OFFICE OF THE DISTRICT & SESSIONS JUDGE ::: :: ::: BONGAIGAON.

No. DJB.VIII-1/2020/ 3575-83 **Dated. 21 .10.2020**

In enclosing herewith the Letter issused by Registrar (Judicial), Gauhati High Court, Guwahati under Memo No. HC. VII/32/2020/4011/ A, dtd. 21.10.2020 alongwith a copy of SUO MOTO w.p. (crl.) No. 02/2020 AND Slp. Crl. No. 5464/2016 of the Hon'ble Supreme Court of India is hereby uploaded in the official website for your kind information & necessary action to and requested to submit suggestion/inputs on or before 06-11-2020.

01. The Addl. District & Sessions Judge, (F.T.C.), North-Salmara, Abhayapuri.
02. The Civil Judge & Asstt. Sessions Judge, Bongaigaon.
03. The Chief Judicial Magistrate, Bongaigaon.
04. The Secretary, D L S A, Bongaigaon.
05. The Addl. Chief Judicial Magistrate, Bongaigaon.
06. The Sub-Divisional Judicial Magistrate (M), North Salmara, Abhayapuri.
07. The Munsiff-cum- J M 1st Class, North Salmara, Abhayapuri.
08. The Munsiff-cum- J M 1st Class, Bongaigaon.
09. The Systems Officer, Bongaigaon district Judiciary, he is asked to uploaded the same in the official website.

By order

Chief Administrative Officer
District & Sessions Judge's Office
Bongaigaon.

21/10/2020

By E-mail/s-post

THE GAUHATI HIGH COURT AT GUWAHATI
(HIGH COURT OF ASSAM: NAGALAND: MIZORAM AND ARUNACHAL PRADESH)

NO. HC.VII/32/2020/ 4011 /A dated. 21 .10.2020

From: **Sri. R. A. Tapadar,**
Registrar (Judl.),
Gauhati High court,
Guwahati.

To : The District & Sessions Judge,
Kamrup (Metro), Guwahati/ Kamrup, Amingaon/ Baksa/ Nalbari/ Barpeta/ Bongaigaon/ Dhubri/ Kokrajhar/ Goalpara/ Darrang, Mangaldoi/ Dima Hasao/ Karbi Anglong/ Udalguri/ Sonitpur, Tezpur/ Lakhimpur, North Lakhimpur/ Dhemaji/ Dibrugarh/ Tinsukia/ Jorhat/ Sivasagar/ Golaghat/ Nagaon/ Morigaon/ Cachar, Silchar/ Karimganj/ Hailakandi/ Chirang, Kajalgaon.

Sub.: Suggestions/inputs, if any, on the report submitted by the learned Amicus Curiae in S.M.W.P(Crl) No. 2/2020 ("Expeditious trial of cases under Section 138 of N.I. Act, 1881"

Sir/Madam,

With reference to the subject cited above, I am directed to request you to kindly send your suggestions/inputs, if any, on the preliminary report received from the Amicus Curiae in connection with S.M.W.P(Crl) No. 2/2020 ("Expeditious trial of cases under Section 138 of N.I. Act, 1881"), to this Registry on or before 07-11-2020.

The suggestions/inputs be sent by e-mail at **regj.ghc@gmail.com.**

With warm regards.

Yours faithfully,

R. A. Tapadar
21. X. 20

REGISTRAR (JUDICIAL)

Enclosed : As stated

IN THE HON'BLE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

SUO MOTO W.P. (CRL.) NO. 02 OF 2020

AND

SLP Crl. No.5464 / 2016

In Re: EXPEDITIOUS TRIAL OF CASES UNDER SECTION 138 OF N.I. ACT, 1881

Along with:

MAKWANA MANGALDAS TULSIDAS ... PETITIONER(s)

VS.

THE STATE OF GUJARAT & ANR. ... RESPONDENT(s)

PRELIMINARY REPORT BY THE AMICI CURIAE

SIDHARTH LUTHRA (Sr.Adv.)

