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Reading Material

on

The Negotiable Instrument Act, 1881

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READING MATERIAL

ON

THE NEGOTIABLE INSTRUMENTS ACT, 1881

Prepared by :

Judicial Academy Jharkhand

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THE NEGOTIABLE INSTRUMENTS (AMENDMENT) ACT, 2018

No. 20 of 2018

(2nd August, 2018)

An Act further to amend the Negotiable Instruments Act, 1881.

Be it enacted by Parliament in the Sixty-ninth year of the Republic of India as follows :—

Short title and Commence-ment

1. (1) This Act may be called the Negotiable Instruments (Amendment) Act, 2018.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

26 of 1881

Insertion of new section 143A. Power to direct interm compensation

2. In the Negotiable Instruments Act, 1881 (hereinafter referred to as the principal Act), after section 143, the following section shall be inserted, namely:—

2 of 1974

"143A. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Court trying an offence under section 138 may order the drawer of the cheque to pay interim compensation to the complainant—

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

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

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

(3) The interim compensation shall be paid within sixty days from the date of the order under 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, shall be reduced by the amount paid or recovered as interim compensation under this section." 2 of 1974

Insertion of new section 148.

3. In the principal Act, after section 147, the following section shall be inserted.

Power of Appellate Court to order payment pending appeal against conviction.

"148. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, in n appeal by the drawer against conviction under section 138, the Appellate Court may order the appellant to deposit such sum which shall be a minimum of twenty per cent of the fine or compensation awarded by the trial Court : 2 of 1974

Provided that the amount payable under this sub-section shall be in addition to any interim compensation paid by the appellant under section 143A.

(2) The amount referred to in sub-section (1) shall be deposited 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 appellant.

(3) The Appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal :

Provided that if the appellant is acquitted, the Court shall direct the complainant to repay to the appellant the amount so released, 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 directred by the Court on sufficient cause being shown by the complainant."

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TOOLS FOR QUICK DISPOSAL OF CASES UNDER THE NEGOTIABLE INSTRUMENTS ACT 1881

The Negotiable Instruments Act 1881 came into being as an Act to define and amend the law relating to promissory notes, bill of exchange and cheques. The chief object behind Negotiable Instruments Act was to legalise the system under which Negotiable Instruments pass from one hand to other in negotiations like ordinary goods. Mostly the English law is followed in case of the N.I. Act except in the area where it was required in Indian context to change the applicability. It has also been said that the law of Negotiable Instruments is not the law of a single country but of the whole of the commercial world and except for certain differences depending on peculiarities existing in each country the general rules of the law is on the same pattern in all the countries.

The earliest attempt to codify a law relating to mercantile uses was made in France as early as in the year 1818 and the French Commercial Code was later adopted as a model by many other countries. In England, the movement for such a codification of law relating to mercantile uses materialized only in 1880 with Bills of Exchange Act, 1882 and in India it came into existence in 1881. The law in its more than 135 years of existence has been subjected to as many as 27 amendments and the most relevant one in present context being The Banking, Public Financial Institutions and Negotiable Instrument Laws (Amending) Act, 1988 and the subsequent the Negotiable Instruments (Amendment and Miscellaneous Provisions)Act, 2002 and the last one being Negotiable Instruments (Amendment) Act, 2015 with retrospective effect from 15/6/2015.

Out of the three specific type of instruments referred in the Negotiable Instruments Act namely the promissory note bill of exchange and cheques it was only the Cheques which became one of the most common instruments for trade and commerce because of certainty and convenience.

Negotiable Instruments has been defined in section 13 of the act and if extracted the way it exists would read:-

S.13. ''Negotiable instrument"

(1)[1] A "negotiable instrument" means a promissory note, bill of exchange or cheque payable either to order or to bearer.

Explanation (i).—A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

Explanation (ii).—A promissory note, bill of exchange or cheque is payable to bearer which is expressed to be so payable or on which the only or last endorsement is an endorsement in blank.

Explanation (iii).—Where a promissory note, bill of exchange or cheque, either originally or by endorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.]

1 Subs. by Act 8 of 1919, sec. 3, for sub-section (1)

(2)[2] A negotiable instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees.]

Section 5 of the N.I. Act 1881 provides the definition of bill of exchange in the following words –

S.5. Bill of exchange

A "bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

A promise or order to pay is not "conditional", within the meaning of this section and section 4, by reason of the time for payment of the amount or any installment thereof being expressed to be on the lapse of a certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain.

The sum payable may be "certain'', within the meaning of this section and section 4, although it includes future interest or is payable at an indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that, on default of payment of an installment, the balance unpaid shall become due.

The person to whom it is clear that the direction is given or that payment is to be made may be a "certain person", within the meaning of this section and section 4, although he is mis-named or designated by description only.

The cheque has been defined in section 6 of the Negotiable Instruments Act and as per section 6 –

S.6.[3] Cheque

A "cheque" is 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.

Explanation I. — For the purposes of this section, the expressions—

(a)[4] "a cheque in the electronic form" means a cheque drawn in electronic form by using any computer resource and signed in a secure system with digital signature (with or without biometrics signature) and asymmetric crypto system or with electronic signature, as the case may be;]

(b) "a truncated cheque" means a cheque which is truncated during the course of a clearing cycle, either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing.

2 Ins. by Act 5 of 1914, sec. 2.

3 Subs. by Act 55 of 2002, sec. 2, for "A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand" (w.e.f. 6-2-2003).

4 Substituted by Act 26 of 2015 , sec. 2 Prior to its substitution Cl (a) read as under (a) "a cheque in the electronic form" means a cheque which contains the exact mirror image of a paper cheque, and is generated, written and signed in a secure system ensuring the minimum safety standards with the use of digital signature (with or without biometrics signature) and asymmetric crypto system;

Explanation II. For the purposes of this section, the expression "clearing house" means the clearing house managed by the Reserve Bank of India or a clearing house recognised as such by the Reserve Bank of India.]

[Explanation III[5] .—For the purposes of this section, the expressions "asymmetric crypto system", "computer resource", "digital signature", "electronic form" and "electronic signature" shall have the same meanings respectively assigned to them in the Information Technology Act, 2000(21 of 2000).]

CHAPTER XIII Special rules of evidence

Section – 118 Presumptions as to negotiable instruments.—Until the contrary is proved, the following presumptions shall be made:—

(a) of consideration.—that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed negotiated or transferred, for consideration;

(b) as to date.—that every negotiable instrument bearing a date when made or drawn on such date;

(c) as to time of acceptance.—that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer.—that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of endorsement.—that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps.—that a lost promissory note, bill of exchange cheque was duly stamped;

(g) that holder is a holder in due course.—that the holder of negotiable instrument is a holder in due course: provided that, where instrument has been obtained from its lawful owner, or from any persons in lawful custody thereof, by means of an offence or fraud, or has obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the he is a holder in due course lies upon him.

Section 9 Holder in due course

Holder in due course means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or endorsee thereof, if payable to order, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he delivered his title.

Cheques have been used in commercial word for a very long period of time as one of the convenient mode for transferring money and with development of banking sectors and with increase in number of branches cheques became one of the favorite Negotiable Instruments. When cheques were issued as a Negotiable Instruments, there was always possibility and likelihood of the same being issue without sufficient amount in the account. The dishonor of a cheque created a civil liability unless because of an increasing trend in use of cheques the government felt it imperative to amend the Negotiable Instruments Act by introducing chapter XVII in the Negotiable Instruments Act by the

5 Substituted by Act 26 of 2015 , sec. 2

banking public financial institutions and Negotiable Instruments law (amendment) Act 1988 (66 of 1988) with effect from 1st April 1989. With amendment of Negotiable Instruments Act as referred herein above section 138 to 142 were inserted with a view to protect the drawing of the cheque. By introducing the new provisions the drawer was made liable for penalties in case of **"bouncing"** of the cheque due to insufficiency of funds etc. with adequate safeguard to prevent harassment of the honest drawer. The object of the said amendment may be extracted here and would read as under –

STATEMENT OF OBJECTS AND REASON OF AMENDING ACT, 1988

To enhance the acceptability of cheques in settlement of liabilities for making the drawer liable for penalties in case of bouncing of cheque due to insufficiency etc. of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer with adequate safeguards to prevent harassment of honest drawers.

Clause – 4: This clause inserts a new chapter XVII in the Negotiable Instruments Act, 1881. The provisions contained in the new Chapter provide that where any cheque drawn by any person for the discharge of any liability is returned by the bank unpaid for the reason of the insufficiency of the amount of money standing to the credit of the account on which the cheque was drawn or for the reason that it exceeds the arrangements made by the drawer of the cheque with the banker for that account, the drawer of such cheque shall be deemed to have committed an offence. In that case, the drawer without prejudice to the other provisions of the said Act, shall be punishable with an imprisonment for a term which may extend to one year[6], or with fine which may extend to twice the amount of the cheque, or with both.The provisions have also been made that to constitute the said offence –

(a) such cheque should have been presented to the bank within a period of six[7] months of the date on which it is drawn or within the period of its validity, whichever is earlier; and

(b) the payee or holder in due course of such cheque should have made a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque within fifteen days of the receipt of information by him from the bank regarding the return of the cheque unpaid; and

(c) The drawer of such cheque should have failed to make the payment of the said amount of money to the payee or the holder in due course of the cheque within fifteen days[8] of the receipt of the said notice.

It has also been provided that it shall be presumed, unless the contrary is proved, that the holder of cheque received the cheque in discharge of liability. Defenses which may or may not be allowed in any prosecution for such offence have also been provided to make the provisions effective. Usual provisions relating to offences by companies have also been included in the said new Chapter. In order to ensure that genuine and honest bank customers are not harassed or put to inconvenience, sufficient safeguards have also been provided in the new Chapter. Such safeguards are –

(a) that no court shall take cognizance of such offence except on a complaint, in writing, made by the payee or the holder in due course of the cheque;

6 Substituted by Act 55 of 2002, S.7, "for a term which may extend to two years" (w.e.f. 06/02/2003)
7 (RBI, circular u/s 35 (A) Banking Regulation Act, 1949- w.e.f. 1.4.2012 validity period of cheque/draft/pay order- 3 months.)
8 Substituted by Act 55 of 2002, S.7, " within thirty days" (w.e.f. 06/02/2003)

(b) that such complaints is made within one month of the date on which the cause of action arises;

(c) that no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any such offence.

With the incorporation of a separate Chapter XVII containing sections 138 to 142, the Negotiable Instruments Act, was amended. Pursuant to the amendment, a person drawing a cheque on his account with a bank for the discharge, in whole or in part, of any debt or other liability, which is returned by the bank unpaid, either because of the amount of money standing to the credit of such account is insufficient to honour the cheque or that it exceeds that amount arranged to be paid from that account by an arrangement made with the Bank, shall be deemed to have committed an offence and be punished with imprisonment for a term extending upto one year or with fine which may extend to twice the amount of the cheque or even with both the penalties.

Thus such person in addition to being made liable in a civil suit, can also be made criminally liable. To safeguard the honest and genuine bank customers, the court will not take cognizance of the offence except in a complaint in writing and no court inferior to that of a Metropolitan Magistrate or a first class Judicial Magistrate shall try the offence. With this amendment, the Negotiable Instruments Act will acquire a double character. Earlier it was an enactment falling exclusively under civil law confined to civil liability, henceforth; it will also have a penal provision.

It was also found over the years that the punishment provided was inadequate and the procedure prescribed where cumbersome and the courts were unable to dispose of the cases expeditiously and in time bound manner and hence the Negotiable Instruments Act was amended by the Negotiable Instruments (amendment and miscellaneous provisions) Act 2002

The Negotiable Instruments (amendment And Miscellaneous Provisions) Bill, 2002

A BILL further to amend the Negotiable Instruments Act, 1881, the Bankers' Books Evidence Act, 1891 and the Information Technology Act, 2000.

With the insertion of 1988 amandment in the Act the situation certainly improved and the instances of dishonour have relatively come down but on account of application of different interpretative techniques by different High Courts on different provisions of the Act although it further complicated the situation on dishonour of cheques. Having regard to the working of these penal provisions on dishonour of cheques and the bottlenecks that have surfaced in strictly implementing these provisions, Parliament enacted the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 (55 of 2002), which is intended to plug the loopholes. This amendment Act inserts five new sections from 143 to 147 touching various limbs of the parent Act and the amendment Act has been recently brought into force on Feb. 6, 2003.

Section 143 is intended to achieve speedy trial. By applying provisions of Sections 262 to 265 CrPC it enables a Judicial Magistrate or Magistrate of the First Class to conduct the trial. Then it contemplates summary trial and provides for continuous day-to-day hearing of the case till its conclusion and further stipulates that the trial is to be completed within 6 months from the date of filing of the complaint. It further empowers the Magistrate to pass a sentence for imprisonment for a term not exceeding two year or a fine not exceeding twice the amount of the cheque notwithstanding anything contained to the contrary in CrPC.

The new Section 144 deals with the service of summons. It would now enable the Magistrate not to follow the elaborate procedure for serving summons as required by Sections 61 to 90 CrPC. The sub-section of this section allows the summons to be served through the speedpost and notified private couriers besides the normal process. Precisely speaking, this section has brought about the concept of "constructive service". This provision is analogous to the principle incorporated in Section 27 of the General Clauses Act, 1897. According to this where the sender has dispatched the notice by post with correct address written on it, then it can be deemed to have been served on the sender unless he proves that it was really not served. This is the position which got endorsed by the Supreme Court in **K. Bhaskaran** case[9] Also on refusal to take delivery of the summons, the Court can declare that the summons have been duly served.

Section 145 contemplates evidence on affidavit and it appears while bringing this amendment the Government had in its mind the ratio decidendi in the case of BIPS System Ltd. v. State, of Delhi High Court. According to this section the complainant can give his evidence by way of an affidavit and the same may be attached with the complaint and if the accused wants to contradict the contents of the affidavit the complainant may be called for examination.

Then Section 146 provides for presumption to bank memorandums. Earlier whenever a question arose whether there was insufficient funds in the account of the drawer of the cheque, it was conceived to be a matter of evidence being a question of fact and onus was placed on the complainant and for discharging this onus the bank personnel was to be examined. This naturally delayed things. It has therefore been provided that based on the bank slip the Court would presume the fact of dishonour, unless and until such fact is disproved.

Section 147 provides for compounding of offences under this Act. There was a difference of opinion in different High Courts on the question whether offences under the provisions of the Act were compoundable or not. The Kerala High Court's view was in the negative whereas the view of the Andhra Pradesh High Court was in the affirmative. Unfortunately the matter did not reach the Apex Court. Parliament therefore has resolved the controversy and provided that offences under the Act would be compoundable.

Besides this Section 138, 141 and 142 have also been amended by doubling the imprisonment term from one year to two years and the period of time to issue demand notice to the drawer from 15 days to 30 days and by providing immunity from prosecution for nominee director. It has also been provided that the Magistrate can condone the delay if any in filing the complaint in special and peculiar circumstances. An objective perusal of the aforesaid amendment would reveal that the Act has now become a self-contained statute wherein an "in-house mechanism" has been provided in the Act itself which would take care that the trial is a speedy one, no undue delay occurs and that a more deterrent punishment is provided. Similarly the service of summons has been made easy and the offence is made compoundable.

STATEMENT OF OBJECTS AND REASONS of 2015 AMENDMENT

The Negotiable Instruments Act, 1881 was enacted to define and amend the law relating to Promissory Notes, Bills of Exchange and Cheques. The Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 inserted in the Negotiable Instruments Act, 1881 (hereinafter called the said Act), a new Chapter XVII, comprising sections 138 to 142 with

9 1997 (7) SCC 510

effect from 1st April, 1989. Section 138 of the said Act provides for penalties in case of dishonour of cheques due to insufficiency of funds in the account of the drawer of the cheque.

As sections 138 to 142 of the said Act were found deficient in dealing with dishonour of cheques, the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002, inter alia, amended sections 138, 141 and 142 and inserted new sections 143 to 147 in the said Act aimed at speedy disposal of cases relating to dishonour of cheque through their summary trial as well as making them compoundable. Punishment provided under section 138 too was enhanced from one year to two years. These legislative reforms are aimed at encouraging the usage of cheque and enhancing the credibility of the instrument so that the normal business transactions and settlement of liabilities could be ensured.

The Supreme Court, in its judgment dated 1st August, 2014, in the case of **Dashrath Rupsingh Rathod versus State of Maharashtra and another** (Criminal Appeal No. 2287 of 2009)[10], held that the territorial jurisdiction for dishonour of cheques is restricted to the court within whose local jurisdiction the offence was committed, which in the present context is where the cheque is dishonoured by the bank on which it is drawn. The Supreme Court has directed that only those cases where, post the summoning and appearance of the alleged accused, the recording of evidence has commenced as envisaged in section 145(2) of the Negotiable Instruments Act, 1881, will proceed and continue at that place. All other complaints (including those where the accused/respondent has not been properly served summons) shall be returned to the complainant for filing in the proper court, in consonance with exposition of the law, as determined by the Supreme Court.

Amendment of section 142

In the principal Act, section 142 shall be numbered as sub-section (1) thereof and after sub-section (1) as so numbered, the following sub-section shall be inserted, namely:-

"(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction the bank branch of the payee, where the payee presents the cheque for payment, is situated.".

Insertion of new section 142A

In the principal Act, after section 142, the following section shall be inserted, namely:-

142A. - Validation for transfer of pending cases

''142A. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or any judgment, decree, order or directions of any court, all cases arising out of section 138 which were pending in any court, whether filed before it, or transferred to it, before the commencement of the Negotiable Instruments (Amendment) Act, 2015, shall be transferred to the court having jurisdiction under sub-section (2) of section 142 as if that sub-section had been in force at all material times.

(2) Notwithstanding anything contained in sub-section (2) of section 142 or sub-section (1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the court having jurisdiction under sub-section (2) of section 142 or the case has been transferred to that court under sub-section (1), all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of

10 (2014)9 SCC 219

whether those cheques were presented for payment within the territorial jurisdiction of that court.

(3) If, on the date of the commencement of the Negotiable Instruments (Amendment) Act, 2015, more than one prosecution filed by the same person against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under sub-section (2) of section 142 before which the first case was filed as if that sub-section had been in force at all material times.''.

Pursuant to the judgment of the Supreme Court, representations have been made to the Government by various stakeholders, including industry associations and financial institutions, expressing concerns about the wide impact this judgment would have on the business interests as it will offer undue protection to defaulters at the expense of the aggrieved complainant; will give a complete go-by to the practice /concept of 'Payable at Par cheques' and would ignore the current realities of cheque clearing with the introduction of CTS (Cheque Truncation System) where cheque clearance happens only through scanned image in electronic form and cheques are not physically required to be presented to the issuing branch (drawee bank branch) but are settled between the service branches of the drawee and payee banks; will give rise to multiplicity of cases covering several cheques drawn on bank(s) at different places; and adhering to it is impracticable for a single window agency with customers spread all over India.

To address the difficulties faced by the payee or the lender of the money in filing the case under section 138 of the said Act, because of which, large number of cases are stuck, the jurisdiction for offence under section 138 has been clearly defined. The Negotiable Instruments (Amendment) Bill, 2015 provides for the following, namely:–

(i) filing of cases only by a court within whose local jurisdiction the bank branch of the payee, where the payee presents the cheque for payment, is situated;

(ii) stipulating that where a complaint has been filed against the drawer of a cheque in the court having jurisdiction under the new scheme of jurisdiction, all subsequent complaints arising out of section 138 of the said Act against the same drawer shall be filed before the same court, irrespective of whether those cheques were presented for payment within the territorial jurisdiction of that court;

(iii) stipulating that if more than one prosecution is filed against the same drawer of cheques before different courts, upon the said fact having been brought to the notice of the court, the court shall transfer the case to the court having jurisdiction as per the new scheme of jurisdiction; and

(iv) amending Explanation I under section 6 of the said Act relating to the meaning of expression "a cheque in the electronic form", as the said meaning is found to be deficient because it presumes drawing of a physical cheque, which is not the objective in preparing "a cheque in the electronic form" and inserting a new Explanation III in the said section giving reference of the expressions contained in the Information Technology Act, 2000.

It is expected that the proposed amendments to the Negotiable Instruments Act, 1881 would help in ensuring that a fair trial of cases under section 138 of the said Act is conducted keeping in

view the interests of the complainant by clarifying the territorial jurisdiction for trying the cases for dishonour of cheques.

The Act was amended last by the Negotiable Instruments amendment Act 2015 and after the said amendment the provision of law stands as follows –

CHAPTER XVII

OF PENALTIES IN CASE OF DISHONOUR OF CERTAIN CHEQUES FOR INSUFFICIENCY OF FUNDS IN THE ACCOUNTS

138. Dishonour of cheque for insufficiency, etc., of funds in the account.—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for [11][a term which may be extended to two years'], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months *(RBI, circular u/s 35 (A) Banking Regulation Act, 1949- w.e.f. 1.4.2012 validity period of cheque/draft/pay order- 3 months.)* from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, [12][within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.—For the purposes of this section, "debt of other liability" means a legally enforceable debt or other liability.

139. Presumption in favour of holder.—It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

140. Defence which may not be allowed in any prosecution under section 138.—It shall not be a defence in a prosecution for an offence under section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that section.

141. Offences by companies.—(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and

11 Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002(Act 55 of 2002)

12 Substituted by Act 55 of 2002, S.7, "for within fifteen days" (w.e.f. 06/02/2013)

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:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

[13][Provided further that 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 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.]

(2) Notwithstanding anything contained in sub-section (1), where any offence under this 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 of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section, —

(a) "company" means anybody corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

142. Cognizance of offences.— [14][(1)] Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

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

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

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

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

[16][(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,—

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

13 Ins. by Act 55 of 2002, s. 8, (w.e.f. 6-2-2003).
14 Section 142 numbered as sub-section (1) thereof by Act 26 of 2015, s. 3 (w.e.f. 15-6-2015).
15 Ins. by Act 55 of 2002, s. 9, (w.e.f. 6-2-2003).
16 Ins. Act 26 of 2015, s. 3, (w.e.f. 15-6-2015).

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

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

[17][142A. Validation for transfer of pending cases.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or any judgment, decree, order or direction of any court, all cases transferred to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015 (Ord. 6 of 2015), shall be deemed to have been transferred under this Act, as if that sub-section had been in force at all material times.

(2) Notwithstanding anything contained in sub-section (2) of section 142 or sub-section (1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the court having jurisdiction under sub-section (2) of section 142 or the case has been transferred to that court under sub-section (1) and such complaint is pending in that court, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.

(3) If, on the date of the commencement of the Negotiable Instruments (Amendment) Act, 2015 (26 of 2015), more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under subsection (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015 (Ord. 6 of 2015), before which the first case was filed and is pending, as if that sub-section had been in force at all material times.]

[18][143. Power of Court to try cases summarily.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials:

Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees:

Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any

17 Ins. by Act 26 of 2015, s. 4, (w.e.f. 15-6-2015).
18 Ins. by Act 55 of 2002, s. 10, (w.e.f. 6-2-2003).

witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.

(2) The trial of a case under this section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion, unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing.

(3) Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint.

144. Mode of service of summons.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) and for the purposes of this Chapter, a Magistrate issuing a summons to an accused or a witness may direct a copy of summons to be served at the place where such accused or witness ordinarily resides or carries on business or personally works for gain, by speed post or by such courier services as are approved by a Court of Session.

(2) Where an acknowledgment purporting to be signed by the accused or the witness or an endorsement purported to be made by any person authorised by the postal department or the courier services that the accused or the witness refused to take delivery of summons has been received, the Court issuing the summons may declare that the summons has been duly served.

145. Evidence on affidavit.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.

146. Bank's slip prima facie evidence of certain facts.—

The Court shall, in respect of every proceeding under this Chapter, on production of Bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved.

147. Offences to be compoundable.—Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable].

Negotiable Instruments (Amendment) Bill of 2017

With the objective of reducing delay in proceedings pertaining to dishonour of cheques and to provide interim relief to the payee in such cases, the Negotiable Instruments (Amendment) Bill of 2017 was tabled before the Lok Sabha on Tuesday. The Central Government has been receiving several representations from the public, including the trading community, relating to the pendency of cheque bounce cases. The same may be imputed to the delay tactics adopted by unscrupulous

drawers of dishonoured cheques on account of the ease of filing of appeals and obtaining stay on proceedings. As a result of this, injustice is caused to the payee of a dishonoured cheque who has to spend considerable time and resources in court proceedings to realise the value of the cheque. Such delays compromise the sanctity of cheque transactions

As per the Statement of Objects and Reasons of the Bill of 2017, the Negotiable Instruments Act of 1881 is proposed to be amended "with a view to address the issue of undue delay in final resolution of cheque dishonour cases so as to provide relief to payees of dishonoured cheques and to discourage frivolous and unnecessary litigation which would save time and money". Further, it is expected that "the proposed amendments will strengthen the credibility of cheques and help trade and commerce in general by allowing lending institutions, including banks, to continue to extend financing to the productive sectors of the economy".

The Amendment Bill inserts a new Section 143A in the Act of 1881, making provision for the payment by the drawer of the dishonoured cheque to the payee thereof of interim compensation of an amount not exceeding 20% of the value of the instrument during the pendency of proceedings for the offence of dishonour under Section 138 of the Act

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

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

The said interim compensation has to be paid within a period of 60 days from the date on which the order to that effect is made. The interim compensation so recovered shall be deductible from the amount of fine imposed under section 138 by the Magistrate upon conviction of the drawer or any compensation directed to be paid under section 357 of the CrPC Section 138 of the Act of 1881 provides for imposition of a sentence of imprisonment not exceeding a period of 2 years or fine extending to twice the amount of the dishonoured cheque or both. The said amount of interim compensation may be recovered in the manner provided under section 421 of CrPC – by way of attachment and sale of any movable property of the drawer or a warrant to the Collector of the concerned district to recover the same as arrears of land revenue from the movable or immovable property of the drawer.

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 year.

Further, the Bill provides for the insertion of Section 148 in the Act of 1881 whereunder, in an appeal by the drawer against conviction under Section 138, the appellate court is empowered to order the appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial court. The amount so payable shall be in addition to any interim compensation paid by the appellant under Section 143A. Also, the same has to be deposited within a period of 60 days from the date of order in this behalf

IMPORTANT INGREDIENTS OF S. 138

Object & Purpose:

The Parliament in its wisdom had chosen to bring section 138 on the Statute book in order to introduce financial discipline in business dealings. Prior to insertion of section 138 of the Negotiable

Instruments Act, a dishonoured cheque left the person aggrieved with the only remedy of filing a claim. The object and purpose of bringing new provisions in the Act was to make the persons dealing in commercial transactions work with a sense of responsibility and for that reason, under the amended provisions of law, lapse on their part to honour their commitment renders the person liable for criminal prosecution. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. The Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment, enacted the aforesaid provisions. The remedy available in Civil Court is a long drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee. **Goa Plast (P) Ltd. v. Chico Urrsula D'souza, (2004) 2 SCC 235.**

Scope:

Section 138 of Negotiable Instruments Act, reflects the anxiety of the legislature to usher in a new healthy commercial morality through the instrumentality of the penal law. Here is a classic example where, as part of an attempt to evolve a healthy norm of commercial behaviour, the principal of social engineering through the instrumentality of penal law is put into operation. What was, prior to the amendment of the Negotiable Instruments Act in 1988 only a moral or civil wrong, has been transformed and exalted to the position of a crime by a deft amendment of the Statute.

The essential requirements to attract section 138, Negotiable Instruments Act are:

(a) The cheque for an amount is issued by the drawer to the payee / complainant on a bank account maintained by him.

(b) The said cheque is issued for the discharge, in whole or in part of any debt or other liability.

(c) The cheque is returned by the bank unpaid on account of insufficient amount to honour the cheque or it exceeds the amount arranged to be paid from that account by an agreement made with the bank.

(d) The cheque is presented within 3 months from the date on which it is drawn or within the period of its validity.

(e) 30 days demand notice is issued by the payee or the holder in due course on receipt of information by him from the bank regarding the dishonour of the cheque.

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

(g) The debt or liability against which the cheque was issued is legally enforceable. **(Kusum Ingots and Alloys Ltd. Vs Pennar Peterson Securities Ltd (2000)2 SCC 745)**

Component of offence:

Section 138 of the Act makes it an offence where may cheque drawn by a person on any account maintained by him in a Bank for payment of any amount to other person is returned unpaid by the Bank for insufficiency of the deposit or for the amount payable exceeding such deposit. The components of offence under this provision are

(a) drawing of the cheque for some amount;

(b) presentation of the cheque to the banker;

(c) return of the cheque unpaid by the drawee bank;

(d) giving of notice by the holder of the cheque or payee to drawer of the cheque demanding payment of cheque amount;

(e) failure of drawer to make payment within 15 days of receipt of such notice.

Harman Electronics Pvt. Ltd.Vs. National Panasonic India Ltd.(2009)1 SCC 720

Complaint

Indra Kumar Patodia Vs. Reliance Industries Ltd.(2012) 13 SCC 1 – Complaint without the signature of complainant is maintainable when it is verified by the complainant and the process is issued by the Magistrate after due verification.(AIR 2013 SC 426)

Drawing of a Cheque:

The drawer in payment of a legal liability to discharge the existing debt should have drawn cheque. Therefore any cheque given say by way of gift would not come within the purview of the section. It should be a legally enforceable debt; therefore time barred debt and money-lending activities are beyond its scope. The words any debt or any other liability appearing in section 138 make it very clear that it is not in respect of any particular debt or liability The presumption which the Court will have to make in all such cases is that there was some debt or liability once a cheque is issued. It will be for the accused to prove the contrary. i.e., there is no debt or any other liability. The Court shall statutorily make a presumption that the cheques were issued for the liability indicated by the prosecution unless contrary is to be proved **Sivakumar Vs. Natrajan (2009) 13 SCC 623.**

Cheque not issued from the account of the accused : Where the Complaint lacks necessary ingredients of the offence under Section 138: Hon'ble Supreme Court in **Jugesh Sehgal v. Shamsher Singh Gogi, (2009) 14 SCC 683** has observed

"22. As already noted herein before, in Para 3 of the complaint, there is a clear averment that the cheque in question was issued from an account which was non-existent on the day it was issued or that the account from where the cheque was issued "pertained to someone else". As per the complainant's own pleadings, the bank account from where the cheque had been issued, was not held in the name of the appellant and therefore, one of the requisite ingredients of Section 138 of the Act was not satisfied."

The Court also noted that one of the essential ingredients of the offence punishable under Section 138 of Negotiable Instruments Act is that the cheque must have been drawn on an account maintained by the accused. Since the cheque in the case before the Supreme Court was not issued from the account maintained by the petitioner, it was held that one essential ingredient of offence under Section 138 of Negotiable Instruments Act was not present."

The matter was referred to a larger bench in the case of **Aneeta Hada Vs God father Tour and Travels Ltd (2008)13 SCC 703** to be ultimately decided by the Hon'ble Supreme Court of india in the following terms "Arraigning of the Company as accused imperative **(2012) 5 SCC 661.**

It was further held in the case of **Aparna A. Shah Vs Sheth Developers Pvt Ltd and Anr(2013)8 SCC 71** that in case of joint account only the drawer is liable. The same view has been retreated by the Apex Court in the recent ruling of **N Harihara Krishna Vs J. Thomas reported in 2017 SCC Online SC 1017.**

Ss. 138, 141 & 142 – Dishonour of cheque – offence by company – Issuance of individual notices under S. 138 to them, held, not required as For dishonor of cheque drawn by company, appellant issued notice u/s 138 to accused company, but no individual notices were given to its Directors- Held, S. 138 does not admit of any necessity or scope for reading into it, requirement that Directors of company in question must also be issued individual notices u/s. 138 – Such Directors who are in charge of and responsible for affairs of company, would be aware of receipt of notice by company u/s. 138(2015) 8 SC Cases 28 AIR 2015 SC 2091 Kirshna Texport and Capital markets limited Vs.Ila A. Agarwal and others

Presentation of Cheque:

The presentation of cheque should be within its validity period. Generally a cheque is valid for six months, but there are cheques whose validity period is restricted to three months etc. The question arises as to which bank the cheque should reach within the validity period, is it the payee to his bank presents that of drawer's bank or it is enough if the cheque before six months. Common sense demands that the cheque should reach the drawer bank within the period of validity as it is that bank that eiher pays or rejects payment as per the situation existing on that day **Central Bank Of India and Another Vs. Saxon Farms and others (1999)8 SCC 221.**

The supreme court has held If within limitation- Two consecutive notices sent by payee by registered post to correct address of drawer of cheque: first one sent within limitation; period of 15 days but same was returned with postal endorsement "intimation served, addressee absent", whereas second one sent after expiry of stipulated period of limitation Held, first notice would be deemed to have been duly effected by virtue of S. 27 of General Clauses Act and S. 114 of Evidence Act- Though drawer entitled to rebut that presumption, but in absence of rebuttal, requirement of S. 138 proviso (b) would stand complied with- subsequent notice should be treated only as reminder and would not affect validity of first to achieve that right of honest lender is not defeated. (2017) 5 SC cases 737: 2017 SCC Online SC 293 AIR 2017 SC 1681 : (2017) 2 Crimes 62 (SC) N. Parameswaran Unni Vs. G. Kannan and Another

Supreme Court in **Sadanandan Bhadran vs. Madhavan Sunil Kuar [(1998) 6 SCC 514],** held that while the payee was free to present the cheque repeatedly within its validity period, once notice had been issued and payments not received within 15 days of the receipt of the notice, the payee has to avail the very cause of action arising thereupon and file the complaint **[Prem Chand Vijay Kumar vs. Yashpal Singh & Anr. [(2005) 4 SCC 417].** Dishonour of the cheque on each re-presentation does not give rise to a fresh cause of action. But the law was settled finally overruling all the contrary views in terms of the judgement of **(2013) 1 SCC 177 MSR Leathers Vs. S. Planniappan and Another** that so long the cheque remains valid the prosecution based on subsequent presentation is permissible so long as it satisfies all the requirements of section 138.

Re-presentation of cheque after dishonor – Limitation period for filing complaint for dishonor of cheque upon re-presentation of cheque – Date from which to be reckoned – Legal notice to drawer must be issued within 30 days of that dishonor of cheque, which matures into complaint – Though first legal notice was issued within two days of first dishonor of cheque, second legal notice issued to drawer of cheque on 17-12-2008 pursuant to dishonor of same cheque second time on 10-11-2008 i.e. beyond limitation period of 30 days – Information as to second dishonor was received from Bank on the same day itself (i.e. 10-11-2008)

Held, although the complainant had right to present the said cheque for encashment a second time after its dishonor, the legal notice pursuant to second dishonor had to be issued within 30 days of the receipt of information as to second dishonor from Bank, which was not done- Hence, complaint filed on basis of notice dt. 17-12-2008 was not maintainable in view of non-compliance with all the three conditions laid down in S. 138 NI Act as explained in MSR Leather, (2013) 1 SCC 177 (2014) 2 SC cases 424 AIR 2014 SC 660 Kamlesh Kumar. Vs. State of Bihar and another.

Practice and procedure :

DIRECTIONS FOR EARLY DISPOSAL OF CASES:

2014 5 SCC 590 Indian Bank Association and others. Versus Union of India and others –

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

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

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

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

(5) The Court concerned must ensure that examination-in-chief, cross-examination and 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.

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

Returning Of the Cheque Unpaid:

Lot of controversy had arisen on the issue. What reasons are relevant to hold the drawer of the cheque criminally responsible for bouncing of a cheque. The case laws on the subject have now made the position clear. It is not what the bank says in its return memo that is relevant but the actual position as on the date when the cheque reaches the drawer bank whether there were enough funds in the drawer account to honour the cheque. The following judgments bring out the correct legal position:

NEPC Ltd. Vs. Magma Leasing Ltd. 1999 (4) SCC 253 – Relying upon **Modi Cement Ltd. 1998 (3) SCC 249 –** Held that cheque returned by mentioning account closed is also an offence u/s. 138 N.I. Act. Despite being penal provision it has been interpreted purposefully in furtherance to effectiveness and workability of the enactment. Account closed, stop payment are species of the genus in sufficient fund. MMTC Co. Vs. Medchil pharmaceuticals 2002 (1) SCC 234

Any reason for dishonour is an offence. S. 138 of the NI Act Marginal Note stating "Dishonour of cheque for insufficiency etc. of funds in accounts" addition of word "etc." cannot be considered to be an accident.

M/s Laxmi Deyechem Vs. State of Gujarat(2012) 13 SCC 375 – overruling Vinod Tawa & others vs. Zahir & Ors. 2002 (7) SCC 541- Held that dishonour of cheque on the ground of non-resemblance of signature will also attract offence u/s 138 N.I. Act. Subject to rebuttal evidence of defence against presumption u/s. 139 N.I. Act. It was held that the **reasons for dishonour like "as account closed ","payment" "stopped" ,"referred to drawer", "signature do not match" or "image is not found " are only the genus of the species " either because of the amount of money standing to the credit of that account is insufficient to honour the cheque"**

Notice:

Notice is a very important stage. It is the non-payment of dishonoured cheque within fifteen days from the receipt of the notice that constitutes an offence. Issuing of a cheque and its dishonour is not an offence. The offence is when the drawer receives a notice from the payee and he fails to pay the dishonoured cheque amount within the grace period of 15 days that constitute an offence. Any demand made after the dishonour of cheque will constitute a notice. It is not necessary that the notice should be sent by Registered Post alone, it could be sent even by fax. It is not necessary that the notice should be in any particular form or style. What is essential is that there should be a demand to pay the dishonoured cheque amount. It is held by the Supreme Court that while the cheque could be presented at any number of times however there shall be only one Notice. The following case may be noted on the subject: **Sadanandan Bhadran v. Madhavan Sunil Kumar[(1998) 6 SCC 514] ,**

Shiv Kumar Vs. Natrajan(2009)13 SCC 623 – Period of notice has to be calculate including the date as the word used is "within" 30 days "from the date it is drawn" invoking section 9 of the General Clauses Act.

