14 SCC 683 : (2009) 5 SCC (Civ) 482 and (2010) 2 SCC (Cri) 218 at page 687, It is manifest that to constitute an offence under Section 138 of the Act, the following ingredients are required to be fulfilled:

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

(ii) the cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;

(iii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;

(iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from ***Further, the judgment of Jugesh Sehgal v. Shamsher Singh Gogi, (2009) 14 SCC 683 : (2009) 5 SCC (Civ) 482 and (2010) 2 SCC (Cri) 218 at page 687, It is manifest that to constitute an offence under Section 138 of the Act, the following ingredients are required to be fulfilled:*** *that account by an agreement made with the bank;*

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(v) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice. Being cumulative, it is only when all the aforementioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have committed an offence under Section 138 of the Act.

5. Kanhaiya Lal v. State of U.P., 2010 SCC OnLine All 495 : (2010) 2 MWN (Cri) DCC 118 : (2010) 3 All LJ 645 : (2010) 69 ACC 541 : 2010 Cri LJ 2769For making out an offence under Section 138 of the Act following ingredients are essential. In seriatim, they are registered here as:

(i) that a person must have an operative account in any bank

(ii) he owns some debt or liability to any other person whether juristic/ legal, or not

(iii) a cheque is issued in the name of that person, to whom the debt or liability is owned by the account holder, from his such operative account in the bank, for the satisfaction of whole or part payment, for the said debt or liability. (Such person who issues the cheque is called "drawer" of the cheque and the person in whose name the cheque is issued is called the 'drawee' of the cheque.)

(iv) the said cheque is presented by the person in whose name it is issued drawee) or the holder of the cheque, in bank for it's encashment with he period of it's validity or within six months of the date of it's issuance noted on the cheque

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(v) the bank had returned the said cheque unpaid or dishonoured or encashed because of 'insufficiency of funds' with what ever terminology used by the bank for said dishonour because of insufficiency of funds in the account from which the cheque had been issued by the drawer

(vi) the person in whose name the cheque was issued (drawee) or holder in due course of the said cheque gives a notice, in writing to the person who has issued the cheque (drawer) with a period of thirty days, from the date of receipt of the notice of dishonoured/unpaid cheque from the bank, demanding the payment of the amount of cheque, with or without other prayers for damages or interest thereon

(vii) the notice of demand is served on the person who had issued, the cheque (drawer)

(viii) the drawer does not make the payment to the payee or drawee within fifteen days of the receipt of the said notice on him and the amount of cheque remains unpaid

6. <u>TIME FRAMES IN RESPECT OF THE OFFENCE UNDER SECTION 138, N.I. ACT:</u>

a) The cheque has to be presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. [Sec. 138 proviso (a)]. **The Reserve Bank of India vide Notification No,DBOD.AML BC.No.47/14.01.001/201112 has made the period of validity of a cheque to be three months now. Hence, as of now, the cheque has to be presented within three months from the date on which it was drawn.**

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

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

The complaint has to be filed **within one month** of the date on which the cause of action arises under clause (c) of the proviso to Sec. 138 N. I. Act. [Sec. 142].

7. <u>Cognizance of offence under Sec. 142 of NI Act:-</u>

The language used in the above section admits of no doubt that the Magistrate is forbidden from taking cognizance of the offence if the complaint was not filed **within one month of the date on which the cause of action arose.** Completion of the offence is the immediate forerunner of rising of cause of action. In other words cause of action would arise soon after completion of the offence, and the period of limitation for filing the complaint would simultaneously start running., **SIL Import, USA v. Exim Aides Silk Exporters, (1999) 4 SCC 567.**

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

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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 hed 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.

8. 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.

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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.7

9. <u>DEMAND STATUTORY NOTICE:</u>

The Notice must be in writing and it must be issued within 30 days of receipt of information from the bank, regarding return of the cheque as unpaid. It is worth adding here that while calculating the period of 30 days, the date of receipt of information from the bank has to be excluded. In **K. Bhaskaran v. Sankaran reported in (1999) 7 SCC 510, & In Dalmia Cement (Bharat) Ltd. v. M/s. Galaxy Traders reported in AIR 2001 SC 676,** the Hon'ble Supreme Court held that to constitute an offence under section 138 N.I. Act, the complainant is obliged to prove its ingredients which includes the receipt of notice by the accused under Clause (b). It is to be kept in mind that it is not the 'giving' of the notice which makes the offence but it is the 'receipt' of the notice by the drawer which gives the cause of action to the complainant to file the complaint within the statutory period.

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In State of M. P. v. Hira Lal reported in (1996) 7 SCC 523 as well as in Jagdish Singh v. Nathu Singh reported in AIR 1992 SC 1604, the Hon'ble Supreme Court held that where the addressee manages to have the notices returned with postal remarks "refused", "not available in the house," "house locked" and "shop closed" respectively, it must be deemed that the notices have been served on the addressee.

10. Commenting on the issue of deemed service, the Hon'ble Supreme Court has in C.C. Alavi Haji v. Palapetty Muhammad & Anr reported in (2007) 6 SCC 555 held as follows.

"According to Section 114 of the (Evidence) Act, read with illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the

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General Clause Act 1897 Act, is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that the notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business." **In C.C. Alavi Haji (supra), the Hon'ble Supreme Court further held that a person who does not pay within 15 (fifteen) days of receipt of the summons along with the copy of the complaint under section 138 of the N.I. Act, cannot obviously contend that there was no proper service of notice as required under section 138 of the Act.**

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11. ISSUANCE OF SECOND DEMAND NOTICE :

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

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

12. WHO CAN FILE THE COMPLAINT ?

The cases under the N.I. Act have a distinction from other criminal cases in the fact that locus standi to prosecute is an essential requirement for the trial. A complaint under section 138 of the Act can be filed only by the Payee of the dishonoured cheque or by the Holder in due course as mandated by Section 142 of the Act. However, this requirement has been qualified with an addendum. The complaint under section 138 of the Act can be filed by the

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payee through his power of attorney holder/duly authorized representative as held in **Sankar Finance and Investment v. State of A.P. & Others reported in (2008) 8 SCC 536.**

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

14. <u>Where the payee is a proprietary concern the complaint can be filed:</u>

i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the "payee";

ii) The proprietary concern describing itself as a sole proprietary concern, represented by its sole proprietor; and

iii) the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor." Where the payee is a partnership firm:

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

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

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

The said issue came before Hon'ble High Court of Telangana and State of Andhra Pradesh in " **M/s Sri Sai Karuna Finance and Enterprises represented by its Manager Vs. N. Sandhya Rani and another (Cr.M.P.No.452/2006, dated 24.10.2018**) Whereas the Hon'ble High Court held that " the Negotiable Instruments Acts specifically laid down that the debt or other liability means Legally enforceable of Legal liability has to be in the nature of Civil Suit because the debt or other liability cannot be recovered by filing a criminal case and when there is a bar of filing a suit by unregistered

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firm, the bar equally applies to criminal case as laid down in explanation to of 138 NI Act."

16. <u>Where the Payee is a Company :</u>

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

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17. <u>Lack of Authorization is a Curable Defect :</u>

The Hon'ble Supreme Court held in M.M.T.C. Ltd. and Another v. Medchl Chemicals and Pharma (P) Ltd. And Another reported in (2002) 1 SCC 234, the Hon'ble Supreme Court has held that, the only eligibility criteria prescribed by Section 142, N.I. Act for maintaining a complaint under section 138 is that the complainant must be the payee or the holder in due course. However, in case of a company, if the defacto complainant did not have authority in the initial stage, still the company can, at any stage, rectify that defect at a subsequent stage, and the company can send a person who is competent to represent it. In Samrat Shipping Co. Pvt. Ltd. v. Dolly George reported in (2002) 9 SCC 455, the Hon'ble Supreme Court termed the dismissal of the complaint at the threshold by the Magistrate on the ground that the individual through whom the complaint was filed had not produced the resolution of the Board of Directors of the Company authorizing him to represent the Company before the Magistrate to be not justified and termed this exercise to be "**too hasty an action**". **A three Judge Bench of the Hon'ble Supreme Court in M/S Haryana State Co.Op. Supply and Marketing Federation Ltd. v. M/S Jayam Textiles and Another reported in AIR 2014 SC 1926** held that the dismissal of the complaint for mere failure to produce authorization would not be proper and an opportunity ought to be granted to produce and prove the authorization.

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

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

19. TERRITORIAL JURISDICTION

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

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

20. 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.

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

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

"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

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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.

22. Jurisdiction:-

In Expeditious Trial of Cases Under Section 138 of NI Act, 1881, In re, (2021) 16 SCC 116 : 2021 SCC On Line SC 325 at page 131, it was held that Section 258 of the Code is not applicable to complaints under Section 138 of the Act and findings to the contrary in **Meters & Instruments [Meters & Instruments (P) Ltd. v. Kanchan Mehta, (2018) 1 SCC 560 : (2018) 1 SCC (Civ) 405 : (2018) 1 SCC (Cri) 477]** do not lay down correct law. To conclusively deal with this aspect, amendment to the Act empowering the trial courts to reconsider/recall summons in respect of complaints under Section 138 shall be considered by the Committee constituted by an order of this Court dated 10-3-2021 [Expeditious Trial of Cases Under Section 138 of NI Act 1881, In 2021 SCC On Line SC 354] .

23. Section 142(2)(a), amended through the Negotiable Instruments Amendment) Second Ordinance, 2015 :-

In Bridgestone India (P) Ltd. v. Inderpal Singh, (2016) 2 SCC 75, it was held that "We are in complete agreement with the contention advanced at the hands of the learned counsel for the appellant. We are satisfied, that

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Section 142(2)(a), amended through the Negotiable Instruments (Amendment) Second Ordinance, 2015, vests jurisdiction for initiating proceedings for the offence under **Section 138 of the Negotiable Instruments Act, inter alia, in the territorial jurisdiction of the court, where the cheque is delivered for collection (through an account of the branch of the bank where the payee or holder in due course maintains an account).** We are also satisfied, based on Section 142-A(1) to the effect, that the judgment rendered by this Court in **Dashrath Rupsingh Rathod case [Dashrath Rupsingh Rathod v. State of Maharashtra,(2014) 9 SCC 129 : (2014) 4 SCC (Civ) 676 : (2014) 3 SCC (Cri) 673]** , would not stand in the way of the appellant, insofar as the territorial jurisdiction for initiating proceedings emerging from the dishonour of the cheque in the present case arises."