And

K. PARAMESHWAR (Adv)

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IN THE HON'BLE SUPREME COURT OF INDIA
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PRELIMINARY REPORT SUBMITTED BY THE AMICI CURIAE MR. SIDHARTH LUTHRA (Sr.Adv) & MR. K. PARAMESHWAR (Adv)

I. INTRODUCTION

1. By order dated 05.03.2020 this Hon'ble Court took suo motu cognizance of the pressing need for expeditious trial and disposal of cases instituted under Section 138 of the Negotiable Instruments Act, 1881 ["the Act"]. The aforesaid detailed order of this Hon'ble Court recounted the backlog of cases pending under the aforesaid provision, the perils that it posed to the justice delivery system and also indicated certain measures that could be undertaken to find a solution to the huge pendency. The undersigned were appointed as *amici curiae* to assist the Court and this report contains their preliminary submissions and suggestions. It may be noted that suggestions are invited from all stakeholders with respect to the submissions and suggestions made in the present report.

2. A copy of the report is being circulated to the Standing Counsels of all the States and Union Territories as well as of the High Courts so that they may be able to address their inputs and suggestions, if any, to the amici curiae. All suggestions/submissions may be emailed to amicus138curiae@gmail.com

II. EXECUTIVE SUMMARY OF SUGGESTIONS

3. The present report by the amici curiae formulates the following suggestions. The Sections of the Report contain a brief history of the legislative scheme, the acute nature of the docket explosion that is a consequence of the criminalisation of dishonour of cheques, and the reasons behind the suggestions.

   a. The Lok Adalats under the Legal Services Act, 1987 ought to be empowered to conduct prelitigation mediation under Section 19(5) of the said Act in respect of cases under Section 138 NI Act. However, this might require legislative intervention in view of the concerns highlighted in the later sections of the report.

   b. Pending legislative intervention, the Magistrates could while issuing summons, direct the parties to resort to post-summons mediation, until a legislative mechanism is in place for pre-trial mediation. A Standard Operating Procedure in this regard will have to be formulated and endorsed by this Hon'ble Court. The SOP must have sufficient safeguards to ensure that the mediation is conducted in a timebound manner and that the mediation does not become a ruse to further prolong the proceedings.

   c. Given the fact that significant percentage of the cases are pending at the stage of service of summons, due to lack of current address and whereabouts of the Accused, it would be expedient to direct that Banks, while issuing a dishonour slips, under Section 146, to disclose the current mobile number, email address and postal address of the drawer of the Cheque.

   d. Service of summons may be effected through SMS, WhatsApp, on the mobile number, email and postal address of the Accused. The Union of India, the Reserve Bank of India and the Indian Banks Association ought to create a Nodal Service Agency for effective service of summons through electronic processes. The e-committee of the Supreme Court may also be consulted in this regard.

   e. If the person against whom a warrant has absconded or has concealed

himself such that the warrant cannot be executed, Magistrates could order attachment of the bank accounts of the Accused to the extent of the cheque amount by passing an order under Section 83, CrPC;

f. The Accused ought to be directed to disclose the nature of his defence before the trial is converted from a summary trial to a summons trial. This requirement ensures that the Accused is not permitted, for frivolous reasons, to prolong the trial;

g. The Magistrate ought to, while converting the case into a summons trial, record cogent and sufficient reasons for exercise of its discretion. The exercise of this discretion ought to be preceded by an order directing the Accused to not just disclose his plea in relation to the offence but also to disclose the grounds of his defence;

h. The exercise of discretion under Section 145(2) of the NI Act to summon any person giving evidence, ought to be exercised by the Magistrate only if the Accused pleads a plausible defence.

i. All the High Courts may be directed to prepare and submit a draft scheme to be executed in their jurisdiction with regard to expeditious disposal of cases relating to Section 138. The scheme must also contain specific measures to be taken to identify cases under Section 138 and fast-track their trials. Apart from this, the scheme must contain goals in respect of cases that have been pending for three bloc-periods viz., pendency for two to four years, four to six year, six years and above.