Yogendra Pratap Singh v. Savitri Pandey, (2014) 10 SCC 713 : 2014 SCC OnLine SC 744 at page 730

S. 138 proviso (a) – Period of limitation – Determination of – Principle that cheque should be presented within six months from date on which it is drawn – Six months' period – Reckoning of – (i) Whether the six months' period means 6 calendar months or exactly 180 days, and (ii) what is the date from which the six months' period must commence and end

Held, limitation period under S. 138 proviso (a) means six calendar months as per British calendar [as per S. 3 (35), General Clauses Act, 1897] and "month" does not mean just a period of 30 days as suggested by the accused, and the said period would commence from the day next when the cheque was drawn and will expire a day prior to the corresponding day of the corresponding month and in case no such day falls in the corresponding month, the said period would expire at the end of the last day of the immediately previous month [as per S. 9, General Clauses, Act, 1897] (2014) 11 SC Cases 759 Rameshchandra Ambalal JoshiVs. State of Gujarat and Another

Notices returned unserved on alleged refusal to accept by defendant – Held, notices cmust be presumed to have been served as contemplated by S. 27 of General Clauses Act- High Court therefore rightly relied upon the averments in the notices treating the same as a part to the plaint having been referred to and relied upon therein. . (1992) 1 SC Cases 647 AIR 1992 SC 1604 Jagdish Singh Vs.Natthu Singh, Respondent

Question (i) Can an offence under Section 138 of the NI Act be said to have been committed when the period provided in clause (c) of the proviso has not expired? The answer to this Question is in the negative for the following reasons given in the above ruling.

- Section 2(d) of the Code defines "complaint". According to this definition, complaint means any allegation made orally or in writing to a Magistrate with a view to taking his action against a person who has committed an offence. Commission of an offence is a sine qua non for filing a complaint and for taking cognizance of such offence.
- A bare reading of the provision contained in clause (c) of the proviso makes it clear that no complaint can be filed for an offence under Section 138 of the NI Act unless the period of 15 days has elapsed. Any complaint filed before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint at all in the eye of the law.
- It is not the question of prematurity of the complaint where it is filed before the expiry of 15 days from the date on which notice has been served on him, it is no complaint at all under law.
- **Merely because at the time of taking cognizance by the court, the period of 15 days has expired from the date on which notice has been served on the drawer/accused, the court is not clothed with the jurisdiction to take cognizance of an offence under Section 138 on a complaint filed before the expiry of 15 days from the date of receipt of notice by the drawer of the cheque.**
- A complaint filed before the expiry of 15 days from the date on which notice has been served on drawer/accused cannot be said to disclose the cause of action in terms of clause (c) of the proviso to Section 138 and upon such complaint which does not disclose the cause of action the court is not competent to take cognizance. Therefore, a court is barred in law from taking cognizance of such complaint.
- We have no doubt that all the five essential features of Section 138 of the NI Act, as noted in the judgment of this Court in Kusum Ingots & Alloys Ltd. v. Pennar Peterson Securities Ltd., (2000) 2 SCC 745 and which we have approved, must be satisfied for a complaint to be filed under Section 138. If the period prescribed in clause (c) of the proviso to Section 138 has not expired, there is no commission of an offence nor accrual of cause of action for filing of complaint under Section 138 of the NI Act.T
- he view taken by the Court in Narsingh Das Tapadia [Narsingh Das Tapadia v. Goverdhan Das Partani, (2000) 7 SCC 183 : 2000 SCC (Cri) 1326] and so also the judgments of various High Courts following Narsingh Das Tapadia [Narsingh Das Tapadia v. Goverdhan Das Partani, that if the complaint under Section 138 is filed before the expiry of 15 days from the date on which notice has been served on the drawer/accused the same is premature and if on the date of taking cognizance a period of 15 days from the date of service of notice on the drawer/accused has expired, such complaint was legally maintainable and, hence, the same is overruled.

- Rather, the view taken by the Court in Sarav Investment & Financial Consultancy [Sarav Investment & Financial Consultancy (P) Ltd. v. Llyods Register of Shipping Indian Office Staff Provident Fund, (2007) 14 SCC 753 : (2009) 1 SCC (Cri) 935] wherein this Court held that service of notice in terms of Section 138 proviso (b) of the NI Act was a part of the cause of action for lodging the complaint and communication to the accused about the fact of dishonouring of the cheque and calling upon to pay the amount within 15 days was imperative in character, commends itself to us.

Question (ii)The other question is that if the answer to Question (i) is in the negative, can the complainant be permitted to present the complaint again notwithstanding the fact that the period of one month stipulated under Section 142(b) for the filing of such a complaint has expired.

The payee or the holder in due course of the cheque may file a fresh complaint within one month from the date of decision in the criminal case and, in that event, delay in filing the complaint will be treated as having been condoned under the proviso to clause (b) of Section 142 of the NI Act. This direction shall be deemed to be applicable to all such pending cases where the complaint does not proceed further in view of our answer to Question (i). As we have already held that a complaint filed before the expiry of 15 days from the date of receipt of notice issued under clause (c) of the proviso to Section 138 is not maintainable, the complainant cannot be permitted to present the very same complaint at any later stage. **His remedy is only to file a fresh complaint; and if the same could not be filed within the time prescribed under Section 142(b), his recourse is to seek the benefit of the proviso, satisfying the court of sufficient cause.**

Complaint U/s. 138- Maintainability - conditions precedent to applicability of sec. 138 - A cheque can be presented any number of times during the period of its validity- Whether dishonour of the cheque on each occasion of its presentation gives rise to a fresh cause of action within the meaning of Sec. 142(b) of the act - Held No. - A competent court can take cognizance of a written complaint of an offence u/s.138 if it is made within one month of the date on which the cause of action arises under clause c of Sec.142 gives it is a restrictive meaning - it is the failure to make payment within 15 days from date of receipt of notice which will give rise to cause of action - Cause of action within meaning of Sec. 142 (c) arises and can arise only once - impediments which negate concept of successive causes of action

Held.:

On each presentation of the cheque and its dishonour a fresh right and not cause of action - accrues in his favour. He may, therefore, without taking pre-emptory action in exercise of his right under clause (b) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque. But, once he gives a notice under clause (b) of Sec. 138 he forfeits such right for in case of failure of the drawer to pay the money within the stipulated time he would be liable for the offence and the cause of action for filing the complaint will arise. Needless to say, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawer expires. No action taken on the first notice - cheque presented again - second notice sent - on failure to receive money case filed on the basis of second notice - Acquittal on ground that there could not be more than one cause of action in respect of a single cheque - sustainable - Appellant had earlier taken recourse to clause (b) of Sec. 138 but did not avail of cause of action that arose in his favour u/s. 142(b) of the Act. Therefore it is essential that the notice should

be perfect and in conformity with law. A mistake in the notice will be fatal. It is common mistake committed by most of the payees that as soon as the cheque is returned unpaid to write a letter to the drawer threatening him that in case he does not pay against the dishonoured cheque legal action will be taken etc. Such letter will also be construed as a notice. Since a second notice cannot now be issued on the basis of subsequent dishonour of cheque, due care and caution should be taken while sending the notice on dishonour of cheque. As stated already that non-payment of cheque amount within the grace period of fifteen days from the date of receipt of the notice constitutes an offence and therefore liable to prosecuted for the criminal offence so committed.

Limitation:

These being a special legislation certain time limits have been laid down and they should be strictly followed. Any lapse in adhering to the schedule, shall take away a cause of action under Sec. 138. The time limits placed cannot be condoned by the Courts. Therefore the question of making an application for condonation of delay as in the case of civil does not arise at all under the said section. What then are the limitations one has to keep in one mind and follow them strictly to prosecute the drawer of cheque who has failed to pay the said sum within fifteen days from the receipt of the notice?

- Cheque should be presented to the bank for encashment within its validity period.
- Within fifteen days from the receipt of return memo indicating reason of dishonour, a notice should be sent demanding the amount of dishonored cheque.
- If the drawer does not pay the amount of dishonoured cheque within the grace period, a complaint thereafter should be filed within one month in the relevant court of Metropolitan Magistrate/Judicial Magistrate as the case may be, having jurisdiction.

Jurisdiction:

Territorial jurisdiction - Dishonour of cheque -

Facts of the Case

A cheuqe No.1950, drawn on the Union Bank of India, Chandigarh, was issued by Inderpal Singh to the appellant -M/s Bridgestone India Pvt. Ltd. The cheque was in the sum of Rs.26,958/-. The appellant -M/s Bridgestone India Pvt. Ltd. presented the above cheque at the IDBI Bank in Indore. The appellant received intimation of its being dishonoured on account of "…exceeds arrangement…" on 04.08.2006 at Indore.

Proceedings were initiated by the appellant in the Court of the Judicial Magistrate, First Class, Indore, under Section 138 of the Negotiable Instruments Act, 1881.

The accused-respondent -Inderpal Singh, preferred an application before the Judicial Magistrate, First Class contesting the territorial jurisdiction with respect to the above cheque drawn on the Union Bank of India, Chandigarh.

The Judicial Magistrate, First Class, Indore held that he had the territorial jurisdiction to adjudicate upon the controversy raised by the appellant – M/s Bridgestone India Pvt.Ltd. under Section 138 of the Negotiable Instruments Act, 1881.

The High Court accepted the prayer made by the accused-respondent -Inderpal Singh by holding, that the jurisdiction lay only before the Court wherein the original drawee bank was located,

namely, at Chandigarh, where-from the accused-respondent had issued the concerned cheque bearing No.1950, drawn on the Union Bank of India, Chandigarh.

Finding of the Court:

In view of second ordinance 2015, JMFC Indore would have jurisdiction.

(2016) 2 SCC 75 M/S BRIDGESTONE INDIA PVT. LTD. VERSUS

INDERPAL SINGH This judgment superseded the earlier judgment of the Hon'ble Supreme Court passed in **Dashrath Rupsingh Rathod Vs. State of Maharashtra reported in (2014) 9 SCC 129**

Dashrath Rupsingh Rathod has overruled Ishar Alloy Steels (2001) 3 SCC 609 which was followed by K. Bhaskaran (1999) 7 SCC 510 and both were overruled on this point by the judgment of Bridgestone India. Earlier in K. Bhaskaran has provided that the complainant can choose any of the follwing for institution of complainant

Complaint can be filed at any of the place: -

1. Where the cheque was drawn.
2. Where the cheque was presented for encashment.
3. Where the cheque was returned unpaid by drawee bank.
4. Where notice in writing was given to drawer of cheque demanding payment.
5. Where drawer of cheque failed to make payment within 15 days of receipt of notice.

Each of the five acts constituting offence could be done at 5 different localities. Hence one of the Courts exercising jurisdiction in one of the five local areas can become the place of trail for the offence under sec. 138 of the Act. In other words, the complainant can choose any one of those courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done.

The position has been clarified after amendment of section 142 as discussed herein above as the amendment to Section 142 (2) has been given force with retrospective effects.

METERS AND INSTRUMENTS PRIVATE LIMITED AND ANOTHER VS. KANCHAN MEHTA (2018) 1 SCC 560 at page 566

7. This Court has noted that the object of the statute was to facilitate smooth functioning of business transactions. The provision is necessary as in many transactions cheques were issued merely as a device to defraud the creditors. Dishonour of cheque causes incalculable loss, injury and inconvenience to the payee and credibility of business transactions suffers a setback. [Goa Plast (P) Ltd. v. Chico Ursula D'Souza, (2004) 2 SCC 235, p. 248, para 26 : 2004 SCC (Cri) 499] At the same time, it was also noted that nature of offence under Section 138 primarily related to a civil wrong and the 2002 Amendment specifically made it compoundable. [Vinay Devanna Nayak v. Ryot Sewa Sahakari Bank Ltd., (2008) 2 SCC 305 : (2008) 1 SCC (Civ) 542 : (2008) 1 SCC (Cri) 351] The offence was also described as "regulatory offence". The burden of proof was on the accused in view of presumption under Section 139 and the standard of proof was of "preponderance of probabilities". [Rangappa v. Sri Mohan, (2010) 11 SCC 441, p. 454, para 28 : (2010) 4 SCC (Civ) 477 : (2011) 1 SCC (Cri) 184] The object of the provision was described as both punitive as well as compensatory. The intention of the provision was to

ensure that the complainant received the amount of cheque by way of compensation. Though proceedings under Section 138 could not be treated as civil suits for recovery, the scheme of the provision, providing for punishment with imprisonment or with fine which could extend to twice the amount of the cheque or to both, made the intention of law clear. The complainant could be given not only the cheque amount but double the amount so as to cover interest and costs. Section 357(1)(b) CrPC provides for payment of compensation for the loss caused by the offence out of the fine. [R. Vijayan v. Baby, (2012) 1 SCC 260, p. 264, para 9 : (2012) 1 SCC (Civ) 79 : (2012) 1 SCC (Cri) 520] Where fine is not imposed, compensation can be awarded under Section 357(3) CrPC to the person who suffered loss. Sentence in default can also be imposed. The object of the provision is not merely penal but to make the accused honour the negotiable instruments. [Lafarge Aggregates & Concrete India (P) Ltd. v. Sukarsh Azad, (2014) 13 SCC 779, p. 781, para 7 : (2014) 5 SCC (Cri) 818]

the court has further given guidelines in the following terms:-

8. **In view of the above scheme, this Court held that the accused could make an application for compounding at the first or second hearing in which case the court ought to allow the same. If such application is made later, the accused was required to pay higher amount towards cost, etc.** [Damodar S. Prabhu v. Sayed Babalal H., (2010) 5 SCC 663 : (2010) 2 SCC (Civ) 520 : (2010) 2 SCC (Cri) 1328] **This Court has also laid down that even if the payment of the cheque amount, in terms of proviso (b) to Section 138 of the Act was not made, the court could permit such payment being made immediately after receiving notice/summons of the court.** [D. Vinod Shivappa v. Nanda Belliappa, (2006) 6 SCC 456 : (2006) 3 SCC (Cri) 114; C.C. Alavi Haji v. Palapetty Muhammed, (2007) 6 SCC 555 : (2007) 3 SCC (Cri) 236] The guidelines in Damodar [Damodar S. Prabhu v. Sayed Babalal H., (2010) 5 SCC 663 : (2010) 2 SCC (Civ) 520 : (2010) 2 SCC (Cri) 1328] have been held to be flexible as may be necessary in a given situation. [M.P. State Legal Services Authority v. Prateek Jain, (2014) 10 SCC 690, p. 701, para 23 : (2015) 1 SCC (Civ) 74 : (2015) 1 SCC (Cri) 211] Since the concept of compounding involves consent of the complainant, this Court held that compounding could not be permitted merely by unilateral payment, without the consent of both the parties. [Rajneesh Aggarwal v. Amit J. Bhalla, (2001) 1 SCC 631 : 2001 SCC (Cri) 229]

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

Vijayan Vs. Sadanandan 2009 (6) SCC 652 – Relying upon **K Bhaskar Vs. Shankaran Balan 1997 (7) SCC 510** – Wherein it was held that in cheque bouncing cases the Magistrate having limited jurisdiction to award fine should invoke section 357 (3) Cr.P.C. powers and award compensation, the amount of which is not limited; **Held** that an order to pay compensation may be enforced by awarding sentence in default.

Damodar S Prabhu Vs. S Babulal 2010 (3) SCC 663 provided guidelines of graded scale of fine to encourage early compounding of N.I. Act offences.

(i) In the summons direction be given that if compounding is preferred in first and second hearing it shall be without any cost.

(ii) If compounding is preferred at a later stage before the Magistrate 10% of the cheque amount shall be imposed as cost to be paid to legal Services Authority etc.

(iii) If compounding is preferred before the sessions / High Court the cost will increase to 15% and before Supreme Court it shall be 20% of the cheque amount.

Presumption

M/s. Kumar Exports Vs. M/s. Sharma Carpets (2009) 2 SCC 513 – The use of phrase "until the contrary is proved" in Section 118 and 139 of the Act read with definition of "may presume" and "shall presume" as given in section 4 of the Evidence Act makes it clear that the presumption raised are rebuttable. Once the rebuttable evidence are adduced and accepted by the court on the benchmark of preponderance of probability, the evidentiary burden shifts back on the complainant.

Krishna Rao Vs. Shankaragauda 2018 SCC Online SC 651

"This Court in Kumar Exports v. Sharma Carpets, (2009) 2 SCC 513, had considered the provisions of Negotiable Instruments Act as well Evidence Act. Referring to Section 139, this Court laid down following in paragraphs 14, 15, 18 and 19:

"14. Section 139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.

15. Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable), (2) "shall presume" (rebuttable), and (3) "conclusive presumptions" (irrebuttable). The term "presumption" is used to designate an inference, affirmative or disaffirmative of the existence of a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumption literally means "taking as true without examination or proof".

18. Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt

or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

19. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over."

19. This Court held that the accused may adduce evidence to rebut the presumption, but mere denial regarding existence of debt shall not serve any purpose. Following was held in paragraph 20:

"20…. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist…"

In case of Breach of settlement accepted by the court - consequences?

The matter has been put to rest now after the above referred verdict of M/s Meters and Instruments Pvt. Ltd case still the following case law has elucidated the matter with the following detailed discussion in the ruling of <u>Dayawati Vs Yogesh Kumar Gosain 2017 Scc Online Del 11032</u>

118. The instant reference has resulted because of the failure of the court to have recorded the settlement and undertakings binding the accused person in the complaint under Section 138 of the NI Act to abide by the settlement arrived at during mediation. There can be no manner of doubt that once a settlement is reported to the court and made the basis of seeking the court's indulgence, the parties ought not to be able to resile from such a position. So what is the remedy available to a complainant if the respondent commits breach of the mediation settlement and defaults in making the agreed payments?

119. Let us examine as to whether the legislature has provided any mechanism in the Cr.P.C. for recovery of monetary amounts.

120. We have extracted Section 421 of the Cr.P.C. above which provides the mechanism to recover fines, by issuing a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender and/or by issuing a warrant authorizing the realization of amounts as arrears of land revenue from movable and immovable property of the defaulter.

121. In the event of either party resiling from the agreed upon settlement which has received the imprimatur of the court, the party attempting to breach the settlement and undertaking cannot be permitted to avoid making the payment. Such party also should not be allowed to violate such undertaking given to the opposite side as well as the court.

122. In (2009) 6 SCC 652, Vijayan v. Sadanandan K., it was held that Section 431 read with Section 421 of the Cr.P.C. is applicable to recovery of compensation ordered under Section 357(5).

123. Section 431 Cr.P.C., also extracted above, provides if any money, other than a fine, is payable by virtue of any order made under the Cr.P.C., the method of recovery whereof is not expressly provided for, shall be recoverable in terms of Section 421 Cr.P.C.

124. In the event that a criminal court passes order accepting the mediated settlement between the parties and directs the accused to make payment in terms thereof, the settlement amount becomes payable under the order of the court. Such order having been passed in proceedings under Section 138 of the NI Act, would be an order under Section 147 of the NI Act and Section 320 of the Cr.P.C.

125. In proceedings where settlement is permitted under Section 320 of the Cr.P.C., it would be an order thereunder.

126. Where proceedings are disposed on settlement terms by the High Court, it would be an order passed in exercise of jurisdiction under Section 482 of the Cr.P.C. Upon breach of such order and non-payment of the agreed amounts, the same may be recoverable in terms of Section 431 read with Section 421 Cr.P.C.

CONCLUSION

Though insertion of the penal provisions have helped to curtail the issuance of cheques light heartedly or in a playful manner or with a dishonest intention and the trading community now feels more secured in receiving the payment through cheques. After going through the above discussions it is ample clear that it is not the case that there is no provision for recovery of the amount covered under the dishonoured cheque, in a case where accused is convicted under section 138 and the accused has served the sentence but, unable to deposit amount of fine, it is also not the case that the only option left with the complainant is to file civil suit. The provisions of the Act do not prohibit any other alternative method of realization of the amount due to the complainant on the cheque being dishonored for the reasons of "insufficient fund" in the drawer's account but the provisions of law as discussed in **Meters and Instruments Private Limited and Another vs. Kanchan Mehta (2018) 1 scc 560** and Dayawati's case[19] show that the criminal courts are empowered to get even the amount awarded as compensation recovered. The proper course to be adopted by the complainant in such a situation should be by filing an application before the same court for recovery of fine under section 412 or 431 Cr.P.C. as the case may be but filing of suit before the competent civil court, for realization/ recovery of the amount due to him for the reason of dishonoured cheque may not be required.

Biresh Kumar
Additional Director Cum Senior Faculty Member, Judicial Academy Jharkhand, Dhurva Ranchi

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19 2017 SCC Online Del 11032

DAMODAR S.PRABHU VERSUS SAYED BABALAL H.

(2010) 5 Supreme Court Cases 663

AIR 2010 SC 1907

Supreme Court of India

Before **Hon'ble Mr. Justice K.G. Balakrishnan, Hon'ble Mr. Justice P. Sathasivam, Hon'ble Mr. Justice J.M. Panchal**

Damodar S. Prabhu ... Appellant (s)
Versus
Sayed Babalal H. ... Respondent (s)

Decided on 3 May, 2010

Criminal Appeal No. 963 of 2010†

[Arising out of SLP (Crl.) No. 6369 of 2007]

WITH

CRIMINAL APPEAL NOS. 964-966 OF 2010†
[Arising out of SLP (Crl.) Nos. 6370-6372 of 2007]

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 appeal, that the accused pays 15% of Supreme Court, the figure would increase to 20% of the cheque amount.

ORDER

1. Leave granted. The present appeals are in respect of litigation involving the offence enumerated by Section 138 of the Negotiable Instruments Act, 1881 [Hereinafter `Act']. It is not necessary for us to delve into the facts leading up to the institution of proceedings before this Court since the appellant and the respondent have arrived at a settlement and prayed for the compounding of the offence as contemplated by Section 147 of the Act. It would suffice to say that the parties were involved in commercial transactions and that disputes had arisen on account of the dishonour of five cheques issued by the appellant. Thereafter, the parties went through the several stages of litigation before their dispute reached this Court by way of special leave petitions.

2. With regard to the impugned judgments delivered by the High Court of Bombay at Goa, the appellant has prayed for the setting aside of his conviction in these matters by relying on the consent terms that have been arrived at between the parties. The respondent has not

opposed this plea and, therefore, we allow the compounding of the offence and set aside the appellant's conviction in each of the impugned judgments.

3. However, there are some larger issues which can be appropriately addressed in the context of the present case. It may be recalled that Chapter XVII comprising sections 138 to 142 was inserted into the Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (66 of 1988). The object of bringing Section 138 into the statute was to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. It was to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficient arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers. If the cheque is dishonoured for insufficiency of funds in the drawer's account or if it exceeds the amount arranged to be paid from that account, the drawer is to be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both.

4. It may be noted that when the offence was inserted in the statute in 1988, it carried the provision for imprisonment up to one year, which was revised to two years following the amendment to the Act in 2002. It is quite evident that the legislative intent was to provide a strong criminal remedy in order to deter the worryingly high incidence of dishonour of cheques. While the possibility of imprisonment up to two years provides a remedy of a punitive nature, the provision for imposing a `fine which may extent to twice the amount of the cheque' serves a compensatory purpose. What must be remembered is that the dishonour of a cheque can be best described as a regulatory offence that has been created to serve the public interest in ensuring the reliability of these instruments. The impact of this offence is usually confined to the private parties involved in commercial transactions.

5. Invariably, the provision of a strong criminal remedy has encouraged the institution of a large number of cases that are relatable to the offence contemplated by Section 138 of the Act. So much so, that at present a disproportionately large number of cases involving the dishonour of cheques is choking our criminal justice system, especially at the level of Magistrates' Courts. As per the 213th Report of the Law Commission of India, more than 38 lakh cheque bouncing cases were pending before various courts in the country as of October 2008. This is putting an unprecedented strain on our judicial system.

6. Mr. Goolam E. Vahanvati, Solicitor General (now Attorney- General for India) had appeared as amicus curiae in the present matter and referred to the facts herein as an illustration of how parties involved in cheque bounce cases usually seek the compounding of the offence at a very late stage. The interests of justice would indeed be better served if parties resorted to compounding as a method to resolve their disputes at an early stage instead of engaging in protracted litigation before several forums, thereby causing undue delay, expenditure and strain on part of the judicial system. This is clearly a situation that is causing some concern, since Section 147 of the Act does not prescribe as to what stage is appropriate for compounding the offence and whether the same can be done at the instance of the complainant or with the leave of the court.

7. The learned Attorney General stressed on the importance of using compounding as an expedient method to hasten the disposal of cases. In this regard, the learned Attorney General

has proposed that this Court should frame some guidelines to disincentivise litigants from seeking the compounding of the offence at an unduly late stage of litigation. In other words, judicial directions have been sought to nudge litigants in cheque bounce cases to opt for compounding during the early stages of litigation, thereby bringing down the arrears.

8. Before examining the guidelines proposed by the learned Attorney General, it would be useful to clarify the position relating to the compounding of offences under the Negotiable Instruments Act, 1881. Even before the insertion of Section 147 in the Act (by way of an amendment in 2002) some High Courts had permitted the compounding of the offence contemplated by Section 138 during the later stages of litigation. In fact in O.P. Dholakia v. State of Haryana[1], a division bench of this Court had permitted the compounding of the offence even though the petitioner's conviction had been upheld by all the three designated forums. After noting that the petitioner had already entered into a compromise with the complainant, the bench had rejected the State's argument that this Court need not interfere with the conviction and sentence since it was open to the parties to enter into a compromise at an earlier stage and that they had not done so. The bench had observed:-

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

Similar reliefs were granted in orders reported as Sivasankaran v. State of Kerala[2], Kishore Kumar v. J.K. Corporation Ltd.[3] and Sailesh Shyam Parsekar v. Baban[4], among other cases.

9. As mentioned above, the Negotiable Instruments Act, 1881 was amended by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 which inserted a specific provision, i.e. Section 147 `to make the offences under the Act compoundable'. We can refer to the following extract from the Statement of Objects and Reasons attached to the 2002 amendment which is self- explanatory:-

"Prefatory Note - Statement of Objects and Reasons. - The Negotiable Instruments Act, 1881 was amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 wherein a new Chapter XVII was incorporated for penalties in case of dishonour of cheques due to insufficiency of funds in the account of the drawer of the cheque. These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument. The existing provisions in the Negotiable Instruments Act, 1881, namely, Sections 138 to 142 in Chapter XVII have been found deficient in dealing with dishonour of cheques. Not only the punishment provided in the Act has proved to be inadequate, the procedure prescribed for the courts to deal with such matters has been found to be cumbersome. The courts are unable to dispose of such cases expeditiously in a time bound manner in view of the procedure contained in the Act. ..."

(emphasis supplied)

In order to address the deficiencies referred to above, Section 10 of the 2002 amendment inserted Sections 143, 144, 145, 146 and 147 into the Act, which deal with aspects such as the power of the Court to try cases summarily (Section 143), Mode of service of summons (Section 144), Evidence on affidavit (Section 145), Bank's slip to be considered as prima facie evidence of certain facts (Section 146) and Offences under the Act to be compoundable (Section 147).

10. At present, we are of course concerned with Section 147 of the Act, which reads as follows:-

"147. Offences to be compoundable. - Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable."

At this point, it would be apt to clarify that in view of the non-obstante clause, the compounding of offences under the Negotiable Instruments Act, 1881 is controlled by Section 147 and the scheme contemplated by Section 320 of the Code of Criminal Procedure [Hereinafter `CrPC'] will not be applicable in the strict sense since the latter is meant for the specified offences under the Indian Penal Code, 1860.

11. So far as the CrPC is concerned, Section 320 deals with offences which are compoundable, either by the parties without the leave of the court or by the parties but only with the leave of the Court. Sub-section (1) of Section 320 enumerates the offences which are compoundable without the leave of the Court, while sub- section (2) of the said section specifies the offences which are compoundable with the leave of the Court.

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

13. In Vinay Devanna Nayak v. Ryot Sewa Sahakari Bank Ltd.[5] this Court had examined `whether an offence punishable under Section 138 of the Act which is a special law can be compounded'. After taking note of a divergence of views in past decisions, this Court took the following position (C.K. Thakker, J. at Para. 17):-

"17. ... This provision is intended to prevent dishonesty on the part of the drawer of negotiable instruments in issuing cheques without sufficient funds or with a view to inducing the payee or holder in due course to act upon it. It thus seeks to promote the efficacy of bank operations and ensures credibility in transacting business through cheques. In such matters, therefore, normally compounding of offences should not be denied. Presumably, Parliament also realised this aspect and inserted Section 147 by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 (Act 55 of 2002). ..."

In the same decision, the court had also noted (Para. 11):-

"11. ... Certain offences are very serious in which compromise or settlement is not permissible. Some other offences, on the other hand, are not so serious and the law may allow the parties to settle them by entering into a compromise. The compounding of an offence signifies that the person against whom an offence has been committed has received some gratification to an act as an inducement for his abstaining from proceeding further with the case."

14. It would also be pertinent to refer to this Court's decision in R. Rajeshwari v. H.N. Jagadish[6], wherein the following observations were made (S.B. Sinha, J. at Para. 12):-

"12. Negotiable Instruments Act is a special Act. Section 147 provides for a non obstante clause, stating:

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

Indisputably, the provisions of the Code of Criminal Procedure, 1973 would be applicable to the proceedings pending before the courts for trial of offences under the said Act. Stricto sensu, however, the table appended to Section 320 of the Code of Criminal Procedure is not attracted as the provisions mentioned therein refer only to provisions of the Penal Code and none other."

15. The compounding of the offence at later stages of litigation in cheque bouncing cases has also been held to be permissible in a recent decision of this Court, reported as K.M. Ibrahim v. K.P. Mohammed & Anr.[7], wherein Kabir, J. has noted (at Paras. 13, 14):-

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

14. It is true that the application under Section 147 of the Negotiable Instruments Act was made by the parties after the proceedings had been concluded before the Appellate Forum. However, Section 147 of the aforesaid Act does not bar the parties from compounding an offence under Section 138 even at the appellate stage of the proceedings. Accordingly, we find no reason to reject the application under Section 147 of the aforesaid Act even in a proceeding under Article 136 of the Constitution."

16. It is evident that the permissibility of the compounding of an offence is linked to the perceived seriousness of the offence and the nature of the remedy provided. On this point we can refer to the following extracts from an academic commentary [Cited from: K.N.C. Pillai, R.V. Kelkar's Criminal Procedure, 5th edn. (Lucknow: Eastern Book Company, 2008) at p. 444]:-

"17.2. Compounding of offences.— A crime is essentially a wrong against the society and the State. Therefore, any compromise between the accused person and the individual victim of the crime should not absolve the accused from criminal responsibility. However, where the offences are essentially of a private nature and relatively not quite serious, the Code considers it expedient to recognize some of them as compoundable offences and some others as compoundable only with the permission of the court. ..."

17. 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 (in so far 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 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."

18. It is quite obvious that with respect to the offence of dishonour of cheques, it is the compensatory aspect of the remedy which should be given priority over the punitive aspect. There is also some support for the apprehensions raised by the learned Attorney General that a majority of cheque bounce cases are indeed being compromised or settled by way of compounding, albeit during the later stages of litigation thereby contributing to undue delay in justice- delivery. The problem herein is with the tendency of litigants to belatedly choose compounding as a means to resolve their dispute. Furthermore, the written submissions filed on behalf of the learned Attorney General have stressed on the fact that unlike Section 320 of the CrPC, Section 147 of the Negotiable Instruments Act provides no explicit guidance as to what stage compounding can or cannot be done and whether compounding can be done at the instance of the complainant or with the leave of the court.

19. As mentioned earlier, the learned Attorney General's submission is that in the absence of statutory guidance, parties are choosing compounding as a method of last resort instead of opting for it as soon as the Magistrates take cognizance of the complaints. One explanation for such behaviour could be that the accused persons are willing to take the chance of progressing through the various stages of litigation and then choose the route of settlement only when no other route remains. While such behaviour may be viewed as rational from the viewpoint of litigants, the hard facts are that the undue delay in opting for compounding contributes to the arrears pending before the courts at various levels. If the accused is willing to settle or compromise by way of compounding of the offence at a later stage of litigation, it is generally indicative of some merit in the complainant's case. In such cases it would be desirable if parties choose compounding during the earlier stages of litigation. If however, the accused has a valid defence such as a mistake, forgery or coercion among other grounds, then the matter can be litigated through the specified forums.

20. It may be noted here that Section 143 of the Act makes an offence under Section 138 triable by a Judicial Magistrate First Class (JMFC). After trial, the progression of further legal proceedings would depend on whether there has been a conviction or an acquittal.

- In the case of conviction, an appeal would lie to the Court of Sessions under Section 374(3)(a) of the CrPC; thereafter a Revision to the High Court under Section 397/401 of the CrPC and finally a petition before the Supreme Court, seeking special leave to appeal under 136 of the Constitution of India. Thus, in case of conviction there will be four levels of litigation.
- In the case of acquittal by the JMFC, the complainant could appeal to the High Court under Section 378(4) of the CrPC, and thereafter for special leave to appeal to the Supreme Court under Article 136. In such an instance, therefore, there will be three levels of proceedings.

21. With regard to the progression of litigation in cheque bouncing cases, the learned Attorney General has urged this Court to frame guidelines for a graded scheme of imposing costs on parties who unduly delay compounding of the offence. It was submitted that the requirement

of deposit of the costs will act as a deterrent for delayed composition, since at present, free and easy compounding of offences at any stage, however belated, gives an incentive to the drawer of the cheque to delay settling the cases for years. An application for compounding made after several years not only results in the system being burdened but the complainant is also deprived of effective justice. In view of this submission, we direct that the following guidelines be followed:-

THE GUIDELINES

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

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

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

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

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

22. 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 Services Authority and those imposed in connection with composition before the Supreme Court should be deposited with the National Legal Services Authority.

22. We are also in agreement with the Learned Attorney General's suggestions for controlling the filing of multiple complaints that are relatable to the same transaction. It was submitted that complaints are being increasingly filed in multiple jurisdictions in a vexatious manner which causes tremendous harassment and prejudice to the drawers of the cheque. For instance, in the same transaction pertaining to a loan taken on an installment basis to be repaid in equated monthly installments, several cheques are taken which are dated for each monthly installment and upon the dishonor of each of such cheques, different complaints are being filed in different courts which may also have jurisdiction in relation to the complaint. In light of this submission, we direct that it should be mandatory for the complainant to disclose that no other complaint has been filed in any other court in respect of the same transaction. Such a disclosure should be made on a sworn affidavit which should accompany the complaint filed under Section 200 of the CrPC. If it is found that such multiple complaints have been filed,

orders for transfer of the complaint to the first court should be given, generally speaking, by the High Court after imposing heavy costs on the complainant for resorting to such a practice. These directions should be given effect prospectively.

24. We are also conscious of the view that the judicial endorsement of the above quoted guidelines could be seen as an act of judicial law-making and therefore an intrusion into the legislative domain. It must be kept in mind that Section 147 of the Act does not carry any guidance on how to proceed with the compounding of offences under the Act. We have already explained that the scheme contemplated under Section 320 of the CrPC cannot be followed in the strict sense. In view of the legislative vacuum, we see no hurdle to the endorsement of some suggestions which have been designed to discourage litigants from unduly delaying the composition of the offence in cases involving Section 138 of the Act.

25. The graded scheme for imposing costs is a means to encourage compounding at an early stage of litigation. In the status quo, valuable time of the Court is spent on the trial of these cases and the parties are not liable to pay any Court fee since the proceedings are governed by the Code of Criminal Procedure, even though the impact of the offence is largely confined to the private parties. Even though the imposition of costs by the competent court is a matter of discretion, the scale of costs has been suggested in the interest of uniformity. The competent Court can of course reduce the costs with regard to the specific facts and circumstances of a case, while recording reasons in writing for such variance. Bona fide litigants should of course contest the proceedings to their logical end.

26. Even in the past, this Court has used its power to do complete justice under Article 142 of the Constitution to frame guidelines in relation to subject-matter where there was a legislative vacuum.

27. The present set of appeals are disposed of accordingly.

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† Arising out of SLPs (Cri.) Nos. 6370-72 of 2007
1. (2000) 1 SCC 762 : 2000 SCC (Cri) 310
2. (2002) 8 SCC 164 : 2002 SCC (Cri) 1872
3. (2004) 13 SCC 494 : 2006 1 SCC (Cri) 348
4. (2005) 4 SCC 162 : 2005 SCC (Cri) 1321
5. (2008) 2 SCC 305 : 2008 1 SCC (Cri) 351
6. (2008) 4 SCC 82 : 2008 2 SCC (Cri) 186
7. (2010) 1 SCC 798 : 2010 1 SCC (Cri) 921 : (2009) 14 Scale 262

DASHRATH RUPSINGH RATHOD VERSUS STATE OF MAHARASHTRA & ANR

(2014) 9 Supreme Court Cases 129

Supreme Court of India

Before **Hon'ble Mr. Justice T.S. Thakur, Hon'ble Mr. Justice Vikramajit Sen, Hon'ble Mr. Justice C. Nagappan**

Dashrath Rupsingh Rathod ..Appellant
Versus
State of Maharashtra & Anr. ..Respondents

Decided on 1 August, 2014

CRIMINAL APPEAL NO. 2287 OF 2009

WITH
CRIMINAL APPEAL NO. 1593 OF 2014
[Arising out of S.L.P.(Crl.)No.2077 of 2009];

CRIMINAL APPEAL NO. 1594 OF 2014
[Arising out of S.L.P.(Crl.)No.2112 of 2009];

CRIMINAL APPEAL NO. 1595 OF 2014
[Arising out of S.L.P.(Crl.)No.2117 of 2009];

CRIMINAL APPEAL NOS. 1596-1600 OF 2014
[Arising out of S.L.P.(Crl.)Nos.1308-1312 of 2009];

CRIMINAL APPEAL NO.1601 OF 2014
[Arising out of S.L.P.(Crl.)No.3762 of 2012];

CRIMINAL APPEAL NO. 1602 OF 2014
[Arising out of S.L.P.(Crl.)No.3943 of 2012];

CRIMINAL APPEAL NO.1603 OF 2014
[Arising out of S.L.P.(Crl.)No.3944 of 2012]; AND

CRIMINAL APPEAL NO. 1604 OF 2014
[Arising out of S.L.P.(Crl.)No.59 of 2013].