(1) A First Class Magistrate may impose a fine exceeding Rs 5000

As was held in **R. Vijayan v. Baby, (2012) 1 SCC 260 : (2012) 1 SCC (Civ) 79 : (2012) 1 SCC (Cri) 520 : 2011 SCC OnLine SC 1363 at page 265**, it is of some interest to note, though may not be of any assistance in this case, that the difficulty caused by the ceiling imposed by Section 29(2) of the Code has been subsequently solved by insertion of Section 143 in the Act (by Amendment Act 55 of 2002) with effect from 6-2-2003. Section 143(1) provides that notwithstanding anything contained in the Code, all offences under Chapter XVII of the Act should be tried by a Judicial Magistrate of the First Class or by a Metropolitan Magistrate and the provisions of Sections 262 to 265 of the Code (relating to summary trials) shall, as far as may be, apply to such

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trials. The proviso thereto provides that it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term extending one year and an amount of fine exceeding Rs 5000, in case of conviction in a summary trial under that section. In view of conferment of such special power and jurisdiction upon the First Class Magistrate, the ceiling as to the amount of fine stipulated in Section 29(2) of the Code is removed. Consequently, in regard to any prosecution for offences punishable under Section 138 of the Act, a First Class Magistrate may impose a fine exceeding Rs 5000, the ceiling being twice the amount of the cheque.

(2). Sec.138 of the NI Act requires to be tried in a summary way:-

Section 138 of the NI Act, which requires to be tried in a summary way It was held in J**.V. Baharuni v. State of Gujarat, (2014) 10 SCC 494,** that a case under Section 138 of the NI Act, which requires to be tried in a summary way as contemplated under Section 143 of the Act, when in fact, was tried as regular summons case it would not come within the purview of Section 326(3) of the Code. In other words, if the case in substance was not tried in a summary way, though was triable summarily, and was tried as a summons case, it need not be heard de novo and the succeeding Magistrate can follow the procedure contemplated under Section 326(1) of the Code. (See Ramilaben Trikamlal Shah v. Tube and Allied Products [2006 SCC OnLine Bom 1272 : (2007) 2 Mah LJ 834 : 2007 All MR (Cri) 1637] .)

(3) Magistrate has the discretion under Section 143 of the NI Act:- The learned Magistrate has the discretion under Section 143 of the NI Act

either to follow a summary trial or summons trial. In case the Magistrate wants to conduct a summons trial, he should record the reasons after hearing the parties and proceed with the trial in the manner provided under the second proviso to Section 143 of the NI Act. Such reasons should necessarily be recorded by the trial court so that further litigation arraigning the mode of trial can be avoided. See. J**.V. Baharuni v. State of Gujarat, (2014) 10 SCC 494.**

(4) <u>De novo enquiry not necessary:</u>-

But where even in a case that can be tried summarily, the court records the evidence elaborately and in verbatim and defence was given full scope to cross-examine, such procedure adopted is indicative that it was not summary procedure and therefore, succeeding Magistrate can rely upon the evidence on record and de novo enquiry need not be conducted. **(See A. Krishna Reddy v. State [(1999) 6 ALD 279] .) See. J.V. Baharuni's case (Supra)**.

(5) <u>Evidence recorded by one Magistrate in such a case may be legally read in evidence by his successor:-</u>

I**n Shivaji Sampat Jagtap v. Rajan Hiralal Arora [2007 Cri LJ 122 (Bom)] , the Bombay High Court observed thus : (Cri LJ p. 128, para 18)** a case, which is triable as summarily, and in which the record of the proceedings has been prepared in accordance with the provisions of Sections 263 and 264 of the Code could be stated to have been tried summarily for the purpose of Section 326(3) and in that case the evidence recorded by one Magistrate cannot be read in evidence by succeeding Magistrate. The

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succeeding Magistrate, however, in a case, where the procedure contemplated under Sections 263 and 264 of the Code in particular has not been followed, he need not hold a trial de novo. In short, if no record as per Sections 263 and 264 has been or is being maintained by the Magistrate and the case has been or is being tried as a regular summons case and not tried in a summary way as contemplated under Sections 262 to 265 of the Code, such case shall not be considered as tried in summary way, though triable summarily as provided for under sub-section (1) of Section 143 of the Act, so as to attract the provisions of Section 326(3) of the Code. Therefore, the evidence recorded by one Magistrate in such a case may be legally read in evidence by his successor and no de novo trial shall be necessary." See. J.V. Baharuni's case (Supra).

24. <u>Offences by Companies :</u>

Subsection (1) of Section 141 of the N.I. Act provides that if a person committing an offence under the section is a company, every person who, at the time offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Subsection (2) of Section 141 of the N.I. Act further provides that where any offence under the N.I. Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty

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of that offence and shall be liable to be proceeded against and punished accordingly. The offender in section 138 of the N.I. Act is the drawer of the cheque. He alone would have been the offender there under if the Act did not contain other provisions. It is because of section 141 of the N.I. Act that penal liability under section 138 is cast on other persons connected with the company. Three categories of persons can be discerned from the said provision who are brought within the purview of the penal liability through the legal fiction envisaged in the section.

1. The company,
2. Everyone who was in charge of and was responsible for the business of the company,
3. Any other person who is a director or a manager or a secretary or officer of the company, with whose connivance or due to whose neglect the company has committed the offence.

The Legislature has thought fit to provide an Explanation to Section 141 of the N.I. Act and the plain reading of the expression "company" as used in sub clause (a) of the Explanation appended to **Section 141 of the N.I. Act shows that it is inclusive of any body corporate, firm or "other association of individuals". Though the heading of Section 141 of the N.I. Act reads "offences by companies" but according to the Explanation to that Section, "company" means "any body corporate and includes a firm or other association of individuals and "director", in relation to a firm means "a partner in the firm".** It is only the drawer of the cheque, who can be held responsible for an offence under Section 138 of the N.I. Act. Section 141, however, provides for constructive liability. It

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postulates that a person, in charge of and responsible to the company, in the context of the business of the company, shall also be deemed guilty of the offence. The drawer can be a company, a firm or an association of individuals, but only those directors, partners, or officers can be held responsible for the offence punishable under Section 138 of the N.I. Act who are responsible for the conduct of its business.

In Aneeta Hada v. Godfather Travels & Tours Private Limited [(2012) 5 SCC 661] , the Apex Court had unequivocally clear on this point." that the prosecution launched against the directors without joining the company (or against the partners of the partnership firm, without joining the partnership firm) cannot be maintainable".

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

25. <u>Status of Nominated Directors :</u>

A question may arise as to the culpability of nominated directors of a company. The second proviso appended to Section 141, N.I. Act provides the answer in this regard.

"where a person is nominated as a Director of a Company by virtue of his holding any office or employment in the Central Government or State

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Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter."

Liability of a Company in respect of which Winding Up Proceedings have been Initiated In Kusum Ingots and Alloys Ltd. Vs Penner Peterson Securities Ltd. reported in (2000) 2 SCC 745, the Apex Court observed, that if the ingredients of Sec. 138 N. I. Act are satisfied, there is no bar for initiating criminal proceeding against the company and its directors, on a complaint made by the payee under N. I. Act. Even in cases where winding up petitions have been instituted against a company, it cannot escape the penal liability for dishonour of cheque under section 138, N.I. Act on the ground that the payment of the cheque pursuant to issuance of notice would amount to disposition of property of company and, hence, void under section 536 (2) of the Companies Act.

26. 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 e mail address got from the complainant. Court, in appropriate cases, may take the assistance of the police or the nearby. Court to serve notice to

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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 examination. Section 145(2) for recalling a witness for cross The Court concerned must ensure that examination in chief, cross examination and reexamination 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 Telangana has issued circular No.11/2021, Dated:21062021. As per Orders dated 16.04.2021 of 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 :

27. <u>PRACTICE DIRECTIONS :</u>

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

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Annexure A'.

i) 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)**.

ii) 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).**

iii) 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.

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iv) 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.

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

vi) 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)**.

vii) 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.)

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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).

viii) 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. (vide Directions of the Hon'ble supreme Court in its Constitutional Bench decision, date d 16.04.2021 in Suo Motu Writ Petition (Crl.) No.2 of 2020 titled In Re: Expeditious Trial of Case Under Section 138 Negotiable Instruments Act.)

ix) 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.

x) 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

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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.

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

Xii) 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

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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.

Xiii) 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 Ac:t, 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.

xiv) 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

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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.

xv) 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.

Xvi) 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.)

xviii) 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. Jagdeeshan, (2002) 2 SCC 420. The Court may consider granting of installments or time to pay such compensation amount. The Court may also

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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.

28. <u>CONCLUSION:</u>

The Negotiable Instruments Act guarantees equitable treatment for payees and upholds financial integrity. Sections 138 to 142, in particular, address cheque dishonor. It describes what constitutes an offense, the penalties under criminal and civil laws, the boundaries of jurisdiction, and the steps involved in filing complaints and getting them resolved. The Act ensures that legal processes are carried out in the proper courts by providing instructions on where criminal complaints for cheque dishonor can be filed

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about jurisdiction. Affidavits, filing complaints, scrutiny processes, mediation, and compounding of offenses are all made clear by procedural standards found in the Act and its later amendments. These rules are intended to facilitate court proceedings, advance equitable settlements, and stimulate payment of debts. All things considered, the Negotiable Instruments Act, and especially Sections 138 to 142, is vital to upholding accountability and confidence in financial transactions, offering legal protection to those impacted by dishonored checks, and enhancing the effectiveness and dependability of business transactions.