j. The High Courts must also be directed to formulate a scheme for online mediation of pending cases at the trial/appeal/revisional stages so that pending cases could be effectively disposed off. In fact, this scheme may act as a guide for pre-summons mediation to be adopted through an online platform rather than summon the Accused physically, for the purposes of mediation. The High Courts must be directed to identify the technical platform and other resources required in this regard. The High Courts may

also consider mediation on non-working days and hours so that court processes are not affected.

k. Pending cases under Section 138 before this Hon'ble Court may also be directed to be placed for online mediation after obtaining consent of the parties and lawyers before they are disposed off on merits.

l. Unless the idea of exclusive courts is backed by a comprehensive plan from the Union to fund setting up of exclusive courts, and an action plan is worked out to appoint Magistrates(for trials) & judges (for appeals) for such courts, diverting existing resources would burden the system. It may be profitably pointed out under Article 247 of the Constitution of India, the Union is empowered to setup additional courts for better administration of laws made by Parliament in respect of a matter enumerated under the Union List, Negotiable Instruments Act, 1881, being one of them.

m. In view of the limitations contained in Section 219 of the Code of Criminal Procedure, 1973, a legislative amendment may be required to address the issue of multiplicity of proceedings where cheques have been issued for one purpose but multiple complaints, summons and trials have to be undertaken;

n. This Hon'ble Court may consider issuing directions under Article 142 of the Constitution to High Courts to amend their Criminal Rules of Practice (by whatever name called) to ensure that complaints arising out of the same transaction, but resulting in dishonour of multiple cheques be clubbed together and a common process evolved for service of summons and joint trial

o. It is desirable that the issue of applicability of Section 202 of Cr. PC or otherwise, in regard to the amendment carried out by Act 25 of 2005, to cases under Sectoin 138, NI Act, be judicially settled by this Hon'ble Court to ensure consistency in the application of the amended Section 202 of Cr. PC.

III. LEGISLATIVE HISTORY OF SECTION 138, NEGOTIABLE INSTRUMENTS ACT, 1881

4. Dishonour of cheque, which originally gave cause of action to file a civil suit, was criminalised in the year 1988 (vide Act 66 of 1988) with the insertion of Chapter XVII in NI Act. Cheque dishonour, followed by default in payment after a demand notice, became punishable under Section 138 NI Act with imprisonment for a period upto two years and/or fine which may extend to twice the amount of cheque.

5. The legislative intent behind the amendment was to ensure faith in the efficacy of banking operations and credibility in transacting business on cheques *(See: Lafarge Aggregates & Concrete India (P) Ltd. vs. Sukarsh Azad)*[1] & *(See: Goa Plast (P) Ltd. v. Chico Ursula D'Souza)*[2]. It was to provide a strong criminal remedy in order to deter the high incidence of dishonour of cheques & ensure compensation to Complainant. Section 138 NI Act was brought in to safeguard the faith of the creditor in drawer of cheque and curb cases of issuing cheques indiscriminately by making stringent provisions and safeguarding interest of creditors *(See: Vinay Devanna Nayak vs. Ryot Sewa Sahakari Bank Ltd)*[3] and to restore the credibility of cheques as a trustworthy substitute for cash payment.

In the year 2002, 14 years after the introduction of Section 138, Parliament enacted the the Negotiable Instruments (Amendment & Miscellaneous Provisions) Act, 2002 (55 of 2002). This amendment *inter alia* amended sections 138, 141 and 142 and inserted new sections 143 to 147 in the Act (section 143 - summary trial; section 144 - service of summons; section 145 - evidence on affidavit; section 146 - Bank's slip prima facie evidence; section 147 - offences to be compoundable). As noted by this Court in *Dashrath Rupsingh Rathod vs.*

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[1] **(2014) 13 SCC 779** (Paras 7 & 8)
[2] **(2004) 2 SCC 235** (Para 26)
[3] **(2008) 2 SCC 305** (Paras 11,16-17,19)

State of Maharashtra[4] these amendments were brought in to enhance the acceptability of cheques.