Complainant is statutority bound to comply with Ss, 177 to 179 CrPC and therefore the place or situs where the S. 138 NI Act complaint is to be filed is not of the choosing of complainant K. Bhaskaran, (1999) 7 SCC 510 overruled on this point. All other complaints shall be returned to the complainant for filing in the proper court – Thus, criminal appeals pending before Supreme Court on the issue of territorial jurisdiction disposed of in light of law laid down herein – Criminal Procedure Code, 1973, Ss. 177 to 179. Proviso to S. 138 simply postpones the actual prosecution of the offender till such time he fails to pay the amount within the statutory period prescribed for such payment – Parliament in its

wisdom considered it just and proper to give to the drawer of a dishonoured cheque an opportunity to pay up the amount before permitting his prosecution, no matter the offence is complete the moment the cheque was dishonoured. To this extent K. Bhaskaran, (1999) 7 SCC 510 is correct in that the satisfaction of all these ingredients of Section 138 and its proviso, is essential for the successful initiation or launch of the prosecution. No manner of adoubt that the return of the cheque by the drawee bank alone constitutes the commission of the offence and indicates the place where the offence is committed. The place, situs or venue of judicial inquiry and trial of the offence must logically be restricted to where the drawee bank is located.

JUDGMENT

VIKRAMAJIT SEN, J.

Leave granted in Special Leave Petitions. These Appeals raise a legal nodus of substantial public importance pertaining to Courts territorial jurisdiction concerning criminal complaints filed under Chapter XVII of the Negotiable Instruments Act, 1881 (for short, the NI Act). This is amply adumbrated by the Orders dated 3.11.2009 in I.A.No.1 in CC 15974/2009 of the three-Judge Bench presided over by the then Honble the Chief Justice of India, Honble Mr. Justice V.S. Sirpurkar and Honble Mr. Justice P. Sathasivam which SLP is also concerned with the interpretation of Section 138 of the NI Act, and wherein the Bench after issuing notice on the petition directed that it be posted before the three-Judge Bench.

PRECEDENTS The earliest and the most often quoted decision of this Court relevant to the present conundrum is K. Bhaskaran v. Sankaran Vaidhyan Balan (1999) 7 SCC 510 wherein a two-Judge Bench has, inter alia, interpreted Section 138 of the NI Act to indicate that, the offence under Section 138 can be completed only with the concatenation of a number of acts. Following are the acts which are components of the said offence: (1) Drawing of the cheque, (2) Presentation of the cheque to the bank, (3) Returning the cheque unpaid by the drawee bank, (4) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) Failure of the drawer to make payment within 15 days of the receipt of the notice. The provisions of Sections 177 to 179 of the Code of Criminal Procedure, 1973 (for short, CrPC) have also been dealt with in detail.

Furthermore, Bhaskaran in terms draws a distinction between giving of notice and receiving of notice. This is for the reason that clause (b) of proviso to Section 138 of the NI Act postulates a demand being made by the payee or the holder in due course of the dishonoured cheque by giving a notice in writing to the drawer thereof. While doing so, the question of the receipt of the notice has also been cogitated upon.

The issuance and the receipt of the notice is significant because in a subsequent judgment of a Coordinate Bench, namely, Harman Electronics Pvt. Ltd. v. National Panasonic India Pvt. Ltd. (2009) 1 SCC 720 emphasis has been laid on the receipt of the notice, inter alia, holding that the cause of action cannot arise by any act of omission or commission on the part of the accused, which on a holistic reading has to be read as complainant. It appears that Harman transacted business out of Chandigarh only, where the Complainant also maintained an office, although its Head Office was in Delhi. Harman issued the cheque to the Complainant at Chandigarh; Harman had its bank account in Chandigarh alone. It is unclear where the Complainant presented the cheque for encashment but it issued the Section 138 notice from Delhi. In those circumstances, this Court had observed that the only question for consideration was whether sending of notice from Delhi itself would

give rise to a cause of action for taking cognizance under the NI Act. It then went on to opine that the proviso to this Section imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. We respectfully agree with this statement of law and underscore that in criminal jurisprudence there is a discernibly demarcated difference between the commission of an offence and its cognizance leading to prosecution. The Harman approach is significant and sounds a discordant note to the Bhaskaran ratio. Harman also highlights the reality that Section 138 of the NI Act is being rampantly misused so far as territorial jurisdiction for trial of the Complaint is concerned. With the passage of time equities have therefore transferred from one end of the pendulum to the other. It is now not uncommon for the Courts to encounter the issuance of a notice in compliance with clause (b) of the proviso to Section 138 of the NI Act from a situs which bears no connection with the Accused or with any facet of the transaction between the parties, leave aside the place where the dishonour of the cheque has taken place. This is also the position as regards the presentation of the cheque, dishonour of which is then pleaded as the territorial platform of the Complaint under Section 138 of the NI Act. Harman, in fact, duly heeds the absurd and stressful situation, fast becoming common-place where several cheques signed by the same drawer are presented for encashment and requisite notices of demand are also despatched from different places. It appears to us that justifiably so at that time, the conclusion in Bhaskaran was influenced in large measure by curial compassion towards the unpaid payee/holder, whereas with the passage of two decades the manipulative abuse of territorial jurisdiction has become a recurring and piquant factor. The liberal approach preferred in Bhaskaran now calls for a stricter interpretation of the statute, precisely because of its misemployment so far as choice of place of suing is concerned. These are the circumstances which have propelled us to minutely consider the decisions rendered by two-Judge Benches of this Court. It is noteworthy that the interpretation to be imparted to Section 138 of the NI Act also arose before a three-Judge Bench in Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd. (2001) 3 SCC 609 close on the heels of Bhaskaran. So far as the factual matrix is concerned, the dishonoured cheque had been presented for encashment by the Complainant/holder in his bank within the statutory period of six months but by the time it reached the drawers bank the aforementioned period of limitation had expired. The question before the Court was whether the bank within the postulation of Section 138 read with Sections 3 and 72 of the NI Act was the drawee bank or the collecting bank and this Court held that it was the former. It was observed that non-presentation of the cheque to the drawee bank within the period specified in the Section would absolve the person issuing the cheque of his criminal liability under Section 138 of the NI Act, who otherwise may be liable to pay the cheque amount to the payee in a civil action initiated under the law. A combined reading of Sections 3, 72 and 138 of the NI Act would leave no doubt in our mind that the law mandates the cheque to be presented at the bank on which it is drawn if the drawer is to be held criminally liable. Clearly, and in our considered opinion rightly, the Section had been rendered 'accused-centric. This decision clarifies that the place where a complainant may present the cheque for encashment would not confer or create territorial jurisdiction, and in this respect runs counter to the essence of Bhaskaran which paradoxically, in our opinion, makes actions of the Complainant an integral nay nuclear constituent of the crime itself.

The principle of precedence should promptly and precisely be paraphrased. A co-ordinate Bench is bound to follow the previously published view; it is certainly competent to add to the precedent to make it logically and dialectically compelling. However, once a decision of a larger Bench has been delivered it is that decision which mandatorily has to be applied; whereas a Co-ordinate Bench, in the event that it finds itself unable to agree with an existing ratio, is competent to recommend the

precedent for reconsideration by referring the case to the Chief Justice for constitution of a larger Bench. Indubitably, there are a number of decisions by two- Judge Benches on Section 138 of the NI Act, the majority of which apply Bhaskaran without noting or distinguishing on facts Ishar Alloy. In our opinion, it is imperative for the Court to diligently distill and then apply the ratio of a decision; and the view of a larger Bench ought not to be disregarded. Inasmuch as the three-Judge Bench in Ishar Alloy has categorically stated that for criminal liability to be attracted, the subject cheque has to be presented to the bank on which it is drawn within the prescribed period, Bhaskaran has been significantly whittled down if not overruled. Bhaskaran has also been drastically diluted by Harman inasmuch as it has given primacy to the service of a notice on the Accused instead of its mere issuance by the Complainant.

In Prem Chand Vijay Kumar v. Yashpal Singh (2005) 4 SCC 417, another two- Judge Bench held that upon a notice under Section 138 of the NI Act being issued, a subsequent presentation of a cheque and its dishonour would not create another cause of action which could set the Section 138 machinery in motion. In that view, if the period of limitation had run out, a fresh notice of demand was bereft of any legal efficacy. SIL Import, USA v. Exim Aides Silk Exporters (1999) 4 SCC 567 was applied in which the determination was that since the requisite notice had been despatched by FAX on 26.6.1996 the limitation for filing the Section 138 Complaint expired on 26.7.1996. What is interesting is the observation that four constituents of Section 138 are required to be proved to successfully prosecute the drawer of an offence under Section 138 of the NI Act (emphasis supplied).

It is also noteworthy that instead of the five Bhaskaran concomitants, only four have been spelt out in the subsequent judgment in Prem Chand. The commission of a crime was distinguished from its prosecution which, in our considered opinion, is the correct interpretation of the law. In other words, the four or five concomitants of the Section have to be in existence for the initiation as well as the successful prosecution of the offence, which offence however comes into existence as soon as subject cheque is dishonoured by the drawee bank. Another two-Judge Bench in Shamshad Begum v. B. Mohammed (2008) 13 SCC 77 speaking through Pasayat J this time around applied Bhaskaran and concluded that since the Section 138 notice was issued from and replied to Mangalore, Courts in that city possessed territorial jurisdiction. As already noted above, this view is not reconcilable with the later decision of Harman. The two-Judge Bench decision in Mosaraf Hossain Khan v. Bhagheeratha Engg. Ltd. (2006) 3 SCC 658 requires to be discussed in some detail. A Complaint under Section 138 of the NI Act was filed and cognizance was taken by the Chief Judicial Magistrate, Birbhum at Suri, West Bengal for the dishonour of a number of cheques issued by the accused-company which had its headquarters in Ernakulam, Kerala where significantly the accused-companys bank on whom the dishonoured cheques had been drawn was located. Several judgments were referred to, but not Bhaskaran. The third ingredient in Bhaskaran, i.e. the returning of the cheque unpaid by the drawee bank, was not reflected upon. Inasmuch as Mosaraf Hossain refers copiously to the cause of action having arisen in West Bengal without adverting at all to Bhaskaran, leave aside the three-Judge Bench decision in Ishar Alloy, the decision may be seen as per incuriam. Moreover, the concept of forum non conveniens has no role to play under Section 138 of the NI Act, and furthermore that it can certainly be contended by the accused-company that it was justifiable/convenient for it to initiate litigation in Ernakulam. If Bhaskaran was followed, Courts in Ernakulam unquestionably possessed territorial jurisdiction. It is, however, important to italicize that there was an unequivocal endorsement of the Bench of a previously expressed view that, where the territorial jurisdiction is concerned the main factor to be considered is the place where the alleged offence was committed. In similar vein,

this Court has opined in Om Hemrajani v. State of U.P. (2005) 1 SCC 617, in the context of Sections 177 to 180 CrPC that for jurisdiction emphasis is on the place where the offence is committed. The territorial jurisdiction conundrum which, candidly is currently in the cauldron owing to varying if not conflicting ratios, has been cogitated upon very recently by a two-Judge Bench in Criminal Appeal No.808 of 2013 titled Nishant Aggarwal v. Kailash Kumar Sharma decided on 1.7.2013 and again by the same Bench in Criminal Appeal No.1457 of 2013 titled Escorts Limited v. Rama Mukherjee decided on 17.09.2013. Bhaskaran was followed and Ishar Alloy and Harman were explained. In Nishant the Appellant issued a post-dated cheque drawn on Standard Chartered Bank, Guwahati in favour of complainant-respondent. It appears that the Appellant had endeavoured to create a case or rather a defence by reporting to his bank in Guwahati as well as to the local police station that one cheque (corresponding to the cheque in question) was missing and hence payment should be stopped. The Respondent-drawer was a resident of District Bhiwani, Haryana; he presented the cheque for encashment at Canara Bank, Bhiwani but it was returned unpaid. The holder then issued a legal notice which failed to elicit the demanded sum of money corresponding to the cheque value, and thereupon followed it by the filing of a criminal complaint under Sections 138 and 141 of the NI Act at Bhiwani. The Judicial Magistrate, Bhiwani, vide order dated 5.3.2011, concluded that the court in Bhiwani did not possess territorial jurisdiction and he accordingly returned the complaint for presentation before the proper Court. The five concomitants of Section 138 extracted in Bhaskaran, were reiterated and various paragraphs from it were reproduced by this Court. Nishant also did not follow Ishar Alloy which, as already analysed, has concluded that the second Bhaskaran concomitant, namely, presentation of cheque to the bank refers to the drawee bank and not the holders bank, is not primarily relevant for the determination of territorial jurisdiction. Nishant distinguished Ishar Alloy on the predication that the question of territorial jurisdiction had not been raised in that case. It is axiomatic that when a Court interprets any statutory provision, its opinion must apply to and be determinate in all factual and legal permutations and situations. We think that he dictum in Ishar Alloy is very relevant and conclusive to the discussion in hand. It also justifies emphasis that Ishar Alloy is the only case before us which was decided by a three-Judge Bench and, therefore, was binding on all smaller Benches. We ingeminate that it is the drawee Bank and not the Complainants Bank which is postulated in the so-called second constituent of Section 138 of the NI Act, and it is this postulate that spurs us towards the conclusion that we have arrived at in the present Appeals. There is also a discussion of Harman to reiterate that the offence under Section 138 is complete only when the five factors are present. It is our considered view, which we shall expound upon, that the offence in the contemplation of Section 138 of the NI Act is the dishonour of the cheque alone, and it is the concatenation of the five concomitants of that Section that enable the prosecution of the offence in contradistinction to the completion/commission of the offence.

We have also painstakingly perused Escorts Limited which was also decided by the Nishant two-Judge Bench. Previous decisions were considered, eventually leading to the conclusion that since the concerned cheque had been presented for encashment at New Delhi, its Metropolitan Magistrate possessed territorial jurisdiction to entertain and decide the subject Complaint under Section 138 of the NI Act. Importantly, in a subsequent order, in FIL Industries Ltd. v. Imtiyaz Ahmed Bhat passed on 12th August 2013, it was decided that the place from where the statutory notice had emanated would not of its own have the consequence of vesting jurisdiction upon that place. Accordingly, it bears repetition that the ratio in Bhaskaran has been drastically diluted in that the situs of the notice, one of the so-called five ingredients of Section 138, has now been held not to clothe that Court with territorial competency. The conflicting or incongruent opinions need to be resolved.

JUDICIAL APPROACH ON JURISDICTION We shall take a short digression in terms of brief discussion of the approach preferred by this Court in the context of Section 20 of the Code of Civil Procedure, 1908 (hereinafter referred to as, CPC), which inter alia, enjoins that a suit must be instituted in a court within the local limits of whose jurisdiction the Defendant actually and voluntarily resides, or carries on business, or personally works for gain, or where the cause of action wholly or in part arises. The Explanation to that Section is important; it prescribes that a corporation shall be deemed to carry on business at its sole or principal office, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place. Since this provision primarily keeps the Defendant in perspective, the corporation spoken of in the Explanation, obviously refers to the Defendant. A plain reading of Section 20 of the CPC arguably allows the Plaintiff a multitude of choices in regard to where it may institute its lis, suit or action. Corporations and partnership firms, and even sole proprietorship concerns, could well be transacting business simultaneously in several cities. If sub-sections (a) and (b) of Section 20 are to be interpreted disjunctively from sub-section (c), as the use of the word or appears to permit the Plaintiff to file the suit at any of the places where the cause of action may have arisen regardless of whether the Defendant has even a subordinate office at that place. However, if the Defendants location is to form the fulcrum of jurisdiction, and it has an office also at the place where the cause of action has occurred, it has been held that the Plaintiff is precluded from instituting the suit anywhere else. Obviously, this is also because every other place would constitute a forum non conveniens. This Court has harmonised the various hues of the conundrum of the place of suing in several cases and has gone to the extent of laying down that it should be courts endeavour to locate the place where the cause of action has substantially arisen and reject others where it may have incidentally arisen. Patel Roadways Limited, Bombay v. Prasad Trading Company, AIR 1992 SC 1514 = (1991) 4 SCC 270 prescribes that if the Defendant-corporation has a subordinate office in the place where the cause of action arises, litigation must be instituted at that place alone, regardless of the amplitude of options postulated in Section 20 of the CPC. We need not dilate on this point beyond making a reference to ONGC v. Utpal Kumar Basu (1994) 4 SCC 711 and South East Asia Shipping Co. Ltd. v. Nav Bharat Enterprises Pvt. Ltd. (1996) 3 SCC 443.

We are alive to the possible incongruities that are fraught in extrapolating decisions relating to civil law onto criminal law, which includes importing the civil law concept of cause of action to criminal law which essentially envisages the place where a crime has been committed empowers the Court at that place with jurisdiction. In Navinchandra N. Majithia v. State of Maharashtra (2000) 7 SCC 640 this Court had to consider the powers of High Courts under Article 226(2) of the Constitution of India. Noting the presence of the phrase cause of action therein it was clarified that since some events central to the investigation of the alleged crime asseverated in the Complaint had taken place in Mumbai and especially because the fundamental grievance was the falsity of the Complaint filed in Shillong, the writ jurisdiction of the Bombay High Court was unquestionably available. The infusion of the concept of cause of action into the criminal dispensation has led to subsequent confusion countenanced in High Courts. It seems to us that Bhaskaran allows multiple venues to the Complainant which runs counter to this Courts preference for simplifying the law. Courts are enjoined to interpret the law so as to eradicate ambiguity or nebulousness, and to ensure that legal proceedings are not used as a device for harassment, even of an apparent transgressor of the law.

Laws endeavour is to bring the culprit to book and to provide succour for the aggrieved party but not to harass the former through vexatious proceedings. Therefore, precision and exactitude are necessary especially where the location of a litigation is concerned.

RELEVANT PROVISIONS The provisions which will have to be examined and analysed are reproduced for facility of reference :

1 Negotiable Instruments Act, 1881 138. Dishonour of cheque for insufficiency, etc., of funds in the account.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the 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.

(b) the payee or the holder in due course of the cheque, as the case may be, 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 thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation. For the purposes of this section, debt or other liability means a legally enforceable debt or other liability.

142. Cognizance of offences.-Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

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

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

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

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138. Code of Criminal Procedure, 1973

177. Ordinary place of inquiry and trial.- Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.

178. Place of inquiry or trial.- (a) When it is uncertain in which of several local areas an offence was committed, or

(b) where an offence is committed partly in one local area and partly in another, or

(c) where an offence is a continuing one, and continues to be committed in more local areas than one, or

(d) where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

179. Offence triable where act is done or consequence ensues.- When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued. PARLIAMENTARY DEBATES The XVIIth fasciculus of the Negotiable Instruments Act containing Sections 138 to 142 was introduced into the statute in 1988. The avowed intendment of the amendment was to enhance the acceptability of cheques. It was based on the Report of the Committee on Banking Laws by Dr. Rajamannar, submitted in 1975, which suggested, inter alia, penalizing the issuance of cheque without sufficient funds. The Minister of Finance had assuaged apprehensions by arguing that safeguards for honest persons had been incorporated in the provisions, viz., (i) the cheque should have been issued in discharge of liability; (ii) the cheque should be presented within its validity period; (iii) a Notice had to be sent by the Payee demanding payment within 15 days of receiving notice of dishonour; (iv) the drawer was allowed to make payment within 15 days from the date of receipt of notice; (v) Complaint was to be made within one month of the cause of action arising; (vi) no Court inferior to that of MM or JMFC was to try the offence. The Finance Minister had also stated that the Court had discretion whether the Drawer would be imprisoned or/ and fined. Detractors, however, pointed out that the IPC already envisioned criminal liability for cheque-bouncing where dishonest or fraudulent intention or mens rea on part of the Drawer was evident, namely, cheating, fraud, criminal breach of trust etc. Therefore, there was no justification to make the dishonour of cheques a criminal offence, ignoring factors like illiteracy, indispensable necessities, honest/innocent mistake, bank frauds, bona fide belief, and/or unexpected attachment or freezing of account in any judicial proceedings as it would bring even honest persons within the ambit of Section 138 NI Act. The possibility of abusing the provision as a tool of harassment could also not be ruled out. Critics also decried the punishment for being harsh; that civil liability can never be converted into criminal liability; that singling out cheques out of all other negotiable instruments would be violative of Article 14 of Constitution of India. Critics contended that there was insufficient empirical enquiry into statutes or legislation in foreign jurisdictions criminalizing the dishonour of cheques and statistics had not been made available bearing out that criminalization would increase the acceptability of cheque. The Minister of Finance was not entirely forthright when he stated in Parliament that the drawer was also allowed sufficient opportunity to say whether the dishonour was by mistake. It must be borne in mind that in the U.K. deception and dishonesty are key elements which require to be proved. In the USA, some States have their own laws, requiring fraudulent intent or knowledge of insufficient funds to be made good. France has

criminalized and subsequently decriminalized the dishonour except in limited circumstances. Instead, it provides for disqualification from issuing cheques, a practice which had been adopted in Italy and Spain also. We have undertaken this succinct study mindful of the fact that Parliamentary debates have a limited part to play in interpretation of statutes, the presumption being that Legislators have the experience, expertise and language skills to draft laws which unambiguously convey their intentions and expectations for the enactments. What is palpably clear is that Parliament was aware that they were converting civil liability into criminal content inter alia by the deeming fiction of culpability in terms of the pandect comprising Section 138 and the succeeding Sections, which severely curtail defences to prosecution. Parliament was also aware that the offence of cheating etc., already envisaged in the IPC, continued to be available.

CIVIL LAW CONCEPTS NOT STRICTLY APPLICABLE We have already cautioned against the extrapolation of civil law concepts such as cause of action onto criminal law. Section 177 of the CrPC unambiguously states that every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed. Offence, by virtue of the definition ascribed to the word by Section 2(n) of the CrPC means any act or omission made punishable by any law. Halsbury states that the venue for the trial of a crime is confined to the place of its occurrence. Blackstone opines that crime is local and jurisdiction over it vests in the Court and Country where the crime is committed. This is obviously the raison detre for the CrPC making a departure from the CPC in not making the cause of action routinely relevant for the determination of territoriality of criminal courts. The word action has traditionally been understood to be synonymous to suit, or as ordinary proceedings in a Court of justice for enforcement or protection of the rights of the initiator of the proceedings. Action, generally means a litigation in a civil Court for the recovery of individual right or redress of individual wrong, inclusive, in its proper legal sense, of suits by the Crown - [Bradlaugh v. Clarke 8 Appeal Cases 354 p.361]. Unlike civil actions, where the Plaintiff has the burden of filing and proving its case, the responsibility of investigating a crime, marshalling evidence and witnesses, rests with the State. Therefore, while the convenience of the Defendant in a civil action may be relevant, the convenience of the so called complainant/victim has little or no role to play in criminal prosecution. Keeping in perspective the presence of the word ordinarily in Section 177 of CrPC, we hasten to adumbrate that the exceptions to it are contained in the CrPC itself, that is, in the contents of the succeeding Section 178. The CrPC also contains an explication of complaint as any allegation to a Magistrate with a view to his taking action in respect of the commission of an offence; not being a police report. Prosecution ensues from a Complaint or police report for the purpose of determining the culpability of a person accused of the commission of a crime; and unlike a civil action or suit is carried out (or prosecuted) by the State or its nominated agency. The principal definition of prosecution imparted by Blacks Law Dictionary 5th Edition is a criminal action; the proceeding instituted and carried on by due process of law, before a competent Tribunal, for the purpose of determining the guilt or innocence of a person charged with crime. These reflections are necessary because Section 142(b) of the NI Act contains the words, the cause of action arises under the proviso to Section 138, resulting arguably, but in our opinion irrelevantly, to the blind borrowing of essentially civil law attributes onto criminal proceedings. We reiterate that Section 178 admits of no debate that in criminal prosecution, the concept of cause of action, being the bundle of facts required to be proved in a suit and accordingly also being relevant for the place of suing, is not pertinent or germane for determining territorial jurisdiction of criminal Trials. Section 178, CrPC explicitly states that every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed. Section

179 is of similar tenor. We are also unable to locate any provision of the NI Act which indicates or enumerates the extraordinary circumstances which would justify a departure from the stipulation that the place where the offence is committed is where the prosecution has to be conducted. In fact, since cognizance of the offence is subject to the five Bhaskaran components or concomitants the concatenation of which ripens the already committed offence under Section 138 NI Act into a prosecutable offence, the employment of the phrase cause of action in Section 142 of the NI Act is apposite for taking cognizance, but inappropriate and irrelevant for determining commission of the subject offence. There are myriad examples of the commission of a crime the prosecution of which is dependent on extraneous contingencies such as obtainment of sanction for prosecution under Section 19 of the Prevention of Corruption Act 1988. Similar situation is statutorily created by Section 19 of the Environmental Protection Act 1986, Section 11 of the Central Sales Tax Act 1956, Section 279 of the Income Tax Act, Sections 132 and 308, CrPC, Section 137 of the Customs Act etc. It would be idle to contend that the offence comes into existence only on the grant of permission for prosecution, or that this permission constitutes an integral part of the offence itself. It would also be futile to argue that the place where the permission is granted would provide the venue for the trial. If sanction is not granted the offence does not vanish. Equally, if sanction is granted from a place other than where the crime is committed, it is the latter which will remain the place for its prosecution.

SECTION 138 NI ACT The marginal note of Section 138 of the NI Act explicitly defines the offence as being the dishonour of cheques for insufficiency, etc., of funds in the account. Of course, the headings, captions or opening words of a piece of legislation are normally not strictly or comprehensively determinative of the sweep of the actual Section itself, but it does presage its intendment. See: Frick India Ltd. v. Union of India (1990) 1 SCC 400 and Forage & Co. v. Municipal Corporation of Greater Bombay (1999) 8 SCC 577. Accordingly, unless the provisions of the Section clearly point to the contrary, the offence is concerned with the dishonour of a cheque; and in the conundrum before us the body of this provision speaks in the same timbre since it refers to a cheque being returned by the bank unpaid. None of the provisions of the IPC have been rendered nugatory by Section 138 of the NI Act and both operate on their own. It is trite that mens rea is the quintessential of every crime. The objective of Parliament was to strengthen the use of cheques, distinct from other negotiable instruments, as mercantile tender and therefore it became essential for the Section 138 NI Act offence to be freed from the requirement of proving mens rea. This has been achieved by deeming the commission of an offence de hors mens rea not only under Section 138 but also by virtue of the succeeding two Sections. Section 139 carves out the presumption that the holder of a cheque has received it for the discharge of any liability. Section 140 clarifies that it will not be available as a defence to the drawer that he had no reason to believe, when he issued the cheque, that it would be dishonoured. Section 138 unequivocally states that the offence is committed no sooner the drawee bank returns the cheque unpaid. Section 138 NI Act is structured in two parts the primary and the provisory. It must be kept in mind that the Legislature does not ordain with one hand and immediately negate it with the other. The proviso often carves out a minor detraction or diminution of the main provision of which it is an appendix or addendum or auxiliary. Black Law Dictionary states in the context of a proviso that it is a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided. . A clause or part of a clause in a statute, the office of which is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of its extent. It should also be kept in perspective

that a proviso or a condition are synonymous. In our perception in the case in hand the contents of the proviso place conditions on the operation of the main provision, while it does form a constituent of the crime itself, it modulates or regulates the crime in circumstances where, unless its provisions are complied with, the already committed crime remains impervious to prosecution. The proviso to Section 138 of the NI Act features three factors which are additionally required for prosecution to be successful. In this aspect Section 142 correctly employs the term cause of action as compliance with the three factors contained in the proviso are essential for the cognizance of the offence, even though they are not part of the action constituting the crime. To this extent we respectfully concur with Bhaskaran in that the concatenation of all these concomitants, constituents or ingredients of Section 138 NI Act, is essential for the successful initiation or launch of the prosecution. We, however, are of the view that so far as the offence itself the proviso has no role to play. Accordingly a reading of Section 138 NI Act in conjunction with Section 177, CrPC leaves no manner of doubt that the return of the cheque by the drawee bank alone constitutes the commission of the offence and indicates the place where the offence is committed. In this analysis we hold that the place, situs or venue of judicial inquiry and trial of the offence must logically be restricted to where the drawee bank, is located. The law should not be warped for commercial exigencies. As it is Section 138 of the NI Act has introduced a deeming fiction of culpability, even though, Section 420 is still available in case the payee finds it advantageous or convenient to proceed under that provision. An interpretation should not be imparted to Section 138 which will render it as a device of harassment i.e. by sending notices from a place which has no casual connection with the transaction itself, and/or by presenting the cheque(s) at any of the banks where the payee may have an account. In our discernment, it is also now manifest that traders and businessmen have become reckless and incautious in extending credit where they would heretofore have been extremely hesitant, solely because of the availability of redress by way of criminal proceedings. It is always open to the creditor to insist that the cheques in question be made payable at a place of the creditors convenience. Todays reality is that the every Magistracy is inundated with prosecutions under Section 138 NI Act, so much so that the burden is becoming unbearable and detrimental to the disposal of other equally pressing litigation. We think that Courts are not required to twist the law to give relief to incautious or impetuous persons; beyond Section 138 of the NI Act.

We feel compelled to reiterate our empathy with a payee who has been duped or deluded by a swindler into accepting a cheque as consideration for delivery of any of his property; or because of the receipt of a cheque has induced the payee to omit to do anything resulting in some damage to the payee. The relief introduced by Section 138 of the NI Act is in addition to the contemplations in the IPC. It is still open to such a payee recipient of a dishonoured cheque to lodge a First Information Report with the Police or file a Complaint directly before the concerned Magistrate. If the payee succeeds in establishing that the inducement for accepting a cheque which subsequently bounced had occurred where he resides or ordinarily transacts business, he will not have to suffer the travails of journeying to the place where the cheque has been dishonoured. All remedies under the IPC and CrPC are available to such a payee if he chooses to pursue this course of action, rather than a Complaint under Section 138 of the NI Act. And of course, he can always file a suit for recovery wherever the cause of action arises dependent on his choosing. The interpretation of Section 138 of the NI Act which commends itself to us is that the offence contemplated therein stands committed on the dishonour of the cheque, and accordingly the JMFC at the place where this occurs is ordinarily where the Complaint must be filed, entertained and tried. The cognizance of the crime by the JMFC at that place however, can be taken only when the concomitants or constituents contemplated by

the Section concatenate with each other. We clarify that the place of the issuance or delivery of the statutory notice or where the Complainant chooses to present the cheque for encashment by his bank are not relevant for purposes of territorial jurisdiction of the Complaints even though non-compliance thereof will inexorably lead to the dismissal of the complaint. It cannot be contested that considerable confusion prevails on the interpretation of Section 138 in particular and Chapter XVII in general of the NI Act. The vindication of this view is duly manifested by the decisions and conclusion arrived at by the High Courts even in the few cases that we shall decide by this Judgment. We clarify that the Complainant is statutorily bound to comply with Section 177 etc. of the CrPC and therefore the place or situs where the Section 138 Complaint is to be filed is not of his choosing. The territorial jurisdiction is restricted to the Court within whose local jurisdiction the offence was committed, which in the present context is where the cheque is dishonoured by the bank on which it is drawn. We are quite alive to the magnitude of the impact that the present decision shall have to possibly lakhs of cases pending in various Courts spanning across the country. One approach could be to declare that this judgment will have only prospective pertinence, i.e. applicability to Complaints that may be filed after this pronouncement. However, keeping in perspective the hardship that this will continue to bear on alleged accused/respondents who may have to travel long distances in conducting their defence, and also mindful of the legal implications of proceedings being permitted to continue in a Court devoid of jurisdiction, this recourse in entirety does not commend itself to us. Consequent on considerable consideration we think it expedient to direct that only those cases where, post the summoning and appearance of the alleged Accused, the recording of evidence has commenced as envisaged in Section 145(2) of the Negotiable Instruments Act, 1881, will proceeding continue at that place. To clarify, regardless of whether evidence has been led before the Magistrate at the pre-summoning stage, either by affidavit or by oral statement, the Complaint will be maintainable only at the place where the cheque stands dishonoured. To obviate and eradicate any legal complications, the category of Complaint cases where proceedings have gone to the stage of Section 145(2) or beyond shall be deemed to have been transferred by us from the Court ordinarily possessing territorial jurisdiction, as now clarified, to the Court where it is presently pending. All other Complaints (obviously including those where the accused/respondent has not been properly served) shall be returned to the Complainant for filing in the proper Court, in consonance with our exposition of the law. If such Complaints are filed/refiled within thirty days of their return, they shall be deemed to have been filed within the time prescribed by law, unless the initial or prior filing was itself time barred.

DISPOSAL OF PRESENT APPEALS Crl. Appeal No.2287 of 2009

21. A learned Single Judge of the High Court of Judicature at Bombay, Nagpur Bench has, pursuant to a threadbare discussion of Bhaskaran concluded that since the concerned cheque was drawn on the Bank of India, Bhandara Branch, Maharashtra where it was dishonoured, the Judicial Magistrate First Class, Digras, District Yavatmal had no jurisdiction to entertain the Complaint. It is pertinent to note that the subject cheque was presented at Digras, District Yavatmal where the Complainant had a bank account although he was a resident of District Washim, Maharashtra. The learned Single Judge, in the impugned judgment, had rightly rejected the argument that the Complaint itself should be dismissed; instead he ordered that it be returned to the complainant for filing in the appropriate Court.

The Appeal is accordingly dismissed.

Crl. Appeal No. 1593 of 2014 [Arising out of S.L.P.(Crl.)No.2077 of 2009 22. In this Appeal the Respondent-accused, having purchased electronic items from the Appellant-company, issued the cheque in question drawn on UCO Bank, Tangi, Orissa which was presented by the Complainant-company at State Bank of India, Ahmednagar Branch, Maharashtra as its branch office was located at Ahmednagar. The cheque was dishonoured by UCO Bank, Tangi, Orissa. A Complaint was filed before JMFC, Ahmednagar. An application was filed by the Respondent-accused under Section 177 CrPC questioning the jurisdiction of the JMFC Ahmednagar, who held that since the demand notice was issued from and the payment was claimed at Ahmednagar, he possessed jurisdiction to try the Complaint. The High Court disagreed with the conclusion of the JMFC, Ahmednagar that the receipt of notice and non- payment of the demanded amount are factors which will have prominence over the place wherefrom the notice of demand was issued and held that JMFC, Ahmednagar did not have the territorial jurisdiction to entertain the Complaint. In view of the foregoing discussion on the issue above, the place where the concerned cheque had been dishonoured, which in the case in hand was Tangi, Orissa, the Appeal is allowed with the direction that the Complaint be returned to the Complainant for further action in accordance with law.

Crl. Appeal Nos. 1594, 1595 & 1601 to 1603 of 2014 [Arising out of S.L.P.(Crl.)Nos.2112 of 2009 and 2117 of 2009; 3762 of 2012; 3943 of 2012; 3944 of 2012]

23. The facts being identical to Criminal Appeal arising out of S.L.P.(Crl.)No.2077 of 2009, these Appeals stand dismissed.

Crl. Appeal Nos.1596-1600 of 2014 [Arising out of S.L.P.(Crl.)Nos.1308-1312 of 2009]

24. The Appellant-complainant herein has its Registered Office in Delhi from where the Respondents-accused are also carrying on their business. The cheques in question were issued by the Respondent No.2-accused drawn on Indian Overseas Bank, Connaught Place, New Delhi.

However, the same were presented and dishonoured at Nagpur, Maharashtra where the Complainant states it also has an office. There is no clarification why the cheques had not been presented in Delhi where the Complainant had its Registered Office, a choice which we think is capricious and perfidious, intended to cause harassment. Upon cheques having been dishonoured by the concerned bank at Delhi, five Complaints were filed before Judicial Magistrate First Class, Nagpur who heard the Complaints, and also recorded the evidence led by both the parties. However, the JMFC, Nagpur acquitted the Respondent No.2-accused on the ground of not having territorial jurisdiction. On appeals being filed before the High Court of Bombay, the judgment of the JMFC, Nagpur was partly set aside so far as the acquittal of the Respondent No.2-accused was concerned and it was ordered that the Complaints be returned for filing before the proper Court. In view of the conclusion arrived at by us above, these Appeals are also dismissed.