The recent judgment in Meters and Instruments (P) Ltd. v. Kanchan Mehta further supports the modernized approach by allowing for the online disposal of such cases, reflecting an ongoing adaptation of the legal system to contemporary needs. The recent judicial pronouncements and legislative amendments underscore the evolving landscape of cheque dishonour cases under the Negotiable Instruments Act (NI Act). The Hon'ble Supreme Court in Arun Kumar v. Anita Mishra affirmed that awards from Lok Adalats are deemed as decrees of civil courts and enforceable as legal debts, reinforcing their status. Similarly, Ajitsinh Chehuji Rathod v. State of Gujarat clarified that Section 118(e) of the NI Act establishes a presumption in favor of the genuineness of endorsements on negotiable instruments, thus placing the burden of proof on the accused to disprove this presumption.

Recent rulings, such as P. Mohanraj v. Shah Bros. is pat (P) Ltd., affirm that Section 147's provisions override Section 320(9) of the CrPC, and modern technology should be utilized to streamline these proceedings. The emphasis is

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on expeditious resolution and avoiding unnecessary court congestion, as highlighted in Meters & Instruments (P) Ltd. v. Kanchan Mehta. Therefore, the judicial and legislative framework supports a practical approach to cheque dishonour cases, focusing on settlement and recovery, while also incorporating technological advancements for efficiency.

(KUM PONNURU BUJJI)
JUDICIAL MAGISTRATE OF I CLASS (SPECIAL MOBILE) -
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Paper Presentation material by

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on topic of Interim Compensation and its recovery-- compounding of offences and Execution of Lok Adalat Award

Interim Compensation and its recovery:

Clause (*b*) of sub-section (1) of Section 143-A will apply only when the case is being tried as a warrant case:-

Section 143A was brought on the statute book by Act No.20 of 2018 with effect from 1st September 2018. Section 143A reads the following:

"143-A. Power to direct interimcompensation.—

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

(*a*) in a summary trial or asummons 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 cheque amount.

(3) 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.

(4) If the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with

interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be
directed by the Court on sufficient cause being shown by the complainant.

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

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

Referred the following relevant latest land mark judgment of Honourable supreme court-- ***Rakesh Ranjan Shrivastava v. State of Jharkhand*, (2024) 4 SCC 419** : 2024 SCC OnLine SC 309 at page 426.para 10 of the following--

Para 10 --The power under sub-section (1) of Section 143-A is to direct the payment of interim compensation in a summary trial or a summons case upon the recording of the plea of the accused that he was not guilty and, in other cases, upon framing of charge. As the maximum punishment under Section 138 of the NI 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 "CrPC"), the cases under Section 138 of the NI Act are triable as summons cases. However, sub-section (1) of Section 143 provides that notwithstanding anything contained in CrPC, the learned Magistrate shall try the complaint by adopting a summary procedure under Sections 262 to 265CrPC. 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 CrPC. Therefore, the complaint under Section 138 becomes a summons case in such a contingency. We may note here that under Section 259CrPC, 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 143-A will apply only when the case is being tried as a warrant case. In the

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case of a summary or summons trial, the power under sub-section (1) of Section 143- A can be exercised after the plea of the accused is recorded.

Para-9:Mandatory or directory:- 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.

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

Amount of interim compensation can be recovered as if it were a fine under Section 421CrPC (now 461 of B.N.S.S.):- Under sub-section (5) of Section 143-A, it is provided that the amount of interim compensation can be recovered as if it were a fine under Section 421CrPC. Therefore, by a legal fiction, the interim compensation is treated as a fine for the purposes of its recovery. Section 421CrPC deals with the recovery of the fine imposed by a criminal court while passing the sentence. Thus, recourse can be taken to Section 421CrPC for recovery of interim compensation. See. ***Rakesh Ranjan Shrivastava v. State of Jharkhand*, (2024) 4 SCC 419.**

As was held in Rakesh Ranjan Shrivastava's case (2024) (supra), 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

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him to realise the interim compensation amount as arrears of land revenue from the movable or immovable property, or both, belonging to the accused.

Recovery of Fine and Compensation

Further, in order to recover the fine and compensation which has been discussed in the decision reported in **Dilip S. Dahanukar v. Kotak ahindra Co. Ltd., (2007) 6 SCC 528,** at page 538, wherein, it is held that fine for an offence under Section 138 of the Act can be imposed only in terms of the provisions of the Act, when fine is not imposed, compensation can be directed to be paid for loss or injury caused to the complainant by reason of commission of such offence. The fine can be recovered under Section 421 of Cr.P.C (now 461 of B.N.S.S.) Section 431 provides for a legal iction in terms whereof any money other than a fine shall be recoverable as if it was a fine. Section 357 (2) Cr.P.C would be attracted in such a situation. There does not appear to be any reason as to why the amount of compensation should be held to be automatically payable, although, the same is only to be recovered, as if, a fine has been imposed.

In the case of **Surinder Singh Deswal @ Col. S.S. Deswal and Ors. v. Virender Gandhi, (2020) 2 SCC 514**, the Hon'ble Supreme Court of India addressed the issue of non-payment of interim compensation under Section 143A of the Negotiable Instruments Act, 1881.

The court held that if the accused fails to pay the interim compensation as directed under Section 143A, the court can resort to the provisions of Section 421 of the Code of Criminal Procedure (now 461 of Bharatiya Nagarik Suraksha Sanhita, 2023) for recovery. Additionally, the court clarified that non-payment of interim compensation can also lead to the cancellation of bail granted to the accused. So, apart from the remedy under Section 421 Cr.P.C. (now 461 of B.N.S.S.) the court may consider the cancellation of bail as a

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consequence of non-payment of interim compensation. This serves as an additional measure to ensure compliance
with the order of interim compensation.

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**.

Compounding of Offences – Execution of Lok Adalat Award. Permission to compound the offence is not necessary:- Section 147 of N.I.Act makes it clear that offence punishable under the provisions of NI Act is compoundable in nature. In **Rameshbhai Sombhai Patel v. Dineshbhai Achalanand Rathi, 2004 SCC Online Gujarath 469**, it was held that No formal permission to compound the offence of section 138 of N.I.Act is required. If the Court satisfies that the complainant has been duly compensated, accused can be discharged in the cases of section 138 of N.I.Act. See. Meters and Instruments (P) Ltd. v. Kanchan Mehta, (2018) 1 SCC 560. As was held in Gunmala Sales Private Ltd. Versus Anu Mehta, (2015) 1 SCC 103, Sec. 482 of the Code of Criminal Procedure,1973 is applicable seeking quash the proceedings under section 138 of N.I.Act.

In ***Damodar S. Prabhu* v. *Sayed Babalal H. Damodar S. Prabhu* v. *Sayed Babalal H.*, (2010) 5 SCC 663**, the Apex Court has issued the following guidelines. They are:

In the circumstances, it is proposed as follows:

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

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 20% 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. Let it also be clarified that any costs imposed in accordance with these guidelines should be deposited with the Legal services Authority operating at the level of the Court before which compounding takes place. 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, costs imposed in connection with composition before the High Court should be deposited with the State Legal service.

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<u>Section 147</u>:- **<u>Offences to be compoundable</u>** - Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable.

Is the offence under Section 138 of N.I Act compoundable?

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After amendment and insertion of Section 147 it is compoundable. Thepurpose of compounding the offence has been stated in the decisions reported in **AIR 2000 SC 3543- P.Mohanbabu Vs. D. Ramaswamy, AIR 2004 SC 3978 Anil Kumar Haritwal v. Alka Gupta, AIR 2008 SC 716 Vinay Devanna Nayak v. Ryot Seva Sahakari Bank Ltd., AIR 2010 SC 276 K. M. Ibrahim v. K. P. Mohammed**. In the latest decision reported in **AIR 2010 SC 1907 = 2010 AIR (SCW) 2929 = 2010- DJ-4-464 – Damodar S. Prabhu vs. Sayed Babalal H.**

Some more guidelines have been issued by the Apex Court in the case of **Madhya Pradesh State Legal Services Authority Vs. Prateek Jain reported in (2014) 10 SCC 690**, as follows;

In the opinion of the Court, since Section 147 of the Act did not carry any guidance on how to proceed with compounding of the offences under the Act and Section 320 of the Code of Criminal Procedure, 1973 (now section 359 of Bharatiya Nagarik Suraksha Sanhita, 2023) could not be followed in strict sense in respect of offences pertaining to Section 138 of the Act, there is a legislative vacuum which prompted the Court to frame those guidelines toachieve the following objectives:

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

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

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

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

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

Award passed by the Lok- Adalath in NI ACT case can be executed in Civil Court. It can be executed before a Civil Court as if as it is passed by a Civil Court. As per 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(GM- RES), held that 'depending upon the terms of a compromise arrived at before lok-adalath it can be enforced as a Civil Decree or in terms the applicable provisions of B.N.S.S including that under Section 431 of Cr.P.C.(now 471 of B.N.S.S.) 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 by invoking the procedure under section 431 of Cr.P.C. (now section 471 of B.N.S.S.).

Section 147 N.I.Act overrides the effect of Section 320(9) CrPC:-

In ***P. Mohanraj v. Shah Bros. Ispat (P) Ltd.*, (2021) 6 SCC 258** it was held that "*since Section 147 was inserted by way of an amendment to a special law, the same will override the effect of Section 320(9) CrPC, especially keeping in mind that Section 147 carries a non obstante clause.*"

"Award" of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision-making process: - It is useful to refer to the judgment of this Court in *State of Punjab* v. *Jalour Singh* [(2008) 2 SCC 660 . The ratio of that decision was that the "award" of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision-making process. The

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making of the award is merely an administrative act of incorporating the terms of settlement or compromise agreed upon by the parties in the presence of the Lok Adalat, in the form of an executable order under the signature and seal of the Lok Adalat. This judgment was followed in *B.P. Moideen Sevamandir* v. *A.M. Kutty Hassan* [(2009) 2 SCC 198. Further more, In ***P.T. Thomas* v. *Thomas Job*** **[(2005) 6 SCC 478]** , the Lok Adalat, its benefits, award and its finality have been extensively discussed.