6. This Hon'ble Court while interpreting Section 138, has often emphasised the compensatory nature of the provision and cautioned against viewing it as a mere punitive piece of legislation. (*See: Damodar S. Prabhu vs. Sayed Babalal*[5]; *Rangappa vs. Sri Mohan*[6]; *R. Vijayan vs. Baby*[7] & *Suganthi Suresh Kumar vs. Jagdeeshan*[8]) In all these cases, the Court also has repeatedly focused on the need for a speedy and expeditious disposal of cheque bouncing cases.

IV. SECTION 138 AND DOCKET EXPLOSION

7. The criminalization of dishonour of cheques was not backed by any judicial impact assessment nor was there adequate infrastructural back-up to deal with the tremendous flow of cases in this respect.

8. The Law Commission of India in its 213th Report submitted in the year 2008, surveyed the statistical, infrastructural and legal dimensions of the docket explosion concerning Section 138 and gave detailed recommendations.[9] The Commission noted, that as of the year 2008, over 38 lakh cheque bouncing cases were pending in various Courts in India as of then, and over 7.6 lakh cases were pending in the Criminal Courts in Delhi at the Magistrate Court's level alone.

9. As per the recent statistics, Section 138 cases constitute 15.2 percent of the total number of criminal cases. As of 31.12.2019, the total number of criminal cases

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[4] **(2014) 9 SCC 1291** (Paras 15,15.1,15.2 & 19)
[5] **(2010) 5 SCC 663** (Paras 4,6,7,18,19,25)
[6] **(2010) 11 SCC 441** (Para 27)
[7] **(2012) 1 SCC 260** (Paras 16-19)
[8] **(2002) 2 SCC 420** (Para 12)
[9] LAW COMMISSION OF INDIA, *Report No. 213: Fast Track Magisterial Courts for Dishonoured Cheque Cases*, New Delhi: Government of India (2008). (available at: http://lawcommissionofindia.nic.in/reports/report213.pdf%20lasta%20accessed%20on%207.10.2020; last accessed on 07.10.2020)

pending was 2,31,28,301 out of which 35,16,894 pertained to Section 138, NI Act. In states like Gujarat, Punjab & Haryana, Delhi and Rajasthan this percentage increases to be more than 30 percent, while in states like Karnataka, Tamil Nadu, Himachal Pradesh and Uttarakhand, it is more than twenty percent of the total criminal cases.

10. This enormous backlog of cases is caused by two factors: *first*, there is a steady increase in the institution of complaints under Section 138 every year; *second,* the rate of disposal does not match the rate of institution. For instance, while on 1st January, 29,68,739 cases were pending, at the end end of the year, the pendency increased to 35,16,894 cases. The number of cases instituted in 2019 was 16,46,371 whereas the number of disposals was only 10,98,142.

11. It has been suggested that on an average, a case filed under Section 138 continues in the system for 1,326 days, almost three years and eight months.[10] This is despite the statutory provision and the directions of this Hon'ble Court that such cases ought to be completed within 6 months.[11]

12. Latest statistics reveal that more than 51 percent of the cases relating to cheque bounce are pending in the courts because of the solitary reason of non-presence of the accused. 18,05,203 cases out of the total of 35,16,894, are pending only for the reason that the presence of the accused has not been secured to proceed with the trial. In states like Gujarat, Madhya Pradesh, Rajasthan, Assam and Sikkim pendency due to non- appearance of accused is more than 60 percent of total cases.

13. Pursuant to the recommendations of the Law Commmission and the directions of this Hon'ble Court, some states created exclusive courts to deal with Section 138 cases. However, the statistics collected by the Supreme Court reveal that the policy has been haphazard and illogical.

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[10] DAKSH INDIA, Justice in India, Chapter 9: *Promise to Pay: An Analysis of Cheque Dishonour Cases* (2019).

[11] Section 143, Indian Banking Association v. Union of India (2014) 5 SCC 590

14. There are only 365 exclusive courts in the Country, out of the total 6,848 courts dealing with these cases. In Bihar, Chhattisgarh, Andhra Pradesh, Himachal Pradesh exclusive courts have not been established, while in West Bengal there is only one exclusive court. Uniform standard for creation of such Courts are not fixed. For example in Maharashtra, the pendency in Pune District is 50,814 with no exclusive court. Whereas in District Amravati, there are five exclusive courts for total pendency of 10,966 cases. Similarly, in Madhya Pradesh, District Bhopal has 5 exclusive courts for the pendency of 17,991 cases whereas in District Indore there is no exclusive court and 54,216 cases are being dealt with by 28 different courts.