Crl. Appeal No. 1604 of 2014 [Arising out of S.L.P.(Crl.)No.59 of 2013]

25. The cheque in question was drawn by the Respondent-accused on State Bank of Travancore, Delhi. However, it was presented by the Appellant- complainant at Aurangabad. A Complaint was filed before JMFC, Aurangabad who issued process. Respondent-accused filed an application under Section 203 of CrPC seeking dismissal of the Complaint. The application was dismissed

on the predication that once process had been initiated, the Complaint could not be dismissed. On a writ petition being filed before the High Court of Bombay, Aurangabad Bench, the order of issuance of process was set aside and the Complaint was ordered to be returned for being presented before a competent court having jurisdiction to entertain the same. The High Court had correctly noted that the objection pertained to the territorial jurisdiction of the JMFC, Aurangabad, a feature which had not been comprehensively grasped by the latter. The High Court noted that the Registered Office of the Complainant was at Chitegaon, Tehsil Paithan, District Aurangabad whereas the Accused was transacting business from Delhi. The High Court pithily underscored that in paragraph 4 of the Complaint it had been specifically contended that credit facility was given to the Accused in Delhi, where the Complainant-company also had its branch office. The statutory notice had also emanated from Aurangabad, and it had been demanded that payment should be made in that city within the specified time. It was also the Complainants case that the Invoice, in case of disputes, restricted jurisdiction to Aurangabad courts; that intimation of the bouncing of the cheques was received at Aurangabad. It is however necessary to underscore that the Accused had clarified that the subject transaction took place at Delhi where the goods were supplied and the offending cheque was handed over to the Complainant. It appears that a Civil Suit in respect of the recovery of the cheque amount has already been filed in Delhi. We may immediately reiterate that the principles pertaining to the cause of action as perceived in civil law are not relevant in criminal prosecution. Whilst the clause restricting jurisdiction to courts at Aurangabad may have efficacy for civil proceedings, provided any part of the cause of action had arisen in Aurangabad, it has no bearing on the situs in criminal prosecutions. Since a Civil Suit is pending, we hasten to clarify that we are not expressing any opinion on the question of whether the courts at Delhi enjoy jurisdiction to try the Suit for recovery.

In the impugned judgment, the High Court duly noted Bhaskaran and Harman. However, it committed an error in analyzing the cause of action as well as the covenant restricting jurisdiction to Aurangabad as these are relevant only for civil disputes. However, the impugned judgment is beyond interference inasmuch as it concludes that the JMFC, Aurangabad has no jurisdiction over the offence described in the Complaint. The Appeal is accordingly dismissed.

[T.S. THAKUR]
[VIKRAMAJIT SEN]
[C. NAGAPPAN]

New Delhi August 1, 2014.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.2287 OF 2009

DASHRATH RUPSINGH RATHOD Appellant

Versus

STATE OF MAHARASHTRA & ANR. Respondents

WITH

CRIMINAL APPEAL NO. 1593 OF 2014
(Arising out of S.L.P. (Crl.) No.2077 of 2009)

CRIMINAL APPEAL NO. 1594 OF 2014
(Arising out of S.L.P. (Crl.) No.2112 of 2009)

CRIMINAL APPEAL NO. 1595 OF 2014
(Arising out of S.L.P. (Crl.) No.2117 of 2009)

CRIMINAL APPEAL NO. 1596-1600 OF 2014
(Arising out of S.L.P. (Crl.) Nos.1308-1312 of 2009)

CRIMINAL APPEAL NO. 1601 OF 2014
(Arising out of S.L.P. (Crl.) No.3762 of 2012)

CRIMINAL APPEAL NO. 1602 OF 2014
(Arising out of S.L.P. (Crl.) No.3943 of 2012)

CRIMINAL APPEAL NO. 1603 OF 2014
(Arising out of S.L.P. (Crl.) No.3944 of 2012)

AND

CRIMINAL APPEAL NO. 1604 OF 2014
(Arising out of S.L.P. (Crl.) No.59 of 2013)

JUDGMENT

T.S. Thakur, J.

1. I have had the advantage of going through the draft order proposed by my esteemed brother Vikramajit Sen, J. I entirely agree with the conclusions which my erudite brother has drawn based on a remarkably articulate process of reasoning that illumines the draft judgment authored by him. I would all the same like to add a few lines of my own not because the order as proposed leaves any rough edges to be ironed out but only because the question of law that arises for determination is not only substantial but of considerable interest and importance for the commercial world. The fact that the view being taken by us strikes a discordant note on certain aspects which have for long been considered settled by earlier decisions of this Court being only an additional reason for the modest addition that I propose to make. Of these decisions Bhaskarans case stands out as the earliest in which this Court examined the vexed question of territorial jurisdiction of the Courts to try offences punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter called NI Act). Bhaskarans case was heard by a two-judge Bench of this Court who took the view that the jurisdiction to try an offence under Section 138 could not be determined only by reference to the place where the cheque was dishonoured. That is because dishonour of the cheque was not by itself an offence

under Section 138 of The Negotiable Instruments Act, 1881, observed the Court. The offence is complete only when the drawer fails to pay the cheque amount within the period of fifteen days stipulated under clause (c) of the proviso to Section 138 of the Act. Having said that the Court recognised the difficulty in fixing a place where such failure could be said to have taken place. It could, said the Court, be the place where the drawer resides or the place where the payee resides or the place where either of them carries on business. To resolve this uncertainty the Court turned to Sections 178 and 179 of the Cr.P.C. to hold that since an offence under Section 138 can be completed only with the concatenation of five acts that constituted the components of the offence any Court within whose jurisdiction any one of those acts was committed would have the jurisdiction to try the offence. The Court held: The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence: (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice.

It is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at five different localities. But a concatenation of all the above five is a sine qua non for the completion of the offence under Section 138 of the Code.

In this context a reference to Section 178(d) of the Code is useful. It is extracted below:

178. (a)-(c) * * *

(d) where the offence consists of several acts done in different local areas, it may be enquired into or tried by a court having jurisdiction over any of such local areas. Thus it is clear, if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the Act. In other words, the complainant can choose any one of those courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done. As the amplitude stands so widened and so expansive it is an idle exercise to raise jurisdictional question regarding the offence under Section 138 of the Act.

2. Bhaskaran held the field for two years. The first blow to the view taken by this Court in Bhaskarans case was dealt by a three-Judge Bench decision in Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd. (2001) 3 SCC 609. The question that arose in that case was whether the limitation of six months for presentation of a cheque for encashment was applicable viz-a-viz presentation to the bank of the payee or that of the drawer. High Courts in this country had expressed conflicting opinions on the subject. This Court resolved the cleavage in those pronouncements by holding that the cheque ought to be presented to the drawee bank for its dishonour to provide a basis for prosecution under Section 138. The Court observed: The use of the words a bank and the bank in the section are an indicator of the intention of the legislature. The bank referred to in proviso (a) to the proviso to Section 138 of the Act would mean the drawee bank on which the cheque is drawn and not all banks where the cheque is presented for collection including the bank of the payee, in whose favour the cheque is issued. It, however, does not mean that the cheque is always to be presented to the drawers bank

on which the cheque is issued. However, a combined reading of Sections 3, 72 and 138 of the Act would clearly show that the law mandates the cheque to be presented at the bank on which it is drawn if the drawer is to be held criminally liable. Such presentation is necessarily to be made within six months at the bank on which the cheque is drawn, whether presented personally or through another bank, namely, the collecting bank of the payee.

3. Ishar Alloys case (supra) did not deal with the question of jurisdiction of the Courts nor was Bhaskaran noticed by the Court while holding that the presentation of the cheque ought to be within six months to the drawee bank. But that does not, in our view, materially affect the logic underlying the pronouncement, which pronouncement coming as it is from a bench of coordinate jurisdiction binds us. When logically extended to the question of jurisdiction of the Court to take cognizance, we find it difficult to appreciate how a payee of the cheque can by presentation of the cheque to his own bank confer jurisdiction upon the Court where such bank is situate. If presentation referred to in Section 138 means presentation to the drawee bank, there is no gainsaying that dishonour would be localised and confined to the place where such bank is situated. The question is not whether or not the payee can deposit his cheque in any bank of his choice at any place. The question is whether by such deposit can the payee confer jurisdiction on a Court of his choice? Our answer is in the negative. The payee may and indeed can present the cheque to any bank for collection from the drawee bank, but such presentation will be valid only if the drawee bank receives the cheque for payment within the period of six months from the date of issue. Dishonour of the cheque would be localised at the place where the drawee bank is situated. Presentation of the cheque at any place, we have no manner of doubt, cannot confer jurisdiction upon the Court within whose territorial limits such presentation may have taken place.

4. Then came Harman Electronics (P) Ltd. v. National Panasonic India (P) Ltd. (2009) 1 SCC 720. That was a case where the complaint under Section 138 was filed in a Delhi Court, only because the statutory notice required to be issued under the proviso to Section 138 was issued from Delhi. If Bhaskaran was correctly decided, Harman should not have interfered with the exercise of jurisdiction by the Delhi Court for issue of a notice was in terms of Bhaskaran, one of the factors that clothed the Court in Delhi to take cognizance and try the case. Harman did not do so. In Harmans case this Court, emphasized three distinct aspects. Firstly, it said that there was a world of difference between issue of a notice, on the one hand, and receipt, thereof, on the other. Issue of notice did not give rise to a cause of action while receipt did, declared the Court.

5. Secondly, the Court held that the main provision of Section 138 stated what would constitute an offence. The proviso appended thereto simply imposed certain further conditions which must be fulfilled for taking cognizance of the offence. The following passage deals with both these aspects:

It is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of a cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence under Section 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act

are intended to be applied in favour of the accused, there cannot be any doubt that receipt [pic]of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice that the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would.

6. Thirdly, the Court held that if presentation of the cheque or issue of notice was to constitute a good reason for vesting courts with jurisdiction to try offences under Section 138, it would lead to harassment of the drawer of the cheques thereby calling for the need to strike a balance between the rights of the parties to the transaction. The Court said:

   We cannot, as things stand today, be oblivious of the fact that a banking institution holding several cheques signed by the same borrower can not only present the cheque for its encashment at four different places but also may serve notices from four different places so as to enable it to file four complaint cases at four different places. This only causes grave harassment to the accused. It is, therefore, necessary in a case of this nature to strike a balance between the right of the complainant and the right of an accused vis-à-vis the provisions of the Code of Criminal Procedure.

7. Bhaskaran was, in the wake of the above, considerably diluted and the logic behind vesting of jurisdiction based on the place from where the notice was issued questioned. Even presentation of the cheque as a reason for assumption of jurisdiction to take cognizance was doubted for a unilateral act of the complainant/payee of the cheque could without any further or supporting reason confer jurisdiction on a Court within whose territorial limits nothing except the presentation of the cheque had happened.

8. Three recent decisions need be mentioned at this stage which have followed Bhaskaran and attempted to reconcile the ratio of that case with the subsequent decisions in Ishar Alloy Steels and Harman Electronics. In Nishant Aggarwal v. Kailash Kumar Sharma (2013) 10 SCC 72 this Court was once again dealing with a case where the complaint had been filed in Court at Bhiwani in Haryana within whose territorial jurisdiction the complainant had presented the cheque for encashment, although the cheque was drawn on a bank at Gauhati in Assam. Relying upon the view taken in Bhaskaran this Court held that the Bhiwani Court had jurisdiction to deal with the matter. While saying so, the Court tried to distinguish the three-Judge Bench decision in Ishar Alloy Steels (supra) and that rendered in Harman Electronics case (supra) to hold that the ratio of those decisions did not dilute the principle stated in Bhaskaran case. That exercise was repeated by this Court in FIL Industries Ltd. v. Imtiyaz Ahmad Bhat (2014) 2 SCC 266 and in Escorts Ltd. v. Rama Mukherjee (2014) 2 SCC 255 which too followed Bhaskaran and held that complaint under Section 138 Negotiable Instrument Act could be instituted at any one of the five places referred to in Bhaskarans case.

9. We have, with utmost respect to the Judges comprising the Bench that heard the above cases, found it difficult to follow suit and subscribe to the view stated in Bhasakaran. The reasons are not far too seek and may be stated right away.

10. Section 138 is a penal provision that prescribes imprisonment upto two years and fine upto twice the cheque amount. It must, therefore, be interpreted strictly, for it is one of the accepted rules of interpretation that in a penal statute, the Courts would hesitate to ascribe a meaning, broader than what the phrase would ordinarily bear. Section 138 is in two parts.

The enacting part of the provision makes it abundantly clear that what constitutes an offence punishable with imprisonment and/or fine is the dishonour of a cheque for insufficiency of funds etc. in the account maintained by the drawer with a bank for discharge of a debt or other liability whether in full or part. The language used in the provision is unambiguous and the ingredients of the offence clearly discernible viz. (a) Cheque is drawn by the accused on an account maintained by him with a banker. (b) The cheque amount is in discharge of a debt or liability and (c) The cheque is returned unpaid for insufficiency of funds or that the amount exceeds the arrangement made with the bank. But for the proviso that comprises the second part of the provision, any dishonour falling within the four corners of the enacting provision would be punishable without much ado. The proviso, however, draws an exception to the generality of the enacting part of the provision, by stipulating two steps that ought to be taken by the complainant holder of the cheque before the failure of the drawer gives to the former the cause of action to file a complaint and the competent Court to take cognizance of the offence. These steps are distinct from the ingredients of the offence which the enacting provision creates and makes punishable. It follows that an offence within the contemplation of Section 138 is complete with the dishonour of the cheque but taking cognizance of the same by any Court is forbidden so long as the complainant does not have the cause of action to file a complaint in terms of clause (c) of the proviso read with Section 142 which runs as under: Section 142:

Cognizance of offences. Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)

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

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138: [Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.]

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

11. The following would constitute cause of action referred to in sub clause (b) above: The complainant has presented the cheque for payment within the period of six months from the date of the issue thereof.

The complainant has demanded the payment of the cheque amount from the drawer by issuing a written notice within thirty days of receipt of information by him from the bank regarding the dishonour. The drawer has failed to pay the cheque amount within fifteen days of the receipt of the notice.

12. A proper understanding of the scheme underlying the provision would thus make it abundantly clear that while the offence is complete upon dishonour, prosecution for such offence is deferred till the time the cause of action for such prosecution accrues to the complainant. The proviso in that sense, simply postpones the actual prosecution of the offender till such time

he fails to pay the amount within the statutory period prescribed for such payment. There is, in our opinion, a plausible reason why this was done. The Parliament in its wisdom considered it just and proper to give to the drawer of a dishonoured cheque an opportunity to pay up the amount, before permitting his prosecution no matter the offence is complete, the moment the cheque was dishonoured. The law has to that extent granted a concession and prescribed a scheme under which dishonour need not necessarily lead to penal consequence if the drawer makes amends by making payment within the time stipulated once the dishonour is notified to him. Payment of the cheque amount within the stipulated period will in such cases diffuse the element of criminality that Section 138 attributes to dishonour by way of a legal fiction implicit in the use of the words shall be deemed to have committed an offence. The drawer would by such payment stand absolved by the penal consequences of dishonour. This scheme may be unique to Section 138 NI Act, but there is hardly any doubt that the Parliament is competent to legislate so to provide for situations where a cheque is dishonoured even without any criminal intention on the part of the drawer.

13. The scheme of Section 138 thus not only saves the honest drawer but gives a chance to even the dishonest ones to make amends and escape prosecution. Compliance with the provision is, in that view, a mandatory requirement. (See C.C. Alavi Haji v. Palapetty Muhammed and Another (2007) 6 SCC 555).

14. Harman in that view correctly held that what would constitute an offence is stated in the main provision. The proviso appended thereto however imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the Parliament intended to make the conditions stipulated in the proviso, also as ingredients of the offence, the provision would have read differently. It would then have specifically added the words and the drawer has despite receipt of a notice demanding the payment of the amount, failed to pay the same within a period of fifteen days from the date of such demand made in writing by a notice. That, however, is not how the enacting provision of Section 138 reads. The legislature has, it is obvious, made a clear distinction between what would constitute an offence and what would give to the complainant the cause of action to file a complaint for the court competent to take cognizance. That a proviso is an exception to the general rule is well settled. A proviso is added to an enactment to qualify or create an exception to what is contained in the enactment. It does not by itself state a general rule. It simply qualifies the generality of the main enactment, a portion which but for the proviso would fall within the main enactment.

15. The P. Ramanatha Aiyar, Law Lexicon, 2nd Edition, Wadhwa & Co. at page 1552 defines proviso as follows:

The word proviso is used frequently to denote the clause the first words of which are provided that inserted in deeds and instruments generally. And containing a condition or stipulation on the performance or non- performance of which, as the case maybe. The effect of a proceeding clause or of the deed depends.

A Clause inserted in a legal or formal document, making some condition, stipulation, exception or limitation or upon the observance of which the operation or validity of the instrument depends [S. 105, Indian Evidence Act].

A proviso is generally intended to restrain the enacting clause and to except something which would have otherwise been within it or in some measure to modify the enacting clause...

16. To quote Craies on Statute Law, 7th Edn., Sweet & Maxwell at page 220 If the principal object of the Act can be accomplished and stand under the restriction of the saving clause or proviso, the same is not to be held void for repugnancy.

17. One of the earliest judgments on the subject is a three Judge Bench decision in Kedarnath Jute Manufacturing Co. v. Commercial Tax Officer, Calcutta and Ors. AIR 1966 SC 12. The Court was in that case examining the effect of a proviso which imposed a condition on getting exemption from tax and observed:

... The substantive clause gives the exemption and the proviso qualifies the substantive clause. In effect the proviso says that part of the turnover of the selling dealer covered by the terms of sub-cl. (ii) will be exempted provided a declaration in the from prescribed is furnished. To put it in other words, a dealer cannot get the exemption unless he furnishes the declaration in the prescribed form.

It is well settled that "the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it" : see "Craies on Statute Law", 6th Edn., p. 217.

18. Also pertinent is a four-Judge Bench decision of this Court in Dwarka Prasad v. Dwarka Das Saraf (1976) 1 SCC 128 where this Court was examining whether a cinema theatre equipped with projectors and other fittings ready to be launched as entertainment house was covered under the definition of accommodation as defined in Section 2 (1) (d) of Uttar Pradesh (Temporary) Control of Rent and Eviction Act, 1947. The proviso provided for some exception for factories and business carried in a building. It was held that sometimes draftsmen include proviso by way of over caution to remove any doubts and accommodation would include this cinema hall: 18. A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso.

It is not a separate or independent enactment. 'Words are dependent on the principal enacting words, to which they are tacked as a proviso. They cannot be read as divorced from their context' 1912 A.C. 544. If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction.

The proper course is to apply the broad general rule of construction which is that a section or enactment must be construed as a whole, each portion throwing light if need be on the rest. The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together is to prevail. (Maxwell on Interpretation of Statutes, 10th Edn. p. 162) (emphasis supplied)

19. In Sreenivasa General Traders & Ors. v. State of Andhra Pradesh & Ors. (1983) 4 SCC 353 another three- Judge bench of this Court examined the role of a proviso while interpreting

Rule 74(1) of the Andhra Pradesh (Agricultural Produce & Livestock) Markets Rules, 1969. The normal function of a proviso is to except something out of the main enacting part or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. Proviso to Rule 74(1) is added to qualify or create an exception.

20. Reference may also be made to Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal and others (1991) 3 SCC 442 wherein this Court clearly held that when the language of the main enactment is clear, the proviso can have no effect on the interpretation of the main clause. 7. It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field, which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted by the proviso and to no other. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is to confine to that case. Where the language of the main enactment is explicit and unambiguous, the proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it, by implication what clearly falls within its express terms. The scope of the proviso, therefore, is to carve out an exception to the main enactment and it excludes something which otherwise would have been within the rule. It has to operate in the same field and if the language of the main enactment is clear, the proviso cannot be torn apart from the main enactment nor can it be used to nullify by implication what the enactment clearly says nor set at naught the real object of the main enactment, unless the words of the proviso are such that it is its necessary effect. (emphasis supplied)

21. The same line of reasoning was followed in A.N. Sehgal and Ors. v. Raje Ram Sheoram and Ors. 1992 Supp (1) SCC 304 while interpreting a proviso in the Haryana Service of Engineers Rules, 1960 where the Court held that the proviso to Rule 5(2)(a) cannot be applied to confer the benefit of regular appointment on every promotee appointed in excess of 50% quota. This Court harmoniously read the main provision and the proviso and gave effect to the rule.

22. In Kerala State Housing Board and Ors. v. Ramapriya Hotels (P) Ltd. and Ors. 1994 (5) SCC 672 this Court was examining whether the period of 4 years envisaged in proviso to Section 16(i) under Kerala Land Acquisition Act, 1961 could be reckoned from date when agreement was executed or from date of publication of notification under Section 3(1) of the Act after the agreement was executed. After relying on Tribhovandas Haribhai Tamboli (supra) and A.N. Sehgal (supra) this Court held that the proviso should be harmoniously read with the section. To quote Tribhovandas (supra) as followed in this judgment:

In Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal this Court held that the proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment and its effect is to be confined to that case. Where the language of the main enactment is explicit and unambiguous, the proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it, by implication what clearly falls within its express terms. The scope of the proviso, therefore, is to carve out an exception to the main enactment and it excludes something which otherwise would have been within the rule. It has to operate in the same field and if the language of the main enactment is clear, the proviso cannot be torn apart from the main enactment nor can it be used to nullify by implication what the enactment clearly says, nor set at naught the real object of the main enactment, unless the words of the proviso are such that it is its necessary

effect. In that case it was held that by reading the proviso consistent with the provisions of Section 88 of the Bombay Tenancy and Agricultural Act, the object of the main provision was sustained. (emphasis supplied)

23. In Kush Sahgal & Ors. v. M.C. Mitter & Ors. (2000) 4 SCC 526 a landlady made an application for eviction of the tenant on the basis that she wanted the place for business purposes which was not allowed as per the proviso to Section 21(2) U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. The Court examined the role and purport of the proviso and observed :

This we say because the normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. (See : Kedarnath Jute Manufacturing Co. Ltd. v. Commercial Tax Office [1965] 3 SCR 626). Since the natural presumption is that but for the proviso, the enacting part of the section would have included the subject-matter of the proviso, the enacting part has to be given such a construction which would make the exceptions carved out by the proviso necessary and a construction which would make the exceptions unnecessary and redundant should be avoided (See: Justice G. P. Singh's "Principles of Statutory Interpretation" Seventh Edition 1999, p-163). This principle has been deduced from the decision of the Privy Council in Govt. of the Province of Bombay v. Hormusji Manekji (AIR 1947 PC 200) as also the decision of this Court in Durga Dutt Sharma v.Navaratna Pharmaceutical Laboratories (AIR 1965 SC 980).

24. To the same effect are the decisions of this Court in Ali M.K. and Ors. v. State of Kerala and Ors. (2003) 11 SCC 632, Nagar Palika (supra) and in Steel Authority of India Ltd. v. S.U.T.N.I Sangam & Ors. (2009) 16 SCC 1.

25. In conclusion, we may refer to Maxwell, Interpretation of Statutes Edn. 12, 1969, on P. 189-190 which states that it is a general finding and practice that inconsistencies can be avoided by applying the general rule that the words of a proviso are not to be taken absolutely in their strict literal sense [R v. Dimbdin (1910)] but that a proviso is of necessity ... limited in its operation to the ambit of the section which it qualifies [Lloyds and Scottish Finance Ltd v. Modern Cars and Canavans (Kingston) Ltd.(1966)]. And, so far as that section itself is concerned, the proviso receives a restricted construction: where the section confers powers, it would be contrary to the ordinary operation of a proviso to give it an effect which would cut down those powers beyond what compliance with the proviso renders necessary. [Re Tabrisky v. Board of Trade (1947)]

26. Bhaskaran, in our view, reads the proviso as prescribing the ingredients of the offence instead of treating it as an exception to the generality of the enacting part by stipulating further conditions before a competent Court may take cognizance of the same. Seen in the light of the provisions of Section 142 of the Act, the proviso simply defers prosecution of the offender till the conditions prescribed therein are satisfied. Bhaskaran does not view the matter in that perspective while Harman (supra) does. We find ourselves in respectful agreement with the view in Harmans case on this aspect.

27. In Bhaskaran, this Court resolved the confusion as to the place of commission of the offence by relying upon Sections 177 to 179 of the Cr.P.C. But the confusion arises only if one were to treat the proviso as stipulating the ingredients of the offence. Once it is held that the conditions precedent for taking cognizance are not the ingredients constituting the offence of dishonour

of the cheque, there is no room for any such confusion or vagueness about the place where the offence is committed. Applying the general rule recognised under Section 177 of the Cr.P.C. that all offences are local, the place where the dishonour occurs is the place for commission of the offence vesting the Court exercising territorial jurisdiction over the area with the power to try the offences. Having said that we must hasten to add, that in cases where the offence under Section 138 is out of the offences committed in a single transaction within the meaning of Section 220 (1) of the Cr.P.C. then the offender may be charged with and tried at one trial for every such offence and any such inquiry or trial may be conducted by any Court competent to enquire into or try any of the offences as provided by Section 184 of the Code. So also, if an offence punishable under Section 138 of the Act is committed as a part of single transaction with the offence of cheating and dishonestly inducing delivery of property then in terms of Section 182 (1) read with Sections 184 and 220 of the Cr.P.C. such offence may be tried either at the place where the inducement took place or where the cheque forming part of the same transaction was dishonoured or at the place where the property which the person cheated was dishonestly induced to deliver or at the place where the accused received such property. These provisions make it clear that in the commercial world a party who is cheated and induced to deliver property on the basis of a cheque which is dishonoured has the remedy of instituting prosecution not only at the place where the cheque was dishonoured which at times may be a place other than the place where the inducement or cheating takes place but also at the place where the offence of cheating was committed. To that extent the provisions of Chapter XIII of the Code will bear relevance and help determine the place where the offences can be tried.

28. We may at this stage refer to two other decisions of this Court which bear some relevance to the question that falls for our determination. In Sadanandan Bhadran v. Madhavan Sunil Kumar (1998) 6 SCC 514 a two-judge bench of this Court held that clause (a) of proviso to Section 138 does not disentitle the payee to successively present cheque for payment during the period of its validity. On each such presentation of the cheque and its dishonour a fresh right - and not cause of action accrues in his favour. He may, therefore, without taking pre-emptory action in exercise of such right under clause (b) of Section 138 go on presenting the cheque so long as the cheque is valid for payment. But once he gives a notice under clause (b) of Section 138 he forfeits such right for in case of failure of the drawer to pay the money within the stipulated time he would be liable for the offence and the cause of action for prosecution will arise. The correctness of this view was questioned in MSR Leathers v. S. Palaniappan & Anr. (2013) 1 SCC 177 before a bench comprising of Markandey Katju and B. Sudershan Reddy, J.J. who referred the issue to a larger bench. The larger bench in MSR Leatherss case (supra) overruled Sadanandan Bhadran (supra) holding that there was no reason why a fresh cause of action within the meaning of Section 142 (b) read with section 138 should not be deemed to have arisen to the complainant every time the cheque was presented but dishonoured and the drawer of cheque failed to pay the amount within the stipulated period in terms of proviso to 138. This Court said: In the result, we overrule the decision in Sadanandan Bhadran's case (supra) and hold that prosecution based upon second or successive dishonour of the cheque is also permissible so long as the same satisfies the requirements stipulated in the proviso to Section 138 of the Negotiable Instruments Act. The reference is answered accordingly. The appeals shall now be listed before the regular Bench for hearing and disposal in light of the observations made above.

29. What is important is that in Sadanandan Bhadran (supra) this Court had, on a careful analysis of Section 138, held that an offence is created when a cheque is returned by the bank unpaid for any reasons mentioned therein, although the proviso to Section 138 stipulates three conditions for the applicability of the section. It is only upon satisfaction of the three conditions that prosecution can be launched for an offence under Section 138. This Court observed: On a careful analysis of the above section, it is seen that its main part creates an offence when a cheque is returned by the bank unpaid for any of the reasons mentioned therein. The significant fact, however, is that the proviso lays down three conditions precedent to the applicability of the above section and, for that matter, creation of such offence and the conditions are: (i) the cheque should have been presented to the bank within six months of its issue or within the period of its validity, whichever is earlier; (ii) the payee should have made a demand for payment by registered notice after the cheque is returned unpaid; and (iii) that the drawer should have failed to pay the amount within 15 days of the receipt of the notice. It is only when all the [pic]above three conditions are satisfied that a prosecution can be launched for the offence under Section 138. So far as the first condition is concerned, clause (a) of the proviso to Section 138 does not put any embargo upon the payee to successively present a dishonoured cheque during the period of its validity. This apart, in the course of business transactions it is not uncommon for a cheque being returned due to insufficient funds or similar such reasons and being presented again by the payee after sometime, on his own volition or at the request of the drawer, in expectation that it would be encashed. Needless to say, the primary interest of the payee is to get his money and not prosecution of the drawer, recourse to which, normally, is taken out of compulsion and not choice. For the above reasons it must be held that a cheque can be presented any number of times during the period of its validity. Indeed that is also the consistent view of all the High Courts except that of the Division Bench of the Kerala High Court in Kumaresan1 which struck a discordant note with the observation that for the first dishonour of the cheque, only a prosecution can be launched for there cannot be more than one cause of action for prosecution. (emphasis supplied)

30. MSR Leathers (supra) also looked at Section 138 and held that a complaint could be filed under Section 138 after cause of action to do so had accrued in terms of clause (c) of the proviso to Section 138 which happens no sooner the drawer of the cheque fails to make the payment of the cheque amount to the payee within fifteen days in terms of clause (b) to proviso to Section 138. MSR Leathers was not so much concerned with the question whether the proviso stipulated ingredients of the offence or conditions precedent for filing a complaint. It was primarily concerned with the question whether the second or successive dishonour followed by statutory notices and failure of the drawer to make payment could be made a basis for launching prosecution against the drawer. That question, as noticed above, was answered in the affirmative holding that successive cause of action could arise if there were successive dishonours followed by statutory notices as required under the law and successive failure of the drawer to make the payment. MSR Leathers cannot, therefore, be taken as an authority for determining whether the proviso stipulates conditions precedent for launching a prosecution or ingredients of the offence punishable under Section 138. Sadanandan Bhadran may have been overruled to the extent it held that successive causes of action cannot be made a basis for prosecution, but the distinction between the ingredient of the offence, on the one hand, and conditions precedent for launching prosecution, on the other, drawn in the said judgement has not been faulted. That distinction permeates the pronouncements of this Court in Sadanandan

Bhadran and MSR Leathers. High Court of Kerala has, in our view, correctly interpreted Section 138 of the Act in Kairali Marketing & Processing Cooperative Society Ltd. V. Pullengadi Service Cooperative Ltd. (2007) 1 KLT 287 when it said:

It is evident from the language of Section 138 of the N.I. Act that the drawer is deemed to have committed the offence when a cheque issued by him of the variety contemplated under Section 138 is dishonoured for the reasons contemplated in the Section. The crucial words are "is returned by the bank unpaid". When that happens, such person shall be deemed to have committed the offence. With the deeming in the body of Section 138, the offence is already committed or deemed to have been committed. A careful reading of the body of Section 138 cannot lead to any other conclusion. Proviso to Section138 according to me only insists on certain conditions precedent which have to be satisfied if the person who is deemed to have committed the offence were to be prosecuted successfully. The offence is already committed when the cheque is returned by the bank. But the cause of action for prosecution will be available to the complainant not when the offence is committed but only after the conditions precedent enumerated in the proviso are satisfied. After the offence is committed, only if the option given to avoid the prosecution under the proviso is not availed of by the offender, can the aggrieved person get a right or course of action to prosecute the offender. The offence is already deemed and declared but the offender can be prosecuted only when the requirements of the proviso are satisfied. The cause of action for prosecution will arise only when the period stipulated in the proviso elapses without payment. Ingredients of the offence have got to be distinguished from the conditions precedent for valid initiation of prosecution. The stipulations in the proviso must also be proved certainly before the offender can be successfully prosecuted. But in the strict sense they are not ingredients of the deemed offence under the body of Section 138 of the N.I. Act, though the said stipulations; must also be proved to ensure and claim conviction. It is in this sense that it is said that the proviso does not make or unmake the offence under Section 138 of the N.I. Act. That is already done by the body of the Sections. This dispute as to whether the stipulations of the proviso are conditions precedent or ingredients/ components of the offence under Section 138 of the N.I. Act may only be academic in most cases. Undoubtedly the ingredients stricto sensu as also the conditions precedent will have to be established satisfactorily in all cases. Of course in an appropriate case it may have to be considered whether substantial compliance of the conditions precedent can be reckoned to be sufficient to justify a conviction. Be that as it may, the distinction between the ingredients and conditions precedent is certainly real and existent. That distinction is certainly vital while ascertaining complicity of an indictee who faces indictment in a prosecution under Section 138 with the aid of Section 141 of the N.I. Act. That is how the question assumes such crucial significance here.

31. To sum up:

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

(ii) Cognizance of any such offence is however forbidden under Section 142 of the Act except upon a complaint in writing made by the payee or holder of the cheque in due course

within a period of one month from the date the cause of action accrues to such payee or holder under clause (c) of proviso to Section 138.

(iii) The cause of action to file a complaint accrues to a complainant/payee/holder of a cheque in due course if

(a) the dishonoured cheque is presented to the drawee bank within a period of six months from the date of its issue.

(b) If the complainant has demanded payment of cheque amount within thirty days of receipt of information by him from the bank regarding the dishonour of the cheque and

(c) If the drawer has failed to pay the cheque amount within fifteen days of receipt of such notice.

(iv) The facts constituting cause of action do not constitute the ingredients of the offence under Section 138 of the Act.

(v) The proviso to Section 138 simply postpones/defers institution of criminal proceedings and taking of cognizance by the Court till such time cause of action in terms of clause (c) of proviso accrues to the complainant.

(vi) Once the cause of action accrues to the complainant, the jurisdiction of the Court to try the case will be determined by reference to the place where the cheque is dishonoured.

(vii) The general rule stipulated under Section 177 of Cr.P.C applies to cases under Section 138 of the Negotiable Instruments Act. Prosecution in such cases can, therefore, be launched against the drawer of the cheque only before the Court within whose jurisdiction the dishonour takes place except in situations where the offence of dishonour of the cheque punishable under Section 138 is committed along with other offences in a single transaction within the meaning of Section 220(1) read with Section 184 of the Code of Criminal Procedure or is covered by the provisions of Section 182(1) read with Sections 184 and 220 thereof.

32. Before parting with this aspect of the matter, we need to remind ourselves that an avalanche of cases involving dishonour of cheques has come upon the Magistracy of this country. The number of such cases as of October 2008 were estimated to be more than 38 lakhs by the Law Commission of India in its 213th Report. The result is that cases involving dishonour of cheque is in all major cities choking the criminal justice system at the Magistrates level. Courts in the four metropolitan cities and other commercially important centres are particularly burdened as the filing of such cases is in very large numbers. More than five lakh such cases were pending in criminal courts in Delhi alone as of 1st June 2008. The position is no different in other cities where large number of complaints are filed under S.138 not necessarily because the offence is committed in such cities but because multinational and other companies and commercial entities and agencies choose these places for filing the complaints for no better reason than the fact that notices demanding payment of cheque amounts were issued from such cities or the cheques were deposited for collection in their banks in those cities. Reliance is often placed on Bhaskarans case to justify institution of such cases far away from where the transaction forming basis of the dishonoured cheque had taken place. It is not uncommon to find complaints filed in different jurisdiction for cheques dishonoured in the same transaction

and at the same place. This procedure is more often than not intended to use such oppressive litigation to achieve the collateral purpose of extracting money from the accused by denying him a fair opportunity to contest the claim by dragging him to a distant place. Bhaskarans case could never have intended to give to the complainant/payee of the cheque such an advantage. Even so, experience has shown that the view taken in Bhaskarans case permitting prosecution at any one of the five different places indicated therein has failed not only to meet the approval of other benches dealing with the question but also resulted in hardship, harassment and inconvenience to the accused persons. While anyone issuing a cheque is and ought to be made responsible if the same is dishonoured despite compliance with the provisions stipulated in the proviso, the Court ought to avoid an interpretation that can be used as an instrument of oppression by one of the parties. The unilateral acts of a complainant in presenting a cheque at a place of his choice or issuing a notice for payment of the dishonoured amount cannot in our view arm the complainant with the power to choose the place of trial. Suffice it to say, that not only on the Principles of Interpretation of Statutes but also the potential mischief which an erroneous interpretation can cause in terms of injustice and harassment to the accused the view taken in the Bhaskarans case needs to be revisited as we have done in foregoing paragraphs.

33. With the above observations, I concur with the order proposed by my noble Brother, Vikramajit Sen, J.

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K. BHASKARAN VERSUS SANKARAN VAIDHYAN BALAN AND ANR.

(1999) 7 Supreme Court Cases 510

Supreme Court of India

Before **Hon'ble Mr. Justice K.T. Thomas, Hon'ble Mr. Justice M.B. Shah**

K. Bhaskaran ... Petitioner
Versus
Sankaran Vaidhyan Balan And Anr. ... Respondent

Appeal (crl.) 1015 of 1999

Decided on 29 September, 1999

General Clauses Act, 1897 – S. 27 – Notice to drawer returned as "unclaimed" – invites a liberal interpretation favouring the person who has the statutory obligation to give notice, because he is presumed to be the loser in the transaction and the provision itself has been made in his interest – Thrust in the clause is on the need to "make a demand" – Strict interpretation would give a handle to a trickster cheque drawer – Further held, the where sender has despatched the notice by post with correct address written thereon – Such actually served and that he was not responsible for the non-service.

JUDGMENT

JUDGMENT 1999 Supp(3) SCR 271 The Judgment of the Court was delivered by THOMAS, J. Leave granted.