In *K.N. Govindan Kutty Menon* v. *C.D. Shaji* [*K.N. Govindan Kutty Menon* v. *C.D. Shaji*, (2012) 2 SCC 51 : (2012) 1 SCC (Civ) 515 : (2012) 1 SCC (Cri) 732] cited by the appellant complainant, this Court held: (SCC pp. 55-56 & 59, paras 11 & 23)

"*11.* ... In the case on hand, the question posed for consideration before the High Court was that 'when a criminal case referred to by the Magistrate to a Lok Adalat is settled by the parties and an award is passed recording the settlement, can it be considered as a decree of a civil court and thus executable by that court?' After highlighting the relevant provisions, namely, Section 21 of the Act, it was contended before the High Court that every award passed by the Lok Adalat has to be deemed to be a decree of a civil court and as such, executable by that court.

Complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail:-

In a recently published commentary, the following observations have been made with regard to the offence punishable under Section 138 of the Act [cited from : *Arun Mohan, Some thoughts towards law reforms on the topic of Section 138, Negotiable Instruments Act—Tackling an avalanche of cases* (New Delhi : Universal Law Publishing Co. Pvt. Ltd., 2009) at p. 5]:

'... *Unlike that for other forms of crime, the punishment here (insofar as the complainant is concerned) is not a means of seeking retribution, but is more a means to ensure payment of money. The complainant's interest lies primarily in*

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recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery. As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque.

If we were to examine the number of complaints filed which were "compromised" or "settled" before the final judgment on one side and the cases which proceeded to judgment and conviction on the other, we will find that the bulk was settled and only a miniscule number continued.' (Observed in *P. Mohanraj's case (supra)).*

Lok Adalats as a decree of a civil court *:*

In K.N. Govindan Kutty Menon v. C.D. Shaji [K.N. Govindan Kutty Menon v. C.D. Shaji, (2012) 2 SCC 51 : (2012) 1 SCC (Civ) 515 : (2012) 1 SCC (Cri) 732] has held that : (SCC p. 60, para 26) "Even if a matter is referred by a criminal court under Section 138 of the Negotiable Instruments Act, 1881 and by virtue of the deeming provisions**, the award passed by the Lok Adalat based on a compromise has to be treated as a decree capable of execution by a civil court**." See also. *Makwana Mangaldas Tulsidas v. State of Gujarat*, (2020) 4 SCC 695.

Modern technology needs to be considered not only for paperless courts but also to reduce overcrowding of courts:-

In ***Meters & Instruments (P) Ltd.*** **[*Meters & Instruments (P) Ltd.* v. *Kanchan Mehta*, (2018) 1 SCC 560** , observed the following : (SCC p. 571, para 17), "Use of modern technology needs to be considered not only for paperless courts but also to reduce overcrowding of courts. There appears to be need to consider categories of cases which can be partly or entirely concluded "online" without physical presence of the parties by simplifying procedures where seriously disputed questions are not required to be adjudicated. Traffic challans may perhaps be one such category. **At least some number of Section 138 cases can be decided online.** If complaint with affidavits and documents can be

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filed online, process issued online and the accused pays the specified amount online, it may obviate the need for personal appearance of the complainant or the accused. Only if the accused contests, need for appearance of parties may arise which may be through counsel and wherever viable, videoconferencing can be used. Personal appearances can be dispensed with on suitable self-operating conditions. *This is a matter to be considered by the High Courts and wherever viable, appropriate directions can be issued.*"

The nature of offence under Section 138 primarily relates to a civil wrong:- In *Meters & Instruments (P) Ltd.* [*Meters & Instruments (P) Ltd.* v. *Kanchan Mehta*, (2018) 1 SCC 560 : , the Supreme Court had also observed that the nature of offence under Section 138 primarily relates to a civil wrong. While criminalising of dishonour of cheques took place in the year 1988 taking into account the magnitude of economic transactions today, decriminalisation of dishonour of cheque of a small amount may also be considered, leaving it to be dealt with under civil jurisdiction. See. *Makwana Mangaldas Tulsidas v. State of Gujarat*, (2020) 4 SCC 695.

Expeditious trial of cases under Section 138 of the NI Act:- In *Makwana Mangaldas Tulsidas v. State of Gujarat*, (2020) 4 SCC 695, it was held that Let the matter be registered separately as Suo Motu Writ Petition (Criminal) with the caption "Expeditious trial of cases under Section 138 of the NI Act, 1881".

No question of any pecuniary jurisdiction was raised and/or required to be considered by the Lok Adalat:- In *Subhash Narasappa case* [(2009) 3 Mah LJ 857] , Mah LJ p. 858, paras 16-17, it was held that "Once the parties entered into compromise before the Lok Adalat, and at that time no question of any pecuniary jurisdiction was raised and/or required to be considered by the Lok Adalat. Therefore, once the award is passed, it is executable under CPC." See also. *K.N. Govindan Kutty Menon v. C.D. Shaji*, (2012) 2 SCC 51; *Valarmathi Oil Industries* v. *Saradhi Ginning Factory* [AIR 2009 Mad 180].

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Whether the Magistrate can convict the accused petitioners under Section 138 of the NI Act after the award was passed in the Lok Adalat (Valarmathi case [AIR 2009 Mad 180]):-

The learned Single Judge, after adverting to Section 21(1) of the Act and the order of the learned Magistrate, has concluded as under: (*Valarmathi case* [AIR 2009 Mad 180] , AIR p. 181, paras 13-14)

"*13*. Had there been no settlement in the Lok Adalat, the learned Magistrate could have proceeded with the trial and delivered his judgment, for which, there is no bar. In the instant case, as admitted by both the learned counsel, there was an award passed in the Lok Adalat, based on the consensus arrived at between the parties. As per the award, the accused petitioners had to pay Rs 3,75,000 to the respondent complainant on or before 3-9-2007. As it is an award made by the Lok Adalat, it is final and binding on the parties to the criminal revision and as contemplated under Section 21(2) of the Act, no appeal shall lie to any court against the award.

14. In such circumstances, the petitioners could have filed the execution petition before the appropriate court, seeking the award amount to be paid with interest and costs. In such circumstances, it is clear that the learned Judicial Magistrate became functus officio, to decide the case after the award passed by the Lok Adalat, to convict the accused under Section 138 of the Negotiable Instruments Act, hence, the impugned order passed by the learned Sessions Judge is also not sustainable in law, however, it is clear that the accused petitioners herein after having given consent for the Lok Adalat award being passed and also agreed to pay the award amount Rs 3,75,000 on or before 3-9-2007 to the respondent, have not complied with their undertaking made before the Lok Adalat, which cannot be justified. However, the order passed by the learned Judicial Magistrate under Section 138 of the Negotiable Instruments Act has to be set aside, in view of the Lok Adalat award passed under Sections 20(1)(*i*)(*b*), 20(1)(*ii*) of the Legal Services Authorities Act (Act 39 of 1987), as the

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Judicial Magistrate became functus officio and the award is an executable decree in the eye of the law, as per Section 21 of the Act."

After arriving at such conclusion, the learned Single Judge made it clear that as per the award passed by the Lok Adalat, the respondent complainant is at liberty to file execution petition before the appropriate court to get the award amount of Rs 3,75,000 reimbursed with subsequent interest and costs, as per procedure known to law. See. *K.N. Govindan Kutty Menon v. C.D. Shaji*, (2012) 2 SCC 51.

Presumptions as to negotiable instruments (Sec. 118 and 139):

"In Basalingappa v. Mudibasappa [Basalingappa v. Mudibasappa, (2019) 5 SCC 418 : (2019) 2 SCC (Cri) 571] wherein it is held as hereunder : (SCC pp. 432-33, para 25)

`25. We having noticed the ratio laid down by this Court in the above cases on Sections 118(*a*) and 139, we now summarise the principles enumerated by this Court in the following manner:

25.1. Once the execution of cheque is admitted *Section 139* of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

25.2. The presumption under *Section 139* is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

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25.4. That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.

25.5. It is not necessary for the accused to come in the witness box to support his defence.' *"(See also the latest ruling: Ranganatha v. Vittal Shetty*, (2022) 16 SCC 683*).*

Some other relevant judgments as to Sec. 138 N.I.Act:

Evidence of the complainant given by him on affidavit :- As was held in ***Expeditious Trial of Cases Under Section 138 of NI Act, 1881, In re,* (2021) 16 SCC 116 : 2021 SCC OnLine SC 325 at page 122**, this gargantuan pendency of complaints filed under Section 138 of the Act has had an adverse effect in disposal of other criminal cases. There was an imminent need for remedying the situation which was addressed by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002. Sections 143 to 147 were inserted in the Act, which came into force on 6-2-2003. Section 143 of the Act empowers the court to try complaints filed under Section 138 of the Act summarily, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (hereinafter "the Code"). Sub-section (3) of Section 143 stipulates that an endeavour be made to conclude the trial within six months from the date of filing of the complaint. Section 144 deals with the mode of service of summons. Section 145 postulates that the evidence of the complainant given by him on affidavit may be read as evidence in any inquiry, trial or other proceeding under the Code. Bank's slip or memo denoting that the cheque has been dishonoured is presumed to be prima facie evidence of the fact of dishonour of the cheque, according to Section 146. Section 147 makes offences punishable under the Act compoundable. The punishment prescribed under the Act was enhanced from one year to two years, along with other amendments made to Sections 138 to 142 with which we are not concerned in this case.

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Director's retirement - Cheque issued after resignation: In ***Rajesh Viren Shah v. Redington India Ltd.*, (2024) 4 SCC 305**, it was held that the record reveals the resignations to have taken place on 9-12-2013 and 12-3-2014. Equally, we find the cheques regarding which the dispute has travelled up the courts to have been issued on 22-3-2014. The latter is clearly, after the appellant(s) have severed their ties with the respondent Company and, therefore, can in no way be responsible for the conduct of business at the relevant time. Therefore, we have no hesitation in holding that they ought to be then entitled to be discharged from prosecution. In ***Sunita Palita v. Panchami Stone Quarry*, (2022) 10 SCC 152**, it was *succinctly* held that Liability depends on the role one plays in the affairs of a company and not on designation or status alone as held by this Court in *S.M.S. Pharmaceuticals* [*S.M.S. Pharmaceuticals Ltd.* v. *Neeta Bhalla*, (2005) 8 SCC 89 : 2005 SCC (Cri) 1975] . The materials on record clearly show that these appellants were independent, non-executive Directors of the company. As held by this Court in *Pooja Ravinder Devidasani* v. *State of Maharashtra* [*Pooja Ravinder Devidasani* v. *State of Maharashtra*, (2014) 16 SCC 1 : (2015) 3 SCC (Civ) 384 : (2015) 3 SCC (Cri) 378] a non-executive Director is not involved in the day-to-day affairs of the company or in the running of its business. Such Director is in no way responsible for the day-to-day running of the accused Company. Moreover, when a complaint is filed against a Director of the company, who is not the signatory of the dishonoured cheque, specific averments have to be made in the pleadings to substantiate the contention in the complaint, that such Director was in charge of and responsible for conduct of the business of the Company or the Company, unless such Director is the designated Managing Director or Joint Managing Director who would obviously be responsible for the company and/or its business and affairs.