V. ANALYSIS OF PRESENT LEGAL FRAMEWORK

15. This Hon'ble Court has time and again referred to the legislative intent behind Section 143, NI Act, and emphasised the need to try cases under Section 138 in a speedy and efficient manner.

16. In *Meters and Instruments Private Limited & Anr. v. Kanchan Mehta,*[12] this Court held,

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

17. Section 143 provides that the trial be conducted in a day-to-day manner and an endeavour be made to conclude the trial within six months [Section 143(2) and (3)]. In this context, it is apposite to mention that this Court in the case of *Indian*

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[12] (2018) 1 SCC 560.

Bank Association v. Union of India,[13] held,

> *"(5) The Court concerned must ensure that examination-in-chief, cross examination and re-examination of the complainant must be conducted within three months of assigning the case."*

18. Section 145 envisages that the evidence of the complainant may be given on affidavit, notwithstanding anything contained in the Code of Criminal Procedure, 1973. The effect of Section 145 is that the complainant is not required to be examined twice i.e., once after filing the complaint (*pre-summoning stage*) and once after summoning of Accused (*post summoning stage*) and his evidence can be used at any stage during the trial.

19. Section 143, which was inserted by Act 55 of 2002, specifically provided that the or trial under Section 138 shall be conducted under Section 262 to 265 of the Code of Criminal Procedure, 1973 that is, the procedure for summary trial. The exception carved out under the Second Proviso to Section 143 is that if, during the course of a summary trial, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year is to be passed, or if for any other reason, it is undesirable to try the case summarily, the Magistrate shall record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or re-hear the case in the manner provided by the Code. In other words, the Magistrate can, for reasons to be recorded, order that the summary trial be converted into a summons trial.

20. The legislative scheme, therefore envisages that the general norm for trial under Section 138 would be a summary trial and summons trial only an exception. However, practical experience shows us that summary trials are routinely converted into summons trial, completely eviscerating the purpose of Section 143. In our considered opinion, the Magistrate must, while converting the case into a summons trial, mandatorily record cogent and sufficient reasons for

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[13] (2014) 5 SCC 590.

exercise of its discretion. Not only that, the exercise of this discretion must mandatorily be preceded by an order directing the Accused to not just disclose his plea in relation to the offence but also to disclose the grounds of his defence.

21. It must be noted that under Section 251 of the Code of Criminal Procedure, 1973, the Magistrate is empowered, in summons cases, to enquire from the Accused, the nature of his defence. Therefore, it would be logical that the Accused is directed to disclose the nature of his defence before the trial is converted from a summary trial to a summons trial. This requirement ensures that the Accused is not permitted, for frivolous reasons, to prolong the trial. Consequently, the exercise of discretion under Section 145(2) of the NI Act to summon any person giving evidence, must be exercised by the Magistrate only if the Accused pleads a plausible defence. This opinion of ours is also justified by the statutory presumption drawn in favour of the holder of the cheque/complainant under Section 139, NI Act.

VI. SUMMONS AND PRESENCE OF ACCUSED:

22. Amongst the causes of delay in prosecutions is on account of the avoidance of summons by accused, delays in execution of warrants and other dilatory tactics employed by the Accused in ensuring that the trial does not commence.

23. Section 144, NI Act, provides for the mode of summons. However, this Hon'ble Court in *Indian Bank Association*[14] held as follows: -

> *"...2) MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. Court, in appropriate cases, may take the assistance of the police or the nearby Court to serve notice to the accused. For notice of appearance, a short date be fixed. If the summons is received back un-served, immediate follow up action be taken. ..."*

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[14] (2014) 5 SCC 590.