This is a case where the complainant and the accused are siblings, being sons of the same parents. They are fighting over a dishonoured cheque. Both must have experienced a roller-coaster ride in this criminal litigation. Fortune favoured the accused in the first round as he scored an acquittal from the Trial Court, but it favoured the complainant in the next round when the High Court reversed the acquittal and convicted his brother of the offence under Section 138 of the Negotiable Instruments Act (for short `the Act'). Perhaps the accused would have remained quiet by then, but for the sentence of imprisonment (six months) which he has now to undergo besides a fine of rupees one lakh which the High Court has imposed on him. So this time it is the turn of the accused to move and hence he has filed this appeal.

We thought that the two brothers would settle their disputes over this cheque case and we granted sufficient opportunity to both . But the battle is destined to continue as the expected settlement eludes like a mirage. We do not know at whose fault the parleys went away. We cannot but proceed with the case and so we heard the counsel for both.

Before dealing with the two main points on which the counsel argued in this Court we may set out the facts in brief. The respondent (who will hereinafter be referred to as the `complainant') presented a cheque which bears the signature of the appellant (hereinafter referred to as the `accused') before the Syndicate Bank's branch office at Kayamkulam (Kerala) on 29.1.1993 for encashment. The cheque was for an amount of rupees one lakh. The bank bounced the cheque due to insufficiency of funds in the account of the accused. Complainant then issued a notice by registered post in the address

of the accused on 2.2.1993. The notice was returned to the complainant on 15.2.1993 with the following endorsements inscribed thereon:

3.2.1993 Addressee absent

4.2.1993 Addressee absent

5.2.1993 Addressee absent

6.2.1993 Intimation served on addressee's house

As the postal article remained unclaimed till 15.2.1993 it was returned to the sender with a further endorsement `unclaimed.' A complaint was filed by the complainant on 4.3.1993 before the Court of the Judicial Magistrate, 1st Class, Adoor (in Pathanamthitta District in Kerala) against the accused under Section 138 of the Act. Among the contentions which the accused raised, one was regarding the territorial jurisdiction of the said magistrate Court to try the case as the cheque was dishonoured at the Syndicate Bank's Branch office at Kayam-kulam (it is situate in another district in Kerala). Accused denied having issued the cheque although he owned his signature therein. According to the accused, his brother (the complainant) had snatched away some signed blank cheque" leaves from his possession and utilised one such cheque leaf for the present case. He also contended that he did not receive any notice from the complainant regarding dishonour of the cheque and hence no cause of action would have arisen in this case. The complaint, according to him, is not maintainable on that score also.

The complainant examined himself as PW-1 and two more witnesses for the prosecution. (PW-2 is the Manager of Syndicate Bank's branch office and PW-3 Devarajan who claimed to have seen the accused issuing the cheque at his shop). Accused examined his wife as DW-1.

The trial magistrate repelled the defence contention that the cheque leaf was stolen by the complainant. It was held that the cheque Was actually issued by the accused to the complainant.

However, the magistrate upheld the contention that his Court had no territorial jurisdiction to try the case as the cheque was dishonoured by the Branch office of the bank situated in a different district. The magistrate further held that as the accused did not receive the notice no cause of action has arisen. As a corollary thereof the Magistrate acquitted the accused.

The High Court of Kerala, on the appeal preferred by the complainant, set aside the order of acquittal and convicted him and sentenced him as aforesaid. Learned single judge of the High Court accepted the version of the complainant that cheque was issued at the shop of PW-3 which is situated within the territorial limits of the Trial Court's jurisdiction. Regarding notice, learned single judge relied on the decision of a Division Bench of the same High Court Kunjan Panicker v. Christudas, (1997) 2 Kerala Law Times 539 wherein it was held that "refusal and even failure to claim in circumstances as here will tantamount to service of notice."

As the signature in the cheque is admitted to be that of the accused, the presumption envisaged in Section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. Section 139 of the Act enjoins on the Court to presume that the holder of the cheque received it for the discharge of any debt or liability. The burden was on the accused to rebut the aforesaid presumption. The Trial Court was not persuaded to rely on the interested testimony of DW-1 to rebut the presumption. The said finding was upheld by the High Court. It is not now open to the accused to contend differently on that aspect.

Learned counsel for the appellant first contended that the Trial Court has no jurisdiction to try this case and hence the High Court should not have converted the acquittal into conviction on the strength of the evidence collected in such a trial. Of course, the Trial Court had upheld the plea of the accused that it had no jurisdiction to try the case.

We fail to comprehend as to how the Trial Court could have found so regarding the jurisdiction question. Under Section 177 of the Code "every offence shall ordinarily be inquired into and tried in a court within whose jurisdiction it was committed." The locality where the bank (which dishonoured the cheque) is situated cannot be regarded as the sole criteria to determine the place of offence. It must be remembered that offence under Section 138 would not be completed with the dishonour of the cheque. It attains completion only with the failure of the drawer of the cheque to pay the cheque amount within the expiry of 15 days mentioned in clause (c) of the proviso to Section 138 of the Act. It is normally difficult to fix up a particular locality as the place of failure to pay the amount covered by the cheque. A place, for that purpose, would depend upon a variety of factors. It can either be at the place where the drawer resides or at the place where the payee resides or at the place where either of them carries on business. Hence, the difficulty to fix up any particular locality as the place of occurrence for the offence under Section 138 of the Act.

Even otherwise the rule that every offence shall be tried by a court within whose jurisdiction it was committed is not an unexceptional or unchangeable principle. Section 177 itself has been framed by the legislature thoughtfully by using the precautionary word `ordinarily' to indicate that the rule is not invariable in all cases. Section 178 of the Code suggests that if there is uncertainty as to where, among different localities, the offence would have been committed the trial can be had in a Court having' jurisdiction over any of those localities. The provision has further widened the scope by stating that in case where the offence was committed partly in one local area and partly in another local area the Court in either of the localities can exercise jurisdiction to try the case. Further again, Section 179 of the Code stretches its scope to a still wider horizon. It reads thus:

"179. Offence triable where act is done or consequence ensues. -When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued."

The above provisions in the Code should have been borne in mind when the question regarding territorial jurisdiction of the Courts to try the offence was sought to be determined.

The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. Following are the acts which are components of the said offence : (1) Drawing of the cheque, (2) Presentation of the cheque to the bank, (3) Returning the cheque unpaid by the drawee bank, (4) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice.

It is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at 5 different localities. But concatenation of all the above five is a sine qua non for the completion of the offence under Section 138 of the Code. In this context a reference to Section 178(d) of the Code is useful. It is extracted below :

"Where the offence consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas."

Thus it is clear, if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the Act. In other words, the complainant can choose any one of those courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done. As the amplitude stands so widened and so expansive it is an idle exercise to raise jurisdictional question regarding the offence under Section 138 of the Act.

The more important point to be decided in this case is whether the cause of action has arisen at all as the notice sent by the complainant to the accused was returned as `unclaimed.' The conditions pertaining to the notice to be given to the drawer, have been formulated and incorporated in clauses (b) and (c) of the proviso to Section 138(1) of the Act. The said clauses are extracted below :

"(b) The payee or the holder in due course of the cheque, as the case may be, 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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice."

On the part of the payee he has to make a demand by `giving a notice' in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such `giving' the travails of the prosecution would have been very much lessened. But the legislature says that failure on the part of the drawer to pay the amount should be within 15 days `of the receipt' of the said notice. It is, therefore, clear that `giving notice' in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer in the correct address.

In Black's Law Dictionary, `giving of notice' is distinguished from `receiving of the notice.' (vide page 621) "A person notifies or gives notice to another by taking such steps as may be reasonably required to inform the other in the ordinary course, whether or not such other actually comes to know of it." A person `receives' a notice when it is duly delivered to him or at the place of his business.

If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape-from the legal consequences of Section 138 of the Act. It must be borne in mind that Court should not adopt in interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure.

In Maxwell's `Interpretation of Statues' the learned author has emphasized that "provisions relating to giving of notice often receive liberal interpretation." (vide page 99 of the 12th edn.) The context envisaged in Section 138 of the Act invites a liberal interpretation for the person who has the statutory obligation to give notice because he is presumed to be the loser in the transaction and it is for his interest the very provision is made by the legislature. The words in clause (b) of the proviso to Section 138 of the Act show that payee has the statutory obligation to `make a demand' by giving notice. The thrust in the clause is on the need to `make a-demand'. It is only the mode for making

such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once it is despatched his part is over and the next depends on what the sendee does.

It is well settled that a notice refused to be accepted by the addressee can be presumed to have been served on him, [vide Harcharan Singh v. Smt. Shivrani and Ors., [1981] 2 SCC 535, and Jagdish Singh v. Natthu Singh, [1992] 1 SCC 647.] Here the notice is returned as unclaimed and not as refused. Will there be any significant different between the two so far as the presumption of service is concerned? In this connection a reference to Section 27 of the General Clauses Act will be useful.

The Section reads thus :

"27. Meaning of service by post. - Where any central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression `serve' or either of the expressions `give' or `send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post"

No doubt Section 138 of the Act does not require that the notice should be given only by `post'.

Nonetheless the principle incorporated in Section 27 (quoted above) can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice.

Thus, when a notice is returned by the sendee as unclaimed such date would be the commencing date in reckoning the period of 15 days contemplated in clause (c) to the proviso of Section 138 of the Act. Of course such reckoning would be without prejudice to the right of the drawer of the cheque to show that he had no knowledge that the notice was brought to his address. In the present case the accused did not even attempt to discharge the burden to rebut the aforesaid presumption.

The High Court is, therefore, right in holding the accused guilty of the offence under Section 138 of the Act. Still there is one more aspect, though neither side has argued about it before us, which requires elucidation. We will deal with that aspect now.

The High Court has imposed a sentence of imprisonment for 6 months and a fine of Rs. one lakh on the accused. Section 138 of the Act provides punishment with "imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of cheque or with both". But the court cannot obviate the jurisdictional limit prescribed in Section 386 of the Code. Though the said provision confers power on the Court of appeal to reverse an order of acquittal and find the accused guilty and pass sentence on him according to law, even the High Court when it is the Court of appeal has to conform to the second proviso to the Section 386 of the Code. It reads thus :

"Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal".

In this context a reference to Section 29(2) of the Code is necessary as it contains a limitation for the magistrate of first class in the matter of imposing fine as a sentence or as a part of the sentence.

Section 29(2) reads thus:

"The court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding five thousand rupees, or of both."

The trial in this case was held before a Judicial Magistrate of first class who could not have imposed a fine exceeding Rs. 5,000 besides imprisonment. The High Court while convicting the accused in the same case could not impose a sentence of fine exceeding the said limit. It is true, if a judicial magistrate of first class were to order compensation to be paid to the complainant from out of the fine realised the complainant will be the loser when the cheque amount exceeded the said limit. In such a case a complainant would get only the maximum amount of Rupees five thousand.

However, the magistrate in such cases can alleviate the grievance of the complainant by making report to Section 357(3) of the Code. It is well to remember that this Court has emphasized the need for making liberal use of that provision, (Hari Kishan and State of Haryana v. Sukhbir Singh and Ors., AIR (1988) SC 2127). No limit is mentioned in the sub-section and therefore, a magistrate can award any sum as compensation. Of course while fixing the quantum of such compensation the Magistrate has to consider what would be the reasonable amount of compensation payable to the complainant. Thus, even if the trial was before a court of magistrate of first class in respect of a cheque which covers an amount exceeding Rs. 5,000 the Court has power to award compensation to be paid to the complainant.

The question of sentence and award of compensation must be considered by the Trial Court. We deem it feasible that the magistrate shall hear the prosecution and the accused on those aspects. Of course, if the complainant and accused settle their disputes regarding this cheque, in the meanwhile, that fact can certainly be taken into consideration in determining the extent or quantum of sentence.

We, therefore, uphold the conviction of the offence under Section 138 of the Act, but we set aside the sentence awarded by the High Court for enabling the trial court to pass orders on the question of sentence and the compensation, if any payable.

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MADHYA PRADESH STATE LEGAL SERVICES AUTHORITY VERSUS PRATEEK JAIN AND ANR

(2014) 10 Supreme Court Cases 690

Supreme Court of India

Before **Hon'ble Mr. Justice J. Chelameswar, Hon'ble Mr. Justice A.K. Sikri**

Madhya Pradesh State Legal Services Authority ...Appellant (S)
Versus
Prateek Jain And Anr ...Respondent (S)

Decided on 10 September, 2014

CIVIL APPEAL NO. 8614 OF 2014

(arising out of Special Leave Petition (Civil) No. 38519 of 2012)

Guidelines laid down by Supreme Court in Damodar S. Prabhu, (2010) 5 SCC 663 in relation to – Adherence to, in cases which are resolved/settled in Lok Adalats – Scope of deviation therefrom – Whether it would frustrate the object of Lok Adalats if imposition of costs as per the Guidelines contained in Damodar S. Prabhu case is insisted upon. However, as observed in Damodar S. Prabhu case itself, the court concerned can deviate from the said Guidelines in a particular case, recording special/specific reasons in writing therefor – Thus, in those matters where case has to be decided/settled in Lok Adalat, if court finds that it is a result of positive attitude of the parties, then in such appropriate cases, court can reduce the costs indicated in Damodar S. Prabhu case by imposing minimal costs or even walve the same. Damodar S. Prabhu case – Legal Aid and ADR.

JUDGMENT

A.K. SIKRI, J.

Leave granted.

Madhya Pradesh State Legal Services Authority, the appellant herein, has filed the instant appeal challenging the propriety of orders dated February 27, 2012 passed by the High Court of Madhya Pradesh in Writ Petition No. 1519 of 2012, which was filed by one Rakesh Kumar Jain (respondent No.2 herein) impleading Prateek Jain (respondent No.1 herein) as the sole respondent. Essentially the lis was between respondent Nos. 1 and 2. Respondent No.1 had filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the 'Act') against respondent No.2. Matter reached before the Additional Sessions Judge in the form of criminal appeal. During the pendency of the said appeal, the matter was settled between the parties. On their application, the matter was referred to Mega Lok Adalat. However, the concerned Presiding Officer in the Lok Adalat did not give his imprimatur to the said settlement in the absence of deposit made as per the direction given in the judgment of this Court in Damodar S. Prabhu v. Sayed Babalal H., (2010) 5 SCC 663. Against the order of Additional Sessions Judge, a writ petition was filed by respondent No.2 but

the same is also dismissed by the High Court, accepting the view taken by the Additional Sessions Judge.

From the aforesaid, it would be clear that the matter in issue was between respondent Nos. 1 and 2.

The appellant comes in picture only because the parties had approached the Mega Lok Adalat organised by the appellant. The reason for filing the present appeal is the apprehension of the appellant that if the settlement arrived at in the Lok Adalats are not accepted by the Courts, one of the essential function and duty of Legal Services Authority cast upon by the Legal Services Authorities Act, 1987 (hereinafter referred to as the '1987 Act') would be greatly prejudiced and, therefore, it is necessary to straighten the law on the subject matter. Acknowledging the significance of the issue involved, permission was granted to the appellant to file the special leave petition and notice was issued in the special leave petition on December 06, 2012. Operation of the impugned order of the High Court was also stayed in the following words:

In the meantime, having regard to the objects to be achieved by the provisions of the Legal Services Authorities Act, 1987, the operation of the order passed by the Lok Adalat-I, Gwalior, Madhya Pradesh, on 30th July, 2011, and that of the High Court impugned in this petition, shall remain stayed. Notice has been duly served upon both the respondents, but neither of them have put in appearance. Be that as it may, since we are concerned with the larger question raised in this appeal, we hard the learned counsel for the appellant in the absence of any representation on the part of the respondents.

With the aforesaid gist of the controversy involved, we now proceed to take note of the relevant facts in some detail.

As pointed out above, there was some dispute between respondent Nos. 1 and 2. Nature of the dispute is not reflected from the papers filed by the appellant. However, since it pertains to a complaint filed under Section 138 of the Act, one can safely infer that the complaint was filed because of dishonour of the cheque. It also appears from the record that this complaint was filed by respondent No.1 against respondent No.2 and had resulted in some conviction/adverse order against respondent No.2, though exact nature of the orders passed by the learned Magistrate is not on record. Be that as it may, respondent No.2 had filed the appeal against the order of the Magistrate in the Court of Additional Sessions Judge.

During the pendency of this appeal, a joint application was filed by both the parties stating that a compromise had taken place between them with mutual consent and they have reestablished their relationship and wanted to maintain the same cordial relation in future as well. On that basis it was stated in the application that respondent No.1 herein did not want to proceed against respondent No.2 and wanted the appeal to be disposed of on the basis of compromise by filing a compromise deed in the appeal. This application was filed under Section 147 of the Act which permits compounding of such offences. We would like to point out at this stage that on what terms the parties had settled the matter is not on record as compromise deed has not been filed.

When this application came up for hearing on July 30, 2011 before the learned appellate Court, counsel for both the parties requested that the matter be forwarded to the Mega Lok Adalat which was being organized on the same date. On this application, following order was passed by the learned Additional Sessions Judge:

30.07.2011

xx xx xx

An application under section 147 Negotiation (sic) Instrument Act filed on behalf of both sides for compromise and request is made to direct the matter be taken up before the Lok Adalat organized today's date.

In view of the facts mentioned in the application, for abrogation of the compromise application, the matter be taken up today before the concerned bench of Lok-Adalat. When the matter was placed before the Lok Adalat, the Presiding Officer refused to act upon the settlement recorded between the parties on the ground that the accused person had not deposited 15% amount of the cheque for compounding of matter at the appeal stage as per The Guidelines contained in the judgment of this Court in the case of Damodar S. Prabhu (supra). The exact order passed is reproduced below: 30.07.2011 The matter produced before the bench of Lok Adalat No.1.

Appellant along with Shri N.S. Yadav, Advocate.

Non-Applicant along with Shri Mohan Babu Mangal Advocate.

The instant matter is related to the appeal filed against the conviction order passed under Section 138 of Negotiation (sic) of Instrument Act, wherein, both parties, being appeared along with their counsels, while filing application for compromise, have requested to mitigate the matter. But, the defendant/accused has not deposited 15 percent amount of cheque for mitigation of matter at the appeal stage according to the guide lines of judgment dated 3.5.2010 passed in Criminal Appeal No. 963/2010 in the matter of Damodar M. Prabhu Vs. Sayyad Baba Lal passed by the Hon'ble Supreme Court, in the District Legal Services Authority, due to said reason, it is not lawful to grant permission of mitigation of the matter to both sides. Hence, the compromise application is hereby dismissed.

The matter be returned back to the Regular Court for abrogation in accordance with law. It is this order which was challenged by respondent No.2 by filing a writ petition under Article 227 of the Constitution of India. The High Court has dismissed the said writ petition stating that the judgment of this Court in Damodar S. Prabhu (supra) is binding on the subordinate Courts under Article 141 of the Constitution and, therefore, the subordinate Court had not committed any legal error.

The Guidelines in the form of directions given in the aforesaid judgment read as under:

THE GUIDELINES (I) In the circumstances, it is proposed as follows:

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

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

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

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

The question of consideration in the aforesaid backdrop is as to whether directions/guidelines given by this Court in the aforesaid judgment are inapplicable in cases which are resolved/settled in Lok Adalats.

What was argued before us by the learned counsel for the appellant was that these guidelines containing the schedule of costs should not be made applicable to the settlements which are arrived at in the Lok Adalats inasmuch as provision for imposition of such costs would run contrary to the very purpose of Lok Adalats constituted under Section 19 of the 1987 Act. It was emphasized that Lok Adalats were constituted to promote the resolution of disputes pending before Court by amicable settlement between the parties and in order to reduce the pendency of cases before the Courts, including appellate Courts. Learned counsel also referred to the judgment of this Court in K.N. Govindan Kutty Menon v. C.D. Shaji, (2012) 2 SCC 51, wherein it is held that a compromise or settlement arrived at before the Lok Adalat and award passed pursuant thereto is to be treated as decree of civil Court by virtue of deeming provision contained in Section 21 and Section 2(aaa) and (c) of the 1987 Act. The Court held that even a settlement of a case under Setion 138 of the Act and Lok Adalat award passed pursuant thereto would be a decree executable under the Code of Civil Procedure, 1908. The position in this behalf is summed up in para 26 of the said judgment, which reads as under:

26. From the above discussion, the following propositions emerge:

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

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

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

(4) Even if a matter is referred by a criminal court under Section 138 of the Negotiable Instruments Act, 1881 and by virtue of the deeming provisions, the award passed by the Lok Adalat based on a compromise has to be treated as a decree capable of execution by a civil court. Taking sustenance from the aforesaid dicta, the submission of learned counsel for the appellant was that even the proceedings under Section 138 of the Act were governed by the Code of Criminal Procedure, 1973, such an award was executable as a decree of the civil Court under the Code of Civil Procedure, 1908.

The submission, therefore, was that once award of the Lok Adalat is given the effect of the decree and attaches this kind of sanctity behind it, it should be carved out as an exception to 'The Guidelines' framed by this Court in Damodar S. Prabhu's case (supra).

We have considered the aforesaid submission of the learned counsel with utmost intensity of thought. It appears to be of substance in the first blush when this submission is to be considered in the context of the purpose and objective with which Lok Adalats have been constituted under

Section 19 of the 1987 Act. No doubt, the manifest objective is to have speedy resolution of the disputes through these Lok Adalats, with added advantage of cutting the cost of litigation and avoiding further appeals. The advent of the 1987 Act gave a statutory status to Lok Adalats, pursuant to the constitutional mandate in Article 39-A of the Constitution of India, contains various provisions of settlement of disputes through Lok Adalat. It is an Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity. In fact, the concept of Lok Adalat is an innovative Indian contribution to the world jurisprudence. It is a new form of the justice dispensation system and has largely succeeded in providing a supplementary forum to the victims for settlement of their disputes. This system is based on Gandhian principles. It is one of the components of Alternate Dispute Resolution systems specifically provided in Section 89 of the Code of Civil Procedure, 1908 as well. It has proved to be a very effective alternative to litigation. Lok Adalats have been created to restore access to remedies and protections and alleviate the institutional burden of the millions of petty cases clogging the regular courts. It offers the aggrieved claimant whose case would otherwise sit in the regular courts for decades, at least some compensation now. The Presiding Judge of a Lok Adalat is an experienced adjudicator with a documented record of public service and has legal acumen. Experience has shown that not only huge number of cases are settled through Lok Adalats, this system has definite advantages, some of which are listed below:

(a) speedy justice and saving from the lengthy court procedures;

(b) justice at no cost;

(c) solving problems of backlog cases; and

(d) maintenance of cordial relations.

Thus, it cannot be doubted that Lok Adalats are serving an important public purpose. Having said so, it needs to be examined as to whether in the given case it becomes derogatory to the movement of the Lok Adalats if the costs amounting to 15% of the cheque amount, as per the guidelines contained in Damodar S. Prabhu (supra), is insisted? However, before discussing this central issue, we would like to analyse the events of the present case, as that would be of help to answer the pivotal issue raised before us.

As pointed out above while taking note of the factual details of the case, it was not a situation where the Court persuaded the parties to use the medium of Lok Adalat for the settlement of their dispute

On the contrary, the parties had already settled the matter between themselves before hand and filed the application in this behalf before the learned Additional Sessions Judge on July 30, 2011 with a request which the matter be taken up before the Lok Adalat that was being organized on the same date. It is clear from the order passed by the learned Additional Sessions Judge on July 30, 2011, which is already extracted above.

In the first instance, we do not understand as to why the matter was sent to Lok Adalat when the parties had settled the matter between themselves and application to this effect was filed in the Court. In such a situation, the Court could have passed the order itself, instead of relegating the matter to the Lok Adalat. We have ourselves highlighted the importance and significance of the Institution of Lok Adalat. We would be failing in our duty if we do not mention that, of late, there

is some criticism as well which, inter alia, relates to the manner in which cases are posted before the Lok Adalats. We have to devise the methods to ensure that faith in the system is maintained as in the holistic terms access to justice is achieved through this system. We, therefore, deprecate this tendency of referring even those matters to the Lok Adalat which have already been settled. This tendency of sending settled matters to the Lok Adalats just to inflate the figures of decision/ settlement therein for statistical purposes is not a healthy practice. We are also not oblivious of the criticism from the lawyers, intelligentsia and general public in adopting this kind of methodology for window dressing and showing lucrative outcome of particular Lok Adalats.

Be that as it may, reverting to the facts of the present case, we find that when the case had been settled between the parties and application in this behalf was made before the Court, it cannot be denied that had the Court passed the compouding order on this application under Section 147 of the Act, as per the rigours of Damodar S. Prabhu (supra), 15% f the cheque amount had to be necessarily deposited by the accused person (respondent No.2). If we hold that such a cost is not to be paid when the matter is sent to the Lok Adalat, this route would be generally resorted to, to bypass the applicability of the directions contained in Damodar S. Prabhu (supra). Such a situation cannot be countenanced.

The purpose of laying down the guidelines in Damodar S. Prabhu (supra) is explained in the said judgment itself. The Court in that case was concerned with the stage of the case when compounding of offence under Section 147 of the Act is to be permitted. To put it otherwise, the question was as to whether such a compounding can be only at the trial Court stage or it is permissible even at the appellate stage. It was noted that even before the insertion of Section 147 of the Act, by way of amendment in the year 2002, some High Courts had permitted the compounding of offence contemplated by Section 138 of the Act during the later stages of litigation. This was so done by this Court also in O.P. Dholakia v. State of Haryana, (2000) 1 SCC 672 and in some other cases which were noticed by the Bench. From these judgments the Court concluded that the compounding of offence at later stages of litigation in cheque bounding cases was held to be permissible.

While holding so, the Court also took note of the phenomena which was widely prevalent in the manner in which cases under Section 138 of the Act proceed in this country. It noticed that there was a tendency on the part of the accused persons to drag on these proceedings and resort to settlement process only at a stage when the accused persons were driven to wall. It is for this reason that most of the complaints filed result in compromise or settlement before the final judgment on the one side and even in those cases where judgment is pronounced and conviction is recorded, such cases are settled at appellate stage. This was so noted in para 13 of the judgment, which reads as under:

13. It is quite obvious that with respect to the offence of dishonour of cheques, it is the compensatory aspect of the remedy which should be given priority over the punitive aspect. There is also some support for the apprehensions raised by the learned Attorney General that a majority of cheque bounce cases are indeed being compromised or settled by way of compounding, albeit during the later stages of litigation thereby contributing to undue delay in justice-delivery. The problem herein is with the tendency of litigants to belatedly choose compounding as a means to resolve their dispute. Further more, the writen submissions filed on behalf of the learned Attorney General have stressed on the fact that unlike Section 320 of the CrPC, Section 147 of the Negotiable Instruments Act provides no explicit guidance as to what stage compounding can or cannot be done and whether compounding can be done at the instance of the complainant or with the leave of the court. As mentioned earlier, the learned

Attorney General's submission is that in the absence of statutory guidance, parties are choosing compounding as a method of last resort instead of opting for it as soon as the Magistrates take cognizance of the complaints. One explanation for such behaviour could be that the accused persons are willing to take the chance of progressing through the various stages of litigation and then choose the route of settlement only when no other route remains. While such behaviour may be viewed as rational from the viewpoint of litigants, the hard facts are that the undue delay in opting for compounding contributes to the arrears pending before the courts at various levels. If the accused is willing to settle or compromise by way of compounding of the offence at a later stage of litigation, it is generally indicative of some merit in the complainant's case. In such cases it would be desirable if parties choose compounding during the earlier stages of litigation. If however, the accused has a valid defence such as a mistake, forgery or coercion among other grounds, then the matter can be litigated through the specified forums. This particular tendency had prompted the Court to accept the submission of the Attorney General to frame guidelines for a graded scheme of imposing costs on parties who unduly delay compounding of the offence inasmuch as such a requirement of deposit of the costs will act as a deterrent for delayed composition since free and easy compounding of offences at any stage, however belated, was given incentive to the drawer of the cheque to delay settling of cases for years. For this reason, the Court framed the guidelines permitting compounding with the imposition of varying costs depending upon the stage at which the settlement took place in a particular case.

After formulating The Guidelines, which are already extracted above, the Court made very pertinent observations in para 17 of the said judgment which would have bearing in the present case. Thus, we reproduce the same below:

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

in respect of offences pertaining to Section 138 of the Act, there was a legislative vacuum which prompted the Court to frame those guidelines to achieve the following objectives:

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

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

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

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

What follows from the above is that normally costs as specified in the guidelines laid down in the said judgment has to be imposed on the accused persons while permitting compounding. There can be departure therefrom in a particular case, for good reasons to be recorded in writing by the concerned Court. It is for this reason that the Court mentioned three objectives which were sought to be achieved by framing those guidelines, as taken note of above. It is thus manifestly the framing of Guidelines in this judgment was also to achieve a particular public purpose. Here comes the issue for consideration as to whether these guidelines are to be given a go by when a case is decided/ settled in the Lok Adalat? Our answer is that it may not be necessarily so and a proper balance can be struck taking care of both the situations.

Having regard thereto, we are of the opinion that even when a case is decided in Lok Adalat, the requirement of following the guidelines contained in Damodar S. Prabhu (supra) should normally not be dispensed with. However, if there is a special/specific reason to deviate therefrom, the Court is not remediless as Damodar S. Prabhu (supra) itself has given discretion to the concerned Court to reduce the costs with regard to specific facts and circumstances of the case, while recording reasons in writing about such variance. Therefore, in those matters where the case has to be decided/ settled in the Lok Adalat, if the Court finds that it is a result of positive attitude of the parties, in such appropriate cases, the Court can always reduce the costs by imposing minimal costs or even waive the same. For that, it would be for the parties, particularly the accused person, to make out a plausible case for the waiver/reduction of costs and to convince the concerned Court about the same. This course of action, according to us, would strike a balance between the two competing but equally important interests, namely, achieving the objectives delineated in Damodar S. Prabhu (supra) on the one hand and the public interest which is sought to be achieved by encouraging settlements/resolution of case through Lok Adalats.

Having straightened the position in the manner above, insofar as the present case is concerned, as we find that the parties had already settled the matter and the purpose of going to the Lok Adalat was only to have a rubber stamp of the Lok Adalat in the form of its imprimatur thereto, we do not find any error in the impugned judgment, though we are giving our own reasons in support of the conclusion arrived at by the High Court in dismissing the writ petition filed by respondent No.2, while straightening the approach that should be followed henceforth in such matters coming before the Lok Adalats.

The appeal stands disposed of in the aforesaid terms.

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BRIDGESTONE INDIA PRIVATE LIMITED VERSUS INDERPAL SINGH

(2016) 2 Supreme Court Cases 75

In the Supreme Court of India

Before **Hon'ble Mr. Justice Jagdish Singh Khehar and Hon'ble Mr. Justice R. Banumathi**

Bridgestone India Private Limited ...Appellant
Versus
Inderpal Singh ...Respondent

Criminal Appeals No. 1557 of 2015

Criminal Appeal No.1557 of 2015 (Arising out of SLP(Crl.)No.7850 of 2011)
[Criminal Appeal No.1562 of 2015 arising out of SLP (CRL.) No.9758 of 2011]
[Criminal Appeal No.1563 of 2015 arising out of SLP (CRL.) No.10019 of 2011]
[Criminal Appeal No.1564 of 2015 arising out of SLP (CRL.) No.10020 of 2011]
[Criminal Appeal No.1557 of 2015 arising out of SLP (CRL.) No.7850 of 2011]

Decided on 24 November, 2015

Ss. 142(2) & 142-A – As Dishonour of cheque – Territorial jurisdiction for filing complaint – Retrospective effect of Ss. 142(2) and 142-A – Supersession of legal position declared by Supreme Court in Dashrath Rupsingh Rathod, (2014) 9 SCC 129 and provisions of CrPC by said Ss. 142(2) & 142-A – as if [S. 142(2)] had been in force at all material times, give retrospectivity to them

Dashrath Rupsingh Rathod v. State of Maharashtra, (2014) 9 SCC 129 : (2014) 4 SCC (Civ) 676 : (2014) 3 SCC (Cri) 673, held, statutorily superseded.

JUDGMENT

JAGDISH SINGH KHEHAR, J.

1. Leave granted.

2. Despite service, no one has entered appearance on behalf of the respondent.

3. A cheque No.1950, drawn on the Union Bank of India, Chandigarh, was issued by Inderpal Singh (the respondent herein) to the appellant - M/s Bridgestone India Pvt.Ltd. The cheque was in the sum of Rs.26,958/-. The appellant - M/s Bridgestone India Pvt.Ltd. presented the above cheque at the IDBI Bank in Indore. The appellant received intimation of its being dishonoured on account of "...exceeds arrangement..." on 04.08.2006 at Indore.

4. The appellant issued a legal notice on 26.08.2006, which was served on the respondent - Inderpal Singh on 06.09.2006, demanding the amount depicted in the cheque. The appellant informed the respondent, that he would be compelled to initiate proceedings under Section 138 of the Negotiable Instruments Act, 1881, if payment was not made by the respondent within 15 days from the date of receipt of the legal notice.

5. Consequent upon the issuance of the aforementioned legal notice wherein the respondent was required to reimburse the cheuqe amount to the appellant, and the respondent having failed to discharge his obligation, proceedings were initiated by the appellant on 13.10.2006 in the Court of the Judicial Magistrate, First Class, Indore, under Section 138 of the Negotiable Instruments Act, 1881.

6. The accused-respondent - Inderpal Singh, preferred an application before the Judicial Magistrate, First Class, Indore, Madhya Pradesh, under Section 177 of the Criminal Procedure Code, contesting the territorial jurisdiction with respect to the above cheque drawn on the Union Bank of India, Chandigarh. The prayer made by the respondent, that the Judicial Magistrate, First Class, Indore, did not have the jurisdiction to entertain the proceedings initiated by the appellant - M/s Bridgestone Indian Pvt. Ltd. was declined on 02.06.2009.

   The Judicial Magistrate, First Class, Indore, relied on the judgment rendered by this Court in K.Bhaskaran vs. Sankaran Vaidhyan Balan and another, AIR 1999 SC 3762, to record a finding in favour of the appellant. Dissatisfied with the order passed by the Judicial Magistrate, First Class, Indore, dated 02.06.2009, the respondent-Inderpal Singh preferred a petition under Section 482 of the Criminal Procedure Code, in the High Court of Madhya Pradesh before its Indore Bench.

   Having examined the controversy in hand and keeping in mind the fact, that a number of documents were presented by the respondent - Inderpal Singh during the course of hearing before the High Court, by an order dated 03.12.2009, the petition filed by the accused-respondent was disposed of, by remitting the case to the Judicial Magistrate, First Class, Indore, requiring him to pass a fresh order after taking into consideration the additional documents relied upon, and the judgments cited before the High Court.

7. The Judicial Magistrate, First Class, Indore, yet again, by an order dated 11.01.2010 held, that he had the territorial jurisdiction to adjudicate upon the controversy raised by the appellant - M/s Bridgestone India Pvt.Ltd. under Section 138 of the Negotiable Instruments Act, 1881. The decision rendered by the Judicial Magistrate, First Class, Indore, was again assailed by the accused-respondent in yet another petition filed by him under Section 482 of the Criminal Procedure Code, in the High Court of Madhya Pradesh before its Indore Bench. The High Court accepted the prayer made by the accused-respondent - Inderpal Singh by holding, that the jurisdiction lay only before the Court wherein the original drawee bank was located, namely, at Chandigarh, where-from the accused-respondent had issued the concerned cheque bearing No.1950, drawn on the Union Bank of India, Chandigarh.

8. Dissatisfied with the order passed by the High Court of Madhya Pradesh, dated 05.05.2011, the appellant has approached this Court through the instant appeal.

9. During the course of hearing, learned counsel for the appellant cited the decision rendered by a three-Judge Bench of this Court in Dashrath Rupsingh Rathod vs. State of Maharashtra and another, (2014) 9 SCC 129, and pointedly invited our attention to the conclusions drawn by this Court in paragraph 58, which is extracted hereunder:

   "58. To sum up:

   58.1 An offence under Section 138 of the Negotiable Instruments Act, 1881 is committed no sooner a cheque drawn by the accused on an account being maintained by him

in a bank for discharge of debt/liability is returned unpaid for insufficiency of funds or for the reason that the amount exceeds the arrangement made with the bank.

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

58.3 The cause of action to file a complaint accrues to a complainant/payee/holder of a cheque in due course if

(a) the dishonoured cheque is presented to the drawee bank within a period of six months from the date of its issue.

(b) If the complainant has demanded payment of cheque amount within thirty days of receipt of information by him from the bank regarding the dishonour of the cheque, and (c) If the drawer has failed to pay the cheque amount within fifteen days of receipt of such notice.

58.4 The facts constituting cause of action do not constitute the ingredients of the offence under Section 138 of the Act.

58.5 The proviso to Section 138 simply postpones/defers institution of criminal proceedings and taking of cognizance by the court till such time cause of action in terms of clause (c) of proviso accrues to the complainant.

58.6 Once the cause of action accrues to the complainant, the jurisdiction of the Court to try the case will be determined by reference to the place where the cheque is dishonoured.

58.7 The general rule stipulated under Section 177 CrPC applies to cases under Section 138 of the Negotiable Instruments Act.

Prosecution in such cases can, therefore, be launched against the drawer of the cheque only before the court within whose jurisdiction the dishonour takes place except in situations where the offence of dishonour of the cheque punishable under Section 138 is committed along with other offences in a single transaction within the meaning of Section 220(1) read with Section 184 of the Code of Criminal Procedure or is covered by the provisions of Section 182(1) read with Sections 184 and 220 thereof." In view of the decision rendered by this Court in Dashrath Rupsingh Rathod's case, it is apparent, that the impugned order dated 05.05.2011, passed by the High Court of Madhya Pradesh, Bench at Indore, was wholly justified.