Certified copy of document:- As was held in ***Ajitsinh Chehuji Rathod v. State of Gujarat*, (2024) 4 SCC 453** , a Two-Judge Bench Judgment, Certified copy of a document issued by a bank is itself admissible under the Bankers' Books Evidence Act, 1891 without any formal proof thereof. Hence, in an appropriate case, the certified copy of the specimen signature maintained by the bank can be

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procured with a request to the court to compare the same with the signature appearing on the cheque by exercising powers under Section 73 of the Evidence Act, 1872.

In *Pankaj Mehra v. State of Maharashtra*, (2000) 2 SCC 756, and *Comorin Match Industries (P) Ltd. v. State*, (1996) 4 SCC 281, the Supreme Court addressed principles concerning the enforcement of debts. Similarly, *Nanda v. Nandkishor*, 2010 SCC Bom Page 54, elaborates on the enforceability of such debts. Regarding the liability of guarantors, *ICDS Ltd. v. Beena Shabeer*, (2002) 6 SCC 426, and *Nangia Construction India (P) Ltd. v. Narinder Kumar*, 1990 SCC OnLine Del 119, offer relevant insights.

The mandatory requirement for a legal notice under Section 138(b) of the Negotiable Instruments Act is underscored in *C.C. Alavi Haji v. Palapetty Muhammed*, (2007) 6 SCC 555, and *Vinay Kumar Shailendra v. Delhi High Court*, (2014) 10 SCC 708. For guidance on referring cases to Lok Adalat, see *M.P. State Legal Services Authority v. P*, (2014) 10 SCC 690. Issues related to the service of legal notice and presumptions are discussed in *N. Parameswaran Unni v. G. Kannan*, (2017) 5 SCC 737, and *Lucy Ayline Jacinto v. Union Bank of India*, 2011 SCC OnLine Bom 271.

The presumption under Section 139 regarding cheques is addressed in *Basalingappa v. Mudibassapa*, 2019 SCC Online 491, and the rebuttable presumption is discussed in *Rangappa v. Sri Mohan*, (2010) 11 SCC 441. The financial capacity of the complainant is also highlighted in *Basalingappa v. Mudibassapa*, 2019 SCC Online 491.

The handling of blank cheques is explored in *Bir Singh v. Mukesh Kumar*, (2019) 4 SCC 197, and other cases like *A. Suseela v. S. Radhakrishnan*, 2011 SCC OnLine Mad 735; *A. Krishna Kumar v. P. Regina*, 2015 SCC OnLine Mad 5490; and *C.A. Balan v. C.K. Jayan*, 2015 SCC OnLine Ker 17083.

For cases under Section 138 NI Act involving companies or firms, refer to *Associated Cement Co. Ltd. v. Keshvanand*, (1998) 1 SCC 687, and *National Small*

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Industries Corporation Ltd. v. Harmeet Singh Paintal, (2010) 3 SCC 330, as well as cases involving company directors like *Aneeta Hada v. Godfather Travels & Tours (P) Ltd.*, (2012) 5 SCC 661; *SMS Pharmaceuticals Ltd. v. Neeta Bhalla*, (2005) 8 SCC 89; and *Katta Sujatha v. Fertilizers & Chemicals Travancore Ltd.*, (2002) 7 SCC 655.

The issue of dishonor of post-dated cheques is addressed in *Goaplast (P) Ltd. v. Chico Ursula D'Souza*, (2003) 3 SCC 232, and *Uniplas India Ltd. v. State (Govt. of NC)*, (2001) 6 SCC 8. Instructions to stop payment are covered in *MMTC Ltd. v. Medchl Chemicals and Pharma (P) Ltd.*, (2002) 1 SCC 234; *Icon Buildcon (P) Ltd. v. Aggarwal Developers*, (2014) 8 HCC (Del) 502; *D. Laxman Rao v. State of A.P.*, 2015 SCC OnLine Hyd 990; and *Battula Parameswara Reddy v. Charity International*, 2015 SCC OnLine Hyd 1006.

Instructions related to signature mismatches are discussed in *Laxmi Dyechem v. State of Gujarat*, (2012) 13 SCC 375, while account closure issues are covered in *NEPC Micon Ltd. v. Magma Leasing Ltd.*, (1999) 4 SCC 253; *Sumedha v. State of Maharashtra*, 2019 SCC OnLine Bom 195; and *A.K. Chaudhary v. Nandita Malhotra*, 2007 SCC OnLine Del 401. The successive presentation of cheques for encashment is discussed in *MSR Leathers v. S. Palaniappan*, (2013) 1 SCC 177.

The disposal of Section 138 NI Act cases online is addressed in *Meters and Instruments (P) Ltd. v. Kanchan Mehta*, (2018) 1 SCC 560. Directions issued by the High Court of Telangana are found in ROC.NO.1608/SO/2020, dated June 21, 2021, and in the Supreme Court's orders dated April 16, 2021, in *Suo Motu Writ Petition (Crl.) No.2 of 2020*, requesting High Courts to streamline procedures for Section 138 cases.

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PAPER PRESENTATION ON DOMESTIC VIOLENCE ACT, 2005

Presented By *Ms B.Kanaka Lakshmi,*

Civil Judge(Junior Division), Gajapathinagaram.

1. Parties by whom and against whom the reliefs can be sought.

2. Types of reliefs

3. Execution of orders.

Introduction : The Protection of women from domestic violence Act,2005 came in to force on 26th October 2006 and the Act containing five chapters and in total 37 sections. The main object of the Act is to provide more effective protection to the constitutional rights of women and to protect them against violence of any kind occurring within the family. The legislative intent was further emphasized by the Honorable Supreme Court of India in the case of **Indra Sarma v. V.K.V Sarma, (2013) 15 SCC 755** where in para 15 it was stated that the DV Act is enacted to provide a remedy in civil law for the protection of women, from being victims of domestic violence and to prevent occurrence of domestic violence in the society. The D.V Act has been enacted also to provide an effective protection of the rights of women guaranteed under the constitution, who are victims of violence of any kind occurring within the family.

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Section 2(f) of D V Act domestic relationship means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.

Domestic violence" is a broad term that entails not only physical beating but also other forms of violence such as emotional violence, mental violence, sexual violence, financial violence and other forms of cruelty that may occur within a household.

The definition provided in Section 3 of the DV Act includes the following as acts of domestic violence:... "Any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—

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

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

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

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

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Explanation I.- For the purposes of this section,-

I."physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

ii. "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

iii. "verbal and emotional abuse" includes-

a. insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

b. repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

v. "economic abuse" includes-

a. deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

b. disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the

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aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

c. prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.- For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes" domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration

shared household under Section 2(s) A shared household is a household where the aggrieved person lives or has ever lived in a domestic relationship with the respondent. It includes (i) allotted, (ii) tenanted or (iii) joint family property, in which the complainant or the respondent has any right.

1. Parties by whom and against whom the reliefs can be sought

As per section 2(a) of the DV Act an aggrieved person alone can file complaint under this Act. **Section 2(a) aggrieved persons "means** any women who is , or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent."

1. Any woman who is or has been in a relationship with the abuser, where both parties have lived together in a shared household and is related by consanguinity, marriage or through a relationship in the nature of marriage

or adoption with the abuser.

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2. In addition, relationships with family member living together as a joint family are also included.

3. Even those woman who is sister, widow, mother or in live-in with the abuser is entitled to legal protection under this act.

4. Any Police Officer, Protection Officer or service provider may also file a complain with regard to Domestic Violence to be held to any women.

5. Any person who has reason to believe that an act of domestic violence has been, or is being, or is likely to be committed, may give information about it to the concerned Protection Officer.

6. The Act protects even those females who are sisters, widows or mothers, living together as a joint family with the respondent in a shared household.

Section 2 (q) of D.A Act "Respondent" means any adult male person who is, or has been, in a **domestic relationship** with the aggrieved person and against whom the aggrieved person has sought any relief under this Act:

Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.

1. But in **Hiralal P. Harsora and Ors v. Kusum Narottamdas Harsora and Ors, AIR 2016 SC 4774** The Honorable Supreme Court struck down adult male from the concept of 'Respondent,' holding that it is not founded on any intelligible differentia having a rational nexus with the purpose sought to be attained. In the same instance, the Supreme Court clarified that women and non-adults are among the people who can seek redress under

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the DV Act. The word "Respondent" in Section 2(q) or those who can be considered perpetrators of violence against women/against whom remedies under the DV Act are enforceable cannot be limited to the phrase "adult male person" in Section 2(q). As a result, remedies under the DV Act are accessible even against female members and non-adults.

2. The Honorable Supreme Court **in the case of D.Veluswamy v. D.Patchaiammal, AIR 2011 SC 479**,wherein the Court enumerated five ingredients of a live- in- relationship as follows:

1. Both the parties must behave as husband and wife and are recognized as husband and wife in front of society.

2. They must be of a valid legal age of marriage.

3. They should qualify to enter into marriage eg. None of the partner should have a spouse living at the time of entering into relationship.

4. They must have voluntarily cohabited for a significant period of time.

5. They must have lived together in a shared household.

3. In **Krishna Bhattacharjee v. Sarathi Choudhury [(2016) 2 SCC 705]** the Hon'ble Supreme Court rejected the view taken by lower courts and held that the status of the parties did not become different due to a decree of judicial separation. There is a distinction between the decree for divorce and the decree of judicial separation. So, the finding of the lower courts, that the parties having been judicially separated, the appellant had ceased to be an aggrieved person, is "wholly unsustainable".Based on these observations, the Supreme Court allowed the appeal and set aside the orders of the lower courts.