24. One of the suggestions received is that the cheque must contain the phone number, and address of the Drawer so that summons may be served on such address. However, this may raise concerns relating to the right of privacy of the Accused. Therefore, a more viable approach, balancing the right to privacy of the Accused, and the public interest in the speedy disposal of cases, would be to direct that Banks, while issuing a dishonour slips, which have been statutorily recognised under Section 146, to disclose the current phone number, email address and postal address of the drawer of the Cheque. In our opinion, this Hon'ble Court may give such a direction in exercise of its plenary powers under Article 142 of the Constitution of India. Consequently, service may be effected through SMS, WhatsApp, on such mobile number, email address and postal address. This would go a long way in expediting the service of summons.

25. In many cases, the Accused fails to appear even after the due service of summons. In such cases, the option to the Court is to issue a warrant of arrest and such warrant is usually directed to the police officers under Section 72 of the Code of Criminal Procedure. It is public knowledge that the service of a warrant in complaint cases are seldom efficiently executed.

26. If the person against whom a warrant has absconded or has concealed himself such that the warrant cannot be executed, then the statutory provisions under Section 82 and 83 of the CrPC can be employed. Therefore, in the context of Section 138, Magistrates could order attachment of the bank accounts of the Accused to the extent of the cheque amount by passing an order under Section 83, CrPC. The manner in which such movable property belonging to the Accused is to be attached is provided under Section 83(3). In the context of Section 138, a Magistrate could therefore, under Section 83(3)(c), direct the concerned bank that the account of the Accused, to the extent of the cheque amount sthall stand frozen. If this procedure is adopted, it would act as a deterrent for the Accused from evading the summons and trial.

27. Apart from these suggestions, in our considered opinion, it would be profitable if the Union of India, the Reserve Bank of India and the Indian Banks Association could pool in their expertise and resources to create a Nodal Service Agency for effective service of summons through electronic processes. This is so because banking platforms are being increasingly digitized, are backed up by KYC detailed, and in most cases effectively linked to PAN and Aadhar Numbers. The modalities will, of course, have to be worked out and perhaps a legislative framework may also be necessary.

28. There are different approaches taken by Courts all over the country on bail bonds and sureties. Some courts make the bail conditions onerous and the amount of surety bond is sometimes relatable to the amount of the cheque. The offence under Section 138 NI Act is bailable and a summons case. Therefore a liberal approach in the grant of exemption under Section 207 read with Section 317 Cr. PC is essential. This is exemplified by the decision of this Court in *Bhaskar Industries Ltd. V. Bhiwani Denim & Apparels Ltd.*, (2001) 7 SCC 401 where the Court held:

> *"These are days when prosecutions for the offence under Section 138 are galloping up in criminal courts. Due to the increase of inter-State transactions through the facilities of the banks it is not uncommon that when prosecutions are instituted in one State the accused might belong to a different State, sometimes a far distant State. Not very rarely such accused would be ladies also. For prosecution under Section 138 of the NI Act the trial should be that of summons case. When a magistrate feels that insistence of personal attendance of the accused in a summons case, in a particular situation, would inflict enormous hardship and cost to a particular accused,* ***it is open to the magistrate to consider how he can relieve such an accused of the great hardships, without causing prejudice to the prosecution proceedings.***" [emphasis supplied]

29. Further, it has come to our notice that for summons cases, in jurisdictions like Mumbai an accepted practice is to take only personal bonds for meagre amounts. While it is imperative that Accused's appearance is ensured during trial after

summons, the Courts must facilitate the early appearance of an accused and ensure that there is reduced avoidance of summons / processes by permitting the accused to be granted bail on a personal bond and not insist upon sureties. The amount of such a bond may be of a meagre amount which would be a deterrent in the event the person absconds.

30. Apart from these suggestions, it is desirable that the applicability of Section 202 of Cr. PC, in regard to the amendment carried out by Act 25 of 2005, to cases under Sectoin 138, NI Act, be judicially settled by this Hon'ble Court. The aforesaid amendment mandates that the Magistrate shall postpone the issue of process against the Accused, if the Accused is residing in a place beyond its territorial jurisdiction, until an enquiry is made for the purpose of deciding whether there are sufficient grounds for proceeding. This Hon'ble in *K S Joseph v. Philips Carbon Black,*[15] left this question open to be decided in an appropriate case.