10. In order to overcome the legal position declared by this Court in Dashrath Rupsingh Rathod's case, learned counsel for the appellant has drawn our attention to the Negotiable Instruments (Amendment) Second Ordinance, 2015 (hereinafter referred to as `the Ordinance'). A perusal of Section 1(2) thereof reveals, that the Ordinance would be deemed to have come into force with effect from 15.06.2015. It is therefore pointed out to us, that the Negotiable Instruments (Amendment) Second Ordinance, 2015 is in force. Our attention was then invited to Section 3 thereof, whereby, the original Section 142 of the Negotiable Instruments Act, 1881, came to be amended, and also, Section 4 thereof, whereby, Section 142A was inserted into the

Negotiable Instruments Act. Sections 3 and 4 of the Negotiable Instruments (Amendment) Second Ordinance, 2015 are being extracted hereunder:

"3. In the principal Act, section 142 shall be numbered as sub- section (1) thereof and after sub-section (1) as so numbered, the following sub-section shall be inserted, namely:-

(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,--

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

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

4. In the principal Act, after section 142, the following section shall be inserted, namely:- 142A.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any judgment, decree, order or directions of any court, all cases transferred to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, shall be deemed to have been transferred under this Ordinance, as if that sub-section had been in force at all material times.

(2) Notwithstanding anything contained in sub-section (2) of section 142 or sub-section (1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the court having jurisdiction under sub-section (2) of section 142 or the case has been transferred to that court under sub-section (1), and such complaint is pending in that court, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.

(3) If, on the date of the commencement of this Ordinance, more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, before which the first case was filed and is pending, as if that sub-section had been in force at all material times." (Emphasis is ours)

A perusal of the amended Section 142(2), extracted above, leaves no room for any doubt, specially in view of the explanation thereunder, that with reference to an offence under Section 138 of the Negotiable Instruments Act, 1881, the place where a cheque is delivered for collection i.e. the branch of the bank of the payee or holder in due course, where the drawee maintains an account, would be determinative of the place of territorial jurisdiction.

11. It is, however, imperative for the present controversy, that the appellant overcomes the legal position declared by this Court, as well as, the provisions of the Code of Criminal Procedure. Insofar as the instant aspect of the matter is concerned, a reference may be made to Section 4 of the Negotiable Instruments (Amendment) Second Ordinance, 2015, whereby Section 142A was inserted into the Negotiable Instruments Act. A perusal of Sub-section (1) thereof leaves no room for any doubt, that insofar as the offence under Section 138 of the Negotiable Instruments Act is concerned, on the issue of jurisdiction, the provisions of the Code of Criminal Procedure, 1973, would have to give way to the provisions of the instant enactment on account of the non-obstante clause in sub-section (1) of Section 142A. Likewise, any judgment, decree, order or direction issued by a Court would have no effect insofar as the territorial jurisdiction for initiating proceedings under Section 138 of the Negotiable Instruments Act is concerned. In the above view of the matter, we are satisfied, that the judgment rendered by this Court in Dashrath Rupsingh Rathod's case would also not non-suit the appellant for the relief claimed.

12. We are in complete agreement with the contention advanced at the hands of the learned counsel for the appellant. We are satisfied, that 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 142A(1) to the effect, that the judgment rendered by this Court in Dashrath Rupsingh Rathod's case, would not stand in the way of the appellant, insofar as the territorial jurisdiction for initiating proceedings emerging from the dishonor of the cheque in the present case arises.

13. Since cheque No.1950, in the sum of Rs.26,958/-, drawn on the Union Bank of India, Chandigarh, dated 02.05.2006, was presented for encashment at the IDBI Bank, Indore, which intimated its dishonor to the appellant on 04.08.2006, we are of the view that the Judicial Magistrate, First Class, Indore, would have the territorial jurisdiction to take cognizance of the proceedings initiated by the appellant under Section 138 of the Negotiable Instruments Act, 1881, after the promulgation of the Negotiable Instruments (Amendment) Second Ordinance, 2015. The words "...as if that sub-section had been in force at all material times..." used with reference to Section 142(2), in Section 142A(1) gives retrospectivity to the provision.

14. In the above view of the matter, the instant appeal is allowed, and the impugned order passed by the High Court of Madhya Pradesh, by its Indore Bench, dated 05.05.2011, is set aside. The parties are directed to appear before the Judicial Magistrate, First Class, Indore, on 15.01.2016. In case the complaint filed by the appellant has been returned, it shall be re-presented before the Judicial Magistrate, First Class, Indore, Madhya Pradesh, on the date of appearance indicated hereinabove. Criminal Appeal No.1562 of 2015 (Arising out of SLP(Crl.) No.9758 of 2011), Criminal Appeal No.1563 of 2015 (Arising out of SLP(Crl.) No. 10019 of 2011) and Criminal Appeal No.1564 of 2015 (Arising out of SLP(Crl.)No.10020 of 2011)

1. Leave granted.

2. Despite service, no one has entered appearance on behalf of the respondent.

3. Learned counsel for the appellant states, that the controversy raised in the instant appeals is identical to the one adjudicated upon by this Court in Criminal Appeal No.1557 of 2015 (Arising out of SLP(Crl.)No.7850 of 2011)[M/s Bridgestone India Pvt.Ltd. vs. Inderpal Singh] on 24.11.2015. The instant appeals are accordingly allowed in terms of the order passed by this Court in Criminal Appeal No.1557 of 2015 [M/s Bridgestone India Pvt.Ltd. vs. Inderpal Singh] on 24.11.2015.

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METERS AND INSTRUMENTS PRIVATE LIMITED & ANR. VERSUS KANCHAN MEHTA

(2018) 1 Supreme Court Cases 560

Supreme Court of India

Before **Hon'ble Mr. Justice Adarsh Kumar Goel and Hon'ble Mr. Justice Uday U. Lalit**

Meters and Instruments private Limited & ANR. ...Appellants
versus
Kanchan Mehta ...Respondent

Criminal Appeal No. 1731 of 2017

With

[Criminal Appeal No. 1732 of 2017
[Criminal Appeal No. 1733 of 2017

Decided on 5 October, 2017

How proceedings for offence under S. 138 can be regulated where accused willing to deposit cheque amount. Courts has jurisdiction under S. 357(3) CrPC to award suitable compensation with default sentence under S. 64 IPC with further powers of recovery under S. 431 CrPC – Court may close proceedings if accused deposits amount as assessed by it having regard to cheque amount, interest/costs, etc. within stipulated period – Affidavit evidence can be received as evidence at all stages of trial or proceedings – When can accused's appearance before court be exempted.

JUDGMENT

ADARSH KUMAR GOEL, J.

1. Leave granted.

   These appeals have been preferred against the order dated 21st April, 2017 of the High Court of Punjab and Haryana at Chandigarh in CRLM Nos.13631, 13628 and 13630 of 2017. The High Court rejected the prayer of the appellants for compounding the offence under Section 138 of the Negotiable Instruments Act, 1881 (the Act) on payment of the cheque amount and in the alternative for exemption from personal appearance.

2. When the matters came up for hearing before this Court earlier, notice was issued to consider the question "as to how proceedings for an offence under Section 138 of the Act can be regulated where the accused is willing to deposit the cheque amount. Whether in such a case, the proceedings can be closed or exemption granted from personal appearance or any other order can be passed." The Court also appointed Mr. K.V. Viswanathan, learned senior counsel to assist the Court as amicus and Mr. Rishi Malhotra, learned counsel to assist the amicus. Accordingly, learned amicus has made his submissions and also filed written submissions duly

assisted by S/Shri Rishi Malhotra, Ravi Raghunath, Dhananjay Ray and Sidhant Buxy, advocates. We place on record our appreciation for the services rendered by learned amicus and his team.

3. Few Facts: The Respondent Kanchan Mehta filed complaint dated 15th July, 2016 alleging that the appellants were to pay a monthly amount to her under an agreement. Cheque dated 31st March, 2016 was given for Rs.29,319/- in discharge of legal liability but the same was returned unpaid for want of sufficient funds. In spite of service of legal notice, the amount having not been paid, the appellants committed the offence under Section 138 of the Act. The Magistrate vide order dated 24th August, 2016, after considering the complaint and the preliminary evidence, summoned the appellants. The Magistrate in the order dated 9th November, 2016 observed that the case could not be tried summarily as sentence of more than one year may have to be passed and be tried as summons case. Notice of accusation dated 9th November, 2016 was served under Section 251 Cr.P.C.

4. Appellant No.2, who is the Director of appellant No.1, made a statement that he was ready to make the payment of the cheque amount. However, the complainant declined to accept the demand draft. The case was adjourned for evidence. The appellants filed an application under Section 147 of the Act on 12th January, 2017 relying upon the judgment of this Court in Damodar S. Prabhu versus Sayed Babalal H.1 The application was dismissed in view of the judgment of this Court in JIK Industries Ltd. versus Amarlal versus Jumani2 which required consent of the complainant for compounding. The High Court did not find any ground to interfere with the order of the Magistrate. Facts of other two cases are identical. Hence these appeals.

5. We have heard learned counsel for the parties and learned amicus who has been duly and ably assisted by S/Shri Rishi Malhotra, Ravi Raghunath, Dhananjay Ray and Sidhant Buxy, advocates. We proceed to consider the question.

6. The object of introducing Section 138 and other provisions of Chapter XVII in the Act in the year 19883 was to enhance the acceptability of cheques in the settlement of liabilities. The drawer of cheque is made liable to prosecution on dishonour of cheque with safeguards to prevent harassment of honest drawers. The Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 to amend the Act was brought in, inter-alia, to simplify the procedure to deal with such matters. The amendment includes provision for service of summons by Speed Post/Courier, summary trial and making the offence compoundable.

7. This Court has noted that the object of the statute was to facilitate smooth functioning of business transactions. The provision is necessary as in many transactions cheques were issued merely as a device to defraud the creditors. Dishonour of cheque causes incalculable loss, injury and inconvenience to the Vide the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 5 payee and credibility of business transactions suffers a setback4. At the same time, it was also noted that nature of offence under Section 138 primarily related to a civil wrong and the 2002 amendment specifically made it compoundable.

The offence was also described as 'regulatory offence'. The burden of proof was on the accused in view of presumption under Section 139 and the standard of proof was of "preponderance of probabilities". The object of the provision was described as both punitive as well as

compensatory. The intention of the provision was to ensure that the complainant received the amount of cheque by way of compensation.

Though proceedings under Section 138 could not be treated as civil suits for recovery, the scheme of the provision, providing for punishment with imprisonment or with fine which could extend to twice the amount of the cheque or to the both, made the intention of law clear. The complainant could be given not only the cheque amount but double the amount so as to cover interest and costs. Section 357(1)(b) of the Cr. P.C. provides for payment of compensation for the loss caused by the offence out of the fine.

Where fine is not imposed, compensation can be to the person who suffered loss. Sentence in default can also be imposed. The object of the provision is not merely penal but to make the accused honour the negotiable instruments.

8. In view of the above scheme, this Court held that the accused could make an application for compounding at the first or second hearing in which case the Court ought to allow the same. If such application is made later, the accused was required to pay higher amount towards cost etc9. This Court has also laid down that even if the payment of the cheque amount, in terms of proviso (b) to Section 138 of the Act was not made, the Court could permit such payment being made immediately after receiving notice/summons of the court. The guidelines in Damodar (Supra) have been held to be flexible as may be necessary in a given situation. Since the concept of compounding involves consent of the complainant, this Court held that compounding could not be permitted merely by unilateral payment, without the consent of both the parties.

9. While the object of the provision was to lend credibility to cheque transactions, the effect was that it put enormous burden on the courts' dockets. The Law Commission in its 213th Report, submitted on 24th November, 2008 noted that out of total pendency of 1.8 crores cases in the country (at that time), 38 lakh cases (about 20% of total pendency) related to Section 138 of the Act. This Court dealt with the issue of interpretation of 2002 amendment which was incorporated for simplified and speedy trials. It was held that the said provision laid down a special code to do away with all stages and processes in regular criminal trial. This Court held that once evidence was given on affidavit, the extent and nature of examination of such witness was to be determined by the Court.

The object of Section 145(2) was simpler and swifter trial procedure. Only requirement is that the evidence must be admissible and relevant. The affidavit could also prove documents. The scheme of Sections 143 to 147 of the Act was a departure from provisions of Cr.P.C. and the Evidence Act and complaints could be tried in a summary manner except where the Magistrate feels that sentence of more than one year may have to be passed. Even in such cases, the procedure to be followed may not be exactly the same as in Cr.P.C.

The expression "as far as possible" in Section 143 leaves 13 Mandvi Cooperative Bank Ltd. v. Nimesh B. Thakore(2010) 3 SCC 83, paras 25, 26 14 Para 41, ibid 8 sufficient flexibility for the Magistrate so as not to affect the quick flow of the trial process. The trial has to proceed on day to day basis with endeavour to conclude the same within six months. Affidavit of the complainant can be read as evidence. Bank's slip or memo of cheque dishonour can give rise to the presumption of dishonour of the cheque, unless and until that fact was disproved.

10. Again, this Court considered the matter in J.V. Baharuni and Anr. etc. versus State of Gujarat and Anr etc. and observed that the procedure prescribed for cases under Section 138 of the Act was flexible and applicability of Section 326(3) of the Cr.P.C. in not acting on the evidence already recorded in a summary trial did not strictly apply to the scheme of Section 143 of the Act. This Court observed that the procedure being followed by the Magistrates was not commensurate with the summary trial provisions and a successor Magistrate ought not to mechanically order de novo trial. This Court observed that the Court should make endeavour to expedite hearing of cases in a time bound manner. The Magistrate should make attempts to encourage compounding of offence at an early stage of litigation. The compensatory aspect of remedy should be given priority over the punitive aspect.

11. While it is true that in Subramanium Sethuraman versus State of Maharashtra18 this Court observed that once the plea of the accused is recorded under Section 252 of the Cr.P.C., the procedure contemplated under Chapter XX of the Cr.P.C. has to be followed to take the trial to its logical conclusion, the said judgment was rendered as per statutory provisions prior to 2002 amendment. The statutory scheme post 2002 amendment as considered in Mandvi Cooperative Bank and J.V. Baharuni (supra) has brought about a change in law and it needs to be recognised. After 2002 amendment, Section 143 of the Act confers implied power on the Magistrate to discharge the accused if the complainant is compensated to the satisfaction of the Court, where the accused tenders the cheque amount with interest and reasonable cost of litigation as assessed by the Court. Such an interpretation was consistent with the intention of legislature.

    The court has to balance the rights of the complainant and the accused and also to enhance access to justice. Basic object of the law is to enhance credibility of the cheque transactions by providing speedy remedy to the complainant without intending to punish the drawer of the cheque whose conduct is reasonable or where compensation to the complainant meets the ends of justice. Appropriate order can be passed by the Court in exercise of its inherent power under Section 143 of the Act which is different from compounding by consent of parties.

    Thus, Section 258 Cr.P.C. which enables proceedings to be stopped in a summons case, even though strictly speaking is not applicable to complaint cases, since the provisions of the Cr.P.C. are applicable “so far as may be”, the principle of the said provision is applicable to a complaint case covered by Section 143 of the Act which contemplates applicability of summary trial provisions, as far as possible, i.e. with such deviation as may be necessary for speedy trial in the context.

12. The sentence prescribed under Section 138 of the Act is upto two years or with fine which may extend to twice the amount or with both. What needs to be noted is the fact that power under Section 357(3) Cr.P.C. to direct payment of compensation is in addition to the said prescribed sentence, if sentence of fine is not imposed. The amount of compensation can be fixed having regard to the extent of loss suffered by the action of the accused as assessed by the Court. The direction to pay compensation can be enforced by default sentence under Section 64 IPC and by recovery procedure prescribed under Section 431 Cr.P.C.19

13. This Court in Indian Bank Association and Ors. versus Union of India and Ors.20 approved the directions of the Bombay High Court, Calcutta High Court and Delhi High Court in KSL and Industries Ltd. v. Mannalal Khandelwal21, Indo International Ltd. versus State of Maharashtra22,

Harishchandra Biyani versus Stock Holding Corporation of India Ltd.23, Magma Leasing Ltd. versus State of W.B.24 and Rajesh Agarwal versus State25 laying down simpler procedure for disposal of cases under Section 138 of the Act. This Court directed as follows:

"23. Many of the directions given by the various High Courts, in our view, are worthy of emulation by the criminal courts all over the country dealing with cases under Section 138 of the Negotiable Instruments Act, for which the following directions are being given:

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

23.2. The 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. The court, in appropriate cases, may take the assistance of the police or the nearby court to serve notice on the accused. For notice of appearance, a short date be fixed. If the summons is received back unserved, immediate follow-up action be taken.

23.3. The court may indicate in the summons 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, the court may pass appropriate orders at the earliest.

23.4. The 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 CrPC to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for recalling a witness for cross-examination.

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

24. We, therefore, direct all the criminal courts in the country dealing with Section 138 cases to follow the abovementioned procedures for speedy and expeditious disposal of cases falling under Section 138 of the Negotiable Instruments Act. The writ petition is, accordingly, disposed of, as above."

14. We may, however, note that this Court held that general directions ought not to be issued which may deprive the Magistrate 13 to exercise power under Section 205 Cr.P.C.

26 We need to clarify that the judgment of this Court is not a bar to issue directions which do not affect the exercise of power under Section 205, to require personal attendance wherever necessary. Needless to say that the judgment cannot be read as affecting the power of the High Court under Article 225 of the Constitution read with Articles 227 and

235 to issue directions to subordinate courts without affecting the prevailing statutory scheme.

15. In Bhaskar Industries Ltd. versus Bhiwani Denim & Apparels Ltd., this Court considered the issue of hardship caused in personal attendance by an accused particularly where accused is located far away from the jurisdiction of the Court where the complaint is filed. This Court held that even in absence of accused, evidence can be recorded in presence of counsel under Section 273 Cr.P.C. and Section 317 Cr.P.C. permitted trial to be held in absence of accused. Section 205 Cr.P.C. specifically enabled the Magistrate to dispense with the personal appearance. Having regard to the nature of offence under Section 138, this Court held that the Magistrates ought to consider exercise of the jurisdiction under Section 205 Cr.P.C. to relieve accused of the hardship without prejudice to the prosecution proceedings.

It was observed :

"15. 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."

16. It is, thus, clear that the trials under Chapter XVII of the Act are expected normally to be summary trial. Once the complaint is filed which is accompanied by the dishonored cheque and the bank's slip and the affidavit, the Court ought to issue summons. The service of summons can be by post/e-mail/courier and ought to be properly monitored. The summons ought to indicate that the accused could make specified payment by deposit in a particular account before the specified date and inform the court and the complainant by e-mail. In such a situation, he may not be required to appear if the court is satisfied that the payment has not been duly made and if 15 the complainant has no valid objection. If the accused is required to appear, his statement ought to be recorded forthwith and the case fixed for defence evidence, unless complaintant's witnesses are recalled for examination.

17. Having regard to magnitude of challenge posed by cases filed under Section 138 of the Act, which constitute about 20% of the total number of cases filed in the Courts (as per 213th Report of the Law Commission) and earlier directions of this Court in this regard, it appears to be necessary that the situation is reviewed by the High Courts and updated directions are issued. Interactions, action plans and monitoring are continuing steps mandated by Articles 39A and 21 of the Constitution to achieve the goal of access to justice28.

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. Atleast some number of Section 138 cases

can be decided online. If complaint with affidavits and documents can be filed online, process issued online and 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, video conferencing 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.

18. From the above discussion following aspects emerge:

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

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

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

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

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

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

20. In every complaint under Section 138 of the Act, it may be desirable that the complainant gives his bank account number and if possible e-mail ID of the accused. If e-mail ID is available with the Bank where the accused has an account, such Bank, on being required, should furnish such e-mail ID to the payee of the cheque. In every summons, issued to the accused, it may be indicated that if the accused deposits the specified amount, which should be assessed by the Court having regard to the cheque amount and interest/cost, by a specified date, the accused need not appear unless required and proceedings may be closed subject to any valid objection of the complainant .

    If the accused complies with such summons and informs the Court and the complainant by e-mail, the Court can ascertain the objection, if any, of the complainant and close the proceedings unless it becomes necessary to proceed with the case. In such a situation, the accused's presence can be required, unless the presence is otherwise exempted subject to such conditions as may be considered appropriate. The accused, who wants to contest the case, must be required to disclose specific defence for such contest. It is open to the Court to ask specific questions to the accused at that stage.

    In case the trial is to proceed, it will be open to the Court to explore the possibility of settlement. It will also be open to the Court to consider the provisions of plea bargaining. Subject to this, the trial can be on day to day basis and endeavour must be to conclude it within six months. The guilty must be punished at the earliest as per law and the one who obeys the law need not be held up in proceedings for long unnecessarily.

21. It will be open to the High Courts to consider and lay down category of cases where proceedings or part thereof can be conducted online by designated courts or otherwise. The High Courts may also consider issuing any further updated directions for dealing with Section 138 cases in the light of judgments of this Court. The appeals are disposed of. It will be open to the appellants to move the Trial Court afresh for any further order in the light of this judgment.

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KISHAN RAO VERSUS SHANKARGOUDA

2018 SCC Online SC 651

Supreme Court of India

Before **Hon'ble Mr. Justice A.K. Sikri and Hon'ble Mr. Justice Ashok Bhushan**

Kishan Rao ...Appellant
Versus
Shankargouda ...Respondent

Criminal Appeal No.803 of 2018

[arising out of SLP (CRL.) No.10030 of 2016]

Decided on 02 July, 2018

JUDGMENT

ASHOK BHUSHAN, J.

1. This appeal has been filed against the judgment and order of the High Court dated 18.03.2016 by which judgment, Criminal Revision Petition filed by the respondent-accused was allowed by setting aside the order of conviction and sentence recorded against the accused under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "Act 1881"). The parties shall be hereinafter referred to as described in the Magistrate's Court.

2. Brief facts of case are: The appellant(complainant) and the respondent (accused) were known to each other and had good relations. Accused approached the complainant for a loan of Rs.2,00,000/- for the purpose of his business expenses and promised to repay the same within one month. On 25.12.2005, complainant had paid sum of Rs.2,00,000/- as a loan. For repayment of the loan accused issued post dated cheque dated 25.01.2006 in the name of complainant for the amount of Rs.2,00,000/-. The cheque was presented for collection at Bank of Maharashtra Branch at Gulbarga which could not be encashed due to insufficient funds. At the request of the accused the cheque was again represented on 01.03.2006 for collection which was returned on 02.03.2006 by the Bank with the endorsement "insufficient funds".

3. A notice was issued by the complainant demanding payment of Rs.2,00,000/- which was received by the accused on 14.03.2006 to which reply was sent on 31.03.2006. A complaint was filed by the appellant alleging the offence under Section 138 of the Act, 1881. Cognizance was taken by the Magistrate. Accused stated not guilty of the offence, hence, trial proceeded. In order to prove the guilt, the complainant himself examined as PW.1 and examined two other witnesses PW.2 and Pw.3. He filed documentary evidence Exhs.P1 and P6, statement of the accused was recorded under Section 313 Cr.P.C.

   Thereafter, the case proceeded for defence evidence. Accused neither examined himself nor produced any evidence either oral or documentary. In the reply to the notice which was sent by the complainant, it was alleged that the said cheque was stolen by the complainant. The complainant was cross-examined by the defence. In the cross-examination defence denied

accused's signatures on the cheque. The trial court rejected the defence of the accused that cheque was stolen by the complainant. The trial court drew presumption under Section 139 of the Act, 1881 against the accused. Accused failed to rebut the presumption by leading any evidence on his behalf. The offence having been found proved, the trial court convicted the accused under Section 138 of the Act, 1881 and sentenced him to pay a fine of Rs.2,50,000/- and simple imprisonment for six months.

4. The appeal was filed by the accused against the said judgment. The Appellate Court considered the submissions of the parties and dismissed the appeal by affirming the order of conviction.

5. Criminal Revision was filed by the accused in the High Court. The High Court by the impugned judgment has allowed the revision by setting aside the conviction order. The High Court held that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. Complainant aggrieved by the judgment of the High Court has come in this appeal.

6. Learned counsel for the appellant submits that the offence having been proved before the trial court by leading evidence, the conviction was recorded by the trial court after appreciating both oral and documentary evidence led by the appellant which order was also affirmed by the Appellate Court. There was no jurisdiction in the High court to re-appreciate the evidence on record and come to the conclusion that accused has been able to raise a doubt regarding existence of the debt or liability of the accused. He submits that the High court in exercise of jurisdiction under Section 379/401 Cr.P.C. can interfere with the order of the conviction only when the findings recorded by the courts below are perverse and there was no evidence to prove the offence against the accused. It is submitted that in exercise of the revisional jurisdiction the High Court cannot substitute its own opinion after re-appreciation of evidence.

7. It is submitted that the presumption under Section 139 was rightly drawn against the accused and accused failed to rebut the said presumption by leading evidence. There was no ground for setting aside the conviction order.

8. Although, the respondent was served but no one appeared at the time of hearing.

9. We have considered the submissions of the appellant and perused the records.

10. The trial court after considering the evidence on record has returned the finding that the cheque was issued by the accused which contained his signatures. Although, the complainant led oral as well as documentary evidence to prove his case, no evidence was led by the accused to rebut the presumption regarding existence of debt or liability of the accused.

11. This Court has time and again examined the scope of Section 397/401 Cr.P.C. and the ground for exercising the revisional jurisdiction by the High Court. In State of Kerala vs. Puttumana Illath Jathavedan Namboodiri, 1999 (2) SCC 452, while considering the scope of the revisional jurisdiction of the High Court this Court has laid down the following:

"5.....In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction.

Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice. On scrutinizing the impugned judgment of the High Court from the aforesaid standpoint, we have no hesitation to come to the conclusion that the High Court exceeded its jurisdiction in interfering with the conviction of the respondent by reappreciating the oral evidence....."

12. Another judgment which has also been referred to and relied by the High Court is the judgment of this Court in Sanjaysinh Ramrao Chavan vs. Dattatray Gulabrao Phalke and others, 2015 (3) SCC 123. This Court held that the High Court in exercise of revisional jurisdiction shall not interfere with the order of the Magistrate unless it is perverse or wholly unreasonable or there is non-consideration of any relevant material, the order cannot be set aside merely on the ground that another view is possible. Following has been laid down in paragraph 14:

"14.....Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of records, the Revisional Court is not justified in setting aside the order, merely because another view is possible. The Revisional Court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence.

The revisional power of the court under Sections 397 to 401 CrPC is not to be equated with that of an appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction."

13. In the above case also conviction of the accused was recorded, the High Court set aside the order of conviction by substituting its own view. This Court set aside the High Court's order holding that the High 9 Court exceeded its jurisdiction in substituting its views and that too without any legal basis.

14. Now, we proceed to examine order of the High Court in the light of the law as laid down in the above mentioned cases. The High Court itself in paragraph 40 has given its reasons for setting aside the order of conviction, it has observed that though perception of a person differs from one another with regard to the acceptance of evidence on record but in its perception and consideration, the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. It is relevant to notice what has been said in paragraph 40 of the judgment which is to the following effect:

"40. In view of the above said "facts and circumstances, though perception of a person differs from one another with regard to the acceptance of evidence on record but in my perception and consideration, the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability particularly with reference to the alleged transaction dated 25.12.2005 as alleged by the complainant.

Hence, in my opinion the High Court has full power to interfere with such judgment of the Trial Court as subject 10 matter exactly falls within the parameters of Section 397 of the Code and also guidelines of the Apex Court as noted in the above said decisions. Therefore, I am of the considered opinion the Trial Court and the First Appellate Court have committed serious error in merely proceeding on the basis of the presumption under Section 139 of the Act and also on the basis that, the accused has not proved his defence with reference to the loss of cheque etc. Hence, I answered the point in the affirmative and proceeded to pass the following: ORDER The revision petition is hereby allowed. Consequently, the judgment and sentence passed by the III-Addl. Civil Judge (Jr.Dn.) & JMFC, Kalaburagi in C.C.No.1362/2006 which is affirmed by Fast Track Court - 1 at Kalaburagi in Cr.A.No.46/2009 are hereby set aside. Consequently, the accused is acquitted of the charges levelled against him under Section 138 of N.I.Act. If any fine amount is deposited by the accused/petitioner, the same is ordered to be refunded to him...."

15. The High Court has not returned any finding that order of conviction based on evidence on record suffers from any perversity or based on no material or there is other valid ground for exercise of revisional jurisdiction. There is no valid basis for the High Court to hold that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. The appellant has proved the issuance of cheque which contained signatures of the accused and on presentation of the cheque, the cheque was returned with endorsement "insufficient funds". Bank official was produced as one of the witnesses who proved that the cheque was not returned on the ground that it did not contain signatures of the accused rather it was returned due to insufficient funds. We are of the view that the judgment of High Court is liable to be set aside on this ground alone.

16. Even though judgment of the High Court is liable to be set aside on the ground that High Court exceeded its revisional jurisdiction, to satisfy ourselves with the merits of the case, we proceeded to examine as to whether there was any doubt with regard to the existence of the debt or liability of the accused.

17. Section 139 of the Act, 1881 provides for drawing the presumption in favour of holder. Section 139 is to the following effect:

"139.Presumption in favour of holder.- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

18. This Court in Kumar Exports vs. Sharma Carpets, 2009 (2) SCC 513, had considered the provisions of Negotiable Instruments Act as well Evidence Act. Referring to Section 139, this Court laid down following in paragraphs 14, 15, 18 and 19:

"14. Section 139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.

15. Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable),

(2) "shall presume" (rebuttable), and (3) "conclusive presumptions" (irrebuttable). The term "presumption" is used to designate an inference, affirmative or disaffirmative of the existence of a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a process of probable 13 reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumption literally means "taking as true without examination or proof".

18. Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

19. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over."

19. This Court held that the accused may adduce evidence to rebut the presumption, but mere denial regarding existence of debt shall not serve any purpose. Following was held in paragraph 20:

"20....The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant.

To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist..."

20. In the present case, the trial court as well as the Appellate Court having found that cheque contained the signatures of the accused and it was given to the appellant to present in the Bank of the presumption under Section 139 was rightly raised which was not rebutted by the accused. The accused had not led any evidence to rebut the aforesaid presumption. The

accused even did not come in the witness box to support his case. In the reply to the notice which was given by the appellant the accused took the defence that the cheque was stolen by the appellant. The said defence was rejected by the trial court after considering the evidence on record with regard to which no contrary view has also been expressed by the High Court.

21. Another judgment which needs to be looked into is Rangappa vs. Sri Mohan, 2010 (11) SCC 441. A three Judge Bench of this Court had occasion to examine the presumption under Section 139 of the Act, 1881. This Court in the aforesaid case has held that in the event 16 the accused is able to raise a probable defence which creates doubt with regard to the existence of a debt or liability, the presumption may fail. Following was laid down in paragraphs 26 and 27:

> "26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat, (2008) 4 SCC 54, may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.
>
> 27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard or proof."

22. No evidence was led by the accused. The defence taken in the reply to the notice that cheque was stolen having been rejected by the two courts below, we do not see any basis for the High court coming to the conclusion that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. How the presumption under Section 139 can be rebutted on the evidence of PW.1, himself has not been explained by the High court.

23. In view of the aforesaid discussion, we are of the view that the High Court committed error in setting aside the order of conviction in exercise of revisional jurisdiction. No sufficient ground has been mentioned by the High Court in its judgment to enable it to exercise its revisional jurisdiction for setting aside the conviction.

24. In the result, the appeal is allowed, judgment of the High Court is set aside and judgment of trial court as affirmed by the Appellate Court is restored.

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INDIAN BANK ASSOCIATION & ORS VERSUS UNION OF INDIA & ANR

(2014) 5 Supreme Court Cases 590

Supreme Court of India

Before **Hon'ble Mr. Justice K.S. Radhakrishnan and Hon'ble Mr. Justice Vikramajit Sen**

Indian Bank Association and others ...Petitioners
Versus
Union of India and others ...Respondents

WRIT PETITION (CIVIL) NO.18 OF 2013

Decided on 21 April, 2014

Debt, Financial and Monetary Laws – Negotiable Instruments Act, 1881 – Ss. 143 to 147 and 138 – Cheque dishonour cases – Directions issued for expeditious disposal of – Objectives of Amendment Act, 2002 – Fulfilment of – In order to have uniform practice in dealing with cases of dishonour of cheques, and to achieve objectives of speedy summary trial in view of amended provisions of NI Act viz. Ss. 143 to 147, held, amended provisions must be given effect to in letter and spirit – Held, court has option of accepting affidavits of complainant and other witnesses instead of examining them in the court, for their examination-in-chief – However, witnesses to the complaint and the accused must be avaible for cross-examination as and when there is direction to this effect by the court – Constitution of India – Arts. 21, 32 and 142 – Criminal Procedure Code, 1973, Ss. 262 to 264 and 202 to 204.

JUDGMENT

K.S. Radhakrishnan, J.

1. This Writ Petition, under Article 32 of the Constitution of India, has been preferred by the Indian Banks Association (IBA) along with Punjab National Bank and another, seeking the following reliefs

   a. Laying down appropriate guidelines/directions to be followed by all Courts within the territory of India competent to try a complaint under Section 138 of the Negotiable Instruments Act, 1881 (the Act) to follow and comply with the mandate of Section 143 of the said Act read with Sections 261 to 265 of Criminal Procedure Code, 1973 (Cr.P.C.) for summary trial of such complaints filed or pending before the said Courts.

   b. Issue a writ of mandamus for compliance with the guidelines of this Honble Court indicating various steps to be followed for summary trial of complaints under Section 138 of the said Act and report to this Honble Court.

   c. Issue a writ of mandamus, directing the respondents, to adopt necessary policy and legislative changes to deal with cases relating to dishonor of cheqeus so that the same are expeditiously disposed off in accordance with the intent of the Act and the guidelines to be laid down by this Honble Court.

2. The first petitioner, which is an Association of Persons with 174 banks/financial institutions as its members, is a voluntary association of banks and functions as think tank for banks in the matters of concern for the whole banking industry. The Petitioners submit that the issue raised in this case is of considerable national importance owing to the reason that in the era of globalization and rapid technological developments, financial trust and commercial interest have to be restored.

3. The Petitioners submit that the banking industry has been put to a considerable disadvantage due to the delay in disposing of the cases relating to Negotiable Instruments Act. The Petitioner banks being custodian of public funds find it difficult to expeditiously recover huge amount of public fund which are blocked in cases pending under Section 138 of the Negotiable Instruments Act, 1881. Petitioners submit that, in spite of the fact, Chapter XIV has been introduced in the Negotiable Instruments Act by Section 4 of the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988, to enhance the acceptability of cheques in settlement of liability by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds, the desired object of the Amendment Act has not achieved.

4. Legislature has noticed that the introduction of Sections 138 to 142 of the Act has not achieved desired result for dealing with dishonoured cheques, hence, it inserted new Sections 143 to 147 in the Negotiable Instruments Act vide Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 for speedy disposal of cases relating to dishonour of cheques through summary trial as well as making the offence compoundable. But, no uniform practice is seen followed by the various Magistrate Courts in the country, as a result of which, the object and purpose for which the amendments were incorporated, have not been achieved.

5. Cheque, though acknowledged as a bill of exchange under the Negotiable Instruments Act and readily accepted in lieu of payment of money and is negotiable, the fact remains that the cheque as a negotiable instrument started losing its credibility by not being honoured on presentation. Chapter XVII was introduced, as already indicated, so as to enhance the acceptability of cheques in settlement of liabilities. The Statement of Objects and Reasons appended with the Bill explaining the provisions of the new Chapter reads as follows

   This clause [Clause (4) of the Bill] inserts a new Chapter XVII in the Negotiable Instruments Act, 1881. The provisions contained in the new Chapter provide that where any cheque drawn by a person for the discharge of any liability is returned by the bank unpaid for the reason of the insufficiency of the amount of money standing to the credit of the account on which the cheque was drawn or for the reason that it exceeds the arrangements made by the drawer of the cheque with the bankers for that account, the drawer of such cheque shall be deemed to have committed an offence. In that case, the drawer, without prejudice to the other provisions of the said Act, shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both.

   The provisions have also been made that to constitute the said offence:

   (a) such cheque should have been presented to the bank within a period of six months of the date of its drawal or within the period of its validity, whichever is earlier; and

(b) the payee or holder in due course of such cheque should have made a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque within fifteen days of the receipt of the information by him from the bank regarding the return of the cheque unpaid; and

(c) the drawer of such cheque should have failed to make the payment of the said amount of money to the payee or the holder in due course of the cheque within fifteen days of the receipt of the said notice.

It has also been provided that it shall be presumed, unless the contrary is proved, that the holder of such cheque received the cheque in the discharge of a liability. Defences which may or may not be allowed in any prosecution for such offence have also been provided to make the provisions effective. Usual provision relating to offences by companies has also been included in the said new Chapter. In order to ensure that genuine and honest bank customers are not harassed or put to inconvenience, sufficient safeguards have also been provided in the proposed new Chapter. Such safeguards are:

(a) that no court shall take cognizance of such offence except on a complaint, in writing, made by the payee or the holder in due course of the cheque;

(b) that such complaint is made within one month of the date on which the cause of action arises; and

(c) that no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate or a Judicial Magistrate of the First Class shall try any such offence.