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Sandhya Manoj Wankhade Vs. Manoj Bhimrao Wankhade (2011) 3 SCC 650 In this case it has been held by the Supreme Court that the term "respondent" includes the term "female relative" .The legislature never intended to exclude female relative of the husband or male partner from the ambit of a complaint that can be made under the provisions of the Act.

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

2. Types of reliefs:

Chapter IV is the heart and soul of the DV Act which provides various reliefs to a woman who has or has been in domestic relationship with any person and seeks one or more reliefs provided under the Act. The Magistrate, while entertaining an application from an aggrieved person under section 12 of the DV Act, can grant the following reliefs:

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I. Section 17 Right to reside in a shared household

1)Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.

(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.

II. Section 18. Protection orders

The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favor of the aggrieved person and prohibit the respondent from-

(a) committing any act of domestic violence;

(b)aiding or abetting in the commission of acts of domestic violence;

(c) entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person;

(d)attempting to communicate in any form, whatsoever, with the aggrieved person, including personal, oral or written or electronic or telephonic contact;

(e) alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the

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respondent or singly by the respondent, including her stridhan or any other property held either jointly by the parties or separately by them without the leave of the Magistrate;

(f) causing violence to the dependents, other relatives or any person who give the aggrieved person assistance from domestic violence;

(g)committing any other act as specified in the protection order.

III. Section 19. Residence orders.

1.While disposing of an application under sub-section (1) of section 12, the

Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order –

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

the shared household;

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

Provided that no order under clause (b) shall be passed against any person whoisawoman.

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

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

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

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

(2) The Magistrate may impose any additional conditions or pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person or any child of such aggrieved person.

(3) The Magistrate may require from the respondent to execute a bond, with

or without sureties, for preventing the commission of domestic violence.

(4) An order under sub-section (3) shall be deemed to be an order under Chapter VIII of the Code of Criminal Procedure, 1973 (2 of 1974) and shall be

dealt with accordingly.

(5) While passing an order under sub-section (1), sub-section (2) or sub-section (3), the court may also pass an order directing the officer in charge of the nearest police station to give protection to the aggrieved person or to assist her or the person making an application on her behalf in the implementation of the order.

(6) While making an order under sub-section (1), the Magistrate may impose on the respondent obligations relating to the discharge of rent and other payments, having regard to the financial needs and resources of the parties.

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(7) The Magistrate may direct the officer in-charge of the police station in whose jurisdiction the Magistrate has been approached to assist in the implementation of the protection order.

(8) The Magistrate may direct the respondent to return to the possession of the aggrieved person her stridhan or any other property or valuable security to which she is entitled.

IV.20. Monetary reliefs.

1) While disposing of an application under sub-section (1) of section 12, the

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

(a) the loss of earnings;

(b) the medical expenses;

(c) the loss caused due to the destruction, damage or removal of any

property from the control of the aggrieved person; and

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under

section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other

law for the time being in force.

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v. Section 21. Custody orders

Notwithstanding anything contained in any other law for the time being in force, the Magistrate may, at any stage of hearing of the application for protection order or for any other relief under this Act grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent:

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

VI. Section 22.Compensation orders.

In addition to other reliefs as may be granted under this Act, the Magistrate may on an application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by that respondent.

Section 23.Power to grant interim and exparte orders.

(1) In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.

(2) If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an exparte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section

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18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent.

Important judgments:

While interpreting the right of an aggrieved person to reside in a shared household under section 17 of the DV Act, a Division Bench of the Supreme Court in ***SK Batra v. Smt. Taruna Batra*** **[(2007) 3 SCC 169]** held that a wife *has no right to reside in the residence that her in-laws own* and in which the husband has no interest.

But A full bench of the Supreme Court in the case of ***Satish Ahuja v. Sneha Ahuja*** **[(2021) 1 SCC 414],** overruled S.K Batra after fourteen years in 2020. The court held that the daughter-in-law can exercise her right to live in the shared household, which is completely owned by the in-laws until her husband finds alternate accommodation. In this case, the court interpreted "*shared household*" in Section 17 irrespective of whether she has any legal interest or not.

However, it went on to hold that the *"living of woman in a household has to refer to a living which has some permanency. Mere fleeting or casual living at different places shall not make a shared household*" and that the *intention* of the parties and the nature of living including the nature of household have to be looked into to find out as to whether the parties intended to treat the premises as shared household or not. (Para 62-64)

Recently in the case of ***Prabha Tyagi v. Kamlesh Devi***, Criminal Appeal No. 511 of 2022 (Division Bench), the aggrieved person was widowed immediately after her marriage and was subjected to domestic violence and was forced to leave the matrimonial home, even though she was entitled to

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properties owned by her husband after his death. The issues before the court were as follows:

1. Whether it is mandatory for the aggrieved person to reside with those persons against whom the allegations have been levelled;

2. Whether there should be a subsisting domestic relationship between the aggrieved person and the person against whom the relief is claimed.

The court held that a *victim of domestic violence can enforce her right to reside in a shared household, regardless of whether she lived in the shared household*. The court introduced the concepts of "*constructive residency*" and "*non-existence of marital connection*" to conclude that the wife is entitled to relief under the DV Act. The Bench observed that if a person is related to another person through consanguinity, marriage, or another type of relationship, it is not necessary for that person to physically live with the other person at the time of the alleged act of domestic violence.

The court held that "*the expression 'right to reside in the shared household' would include not only actual residence but also constructive residence in the shared household i.e., right to reside therein which cannot be excluded vis-à-vis an aggrieved person except in accordance with the procedure established by law. If a woman is sought to be evicted or excluded from the shared household, she would be an aggrieved person in which event Sub-Section (2) of Section 17 would apply.*" (Para 32, 44-45)

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

In this case the appellant Lalita Toppo claimed maintenance under the provisions of the Protection of Women from Domestic Violence Act, 2005

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despite the fact that she was not a legally wedded wife and thus was not eligible to claim maintenance under Section 125 of the Code of Criminal Procedure, 1973.

It is held that the maintenance can be claimed under Domestic Violence Act, 2005 even if the claimant is not a legally wedded wife. Such relief cannot be allowed under section 125 of CrPC. The bench expanded the definition of the term "domestic violence" contained in Section 3(a) of the D.V Act, 2015 to include economic abuse as domestic violence. Further, the court held that the estranged wife or live-in-partner would be entitled to extra relief under the provisions in Section 3(a) of the D.V Act, 2005 than what is provided under Section 125 of the Cr.P.C.

3. Execution of orders:

The orders of the Magistrate are executed by the Magistrate himself and in the manner in which all such orders of the Magistrate are executed. If the orders are prohibitory orders, the respondent is directed not to interfere with the freedom of the aggrieved woman.

Monetary relief/Maintenance Order:

The protection of women from domestic violence rules, 2006 rule 6 deals with Application to the Magistrate:

(1) every application of the aggrieved person under section 12 shall be in form II or as nearly as possible there to.

(2) An aggrieved person may seek the assistance of the protection officer in preparing her application under sub rule 1 and forwarding the same to the concerned magistrate.

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(3) in case the aggrieved person is illiterate the protection officer shall read over the application and explain to her the contents thereof,

(4) The affidavit to be filed under sub section (2) of section 23 shall be filed in form III.

(5) The application under section 12 shall be dealt with and the orders enforced in the same manner laid down under section 125 of Cr.P.C.

In SMT. RENUKA v. YALAGURESH SHIVANAPPA CHANDRAGIR**I** The Karnataka High Court (Dharwad Bench) recently ruled that an order passed under section 12 of DV Act 2005 can be enforced in the same manner as laid down under section 125 of Criminal Procedure code while relegating the petitioner to file a necessary application before the jurisdictional Magistrate as per the provisions of the Domestic Violence Act read with the CrPC. A Bench of Justice H.T Narendra Prasad observed that for enforcement of order passed u/s 12 of the Domestic Violence (DV) Act, the parties have to file an application before the jurisdictional Magistrate and the Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines and may sentence such a person. The order was passed in relation to a petition seeking enforcement of the order passed by Principal, JMFC, Honnavar, in 2013 under section 12 of the DV Act, directing the respondent to pay monthly allowances as well as expense of the proceedings, which was not complied with by the respondent. The High Court found that the Protection of Women from Domestic Violence Act, 2005, was enacted with an object to provide for more effective protection of the rights of women, guaranteed under the Constitution, who are victims of violence of any kind occurring within the family and for matters connected therewith. As per Rule 6 of the Protection of Women from Domestic Violence

Rules, 2006, any application u/s 12 of the DV Act shall be dealt with and the orders enforced in the same manner laid down u/s 125 of CrPC.

"As per Section 25 (2) of the Act, if there is any change in the circumstances and if the Learned Magistrate is satisfied on receipt of application from the aggrieved person or the Respondent, requiring alteration, modification or revocation of any order made under this Act, he may for the reasons to be recorded in writing pass appropriate orders as he deems fit," the Bench observed. At the same time, the Court is not prevented from laying down its own procedure for disposal of an application u/s 12 or u/s 23(2) of DV Act, observed the Bench. With these observations, the High Court disposed of the plea, while granting liberty to the petitioner to file an application before the jurisdictional magistrate as per the provisions of the DV Act read with the CrPC.

Section 31 of DV Act 2005: Penalty for breach of protection order by respondent.

1. A breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

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

(3) While framing charges under sub-section *(1)*, the Magistrate may also frame charges under section 498A of the Indian Penal Code (45 of 1860) or any other provision of that Code or the Dowry Prohibition Act, 1961 (28 of

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1961), as the case may be, if the facts disclose the commission of an offence under those provisions.

Custody orders: If the order is for custody of children the Magistrate with the assistance of the police recovers their custody from the Respondent and hands them over to the aggrieved woman.