31. Invariably, in cases under Section 138, NI Act, the cheque is presented in a territorial jurisdiction where the Accused does not ordinarily reside. This, coupled with the fact that Section 142(2) of the NI Act, as amended by Act 26 of 2015, results in the Accused being resident outside the jurisdiction of the summoning Magistrate. The High Courts have taken conflicting views as regards the applicability of this procedure to cases under Section 138, NI Act. Since a large number of cases are pending across the country awaiting a final word in this regard and the trials are invariably stayed on this ground, it might be desirable that this Hon'ble Court settle this question of law, which has serious ramifications for issues of pendency.

VII. PRE-LITIGATION MEDIATION

32. One effective way to ensure that the Courts are not burdened by cheque dishonour cases is to ensure that there is a mechanism in place to incentivize pre-

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[15] **(2016) 11 SCC 105** (Paras 1 & 10)

litigation mediation and settlement of such cases. Pre-litigation mediation has already been employed across the country as a strategy to tackle commercial disputes under the Commercial Courts Act, 2015. The Union of India has also issued the the Commercial Courts (Pre-Institution Mediation And Settlement) Rules, 2018 thereunder. A similar scheme could be drawn up for settlement of disputes under Section 138.

33. Apart from this, Lok Adalats under the Legal Services Act, 1987 could also be empowered to conduct prelitigation mediation under Section 19(5) of the said Act. The compromise or settlement arrived at by the parties in the pre-litigation mediation is to be recorded in the form of an award. Section 21 of the said Act deems every award of the Lok Adalat to be a decree of the Civil Court and therefore, such a decree could be executed.

34. However, in the case of Section 138, legal complications could arise due to the period of one month, prescribed under Section 142, for taking cognisance of the offence after the cause of action has arisen under Clause(c) to the Proviso to Section 138. In other words, pre-litigation mediation notices and the process would have to be completed within the said one month in order to comply with the period under Section 142. Therefore, in our considered opinion, unless and until suitable legislative amendments are made to the Negotiable Instruments Act, 1881, it may be difficult to effectively implement pre-litigation mediation in cases under Section 138.

35. On the other hand, the Magistrates could while issuing summons, direct the parties to resort to post-summons but pre-trial mediation, until a legislative mechanism is in place. In such cases, the summons may reflect a date for mediation and also a date for trial.

36. A Standard Operating Procedure for post-summons mediation will have to be developed in consultation with the relevant stakeholders keeping in mind that the mediation is time-bound, cost-effective and does not become another tool in the hands of the Accused to delay the trial.

37. In the context of an award passed by a Lok Adalat upon reference by a trial court, in relation to a case under Section 138, this Hon'ble Court in *K.N. Govindan Kutty Menon vs C.D. Shaji*,[16] held:

> *"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."*

38. In our considered opinion, apart from it being treated as a decree capable of execution, an undertaking may also be taken from the parties by the trial court to comply with the terms of the settlement/award within a specified time-frame. Any breach of the terms of settlement/award would amount to contempt of court. This would ensure that a complainant under Section 138 does not have to endure the long-drawn process of execution of civil court decree under the Code of Civil Procedure, 1908.

VIII. INTERIM COMPENSATION AND FINE

39. Section 143A was inserted by the Negotiable Instrument (Amendment) Act, 2018 to empower the Court to direct interim compensation. Such interim compensation shall not exceed twenty percent of the amount of the cheque. The maximum time period given under Section 143A(3) is ninety days. Section 143A(5) provides that the interim compensation could be recovered in the manner provided under Section 421 of the CrPC.

40. One effective method to be employed by Magistrates to speed up the trial could be to award such interim compensation and recover such compensation under Section 421, CrPC in case the Accused fails to pay the interim compensation. In this regard, an effective order could be passed to attach the bank account of the

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[16] (2012) 2 SCC 51.

Accused to the extent of the cheque amount [See Section 421(1)(a), CrPC].