6. The objectives of the proceedings of Section 138 of the Act are that the cheques should not be used by persons as a tool of dishonesty and when cheque is issued by a person, it must be honoured and if it is not honoured, the person is given an opportunity to pay the cheque amount by issuance of a notice and if he still does not pay, he must face the criminal trial and consequences. Section 138 of the Negotiable Instruments Act, 1881, is given below for easy reference

138. Dishonour of cheque for insufficiency, etc., of funds in the account. - Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the 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;

(b) the payee or the holder in due course of the cheque, as the case may be, 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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

7. This Court in Electronics Trade & Technology Development Corporation Ltd., Secunderabad v. Indian Technologists & Engineers (Electronics) (P) Ltd. and Another (1996) 2 SCC 739, held as follows:

6...The object of bringing Section 138 on statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Despite civil remedy, Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a book and induce the payee or holder in due course to act upon it. Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly. It is seen that once the cueque has been drawn and issued to the payee and the payee has presented the cheque and thereafter, if any instructions are issued to the bank for non-payment and the cheque is returned to the payee with such an endorsement, it amounts to dishonour of cheque and it comes within the meaning of Section 138.

8. In Goa Plast (P) Ltd. v. Chico Ursula DSouza (2004) 2 SCC 235, this Court, while dealing with the objects and ingredients of Sections 138 and 139 of the Act, observed as follows

The object and the ingredients under the provisions, in particular, Sections 138 and 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforesaid provisions. The remedy available in a civil court is a long-drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee.

9. We have indicated, Sections 138 to 142 of the Act were found to be deficient in dealing with the dishonoured cheques. In the said circumstances, the legislature inserted new Sections 143 to 147 by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002, which is brought into force w.e.f. 6th February, 2003. The object and reasons for the said Amendment Act are of some importance and are given below

1. The Negotiable Instruments Act, 1881 was amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 wherein a new Chapter XVII was incorporated for penalties in case of dishonour of cheques due to

insufficiency of funds in the account of the drawer of the cheque. These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument. The existing provisions in the Negotiable Instruments Act,1881, namely, sections 138 to 142 in Chapter XVII have been found deficient in dealing with dishonour of cheques. Not only the punishment provided in the Act has proved to be inadequate, the procedure prescribed for the Courts to deal with such matters has been found to be cumbersome. The Courts are unable to dispose of such cases expeditiously in a time bound manner in view of the procedure contained in the Act.

2. A large number of cases are reported to be pending under sections 138 to 142 of the Negotiable Instruments Act in various courts in the country. Keeping in view the large number of complaints under the said Act pending in various courts, a Working Group was constituted to review section 138 of the Negotiable Instruments Act, 1881 and make recommendations as to what changes were needed to effectively achieve the purpose of that section.

3. The recommendations of the Working Group along with other representations from various institutions and organisations were examined by the Government in consultation with the Reserve Bank of India and other legal experts, and a Bill, namely, the Negotiable Instruments (Amendment) Bill, 2001 was introduced in the Lok Sabha on 24th July, 2001. The Bill was referred to Standing Committee on Finance which made certain recommendations in its report submitted to Lok Sabha in November, 2001.

4. Keeping in view the recommendations of the Standing Committee on Finance and other representations, it has been decided to bring out, inter alia, the following amendments in the Negotiable Instruments Act,1881, namely:

   (i) to increase the punishment as prescribed under the Act from one year to two years;

   (ii) to increase the period for issue of notice by the payee to the drawer from 15 days to 30 days;

   (iii) to provide discretion to the Court to waive the period of one month, which has been prescribed for taking cognizance of the case under the Act;

   (iv) to prescribe procedure for dispensing with preliminary evidence of the complainant;

   (v) to prescribe procedure for servicing of summons to the accused or witness by the Court through speed post or empanelled private couriers;

   (vi) to provide for summary trial of the cases under the Act with a view to speeding up disposal of cases;

   (vii) to make the offences under the Act compoundable;

   (viii) to exempt those directors from prosecution under section 141 of the Act who are nominated as directors of a company by virtue of their holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government, or the State Government, as the case may be;

(ix) to provide that the Magistrate trying an offence shall have power to pass sentence of imprisonment for a term exceeding one year and amount of fine exceeding five thousand rupees;

(x) to make the Information Technology Act, 2000 applicable to the Negotiable Instruments Act,1881 in relation to electronic cheques and truncated cheques subject to such modifications and amendments as the Central Government, in consultation with the Reserve Bank of India, considers necessary for carrying out the purposes of the Act, by notification in the Official Gazette; and

(xi) to amend definitions of "bankers' books" and "certified copy" given in the Bankers' Books Evidence Act,1891.

5. The proposed amendments in the Act are aimed at early disposal of cases relating to dishonour of cheques, enhancing punishment for offenders, introducing electronic image of a truncated cheque and a cheque in the electronic form as well as exempting an official nominee director from prosecution under the Negotiable Instruments Act,1881.

6. The Bill seeks to achieve the above objects.

10. Section 143 of the Act introduced by 2002 Amendment reads as follows

	143. Power of Court to try cases summarily.-	
	(1) Notwithstanding anything contained in the Code of	
	Criminal Procedure, 1973, all offences under this Chapter	

shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of Sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials: Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees: Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code. (2) The trial of a case under this section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion, unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing. (3) Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint.

11. Section 145 of the Act deals with the evidence on affidavit and reads as follows :

> 145. Evidence on affidavit.
>
> (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974.) the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions, be read in evidence in any enquiry, trial or other proceeding under the said Code.
>
> (2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.

12. The scope of Section 145 came up for consideration before this Court in Mandvi Cooperative Bank Limited v. Nimesh B. Thakore (2010) 3 SCC 83, and the same was explained in that judgment stating that the legislature provided for the complainant to give his evidence on affidavit, but did not provide the same for the accused. The Court held that even though the legislature in their wisdom did not deem it proper to incorporate a word accused with the word complainant in Section 145(1), it does not mean that the Magistrate could not allow the complainant to give his evidence on affidavit, unless there was just and reasonable ground to refuse such permission.

13. This Court while examining the scope of Section 145 in Radhey Shyam Garg v. Naresh Kumar Gupta (2009) 13 SCC 201, held as follows :-

> If an affidavit in terms of the provisions of Section 145 of the Act is to be considered to be an evidence, it is difficult to comprehend as to why the court will ask the deponent of the said affidavit to examine himself with regard to the contents thereof once over again. He may be cross-examined and upon completion of his evidence, he may be re-examined. Thus, the words examine any person giving evidence on affidavit as to the facts contained therein, in the event, the deponent is summoned by the court in terms of sub-section (2) of Section 145 of the Act, in our opinion, would mean for the purpose of cross-examination. The provision seeks to attend a salutary purpose.

14. Considerable time is usually spent for recording the statement of the complainant. The question is whether the Court can dispense with the appearance of the complainant, instead, to take steps to accept the affidavit of the complainant and treat the same as examination-in-chief. Section 145(1) gives complete freedom to the complainant either to give his evidence by way of affidavit or by way of oral evidence. The Court has to accept the same even if it is given by way of an affidavit. Second part of Section 145(1) provides that the complainants statement on affidavit may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceedings. Section 145 is a rule of procedure which lays down the manner in which the evidence of the complainant may be recorded and once the Court issues summons and the presence of the accused is secured, an option be given to the accused whether, at that stage, he would be willing to pay the amount due along with reasonable interest and if the accused is not willing to pay, Court may fix up the case at an early date and ensure day-to-day trial.

15. Section 143 empowers the Court to try cases for dishonour of cheques summarily in accordance with the provisions of Section 262 to 265 of the Code of Criminal Procedure, 1973. The relevant provisions being Sections 262 to 264 are extracted hereinbelow for easy reference :

262. Procedure for summary trials.

(1) In trials under this Chapter, the procedure specified in this Code for the trial of summons- ease shall be followed except as hereinafter mentioned.

(2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

263. Record in summary trials.-

In every case tried summarily, the Magistrate shall enter, in such form as the State Government may direct, the following particulars, namely:-

(a) the serial number of the case:

(b) the date of the commission of the offence;

(c) the date of the report or complaint;

(d) the name of the complainant (if any);

(e) the name, parentage and residence of the accused;

(f) the offence complained of and the offence (if any) proved, and in cases coming under clause (ii), clause (iii) or clause (iv) of sub- section (1) of section 260, the value of the property in respect of which the offence has been committed;

(g) the plea of the accused and his examination (if any);

(h) the finding;

(i) the sentence or other final order

(j) the date on which proceedings terminated.

264. Judgment in cases tried summarily. In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding.

16. We have indicated that under Section 145 of the Act, the complainant can give his evidence by way of an affidavit and such affidavit shall be read in evidence in any inquiry, trial or other proceedings in the Court, which makes it clear that a complainant is not required to examine himself twice i.e. one after filing the complaint and one after summoning of the accused. Affidavit and the documents filed by the complainant along with complaint for taking cognizance of the offence are good enough to be read in evidence at both the stages i.e. pre-summoning stage and the post summoning stage. In other words, there is no necessity to recall and re- examine the complaint after summoning of accused, unless the Magistrate passes a specific order as to why the complainant is to be recalled. Such an order is to be passed on an application made by the accused or under Section 145(2) of the Act suo moto by the Court. In summary trial, after the accused is summoned, his plea is to be recorded under Section 263(g) Cr.P.C. and his examination, if any, can be done by a Magistrate and a finding can be given by the Court under Section 263(h) Cr.P.C. and the same procedure can be followed by a Magistrate for offence of dishonour of cheque since offence under Section 138 of the Act is a document based offence. We make it clear that if the proviso (a), (b) & (c) to Section 138 of the Act are shown to have been complied with, technically the commission of the offence stands completed and it is for

the accused to show that no offence could have been committed by him for specific reasons and defences.

17. Procedure for summary case has itself been explained by this Court in Nitinbhai Saevantilal Shah and another v. Manubhai Manjibhai Panchal and another (2011) 9 SCC 638, wherein this Court held as under :

> 12. Provision for summary trials is made in Chapter XXI of the Code. Section 260 of the Code confers power upon any Chief Judicial Magistrate or any Metropolitan Magistrate or any Magistrate of the First Class specially empowered in this behalf by the High Court to try in a summary way all or any of the offences enumerated therein. Section 262 lays down the procedure for summary trial and sub-section (1) thereof inter alia prescribes that in summary trials the procedure specified in the Code for the trial of summons case shall be followed subject to the condition that no sentence of imprisonment for a term exceeding three months is passed in case of any conviction under the chapter.
>
> 13. The manner in which the record in summary trials is to be maintained is provided in Section 263 of the Code. Section 264 mentions that in every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding. Thus, the Magistrate is not expected to record full evidence which he would have been, otherwise required to record in a regular trial and his judgment should also contain a brief statement of the reasons for the finding and not elaborate reasons which otherwise he would have been required to record in regular trials.

18. Amendment Act, 2002 has to be given effect to in its letter and spirit. Section 143 of the Act, as already indicated, has been inserted by the said Act stipulating that notwithstanding anything contained in the Code of Criminal Procedure, all offences contained in Chapter XVII of the Negotiable Instruments Act dealing with dishonour of cheques for insufficiency of funds, etc. shall be tried by a Judicial Magistrate and the provisions of Sections 262 to 265 Cr.P.C. prescribing procedure for summary trials, shall apply to such trials and it shall be lawful for a Magistrate to pass sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding Rs.5,000/- and it is further provided that in the course of a summary trial, if it appears to the Magistrate that the nature of the case requires passing of the sentence of imprisonment exceeding one year, the Magistrate, after hearing the parties, record an order to that effect and thereafter recall any witness and proceed to hear or rehear the case in the manner provided in Criminal Procedure Code.

19. This Court in Damodar S. Prabhu v. Sayed Babalal H. (2010) 5 SCC 663, laid down certain guidelines while interpreting Sections 138 and 147 of the Negotiable Instruments Act to encourage litigants in cheque dishonour cases to opt for compounding during early stages of litigation to ease choking of criminal justice system for graded scheme of imposing costs on parties who unduly delay compounding of offence, and for controlling of filing of complaints in multiple jurisdictions relatable to same transaction, which have also to be borne in mind by the Magistrate while dealing with cases under Section 138 of the Negotiable Instruments Act.

20. We notice, considering all those aspects, few High Courts of the country have laid down certain procedures for speedy disposal of cases under Section 138 of the Negotiable Instruments Act. Reference, in this connection, may be made to the judgments of the Bombay High Court in KSL

and Industries Ltd. v. Mannalal Khandelwal and The State of Maharashtra through the Office of the Government Pleader (2005) CriLJ 1201, Indo International Ltd. and another v. State of Maharashtra and another (2005) 44 Civil CC (Bombay) and Harischandra Biyani v. Stock Holding Corporation of India Ltd. (2006) 4 MhLJ 381, the judgment of the Calcutta High Court in Magma Leasing Ltd. v. State of West Bengal and others (2007) 3 CHN 574 and the judgment of the Delhi High Court in Rajesh Agarwal v. State and another (2010) ILR 6 Delhi 610.

21. Many of the directions given by the various High Courts, in our view, are worthy of emulation by the Criminal Courts all over the country dealing with cases under Section 138 of the Negotiable Instruments Act, for which the following directions are being given :-

DIRECTIONS:

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

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

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

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

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

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

23. Writ Petition is, accordingly, disposed of, as above. ..J.

❑❑❑

MSR LEATHERS VERSUS S. PALANIAPPAN AND ANR

(2013) 1 Supreme Court Cases 177

Supreme Court of India

Before **Hon'ble Mr. Justice R.M. Lodha, Hon'ble Mr. Justice T.S. Thakur, Hon'ble Mr. Justice Anil R. Dave**

MSR Leathers ...Appellant
Versus
S. Palaniappan & Anr. ...Respondents

CRIMINAL APPEAL NOS.261-264 OF 2002

Decided on 26 September, 2012

Held, prosecution based upon second or successive dishonour of cheque is permissible so long as it satisfies all the requirements stipulated in proviso to S. 138. So long as cheque remains valid and unpaid there is a continuing obligation of drawer to make good the same.

JUDGMENT

T.S. THAKUR, J.

1. In Sadanandan Bhadran v. Madhavan Sunil Kumar (1998) 6 SCC 514, this Court was dealing with a case under Section 138 of the Negotiable Instrument Act, 1881 (hereinafter referred to as the Act) in which the complainant had, after dishonour of a cheque issued in his favour, taken steps to serve upon the accused-drawer of the cheque a notice under clause (b) of proviso to Section 138 of the Act. No complaint was, however, filed by the complainant despite failure of the accused to arrange the payment of the amount covered by the cheque. Instead, the complainant-payee of the cheque had presented the cheque for collection once again, which was dishonoured a second time for want of sufficient funds. Another notice was served on the drawer of the cheque to arrange payment within fifteen days of receipt of said notice. Only after failure of drawer to do so did the payee file a complaint against the former under Section 138 of the Act.

2. After entering appearance, the drawer filed an application seeking discharge on the ground that the payee could not create more than one cause of action in respect of a single cheque and the complaint in question having been filed on the basis of the second presentation and resultant second cause of action was not maintainable. The Magistrate accepted that contention relying upon a Division Bench decision of Kerala High Court in Kumaresan v. Ameerappa (1991) 1 Ker L.T. 893 and dismissed the complaint. The order passed by the Magistrate was then questioned before the High Court of Kerala who relying upon Kumaresans case (supra) upheld the order passed by the Magistrate. The matter was eventually brought up to this Court by special leave. This Court formulated the following question for determination:

   Whether payee or holder of cheque can initiate proceeding of prosecution under Section 138 of Negotiable Instrument Act, 1881 for the second time if he has not initiated any action on earlier cause of action?

3. Answering the question in the negative this Court held that a combined reading of Sections 138 and 142 of the Act left no room for doubt that cause of action under Section 142(b) can arise only once. The conclusion observed by the court is supported not only by Sections 138 and 142 but also by the fact that the dishonour of cheque gives rise to the commission of offence only on the failure to pay money when a notice is served upon the drawer in accordance with clause (b) of the proviso to Section 138. The Court further held that if the concept of successive causes of action were to be accepted the same would make the limitation under Section 142(b) otiose. The Court observed:

    7. Besides the language of Sections 138 and 142 which clearly postulates only one cause of action, there are other formidable impediments which negate the concept of successive causes of action. One of them is that for dishonour of one cheque, there can be only one offence and such offence is committed by the drawer immediately on his failure to make the payment within fifteen days of the receipt of the notice served in accordance with clause (b) of the proviso to Section 138. That necessarily means that for similar failure after service of fresh notice on subsequent dishonour, the drawer cannot be liable for any offence nor can the first offence be treated as non est so as to give the payee a right to file a complaint treating the second offence as the first one. At that stage, it will not be a question of waiver of the right of the payee to prosecute the drawer but of absolution of the drawer of an offence, which stands already committed by him and which cannot be committed by him again.

    8. The other impediment to the acceptance of the concept of successive causes of action is that it will make the period of limitation under clause (c) of Section 142 otiose, for, a payee who failed to file his complaint within one month and thereby forfeited his right to prosecute the drawer, can circumvent the above limitative clause by filing a complaint on the basis of a fresh presentation of the cheque and its dishonour. Since in the interpretation of statutes, the court always presumes that the legislature inserted every part thereof for a purpose and the legislative intention is that every part should have effect, the above conclusion cannot be drawn for that will make the provision for limiting the period of making the complaint nugatory.

4. The Court then tried to reconcile the apparently conflicting provisions of the Act - one enabling the payee to present the cheque and the other giving him opportunity to file a complaint within one month and observed:

    ..Having given our anxious consideration to this question, we are of the opinion that the above two provisions can be harmonised, with the interpretation that on each presentation of the cheque and its dishonour, a fresh right and not cause of action accrues in his favour. He may, therefore, without taking pre-emptory action in exercise of his such right under clause (b) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque. But once he gives a notice under clause (b) of Section 138, he forfeits such right for in case of failure of the drawer to pay the money within the stipulated time, he would be liable for offence and the cause of action for filing the complaint will arise. Needless to say, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawer expires.

5. The Court accordingly dismissed the appeal while affirming the decision of the Kerala High Court in Kumaresans case (supra), no matter the same had been in the meantime overruled by a decision of the Full Bench of that Court in S.K.D. Lakshmanan Fireworks Industries v. K.V. Sivarama Krishnan (1995) Cri L J 1384 (Ker).

6. When the present appeal first came up for hearing before a bench comprising Markandey Katju and B. Sudershan Reddy, JJ., reliance on behalf of respondents was placed upon the decision of this Court in Sadanandan Bhadrans case (supra) to argue that the complaint in the instant case had also been filed on the basis of the second dishonour of a cheque after the payee of the cheque had issued a notice to the drawer under clause (b) of the proviso to Section 138 of the Act based on an earlier dishonour. On the ratio of Sadanandan Bhadrans case (supra) such a complaint was not maintainable, argued the respondents. The Court, however, expressed its reservation about the correctness of the view taken in Sadanandan Bhadrans case (supra) especially in para 9 thereof and accordingly referred the matter to a larger Bench. That is precisely how the present appeal has come up for hearing before us. It is, therefore, evident that this Court has repeatedly followed the view taken in Sadanandan Bhadrans case (supra). But a careful reading of these decisions reveals that in these subsequent decisions there had been no addition to the ratio underlying the conclusion in Sadanandan Bhadrans case (supra).

7. Before adverting to the submissions that were urged at the Bar we may briefly summarise the facts in the backdrop of which the issue arises for our determination. Four cheques for a total sum of rupees ten lakhs were issued by the respondent-company on 14th August, 1996 in favour of the appellant which were presented to the bank for collection on 21st November, 1996. The cheques were dishonoured in terms of memo dated 22nd November, 1996 for insufficiency of funds. A notice under clause (b) of proviso to Section 138 was then issued by the appellant to the respondent on 8th January, 1997 demanding payment of the amount covered by the cheques. Despite receipt of the notice by the respondent the payment was not arranged. The appellants case is that the respondent assured the appellant that the funds necessary for the encashment of the cheques shall be made available by the respondent, for which purpose the cheques could be presented again to the bank concerned. The cheques were accordingly presented for the second time to the bank on 21st January, 1997 and were dishonoured for a second time in terms of a memo dated 22nd January, 1997 once again on the ground of insufficiency of funds. A statutory notice issued by the appellant under clause (b) of proviso to Section 138 of the Act on 28th January, 1997 called upon the respondent-drawer of the cheques to arrange payment of the amount within 15 days. Despite receipt of the said notice on 3rd February, 1997, no payment was arranged which led to the filing of Complaint Case No.1556-1557/1997 by the appellant before the II Metropolitan Magistrate, Madras for the offence punishable under Section 138 read with Section 142 of the Act. The Magistrate took cognizance and issued summons to the respondents in response whereto the respondents entered appearance and sought discharge primarily on the ground that the complaint had not been filed within 30 days of the expiry of the notice based on the first dishonour of the cheque. It was also alleged that the statutory notice which formed the basis of the complaint had not been served upon the accused persons. The Magistrate upon consideration dismissed the applications for discharge which order was then assailed by the respondents before the High Court of Madras in Criminal Appeal Nos. 618, 624, 664, 665/2000.

8. The High Court has, by the order impugned in this appeal, allowed the revision and quashed the orders passed by the Magistrate relying upon the decision of this Court in Sadanandan Bhadrans case (supra) according to which a complaint based on a second or successive dishonour of the cheque was not maintainable if no complaint based on an earlier dishonour, followed by the statutory notice issued on the basis thereof, had been filed.

9. Section 138 of the Negotiable Instruments Act, 1881, constituting Chapter XVII of the Act which was introduced by Act 66 of 1988, inter alia, provides:

> 138. Dishonour of cheque for insufficiency, etc., of funds in the account. Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice. to any other provision of this Act, be punished with imprisonment for a term which may extend to two year, or with fine which may extend to twice the amount of the cheque, or with both

10. Proviso to Section 138, however, is all important and stipulates three distinct conditions precedent, which must be satisfied before the dishonour of a cheque can constitute an offence and become punishable. The first condition is that the cheque ought to have been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. The second condition is that the payee or the holder in due course of the cheque, as the case may be, ought to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. The third condition is that the drawer of such a cheque should have failed to make payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice. It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to Section 138 as clauses (a), (b) and (c) thereof that an offence under Section 138 can be said to have been committed by the person issuing the cheque.

11. Section 142 of the Negotiable Instruments Act governs taking of cognizance of the offence and starts with a non-obstante clause. It provides that no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, by the holder in due course and such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138. In terms of sub-section (c) to Section 142, no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class is competent to try any offence punishable under Section 138.

12. A careful reading of the above provisions makes it manifest that a complaint under Section 138 can be filed only after cause of action to do so has accrued in terms of clause (c) of proviso to Section 138 which, as noticed earlier, happens no sooner than when the drawer of the cheque fails to make the payment of the cheque amount to the payee or the holder of the cheque

within 15 days of the receipt of the notice required to be sent in terms of clause (b) of proviso to Section 138 of the Act.

13. What is important is that neither Section 138 nor Section 142 or any other provision contained in the Act forbids the holder or payee of the cheque from presenting the cheque for encashment on any number of occasions within a period of six months of its issue or within the period of its validity, whichever is earlier. That such presentation will be perfectly legal and justified was not disputed before us even at the Bar by learned counsel appearing for the parties and rightly so in light of the judicial pronouncements on that question which are all unanimous. Even Sadanandan Bhadrans case (supra) the correctness whereof we are examining, recognized that the holder or the payee of the cheque has the right to present the same any number of times for encashment during the period of six months or during the period of its validity, whichever is earlier.

14. Presentation of the cheque and dishonour thereof within the period of its validity or a period of six months is just one of the three requirements that constitutes cause of action within the meaning of Sections 138 and 142(b) of the Act, an expression that is more commonly used in civil law than in penal statutes. For a dishonour to culminate into the commission of an offence of which a court may take cognizance, there are two other requirements, namely, (a) service of a notice upon the drawer of the cheque to make payment of the amount covered by the cheque and (b) failure of the drawer to make any such payment within the stipulated period of 15 days of the receipt of such a notice. It is only when the said two conditions are superadded to the dishonour of the cheque that the holder/payee of the cheque acquires the right to institute proceedings for prosecution under Section 138 of the Act, which right remains legally enforceable for a period of 30 days counted from the date on which the cause of action accrued to him. There is, however, nothing in the proviso to Section 138 or Section 142 for that matter, to oblige the holder/payee of a dishonoured cheque to necessarily file a complaint even when he has acquired an indefeasible right to do so. The fact that an offence is complete need not necessarily lead to launch of prosecution especially when the offence is not a cognizable one. It follows that the complainant may, even when he has the immediate right to institute criminal proceedings against the drawer of the cheque, either at the request of the holder/payee of the cheque or on his own volition, refrain from instituting the proceedings based on the cause of action that has accrued to him. Such a decision to defer prosecution may be impelled by several considerations but more importantly it may be induced by an assurance which the drawer extends to the holder of the cheque that given some time the payment covered by the cheques would be arranged, in the process rendering a time consuming and generally expensive legal recourse unnecessary. It may also be induced by a belief that a fresh presentation of the cheque may result in encashment for a variety of reasons including the vicissitudes of trade and business dealings where financial accommodation given by the parties to each other is not an unknown phenomenon. Suffice it to say that there is nothing in the provisions of the Act that forbids the holder/payee of the cheque to demand by service of a fresh notice under clause (b) of proviso to Section 138 of the Act, the amount covered by the cheque, should there be a second or a successive dishonour of the cheque on its presentation.

15. Sadanandan Bhadrans case (supra) holds that while a second or successive presentation of the cheque is legally permissible so long as such presentation is within the period of six months or the validity of the cheque whichever is earlier, the second or subsequent dishonour of the

cheque would not entitle the holder/payee to issue a statutory notice to the drawer nor would it entitle him to institute legal proceedings against the drawer in the event he fails to arrange the payment. The decision gives three distinct reasons why that should be so. The first and the foremost of these reasons is the use of the expression cause of action in Section 142(b) of the Act which according to the Court has been used in a restrictive sense and must therefore be understood to mean that cause of action under Section 142(b) can arise but once. The second reason cited for the view taken in the Sadanandan Bhadrans case (supra) is that dishonour of a cheque will lead to commission of only one offence and that the offence is complete no sooner the drawer fails to make the payment of the cheque amount within a period of 15 days of the receipt of the notice served upon him. The Court has not pressed into service the doctrine of waiver of the right to prosecute but held that the failure of the holder to institute proceedings would tantamount to absolution of the drawer of the offence committed by him. The third and the only other reason is that successive causes of action will militate against the provisions of Section 142(b) and make the said provision otiose. The Court in Sadanandan Bhadrans case (supra) held that the failure of the drawer/payee to file a complaint within one month resulted in forfeiture of the complainants right to prosecute the drawer/payee which forfeiture cannot be circumvented by him by presenting the cheque afresh and inviting a dishonour to be followed by a fresh notice and a delayed complaint on the basis thereof.

16. With utmost respect to the Judges who decided Sadanandan Bhadrans case (supra) we regret our inability to fall in line with the above line of reasoning to hold that while a cheque is presented afresh the right to prosecute the drawer, if the cheque is dishonoured, is forfeited only because the previous dishonour had not resulted in immediate prosecution of the offender even when a notice under clause (b) of proviso to Section 138 had been served upon the drawer. We are conscious of the fact that Sadanandan Bhadrans case (supra) has been followed in several subsequent decisions of this Court such as in Sil Import, USA v. Exim Aides Silk Exporters, Bangalore, (1999) 4 SCC 567, Uniplas India Ltd. and Ors. v. State (Govt. of NCT Delhi) and Anr., (2001) 6 SCC 8, Dalmia Cement (Bharat) Ltd. v. Galaxy Traders & Agencies Ltd. and Anr., (2001) 6 SCC 463, Prem Chand Vijay Kumar v. Yashpal Singh and Anr., (2005) 4 SCC 417, S.L. Constructions and Anr. v. Alapati Srinivasa Rao and Anr., (2009) 1 SCC 500, Tameshwar Vaishnav v. Ramvishal Gupta, (2010) 2 SCC 329.

17. All these decisions have without disturbing or making any addition to the rationale behind the decision in Sadanandan Bhadrans case (supra) followed the conclusion drawn in the same. We, therefore, propose to deal with the three dimensions that have been highlighted in that case while holding that successive causes of action are not within the comprehension of Sections 138 and 142 of the Act.

18. The expression cause of action is more commonly and easily understood in the realm of civil laws. The expression is not defined anywhere in the Code of Civil Procedure to which it generally bears relevance but has been universally understood to mean the bundle of facts which the plaintiff must prove in order to entitle him to succeed in the suit. (See State of Madras v. C.P. Agencies AIR 1960 SC 1309; Rajasthan High Court Advocates Association v. U.O.I. & Ors. AIR 2001 SC 416 and Mohamed Khaleel Khan v. Mahaboob Ali Mia AIR 1949 PC 78).

19. Section 142 of the Negotiable Instruments Act is perhaps the only penal provision in a statute which uses the expression cause of action in relation to the commission of an offence or the institution of a complaint for the prosecution of the offender. A careful reading of Sections 138

and 142, as noticed above, makes it abundantly clear that the cause of action to institute a complaint comprises the three different factual prerequisites for the institution of a complaint to which we have already referred in the earlier part of this order. None of these prerequisites is in itself sufficient to constitute a complete cause of action for an offence under Section 138. For instance if a cheque is not presented within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier, no cause of action would accrue to the holder of the cheque even when the remaining two requirements, namely service of a notice and failure of the drawer to make the payment of the cheque amount are established on facts. So also presentation of the cheque within the stipulated period without service of a notice in terms of Section 138 proviso (b) would give no cause of action to the holder to prosecute the drawer just as the failure of the drawer to make the payment demanded on the basis of a notice that does not satisfy the requirements of clause (b) of proviso to Section 138 would not constitute a complete cause of action.

20. The expression cause of action appearing in Section 142 (b) of the Act cannot therefore be understood to be limited to any given requirement out of the three requirements that are mandatory for launching a prosecution on the basis of a dishonoured cheque. Having said that, every time a cheque is presented in the manner and within the time stipulated under the proviso to Section 138 followed by a notice within the meaning of clause (b) of proviso to Section 138 and the drawer fails to make the payment of the amount within the stipulated period of fifteen days after the date of receipt of such notice, a cause of action accrues to the holder of the cheque to institute proceedings for prosecution of the drawer.

21. There is, in our view, nothing either in Section 138 or Section 142 to curtail the said right of the payee, leave alone a forfeiture of the said right for no better reason than the failure of the holder of the cheque to institute prosecution against the drawer when the cause of action to do so had first arisen. Simply because the prosecution for an offence under Section 138 must on the language of Section 142 be instituted within one month from the date of the failure of the drawer to make the payment does not in our view militate against the accrual of multiple causes of action to the holder of the cheque upon failure of the drawer to make the payment of the cheque amount. In the absence of any juristic principle on which such failure to prosecute on the basis of the first default in payment should result in forfeiture, we find it difficult to hold that the payee would lose his right to institute such proceedings on a subsequent default that satisfies all the three requirements of Section 138.

22. That brings us to the question whether an offence punishable under Section 138 can be committed only once as held by this Court in Sadanandan Bhadrans case (supra). The holder of a cheque as seen earlier can present it before a bank any number of times within the period of six months or during the period of its validity, whichever is earlier. This right of the holder to present the cheque for encashment carries with it a corresponding obligation on the part of the drawer to ensure that the cheque drawn by him is honoured by the bank who stands in the capacity of an agent of the drawer vis-a-vis the holder of the cheque. If the holder of the cheque has a right, as indeed is in the unanimous opinion expressed in the decisions on the subject, there is no reason why the corresponding obligation of the drawer should also not continue every time the cheque is presented for encashment if it satisfies the requirements stipulated in that clause (a) to the proviso to Section 138. There is nothing in that proviso to even remotely suggest that clause (a) would have no application to a cheque presented

for the second time if the same has already been dishonoured once. Indeed if the legislative intent was to restrict prosecution only to cases arising out of the first dishonour of a cheque nothing prevented it from stipulating so in clause (a) itself. In the absence of any such provision a dishonour whether based on a second or any successive presentation of a cheque for encashment would be a dishonour within the meaning of Section 138 and clause (a) to proviso thereof. We have, therefore, no manner of doubt that so long as the cheque remains unpaid it is the continuing obligation of the drawer to make good the same by either arranging the funds in the account on which the cheque is drawn or liquidating the liability otherwise. It is true that a dishonour of the cheque can be made a basis for prosecution of the offender but once, but that is far from saying that the holder of the cheque does not have the discretion to choose out of several such defaults, one default, on which to launch such a prosecution. The omission or the failure of the holder to institute prosecution does not, therefore, give any immunity to the drawer so long as the cheque is dishonoured within its validity period and the conditions precedent for prosecution in terms of the proviso to Section 138 are satisfied.

23. Coming then to the question whether there is anything in Section 142(b) to suggest that prosecution based on subsequent or successive dishonour is impermissible, we need only mention that the limitation which Sadanandan Bhadrans case (supra) reads into that provision does not appear to us to arise. We say so because while a complaint based on a default and notice to pay must be filed within a period of one month from the date the cause of action accrues, which implies the date on which the period of 15 days granted to the drawer to arrange the payment expires, there is nothing in Section 142 to suggest that expiry of any such limitation would absolve him of his criminal liability should the cheque continue to get dishonoured by the bank on subsequent presentations. So long as the cheque is valid and so long as it is dishonoured upon presentation to the bank, the holders right to prosecute the drawer for the default committed by him remains valid and exercisable. The argument that the holder takes advantage by not filing a prosecution against the drawer has not impressed us. By reason of a fresh presentation of a cheque followed by a fresh notice in terms of Section 138, proviso (b), the drawer gets an extended period to make the payment and thereby benefits in terms of further opportunity to pay to avoid prosecution. Such fresh opportunity cannot help the defaulter on any juristic principle, to get a complete absolution from prosecution.

24. Absolution is, at any rate, a theological concept which implies an act of forgiving the sinner of his sins upon confession. The expression has no doubt been used in some judicial pronouncements, but the same stop short of recognizing absolution as a juristic concept. It has always been used or understood in common parlance to convey setting free from guilt or release from a penalty. The use of the expression absolution in Sadanandan Bhadrans case (supra) at any rate came at a time when proviso to Section 142(b) had not found a place on the statute book. That proviso was added by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 which read as under:

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

25. The Statement of Objects and Reasons appended to the Amendment Bill, 2002 suggests that the introduction of this proviso was recommended by the Standing Committee on Finance and other representatives so as to provide discretion to the Court to waive the period of one

month, which has been prescribed for taking cognizance of a case under the Act. This was so recognised judicially also by this Court in Subodh S. Salaskar v. Jayprakash M. Shah & Anr. (2008) 13 SCC 689 where this Court observed:

> 11. The [Negotiable Instruments] Act was amended in the year 2002 whereby additional powers have been conferred upon the court to take cognizance even after expiry of the period of limitation by conferring on it a discretion to waive the period of one month.
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> 24. ..The provisions of the Act being special in nature, in terms thereof the jurisdiction of the court to take cognizance of an offence under Section 138 of the Act was limited to the period of thirty days in terms of the proviso appended thereto. The Parliament only with a view to obviate the aforementioned difficulties on the part of the complainant inserted proviso to Clause (b) of Section 142 of the Act in 2002. It confers a jurisdiction upon the court to condone the delay...

26. The proviso referred to above now permits the payee to institute prosecution proceedings against a defaulting drawer even after the expiry of the period of one month. If a failure of the payee to file a complaint within a period of one month from the date of expiry of the period of 15 days allowed for this purpose was to result in absolution, the proviso would not have been added to negate that consequence. The statute as it exists today, therefore, does not provide for absolution simply because the period of 30 days has expired or the payee has for some other reasons deferred the filing of the complaint against the defaulter.

27. It is trite that the object underlying Section 138 of the Act is to promote and inculcate faith in the efficacy of banking system and its operations, giving credibility to Negotiable Instruments in business transactions and to create an atmosphere of faith and reliance by discouraging people from dishonouring their commitments which are implicit when they pay their dues through cheques. The provision was intended to punish those unscrupulous persons who issued cheques for discharging their liabilities without really intending to honour the promise that goes with the drawing up of such a negotiable instrument. It was intended to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case the cheque was dishonoured and to safeguard and prevent harassment of honest drawers. (See Mosaraf Hossain Khan v. Bhagheeratha Engg. Ltd. (2006) 3 SCC 658, C.C. Alavi Haji v. Palapetty Muhammed & Anr. (2007) 6 SCC 555 and Damodar S. Prabhu v. Sayed Babulal H. (2010) 5 SCC 663). Having said that, we must add that one of the salutary principles of interpretation of statutes is to adopt an interpretation which promotes and advances the object sought to be achieved by the legislation, in preference to an interpretation which defeats such object. This Court has in a long line of decisions recognized purposive interpretation as a sound principle for the Courts to adopt while interpreting statutory provisions. We may only refer to the decisions of this Court in New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar (AIR 1963 SC 1207), where this Court observed:

> It is a recognised rule of interpretation of statutes that expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature. If an expression is susceptible of a narrow or technical meaning, as well as a popular meaning, the Court would be justified in assuming

that the Legislature used the expression in the sense which would carry out its object and reject that which renders the exercise of its power invalid.

28. Reference may also be made to the decision of this Court in Deputy Custodian, Evacuee Property v. Official Receiver (AIR 1965 SC 951), where this Court observed:

The rules of grammar may suggest that when the section says that the property is evacuee property, it prima facie indicates that the property should bear that character at the time when the opinion is formed. But Mr. Ganapathy Iyer for the appellants has strenuously contended that the construction of s. 7(1) should not be based solely or primarily on the mechanical application of the rules of grammar. He urges that the construction for which Mr. Pathak contents and which, in substance, has been accepted by the High Court, would lead to very anomalous results; and his arguments is that it is open to the Court to take into account the obvious aim and object of the statutory provision when attempting the task of construing its words. If it appears that the obvious aim and object of the statutory provisions would be frustrated by accepting the literal construction suggested by the respondent, then it may be open to the Court to enquire whether an alternative construction which would serve the purpose of achieving the aim and object of the Act, is reasonably possible.