Mohammed Yaseen Naikwadi S/O Abdulla ... vs Smt Aneesa Mohammed Yaseen Naikwadi on 13 December, 2023

The Karnataka High Court has held that a husband's non-payment of arrears to his wife and children would not invite prosecution under Section 31 of the Protection of Women from Domestic Violence Act, 2005.A single judge bench of Justice Shivashankar Amarannavar quashed the proceedings initiated against Mohammed Yaseen Naikwadi and said "The approach of learned Magistrate in taking cognizance of the offence punishable under section 31 of the D.V. Act is a glaring legal error and hence, the same will have to be set aside.

Manoj Anand vs. State of U.P., Criminal Revision No. 635/2011 with Writ Petition No. 17658 of 2010, decided on 10-02-10

A maintenance order including interim maintenance order passed under section 23, cannot be enforced through section 31 and it can be enforced in the same manner as laid down under section 125 Cr. P.C.

Section 26.Relief in other suits and legal proceedings:

Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court,

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affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court. In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.

Conclusion : The Domestic violence is a complex issue that requires a multifaceted approach to prevent and address. Changing societal attitudes towards women, improving access to education and economic opportunities for women, providing support for victims, and strengthening legal protections are all critical components of preventing domestic violence. By taking these steps, we can work towards creating a society where all individuals are valued and treated with respect and dignity.

The Protection of one must not result in harassment of other, therefore, while protecting the rights of aggrieved person courts has to make a balance between the conflicting interests.

THE END

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Smt.M. Rohini Rao,

Additional Civil Judge

(Junior Division),

Bobbili.

Protection Of Children from Sexual Offences Act (POCSO Act)

With the intent to effectively address the evil of sexual exploitation and sexual abuse of children, Protection Of Children from Sexual Offences Act (POCSO) was passed by the parliament in the year 2012.

About POCSO Act

Given below is a table with the important facts about the Protection of Children from Sexual Offences Act:

Enactment Date:	*June 19, 2012*
Act Year:	*2012*
Short Title:	*The Protection of Children from Sexual Offences Act, 2012*
Long Title:	*An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences* *and for matters connected therewith or incidental thereto.*
Ministry:	*Ministry of Women and Child Development* *Enforcement*
Date:	*November 14, 2012*

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The Necessity of the POCSO Act

India has one of the largest populations of children in the world – Census data from 2011 shows that India has a population of 472 million children below the age of eighteen. Protection of children by the state is guaranteed to Indian citizens by an expansive reading of Article 21 of the Constitution of India and also mandated given India's status as a signatory to the UN Convention on the Rights of the Child. Before the implementation of the POCSO Act, the Goa Children's Act, 2003, was the only specific piece of child abuse legislation.

Child sexual abuse was prosecuted under the following sections of the Indian Penal Code:

I.P.C. (1860) 375- Rape

I.P.C. (1860) 354- Outraging the modesty of a woman

I.P.C. (1860) 377- Unnatural offences

However, such a measure had drawbacks since the IPC could not effectively protect the child due to variousloopholes like:

IPC 375 doesn't protect male victims or anyone from sexual acts of penetration other than "traditional" peno-vaginal intercourse.

IPC 354 lacks a statutory definition of "modesty". It carries a weak penalty and is a compoundable offence. Further, it does not protect the "modesty" of a male child.

In IPC 377, the term "unnatural offences" is not defined. It only applies to victims penetrated by their attacker's sex act and is not designed to criminalise sexual abuse of children.

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As such a legislative reform with a specific child protection act in mind was needed.

Salient features of the POCSO Act

"Children" according to the Act are individuals aged below 18 years. The Act is gender-neutral.

Different forms of sexual abuse including but not limited to sexual harassment, pornography, penetrative & non-penetrative assault are defined in the Act.

Sexual assault is deemed to be "aggravated" under certain circumstances such as when the child is mentally ill. Also when the abuse is committed by the person in a position of trust such as a doctor, teacher, policeman, family member.

Adequate provisions are made to avoid re-victimization of the Child at the hands of the judicial system. The Act assigns a policeman in the role of child protector during the investigation process.

The Act stipulates that such steps must be taken which makes the investigation process as child-friendly as possible and the case is disposed of within one year from the date of reporting of the offence.

The Act provides for the establishment of Special Courts for the trial of such offences and matters related to it.

Under section 45 of the Act, the power to make rules lies with the central government.

To monitor the implementation of the Act, the National Commission for the Protection of Child

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Rights (NCPCR) and State Commissions for the Protection of Child Rights (SCPCRs) have been made the designated authority. Both being statutory bodies.

Section 42 A of the Act provides that in case of inconsistency with provisions of any other law, the POCSO Act shall override such provisions.

The Act calls for mandatory reporting of sexual offences. A false complaint with intent to defame a person is punishable under the Act.

POCSO Act – General Principles

The Protection of Children from Sexual Offences Act, 2012 mentions 12 key principles which are to be followed by anyone, including the State Governments, the Child Welfare Committee,

the Police, the Special Courts, NGOs or any other professional present during the trial and assisting the child during the trial. These include:

1. Right to life and survival – *A child must be shielded from any kind of physical, psychological, mental and emotional abuse and neglect*

2. Best interests of the child – *The primary consideration must be the harmonious development of the child*

3. Right to be treated with dignity and compassion – *Child victims should be treated in a caring and sensitive manner throughout the justice process*

4. Right to be protected from discrimination – *The justice process must be transparent and just; irrespective of the child's cultural, religious, linguistic or social orientation*

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5. Right to special preventive measures – *It suggests, that victimised children are more likely to get abused again, thus, preventive measures and training must be given to them for self-protection*

6. Right to be informed – *The child victim or witness must be well informed of the legal proceedings*

7. Right to be heard and to express views and concerns – *Every child has the right to be heard in respect of matters affecting him/her*

8. Right to effective assistance – *financial, legal, counselling, health, social and educational services, physical and psychological recovery services and other services necessary for the child"s healing must be provided*

9. Right to Privacy – *The child"s privacy and identity must be protected at all stages of the pre-trial and trial process*

10. Right to be protected from hardship during the justice process – *Secondary victimisation or hardships for a child during the justice procedure must be minimised*

11. Right to safety – *A child victim must be protected before, during and after the justice process*

12. Right to compensation – *The child victim may be awarded compensation for his/her relief and rehabilitation*

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SESSION No.-IV

Protection of Children from Sexual Offences Act, 2012

(h) NATURE OF OFFENCES

Offences covered under the Act:

- *Penetrative Sexual Assault (Section 3)*
- *Aggravated Penetrative Sexual Assault (Section 5)*
- *Sexual Assault (Section 7)*
- *Aggravated Sexual Assault (Section 9)*
- *Sexual Harassment of the Child (Section 11)*
- *Use of Child for Pornographic Purposes*

Penetrative Sexual Assault (Section 3)

A person is said to commit "penetrative sexual assault" if—

• he penetrates his penis, to any extent, into the vagina, mouth, urethra oranus of a child or makes the child to do so with him or any other person; or he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or

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• he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

• he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

Sexual Assault (Section 7)

Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

Sexual Harassment of the Child (Section 11)

11. A person is said to commit sexual harassment upon a child when such person with sexual intern,—

(i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or

(ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or

(iii) shows any object to a child in any form or media for pornographic purposes; or

(iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or

(v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or

(vi) entices a child for pornographic purposes or gives gratification there for.

Explanation.—Any question which involves "sexual intent" shall be a question of fact.

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Use of Child for Pornographic Purposes (Section 13)

Whoever, uses a child in any form of media (including programme or advertisement telecast by television channels or interne or any other electronic form or printed form. whether or not such programme or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, which includes—

• representation of the sexual organs of a child;

• usage of a child engaged in real or simulated sexual acts (with or without penetration):

• the indecent or obscene representation of a child, shall he guilty of the offence of using a child for pornographic purposes.

Explanation:—For the purposes of this section, the expression "use a child" shall include involving a child through any medium like print, electronic, computer or any other technology for preparation, production, offering, transmitting, publishing. facilitation and distribution of the pornographic material.

Offences Covered under the Act:

- Offence is **"aggravated"** when:
- a)Committed by a person in position of trust or authority such as police/ army/ security personnel, public servants or family members
- b)Committed by persons in management or staff of educational, medical or religious Institution
- c)Committed by persons in management or staff of jail, remand home, protection home, observation home, or any other place of custody or care and protection

Offences Covered under the Act:

Offence is **"aggravated"** when:

- Gang assault
- a)When offence causes grievous hurt
- b)When offence causes physical or mental disability

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- c)When offence is committed taking advantage of child's mental or physical disability
- d)When offence is committed more than once

Offences Covered under the Act:

- Offence is **"aggravated"** when:
- a)When child is below 12 years of age
- b)When offender is a relative of the child
- c)When attempt is also made to murder the child
- d)When offence is committed and child is made to strip and/ or pared naked in public

Offences Covered under the Act:

- Offence is **"aggravated"** when:
- When committed by a person who has been previously convicted of having committed such an offence, either under this law or any other law

When offence is committed in course of communal or sectarian violence

(i) PRESUMPTIONS

Basic Presumptions -Under Criminal Jurisprudence

- ➔ to be innocentAccused is presumed unless proved guilty;
- ➔ Entire burden of proof lies on the prosecution to prove the guilt of Accused.

Why the necessity of'presumptions' ?

- ➔ Difficulty in proving certain facts.

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- Negative burden.
- Prosecution cannot be asked impossible.
- Certain facts exclusively within knowledge of Accused alone.
- To plug the loopholes and gaps in evidence.
- To get best possible evidence.

- ***Burden of Proof***

Prosecution – beyond reasonable doubt – through positive evidence.

Accused – on preponderance of probability – through cross-examination, other material, statement u/s. 313 Cr.P.C. Etc.

- ***What is reverse burden of proof ?***

Casting the burden of proof of innocence on the Accused himself.

To balance personal rights of Accused with community's broader interest in law enforcement.

<u>Presumptions under Pocso Act</u>

<u>Section 29 of POCSO Act</u>

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

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Section 30 of POCSO Act

30. Presumption of culpable mental state -

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

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

Pair of "Presumptions" ----Section 29 and 30 of POCSO Act

- Section 29

A radical shift from "Presumption of Innocence" to "Presumption of Guilt"?

- Section 30

A Singular Exception to Fundamental Rule

That burden on Accused – lighter to prove only on preponderance of probability.