IX. PLAN OF ACTION BY HIGH COURTS

41. In this regard to initiate a process of change, all the High Courts may be directed to prepare and submit a draft scheme to be executed in their jurisdiction with regard to expeditious disposal of cases relating to Section 138.

42. The scheme will be effective from 1st January, 2021 and must be in force for a period of one year. The scheme must delineate the categories of cases under Section 138 in each level of Courts, which can be taken up for mediation, especially through an online mode. The scheme must also contain specific measures to be taken to identify cases under Section 138 and fast-track their trials. Apart from this, the scheme must contain goals in respect of cases that have been pending for three bloc-periods viz., pendency for two to four years, four to six year, six years and above. Needless to say, the older cases must be prioritised. The scheme must be formulated keeping in mind the available man-power and other resources and may be formulated such that it does not exist merely on paper. This Hon'ble Court may direct the states to submit such scheme to this Hon'ble Court by 1st December, 2020.

43. The High Courts must also be directed to formulate a scheme for online mediation of pending cases at the trial/appeal/revisional stages so that pending cases could be effectively disposed off. In fact, this scheme may act as a guide for pre-summons mediation to be adopted through an online platform rather than summon the Accused physically, for the purposes of mediation. The High Courts must be directed to identify the technical platform and other resources required in this regard. The High Courts may also consider mediation on non-working days and hours so that court processes are not affected.

44. Pending cases under Section 138 before this Hon'ble Court may also be directed to be placed for online mediation after obtaining consent of the parties and lawyers before they are disposed off on merits.

45. Keeping in view the recommendation of the Law Commission, it may be prudent to suggest that Exclusive Courts of Magistrates(for trials) & judges (for appeals)be established or certain amount of existing human resources and judicial resources be exclusively used for Special Courts for trying cases under Section 138, NI Act. This is not just desirable from the viewpoint of judicial arrears and delay but also from an economic perspective where substiatnial financial resources are tied up in litigation. Experience has shown us that exclusive courts do facilitate speedy disposal. However, experience has equally demonstrated that setting up exclusive courts without additional human and judicial resources could end up clogging other forms of litigation. In this context, in our opinion, unless the idea of exclusive courts is backed by a comprehensive plan from the Union to substantially fund setting up of exclusive courts, and an action plan is worked out to appoint judges in such courts, diverting existing resources would burden the system. It may be profitably pointed out under Article 247 of the Constitution of India, the Union is empowered to setup additional courts for better administration of laws made by Parliament in respect of a matter enumerated under the Union List, Negotiable Instruments Act, 1881, being one of them.

X. MISCELLENOUS

46. In our considered opinion, it may be profitable to direct the Union to consider the possibility of mandating, by legislation, that certain categories of payments or payments above a certain threshold be only effected through electronic transactions. This would also reflect the evolution of banking processes from the year 1988, when Section 138 was introduced, when cheques were the prevalent mode of transaction.

47. Experience has also shown us that a single financial transaction may lead to the dishonour of multiple cheques. However, under Section 219, CrPC, only 3 offences and therefore; the dishonour of only 3 cheques could be tried together. A legislative amendment may be required to address this issue of multiplicity of

proceedings where cheques have been issued for one purpose but multiple complaints, summons and trials have to be undertaken.

48. Until the statutory amendments are in place, this Court may issue directions under Article 142 of the Constitution to High Courts to amend their Criminal Rules of Practice (by whatever name called) to ensure that complaints arising out of the same transaction, but resulting in dishonour of multiple cheques be clubbed together and a common process evolved for service of summons and joint trial.

49. In respect of decriminalisation of cheque dishonour, the Union of India has already issued Circular dated 08.06.2020 proposing to de-criminalise certain *minor offences*, including Section 138 NI Act, purportedly for two-fold purposes, namely, to *improve business sentiment* and secondly, to *unclog Court processes*. In our opinion, it would be profitable to await the completion of this exercise by the Union and suggestions in this regard may be directed to the Union Government. Any discussion in a judicial forum as regards the desirability of decriminalisation of cheque dishonour would pre-empt legislation, which would not be desirable.

Dated: 11.10.2020