➔ Whether these two provisions mean that Prosecution need not adduce any evidence as there is already presumption that the offence alleged is committed by the Accused and it will be for the Accused to 'prove' that he has not committed an offence and he has to prove it beyond reasonable doubt ?

Whether Accused can be convicted on the basis of presumption alone ?

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- **Dhanwantrai Balwantrai Desai Vs. State of Maharashtra**

  [1964 (1) Cr.L.J. 437 (SC)]

"Presumptions, are rules of evidence and do not conflict with the presumption of innocence of the accused, for, the burden, on the prosecution, to prove its case, beyond all reasonable doubt, still remains intact."

Presumption u/s. 30 (1) rebuttable

- In its ultimate effect, child is required just to give account of the physical act of the accused. This account has to stand the test of proof beyond reasonable doubt. Once this test is complete, the Statute would fill the required mens rea in the alleged act.
- Then, it will be for the Accused to disprove culpable mental act. Accused can prove that child had misunderstood or misinterpreted his good acts.

- **Sher Singh @ Partapa Vs. State of Haryana**

  [Criminal Appeal No.1592 of 2011 dt. 9.1.2015]

- While dealing with S.304B IPC and S.113B Evidence Act inter alia held as follows :-

- 1.The Prosecution can discharge the initial burden to prove the ingredients of S.304B even by preponderance of probabilities. 2.Once the presence of the concomitants are established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt.

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- **Sher Singh @ Partapa Vs. State of Haryana**

  [Criminal Appeal No.1592 of 2011 dt. 9.1.2015]

  Keeping in perspective that Parliament has employed the morphous pronoun/noun "it" (which we think should be construed as an llusion to the prosecution), followed by the word "shown" in Section 304B, the proper manner of interpreting the Section is that "shown" has to be read up to mean "prove" and the word "deemed" has to be read down to mean "presumed"."

- **Subrato Biswas VS. State of West Bengal**

  CRA 011/2018 Cal.SDB dated 11-06-2019

  "A Proper interpretation 0s Section 29 is that Prosecution is absolved from proving its case beyond reasonable doubt but is only required to lead evidence to establish ingredients of offence on a pre-ponderance of probability. Only when Prosecution lays foundation of its case by leading cogent and reliable evidence, the onus shifts on Accused to prove the contrary. If Prosecution fails to do so, no question arises of invoking Section 29. Any other interpretation would lead to absurdity andrender the section Constitutionally suspect."

- **Amol Dudhram Barsagade v/s State of Maharashtra , in Criminal Appeal No.600/2017 Decided on 23.04.18 by Nagpur Bench of Bombay High Court**

  The submission that statutory presumption under Section 29 of the POCSO Act is absolute, must be rejected, if the suggestion is that even if foundational facts are not established, the prosecution can invoke the statutory presumption. Such an interpretation of Section 29 of the POCSO Act would render the said provision vulnerable to the vice of unconstitutionality. The statutory presumption would stand activated only if the prosecution proves the foundational facts, and then, even if the statutory presumption is activated, the burden on the accused is not to rebut the presumption beyond reasonable doubt. Suffice it if the accused is in a position to create

a serious doubt about the veracity of the prosecution case or the accused brings on record material to render the prosecution.

- **Navin Dhaniram Baraiye vs State Of Maharashtra dated 25 June, 2018, Bombay H.C.**
- The presumption would operate only upon the prosecution first proving foundational facts against the accused, beyond reasonable doubt. Unless the prosecution is able to prove foundational facts in the context of the allegations made against the accused under the POCSO Act, the presumption under Section 29 of the said Act would not operate against the accused. Even if the prosecution establishes such facts and the presumption is raised against the accused, he can rebut the same either by discrediting prosecution witnesses through cross-examination demonstrating that the prosecution case is improbable or absurd or the accused could lead evidence to prove his defence, in order to rebut the presumption.
- **Lingappa vs The State of Karnataka**

  Criminal Petition No.200659 OF 2014

- The Court refused to apply the presumption at the stage of bail, by holding that,"it cannot be said that there can be any presumption of forcible acts on the part of the petitioner. It is only if the minority of the girl is established then the letter of the law will have to be applied. Till such time, to proceed on the basis that the girl was a minor and to incarcerate the petitioner, virtually punish him for the offences which are necessarily have to be established at the trialand would lead to miscarriage of justice."
- **Sugathan V/s State of Kerala Bail Application No. 325/2017**

  when the accused was charged for the offences under section 3 and 4 of the Act, and section 377 IPC, though he was in jail for more than 65 days, in addition to other factors like investigation was not complete and accused was neighbor of the accused, it was held that in view of section 29 of the Act, the innocence of the accused cannot be presumed. Hence his bail application came to be rejected.

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(j) COMPENSATION:

Meaning of compensation

❑ The term 'Compensation' means amend for the loss sustained.

❑ Compensation is anything given to make things equivalent, a thing given to make amends for loss, recompense, remuneration or bay.

❑ It is counter balancing of the victim's sufferings and loss that result from victimization.

❖ The rationale or basis for compensation may be the following three

perspective:

1. As an additional type of social insurance.

2. As an welfare measure another facet of the Government/Public assistance of the Unprivileged.

3. A way of meeting an overlooked governmental obligation to all citizens.

Who is victim

SECTION 2 (wa) of Code of Criminal Procedure, 1973 r/w SECTION 2 (2)

of the POCSO Act, 2012

"victim" means a person who has suffered any loss or injury caused by

reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir.

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POCSO ACT, 2012

Section 33(8) states :

In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

Categories of Compensation

❑ Immediate Compensation/Specific Relief.

■ Under Rule 8 of the POCSO Rules, 2020.

❑ Interim Compensation.

■ Under Rule 9(1) of the POCSO Rules, 2020.

❑ Final Compensation.

■ under sub-section (8) of section 33 of the Act read with sub-

sections (2) and (3) of section 357A of the Code of Criminal

Procedure, 1973 (2 of 1974)

Relevant Factors To Be Considered While Granting Compensation

Rule 9(3) of the POCSO Rules, 2020 – Where the Special Court, under sub-section (8) of section 33 of the Act read with sub-sections (2) and (3) of section 357A of the Code of Criminal Procedure, 1973 (2 of 1974) makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim, including the following:-

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

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(ii) the expenditure incurred or likely to be incurred on child's medical treatment for physical or mental health or on both;

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

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

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

(vi) whether the abuse was a single isolated incidence or whether the abuse

took place over a period of time;

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

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

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

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

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

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

Entitlement of victim for relief under any other rules or scheme

❖Rule 9(6) of the POCSO Rules, 2020 provides that –

❑ Nothing in these rules shall prevent a child or child's parent or

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guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules or scheme of the Central Government or State Government.

FINE WHICH IS TO BE PAID TO VICTIM

10. Procedure for imposition of fine and payment thereof.––

(1) The CWC shall coordinate with the DLSA to ensure that any amount of fine imposed by the Special Court under the Act which is to be paid to the victim, is in fact paid to the child.

(2) The CWC will also facilitate any procedure for opening a bank account, arranging for identity proofs, etc., with the assistance of DCPU and support person.

JUDICIAL MANDATES

Nipun Saxena v. Union of India, (2019) 13 SCC 715 : (2019) 4 SCC (Cri) 592 : 2018 SCC OnLine SC 2010.(order dated 05.09.2018).

❑ Hon'ble Supreme Court had considered the issue as to lack of guidelines or a scheme framed for awarding compensation to victims of sexual abuse under the provisions of POCSO Act.

❑ The Hon'ble Court Considered the NALSA Compensation Scheme, 2018 and had noted that a Scheme of such nature had not been framed with regards to victims of sexual abuse under the POCSO Act and directed that till such compensation scheme is framed, the NALSA Compensation Scheme would function as a guideline for the Special Court to award Compensation to minor victims of sexual abuse, under Rule 7 of the POCSO Rules, 2012. (Now POCSO Rules, 2020)

JUDICIAL MANDATES

Nipun Saxena v. Union of India, (2019) 2 SCC 703 : (2019) 1 SCC

(Cri) 772 : 2018 SCC OnLine SC 2772 at page 722.(Order dated 11.12.2018)

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☐ Adopted the direction given by the Hon'ble Calcutta High Court in Bijoy case [Bijoy v. State of W.B., 2017 SCC OnLine Cal 417 : 2017 Cri LJ 3893] and made it Annexure –I of the Judgment.

JUDICIAL MANDATES

The Direction relating to the compensation under the POCSO Act, 2012 issued by the Calcutta High Court in the case of Bijoy v. State of West Bengal (2017 Cri.L.J.3893) are:

❖ The Special Court upon receipt of information as to commission of any offence under the Act by registration of FIR shall on his own or on the application of the victim make enquiry as to the immediate needs of the child for relief or rehabilitation and upon giving an opportunity of hearing to the State and other affected parties including the victim pass appropriate order for interim compensation and/or rehabilitation of the child.

❖ In conclusion of proceeding, whether the accused is convicted or not, or in cases where the accused has not been traced or had absconded, the Special Court being satisfied that the victim had suffered loss or injury due to commission of the offence shall award just and reasonable compensation in favour of the victim.

❖ The quantum of the compensation shall be fixed taking into consideration the loss and injury suffered by the victim and other related factors as laid down in Rule 7(3) of the Protection of Children from Sexual Offences Rules, 2012 and shall not be restricted to the minimum amounts prescribed in the Victim Compensation Fund.

JUDICIAL MANDATES

The Direction relating to the compensation under the POCSO Act, 2012 issued by the Calcutta High Court in the case of Bijoy v. State of West Bengal (2017 Cri.L.J.3893) are:

❖ The interim/final compensation shall be paid either from the Victim Compensation Fund or any other special scheme/fund established under section 357A of the Code of Criminal Procedure, 1973 or any other law for the time being in force through the State

Legal Services Authorities or the District Services Authority in whose hands the Fund is entrusted.

❖ If the Court declines to pass interim or final compensation in the instant case it shall record its reasons for not doing so. The interim compensation, so paid, shall be adjusted with final compensation, if any, awarded by the Special Court in conclusion of trial in terms of section 33(8) of the Act.

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