29. The decision of this Court in Nathi Devi v. Radha Devi (2005) 2 SCC 271, reiterates the rule of purposive construction in the following words:

Even if there exists some ambiguity in the language or the same is capable of two interpretations, it is trite the interpretation which serves the object and purport of the Act must be given effect to. In such a case the doctrine of purposive construction should be adopted.

30. To the same effect is the decision of this Court in S.P. Jain v. Krishan Mohan Gupta (1987) 1 SCC 191, where this Court observed:

We are of the opinion that law should take a pragmatic view of the matter and respond to the purpose for which it was made and also take cognizance of the current capabilities of technology and life- style of the community. It is well settled that the purpose of law provides a good guide to the interpretation of the meaning of the Act. We agree with the views of Justice Krishna Iyer in Busching Schmitz Private Ltds case (supra) that legislative futility is to be ruled out so long as interpretative possibility permits.

31. Applying the above rule of interpretation and the provisions of Section 138, we have no hesitation in holding that a prosecution based on a second or successive default in payment of the cheque amount should not be impermissible simply because no prosecution based on the first default which was followed by a statutory notice and a failure to pay had not been launched. If the entire purpose underlying Section 138 of the Negotiable Instruments Act is to compel the drawers to honour their commitments made in the course of their business or other affairs, there is no reason why a person who has issued a cheque which is dishonoured and who fails to make payment despite statutory notice served upon him should be immune to prosecution simply because the holder of the cheque has not rushed to the court with a complaint based on such default or simply because the drawer has made the holder defer prosecution promising to make arrangements for funds or for any other similar reason. There is in our opinion no real or qualitative difference between a case where default is committed

and prosecution immediately launched and another where the prosecution is deferred till the cheque presented again gets dishonoured for the second or successive time.

32. The controversy, in our opinion, can be seen from another angle also. If the decision in Sadanandan Bhadrans case (supra) is correct, there is no option for the holder to defer institution of judicial proceedings even when he may like to do so for so simple and innocuous a reason as to extend certain accommodation to the drawer to arrange the payment of the amount. Apart from the fact that an interpretation which curtails the right of the parties to negotiate a possible settlement without prejudice to the right of holder to institute proceedings within the outer period of limitation stipulated by law should be avoided we see no reason why parties should, by a process of interpretation, be forced to launch complaints where they can or may like to defer such action for good and valid reasons. After all, neither the courts nor the parties stand to gain by institution of proceedings which may become unnecessary if cheque amount is paid by the drawer. The magistracy in this country is over-burdened by an avalanche of cases under Section 138 of Negotiable Instruments Act. If the first default itself must in terms of the decision in Sadanandan Bhadrans case (supra) result in filing of prosecution, avoidable litigation would become an inevitable bane of the legislation that was intended only to bring solemnity to cheques without forcing parties to resort to proceedings in the courts of law. While there is no empirical data to suggest that the problems of overburdened magistracy and judicial system at the district level is entirely because of the compulsions arising out of the decisions in Sadanandan Bhadrans case (supra), it is difficult to say that the law declared in that decision has not added to court congestion.

33. In the result, we overrule the decision in Sadanandan Bhadrans case (supra) and hold that prosecution based upon second or successive dishonour of the cheque is also permissible so long as the same satisfies the requirements stipulated in the proviso to Section 138 of the Negotiable Instruments Act. The reference is answered accordingly. The appeals shall now be listed before the regular Bench for hearing and disposal in light of the observations made above.

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ECON ANTRI LIMITED VERSUS ROM INDUSTRIES LIMITED & ANR

(2014) 11 Supreme Court Cases 769

AIR 2013 SC 3283

Supreme Court of India

Before **Hon'ble Mr. Justice P Sathasivam, Hon'ble Mr. Justice Ranjana Prakash Desai, Hon'ble Mr. Justice Ranjan Gogoi**

Econ Antri Limited ...Appellant
Versus
Rom Industries Limited & Anr ...Respondents

CRIMINAL APPEAL NO.1079 OF 2006

Decided on 26 August, 2013

Debt, Financial and Monetary Laws – Negotiable Instruments Act, 1881 – Ss. 142 and 138 – Dishonour of cheque – Period of limitation for filing complaint under S. 142(a) – Reckoning of – Held, period of limitation is to be calculated by excluding date on which cause of action arose.

JUDGMENT

(SMT.) RANJANA PRAKASH DESAI, J.

1. On 13/10/2006, while granting leave in Special Leave Petition (Criminal) No.211 of 2005, this Court passed the following order:

   In our view, the judgment relied upon by the counsel for the appellant in the case of Saketh India Ltd. & Ors. v. India Securities Ltd. (1999) 3 SCC 1 requires reconsideration. Orders of the Honble the Chief Justice may be obtained for placing this matter before a larger Bench. Pursuant to the above order, this appeal is placed before us.

2. Since the referral order states that the judgment of this Court in Saketh India Ltd. & Ors. v. India Securities Ltd.[1] (Saketh) requires reconsideration, we must first refer to the said judgment. In that case, this Court identified the question of law involved in the appeal before it as under:

   Whether the complaint filed under Section 138 of the NI Act is within or beyond time as it was contended that it was not filed within one month from the date on which the cause of action arose under clause (c) of the proviso to Section 138 of the NI Act? The same question was reframed in simpler language as under:

   Whether for calculating the period of one month which is prescribed under Section 142(b), the period has to be reckoned by excluding the date on which the cause of action arose?

3. It is pointed out to us that there is a variance between the view expressed by this Court on the above question in Saketh and in SIL Import, USA v. Exim Aides Silk Exporters, Bangalore[2]. We will have to therefore re-examine it for the purpose of answering the reference. The basic provisions of law involved in this reference are proviso (c) to Section 138 and Section 142(b) of the Negotiable Instruments Act, 1881 (the NI Act).

4. Facts of Saketh need to be stated to understand how the above question of law arose. But, before we turn to the facts, we must quote Section 138 and Section 142 of the N.I. Act. We must also quote Section 12(1) and (2) of the Limitation Act, 1963 and Section 9 of the General Clauses Act, 1897, on which reliance is placed in Saketh.

Section 138 of the N.I. Act reads as under:

138. Dishonour of cheque for insufficiency, etc., of funds in the account. Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid. either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the 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;

(b) the payee or the holder in due course of the Cheque, as the case may be, 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 thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice. Section 142 of the N.I. Act reads as under:

142. Cognizance of offences: Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

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

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

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

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138. Sections 12(1) and (2) of the Limitation Act, 1963 reads as under: 12. Exclusion of time in legal proceedings.- (1) In computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded.

(2) In computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded. Section 9 of the General Clauses Act, 1897 reads as under:

9. Commencement and termination of time.-

(1) In any [Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word from, and, for the purpose of including the last in a series of days or any other period of time, to use the word to.

(2) This section applies also to all [Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

5. In Saketh cheques dated 15/3/1995 and 16/3/1995 issued by the accused therein bounced when presented for encashment. Notices were served on the accused on 29/9/1995. As per proviso (c) to Section 138 of the NI Act, the accused were required to make the payment of the said amount within 15 days of the receipt of the notice i.e. on or before 14/10/1995. The accused failed to pay the amount. The cause of action, therefore, arose on 15/10/1995. According to the complainant for calculating one months period contemplated under Section 142(b), the date 15/10/1995 has to be excluded. The complaint filed on 15/11/1995 was, therefore, within time. According to the accused, however, the date on which the cause of action arose i.e. 15/10/1995 has to be included in the period of limitation and thus the complaint was barred by time. The accused, therefore, filed petition under Section 482 of the Code of Criminal Procedure, 1973 (the Code) for quashing the process issued by the learned Magistrate. That petition was rejected by the High Court. Hence, the accused approached this Court. This Court referred to its judgment in Haru Das Gupta v. State of West Bengal.[3] wherein it was held that the rule is well established that where a particular time is given from a certain date within which an act is to be done, the day on that date is to be excluded; the effect of defining the period from such a day until such a day within which an act is to be done is to exclude the first day and to include the last day. Referring to several English decisions on the point, this Court observed that the principle of excluding the day from which the period is to be reckoned is incorporated in Section 12(1) and (2) of the Limitation Act, 1963. This Court observed that this principle is also incorporated in Section 9 of the General Clauses Act, 1897. This Court further observed that there is no reason for not adopting the rule enunciated in Haru Das Gupta, which is consistently followed and which is adopted in the General Clauses Act and the Limitation Act. This Court went on to observe that ordinarily in computing the time, the rule observed is to exclude the first day and to include the last. Following the said rule in the facts before it, this Court excluded the date 15/10/1995 on which the cause of action had arisen for counting the period of one month. Saketh has been followed by this

Court in Jindal Steel and Power Ltd. & Anr. v. Ashoka Alloy Steel Ltd. & Ors.[4] In Subodh S. Salaskar v. Jayprakash M. Shah & Anr.,[5] there is a reference to Jindal Steel & Power Ltd.

6. We have heard learned counsel for the parties at some length. We have also carefully perused their written submissions. Ms. Prerna Mehta, learned counsel for the appellant submitted that Saketh lays down the correct law. She submitted that as held by this Court in Saketh while computing the period of one month as provided under Section 142(b) of the N.I. Act, the first day on which the cause of action has arisen has to be excluded. The same principle is applicable in computing the period of 15 days under Section 138(c) of the N.I. Act. Counsel submitted that Saketh has been followed by this Court in Jindal Steel and Power Ltd. and Subodh S. Salaskar. Counsel also relied on Section 12(1) of the Limitation Act, 1961 which provides that the first day on which cause of action arises is to be excluded. In this connection counsel relied on State of Himachal Pradesh & Anr. v. Himachal Techno Engineers & Anr.,[6] where it is held that Section 12 of the Limitation Act is applicable to the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act"), which is a statute providing for its own period of limitation. Counsel submitted that the N.I. Act is a special statute and it does not expressly bar the applicability of the Limitation Act. Counsel submitted that if this Court reaches a conclusion that the provisions of the Limitation Act are not applicable to the N.I. Act, it should hold that Section 9 of the General Clauses Act, 1897 covers this case. Counsel submitted in Tarun Prasad Chatterjee v. Dinanath Sharma[7] Section 12 of the Limitation Act is held to be in pari materia with Section 9 of the General Clauses Act. Counsel submitted that in the same judgment this Court has held that use of words from and within does not reflect any contrary intention and the first day on which the cause of action arises has to be excluded. Counsel submitted that in the circumstances this Court should hold that Saketh lays down correct proposition of law.

7. Shri Sunil Gupta, learned senior counsel for the respondents, on the other hand, submitted that the provisions of the N.I. Act provide for a criminal offence and punishment and, therefore, must be strictly construed. Counsel submitted that it is well settled that when two different words are used in the same provision or statute, they convey different meaning. [The Member, Board of Revenue v. Arthur Paul Benthall[8], The Labour Commissioner, Madhya Pradesh v. Burhanpur Tapti Mills Ltd. and others[9], B.R. Enterprises etc. V. State of U.P. & Ors. etc. [10], Kailash Nath Agarwal and ors. v. Pradeshiya Industrial & Investment Corporation of U.P. Ltd. and another[11], DLF Qutab Enclave Complex Educational Charitable Trust v. State of Haryana and others[12]]. Counsel pointed out that Section 138(a) provides a period of 6 months from the date on which the Cheque is drawn, as the period within which the Cheque is to be presented to the bank. Section 138(b) provides that the payee must make a demand of the amount due to him within 30 days of the receipt of information from the bank. Section 138(c) uses the words within 15 days of the receipt of notice. Using two different words from and of in the same Section at different places clarifies the intention of the legislature to convey different meanings by the said words. According to counsel, seen in this light, the word of occurring in Section 138(c) and Section 142(b) is to be interpreted differently as against the word from occurring in Section 138(a). The word from may be taken as implying exclusion of the date in question and may well be governed by the General Clauses Act, 1897. However, the word of is different and needs to be interpreted to include the starting day of the commencement of the prescribed period. It is not governed by Section 9 of the General Clauses Act, 1897. Thus, for the purposes of Section 142(b), which prescribes that the complaint is to be filed

within 30 days of the date on which the cause of action arises, the starting date on which the cause of action arises should be included for computing the period of 30 days. Counsel further submitted that Section 138(c) and Section 142(b) prescribe the period within which certain acts are required to be done. Section 12(1) of the Limitation Act cannot be resorted to so as to extend that period even by one day. If the starting point is excluded, that will render the word within of Section 142(b) of the N.I. Act otiose. Counsel submitted that the word within has been held by this Court to mean on or before. [Danial Latifi and Another v. U.O.I.[13]] Therefore, the complaint under Section 142(b) should be filed on or before or within, 30 days of the date on which the cause of action under Section 138(c) arises. Counsel submitted that there is no justification to exclude the 16th day of the 15 day period under Section 138(c) or the first day of the 30 days period under Section 142(b) as has been wrongly decided in Saketh. This would amount to exclusion of the starting date of the period. Such exclusion has been held to be against the law in SIL Import USA. Counsel further submitted that the provisions of the Limitation Act are not applicable to the N.I. Act as held by this Court in Subodh S. Salaskar. Counsel pointed out that by Amending Act 55 of 2002, a proviso was added to Section 142(b) of the N.I. Act. It bestows discretion upon the court to accept a complaint after the period of 30 days and to condone the delay. This amendment signifies that prior to this amendment the courts had no discretion to condone the delay or exclude time by resorting to Section 5 of the Limitation Act. The statement of objects and reasons of the Amending Act 55 of 2002 confirms the legal position that the N.I. Act being a special statute, the Limitation Act is not applicable to it. Counsel submitted that the judgment of this Court on the Arbitration Act is not applicable to this case because Section 43 of the Arbitration Act specifically makes the Limitation Act applicable to arbitrations. Counsel submitted that in view of the above, it is evident that Saketh does not lay down the correct law. It is SIL Import USA which correctly analyses the provisions of law and lays down the law. Counsel urged that the reference be answered in light of his submissions.

8. It is necessary to first refer to SIL Import USA on which heavy reliance is placed by the respondents as it takes a view contrary to the view taken in Saketh. In SIL Import USA, the complainant- Companys case was that the accused owed a sum of US $ 72,075 (equivalent to more than 26 lakhs of rupees) to it towards the sale consideration of certain materials. The accused gave some post-dated Cheques in repayment thereof. Two of the said Cheques when presented on 3/5/1996 for encashment were dishonoured with the remark no sufficient funds. The complainant sent a notice to the accused by fax on 11/6/1996. On the next day i.e. 12/6/1996 the complainant also sent the same notice by registered post which was served on the accused on 25/6/1996. On 8/8/1996 the complainant filed a complaint under Section 138 of the N.I. Act. Cognizance of the offence was taken and process was issued. Process was quashed by the Magistrate on the grounds urged by the accused. The complainant moved the High Court. The High Court set aside the Magistrates order and restored the complaint. That order was challenged in this Court. The only point which was urged before this Court was that the Magistrate could not have taken cognizance of the offence after the expiry of 30 days from the date of cause of action. This contention was upheld by this Court. This Court held that the notice envisaged in clause (b) of the proviso to Section 138 transmitted by fax would be in compliance with the legal requirement. There was no dispute about the fact that notice sent by fax was received by the complainant on the same date i.e. 11/6/1996. This Court observed that as per clause (c) of Section 138, starting point of period for making payment is the date

of receipt of the notice. Once it starts, the offence is completed on failure to pay the amount within 15 days therefrom. Cause of action would arise if the offence is committed. Thus, it was held that since the fax was received on 11/6/1996, the period of 15 days for making payment expired on 26/6/1996. Since amount was not paid, offence was committed and, therefore, cause of action arose from 26/6/1996 and the period of limitation for filing complaint expired on 26/7/1996 i.e. the date on which period of one month expired as contemplated under Section 142(b). The complaint filed on 8/8/1996 was, therefore, beyond the period of limitation. The relevant observations of this Court could be quoted hereunder:

> 19. The High Courts view is that the sender of the notice must know the date when it was received by the sendee, for otherwise he would not be in a position to count the period in order to ascertain the date when cause of action has arisen. The fallacy of the above reasoning is that it erases the starting date of the period of 15 days envisaged in clause (c). As per the said clause the starting date is the date of the receipt of the said notice. Once it starts, the offence is completed on the failure to pay the amount within 15 days therefrom. Cause of action would arise if the offence is committed.
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> 20. If a different interpretation is given the absolute interdict incorporated in Section 142 of the Act that no court shall take cognizance of any offence unless the complaint is made within one month of the date on which the cause of action arises, would become otiose.

9. Undoubtedly, the view taken in SIL Import USA runs counter to the view taken in Saketh. What persuaded this Court in Saketh to take the view that in computing time, the rule is to exclude the first day and include the last can be understood if we have a look at the English cases which have been referred to in the passage quoted therein from Haru Das Gupta.

10. We must first refer to The Goldsmiths Company v. The West Metropolitan Railway Company.[14] In that case, under a special Act, a railway company was empowered to take lands compulsorily for the purpose of its undertaking, and the powers of the company for this purpose were to cease after the expiration of three years from the passing of the Act. The Act received the Royal assent on 9/8/1899. On 9/8/1902 the railway company gave notice to the plaintiffs to treat for the purchase of lands belonging to them which were scheduled in the special Act. The question was whether the notice was served on the plaintiffs within three years. It was held that the notice was served within the prescribed time because the day of the passing of the Act i.e. 9/8/1899 had to be excluded. The relevant observations of the Court may be quoted as under:

> The true principle that governs this case is that indicated in the report of Lester v. Garland[15], where Sir William Grant broke away from the line of cases supporting the view that there was a general rule that in cases where time is to run from the doing of an act or the happening of an event the first day is always to be included in the computation of the time. The view expressed by Sir William Grant was repeated by Parke B. in Russell v. Ledsam[16], and by other judges in subsequent cases. The rule is now well established that where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded.

11. The second case referred to is Cartwright v. MacCormack[17]. In that case, the plaintiffs met with an accident at 5.45 p.m. on 17/12/1959. He was run into by the defendant driving a motor car. He issued his writ in this action claiming damages for personal injuries. The defendant initiated third party proceedings against the respondent insurance company, alleging the companys

liability to indemnify him under an instrument called a temporary cover note admittedly issued by the insurance company on 2/12/1959. The insurance company inter alia contended that the policy had expired before the accident happened. The insurance company succeeded on this point. On appeal the insurance company reiterated that the cover note issued by the insurance company contained the expression fifteen days from the date of commencement of policy. On the same note date and time were noted as 2/12/1959 and 11.45 a.m. It was argued that the fifteen days started at 11.45 a.m. on 2/12/1959 and expired at the same time on 17/12/1959. The accident occurred at 5.45 p.m. on 17/12/1959 and, therefore, it was not covered by the insurance policy. The Court of Appeal treated the expression fifteen days from the commencement of the policy as excluding the first date and the cover note was held to commence at midnight of that date. It was observed that the policy expired fifteen days from 2/12/1959 and these words on the ordinary rules of construction exclude the first date and begin at midnight on that day, therefore, the policy would cover the accident which had occurred at 5.45 p.m. on 17/12/1959.

12. The third case referred to is Marren v. Dawson Bentley & Co. Ltd.[18]. In that case on 8/11/1954 an accident occurred whereby the plaintiff was injured in the course of his employment with the defendants. On 8/11/1957, he issued a writ claiming damages for the injuries which he alleged were caused by the defendants negligence. The defendants pleaded, inter alia, that the plaintiffs cause of action, if any, accrued on 8/11/1954 and the proceedings had not been commenced within the period of three years thereof contrary to Section 2(1) of the Limitation Act, 1939. It was held that the day of the accident was to be excluded from the computation of the period within which the action should be brought and, therefore, the defendants plea must fail. While coming to this conclusion reliance was placed on passages from Halsburys laws of England[19]. It is necessary to quote those passages:

    207. The general rule in cases in which a period is fixed within which a person must act or take the consequences is that the day of the act or event from which the period runs should not be counted against him. This rule is especially reasonable in the case in which that person is not necessarily cognisant of the act or event; and further in support of it there is the consideration that in case the period allowed was one day only, the consequence of including that day would be to reduce to a few hours or minutes the time within which the person affected should take action.

    208. In view of these considerations the general rule is that, as well in cases where the limitation of time is imposed by the act of a party as in those where it is imposed by statute, the day from which the time begins to run is excluded; thus, where a period is fixed within which a criminal prosecution or a civil action may be commenced, the day on which the offence is committed or the cause of action arises is excluded in the computation. Reliance was also placed in this judgment on Radcliffe v. Bartholomew[20]. In that case on June 30 an information was laid against the appellant therein in respect of an act of cruelty alleged to have been committed by him on May 30. An objection was taken on the ground that the complaint had not been made within one calendar month after the cause of the complaint had arisen. It was held that the day on which the alleged offence was committed was to be excluded from the computation of the calendar month within which the complaint was to be made; that the complaint was, therefore, made in time.

13. The fourth case referred to is Stewart v. Chapman[21]. In that case, an information was preferred by a police constable that Mr. Chapman had on 11/1/1951 driven a motor car along a road without due care and attention contrary to Section 12 of the Road Traffic Act, 1930. At hearing, a preliminary objection was taken that the notice of intended prosecution had not been served on the defendant within fourteen days of commission of offence in accordance with Section 21 of the Road Traffic Act, 1930, inasmuch as although the alleged offence was committed at 7.15 a.m. on 11/1/1951, the prosecutor did not send the notice of intended prosecution by registered post; until 1.00 p.m. on 11/1/1951 and it was not delivered to the defendant until 25/1/1951 at about 8.00 a.m. This submission was rejected observing that in calculating the period of fourteen days within which the notice of an intended prosecution must be served under Section 21 of the Road Traffic Act, 1930, the date of commission of the offence is to be excluded.

14. In re. North. Ex parte Hasluck[22], the execution creditor obtained judgment on 19/5/1893. An order was made authorizing sale of the bankrupts goods. The purchase money thereunder was paid to the sheriff on July 18. The sheriff retained the money for fourteen days in compliance with Section 11 of the Bankruptcy Act, 1890. In August, the solicitor of the execution creditor paid over the said money to the execution creditor. Application was filed by the trustee in bankruptcy for an order calling upon the execution creditor and his solicitor to pay over to the trustee, the proceeds of an execution against the bankruptcy goods on the ground that at the time of the sale they had notice of prior act of bankruptcy on the part of the bankrupt. Under Section 1 of the Bankruptcy Act, 1890, a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods, and the goods have been held by the sheriff for twenty one days. The time limit of twenty one days was an allowance of time to the debtor within which to redeem if he can. It was under these circumstances it became necessary to ascertain whether there was, in fact, a holding by the sheriff for twenty one days prior to the sale. If there was, then neither the execution creditor, nor his solicitor could be heard to say that they had no notice of such possession and the act of bankruptcy thereby constituted. Vaughan Williams, J. held that if the goods were seized on June 27 and sold on July 18, if June 27 is excluded, there was no holding by the sheriff for 21 days and consequently there was no act of bankruptcy and therefore execution creditor is not bound to hand over the money on the ground that he received it with notice of an act of bankruptcy. On appeal the same view was reiterated. Rigby L.J referred to Lester v. Garland[23] where Sir W. Grant expressed that if there were to be a general rule, it ought to be one of exclusion, as being more reasonable than one to the opposite effect.

15. We shall now turn to Haru Das Gupta, where this Court has followed the law laid down in the above judgments. In that case, the petitioner therein was arrested and detained on 5/2/1971 by order of District Magistrate passed on that day. The order of confirmation and continuation, which has to be passed within three months from the date of detention, was passed on 5/5/1971. The question for decision was as to when the period of three months can be said to have expired. It was contended by the petitioner that the period of three months expired on the midnight of 4/5/1971, and any confirmation and continuation of detention thereafter would not be valid. This Court referred to several English decisions on the point apart from the above decisions and rejected this submission holding that the day of commencement of

detention namely 5/2/1971 has to be excluded. Relevant observations of this could read as under:

These decisions show that courts have drawn a distinction between a term created within which an act may be done and a time limited for the doing of an act. The rule is well-established that where a particular time is given from a certain date within which an act is to be done, the day on that date is to be excluded. (See Goldsmiths Company v. the West Metropolitan Railway Company). This rule was followed in Cartwright v. Maccormack where the expression fifteen days from the date of commencement of the policy in a cover note issued by an insurance company was construed as excluding the first date and the cover note to commence at midnight of that day, and also in Marren v. Damson Bentley & Co. Ltd. a case for compensation for injuries received in the course of employment, where for purposes of computing the period of limitation the date of the accident, being the date of the cause of action, was excluded. (See also Stewart v. Chadman and In re North, Ex parte Wasluck). Thus, as a general rule the effect of defining a period from such a day until such a day within which an act is to be done is to exclude the first day and to include the last day. [See Halsburys Laws of England, (3rd Edn.). Vol. 37, pp. 92 and 95.] There is no reason why the aforesaid rule of construction followed consistently and for so long should not also be applied here.

16. We have extensively referred to Saketh. The reasoning of this Court in Saketh based on the above English decisions and decision of this Court in Haru Das Gupta which aptly lay down and explain the principle that where a particular time is given from a certain date within which an act has to be done, the day of the date is to be excluded, commends itself to us as against the reasoning of this Court in SIL Import USA where there is no reference to the said decisions.

17. It was submitted that in Saketh this Court has erroneously placed reliance on Section 12(1) and (2) of the Limitation Act, 1963. Section 12 (1) states that in computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded. In Section 12(2) the same principle is extended to computing period of limitation for an application for leave to appeal or for revision or for review of a judgment. Our attention was drawn to Subodh S. Salaskar wherein this Court has held that the Limitation Act, 1963 is not applicable to the N.I. Act. It is true that in Subodh S. Salaskar, this Court has held that the Limitation Act, 1963 is not applicable to the N.I. Act. However even if the Limitation Act, 1963 is held not applicable to the N.I. Act, the conclusion reached in Saketh could still be reached with the aid of Section 9 of the General Clauses Act, 1897. Section 9 of the General Clauses Act, 1897 states that in any Central Act or Regulation made after the commencement of the General Clauses Act, 1897, it shall be sufficient to use the word from for the purpose of excluding the first in a series of days or any other period of time and to use the word to for the purpose of including the last in a series of days or any other period of time. Sub-Section (2) of Section 9 of the General Clauses Act, 1897 states that this Section applies to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887. This Section would, therefore, be applicable to the N.I. Act.

18. Counsel, however, submitted that using two different words from and of in Section 138 at different places clarifies the intention of the legislature to convey different meanings by the said words. He submitted that the word of occurring in Sections 138(c) and 142(b) of the N.I. Act is to be interpreted differently as against the word from occurring in Section 138(a) of the N.I. Act. The word from may be taken as implying exclusion of the date in question and that

may well be governed by the General Clauses Act, 1897. However, the word of is different and needs to be interpreted to include the starting day of the commencement of the prescribed period. It is not governed by Section 9 of the General Clauses Act 1897. Thus, according to learned counsel, for the purposes of Section 142(b), which prescribes that the complaint is to be filed within 30 days of the date on which the cause of action arises, the starting date on which the cause of action arises should be included for computing the period of 30 days.

19. We are not impressed by his submission. In this connection, we may refer to Tarun Prasad Chatterjee. Though, this case relates to the provisions of the Representation of the People Act, 1951 (for short the RP Act, 1951), the principle laid down therein would have a bearing on the present case. What is important to bear in mind is that the Limitation Act is not applicable to it. In that case the short question involved was whether in computing the period of limitation as provided in Section 81(1) of the RP Act, 1951, the date of election of the returned candidate should be excluded or not. The appellant was declared elected on 28/11/1998. On 12/1/1999, the respondent filed an election petition under Section 81(1) of the RP Act, 1951 challenging the election of the appellant. The appellant filed an application under Order VII Rule 11 of the CPC read with Section 81 of the RP Act, 1951 praying that the election petition was liable to be dismissed at the threshold as not maintainable as the same had not been filed within 45 days from the date of election of the returned candidate. While dealing with this issue, this Court referred to Section 67-A of the RP Act, 1951 which states that for the purpose of the RP Act, 1951 the date on which a candidate is declared by the returning officer under Section 53 or Section 66 to be elected shall be the date of election of the candidate. As stated earlier, the appellant was declared elected as per this provision by the returning officer on 28/11/1998. Section 81 of the RP Act, 1951 which relates to presentation of petition reads thus:

> 81. Presentation of petitions. (1) An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of Section 100 and Section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates.
>
> Explanation.In this sub-section, elector means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.
>
> * * * (3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition. Before analyzing this provision, this Court made it clear that it was an accepted position that the Limitation Act had no application to the RP Act, 1951. This Court then referred to sub-clause (1) of Section 9 of the General Clauses Act, 1897, which states that it shall be sufficient for the purpose of excluding the first in a series of days or any other period of time to use the words from and for the purpose of including last in a series of days or any other period of time to use the word to. This Court observed that Section 9 gives statutory recognition to the well established principle applicable to the construction of statute that ordinarily in computing the period of time prescribed, the rule observed is to exclude the first and include the last day. This Court quoted the relevant provisions of Halsburys Laws of England, 37th Edn., Vol.3, p. 92.

We deem it appropriate to quote the same.

Days included or excluded When a period of time running from a given day or even to another day or event is prescribed by law or fixed as contract, and the question arises whether the computation is to be made inclusively or exclusively of the first-mentioned or of the last-mentioned day, regard must be had to the context and to the purposes for which the computation has to be made. Where there is room for doubt, the enactment or instrument ought to be so construed as to effectuate and not to defeat the intention of Parliament or of the parties, as the case may be. Expressions such as from such a day or until such a day are equivocal, since they do not make it clear whether the inclusion or the exclusion of the day named may be intended. As a general rule, however, the effect of defining a period in such a manner is to exclude the first day and to include the last day. The further observations made by this Court are pertinent and need to be quoted:

12. Section 9 says that in any Central Act or regulation made after the commencement of the General Clauses Act, 1897, it shall be sufficient for the purpose of excluding the first in a series of days or any other period of time, to use the word from, and, for the purpose of including the last in a series of days or any period of time, to use the word to. The principle is that when a period is delimited by statute or rule, which has both a beginning and an end and the word from is used indicating the beginning, the opening day is to be excluded and if the last day is to be included the word to is to be used. In order to exclude the first day of the period, the crucial thing to be noted is whether the period of limitation is delimited by a series of days or by any fixed period. This is intended to obviate the difficulties or inconvenience that may be caused to some parties. For instance, if a policy of insurance has to be good for one day from 1st January, it might be valid only for a few hours after its execution and the party or the beneficiary in the insurance policy would not get reasonable time to lay claim, unless 1st January is excluded from the period of computation. It was argued in that case that the language used in Section 81(1) that within forty-five days from, but not earlier than the date of election of the returned candidate expresses a different intention and Section 9 of the General Clauses Act has no application. While rejecting this submission, this Court observed that:

    We do not find any force in this contention. In order to apply Section 9, the first condition to be fulfilled is whether a prescribed period is fixed from a particular point. When the period is marked by terminus a quo and terminus ad quem, the canon of interpretation envisaged in Section 9 of the General Clauses Act, 1897 require to exclude the first day. The words from and within used in Section 81(1) of the RP Act, 1951 do not express any contrary intention. This Court concluded that a conjoint reading of Section 81(1) of the RP Act, 1951 and Section 9 of the General Clauses Act, 1897 leads to the conclusion that the first day of the period of limitation is required to be excluded for the convenience of the parties. This Court observed that if the declaration of the result is done late in the night, the candidate or elector would hardly get any time for presentation of election petition.

    Law comes to the rescue of such parties to give full forty-five days period for filing the election petition. In the facts before it since the date of election of the returned candidate was 28/11/1998, the election petition filed on 12/1/1999 on exclusion of the first day from computing the period of limitation, was held to be in time.

20. As the Limitation Act is held to be not applicable to N.I. Act, drawing parallel from Tarun Prasad Chatterjee where the Limitation Act was held not applicable, we are of the opinion that with the aid of Section 9 of the General Clauses Act, 1897 it can be safely concluded in the present case that while 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. It is not possible to agree with the counsel for the respondents that the use of the two different words from and of in Section 138 at different places indicates the intention of the legislature to convey different meanings by the said words.

21. In this connection we may also usefully refer to the judgment of the Division Bench of the Bombay High Court in Vasantlal Ranchhoddas Patel & Ors. v. Union of India & Ors.[24] which is approved by this Court in Gopaldas Udhavdas Ahuja and another v. Union of India and others[25], though in different context. In that case the premises of the appellants were searched by the officers of the Enforcement Directorate. Several packets containing diamonds were seized. The appellants made an application, for return of the diamonds, to the learned Magistrate, which was rejected. Similar prayer made to the Single Judge of the Bombay High Court was also rejected. An appeal was carried by the appellants to the Division Bench of the Bombay High Court. It was pointed out that under Section 124 of the Customs Act, 1962, no order confiscating any goods or imposing any penalty on any person shall be made unless the owner of the goods or such person is given a notice in writing with the prior approval of the officer of customs not below the rank of an Assistant Commissioner of Police, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty. Under Section 110(1) of the Customs Act, 1962 a proper officer, who has reason to believe that any goods are liable to confiscation may seize such goods. Under sub-Section(2) of Section 110 of the Customs Act, 1962, where any goods are seized under sub-Section (1) and no notice in respect thereof is given under clause (a) of Section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized. Under proviso to Section 110, sub-section (2), however, the Collector could extend the period of six months on sufficient cause being shown. It was argued that the Customs Officers had seized the goods within the meaning of Section 110 of the Customs Act, 1962 on 4/9/1964. The notice contemplated under Section 124(a) was given after 3/3/1965, that is after the period of six months had expired. As per Section 110(2), notice contemplated under Section 124(a) of the Customs Act, 1962 had to be given within six months of the seizure of the goods, and, therefore, notice issued after the expiry of six months was bad in law and, hence, the Collector of Customs was not competent to extend the period of six months under the proviso to sub-section (2) of Section 110 as he had done. Therefore, no order confiscating the goods or imposing penalty could have been made and the goods had to be returned to the appellants. It was argued that Section 9 of the General Clauses Act, 1897 has no application because the words from and to found in Section 9 of the General Clauses Act, 1897 are not used in sub-Section 2 of Section 110 of the Customs Act, 1962. This submission was rejected and Section 9 of the General Clauses Act, 1897 was held applicable. Speaking for the Bench Chainani, C.J. observed as under:

The principle underlying section 9 has been applied even in the cases of judicial orders passed by Courts, even though in terms the section is not applicable, See. Ramchandra Govind v. Laxman Savleram, AIR 1938 Bom 447, Dharamraj v Addl. Deputy Commr., Akola, AIR 1957

Bom 154, Puranchand v. Mohd Din. AIR 1935 Lah 291, Marakanda Sahu v. Lal Sadananda, AIR 1952 Orissa 279, and Liquidator Union Bank, Mal, v. Padmanabha Menon, (1954) 2 Mad LJ 44.The material words in sub-s. (2) of section 110 are "within six months of the seizure of the goods". In such provisions the word "of" has been held to be equivalent to "from": see Willims v. Burgess and Walcot, (1840) 12 Ad and El 635. In that case section 1 of the relevant statute enacted that warrants of attorney shall be filed "within twenty-one days after the execution. Section 2 enacted that unless they were "filed as aforesaid within the said space of twenty-one days from the execution, "they and the judgment thereon shall be void subject to the conditions specified in the section. The warrant of attorney was executed on 9th December, 1839 and it was filed, and judgment entered up on the 30th December. It was held that in computing the period of 21 days the day of execution must be excluded, Reliance was placed on Ex parte Fallon, (1793) 5 Term Rep 283 in which the word used was "of" and not "from". It was observed that "of", "from" and "'after" really meant the same thing and that no distinction could be suggested from the nature of the two provisions. In Stroud's Judicial Dictionary, Vol. 3, 1953 Edition in Note (5) under the word "of", it has been observed that "of" is sometimes the equivalent of "after" e.g., in the expression "within 21 days of the execution". The principle underlying section 9 of the General Clauses Act cannot therefore, be held to be inapplicable, merely because the word used in sub-section (2) of section 110 is "of" and not "from".

Relevant extracts from Halsburys laws of England[26] were quoted. They read as under:

The general rule in cases in which a period is fixed within which a person must act or take the consequences is that the day of the act or event from which the period runs should not be counted against him.

This general rule applies irrespective of whether the limitation of time is imposed by the act of a party or by statute; thus, where a period is fixed within which a criminal prosecution or a civil action may be commenced, the day on which the offence is committed or the cause of action arises is excluded in the computation. In the circumstances, it was held that the day on which the goods were seized has to be excluded in computing the period of limitation contemplated under sub-section (2) of Section 110 and therefore the notice was issued within the period of limitation. It is pertinent to note that under Section 110 (2) of the Customs Act, notice had to be given within six months of the seizure of the goods. Similarly, under Section 142(b) of the N.I. Act, the complaint has to be made within one month of the date of which cause of action arose. The view taken in Vasantlal Ranchhoddas Patel meets with our approval.

22. In view of the above, it is not possible to hold that the word of occurring in Section 138(c) and 142(b) of the N.I. Act is to be interpreted differently as against the word from occurring in Section 138(a) of the N.I. Act; and that for the purposes of Section 142(b), which prescribes that the complaint is to be filed within 30 days of the date on which the cause of action arises, the starting day on which the cause of action arises should be included for computing the period of 30 days. As held in Ex parte Fallon[27] the words of, from and after may, in a given case, mean really the same thing. As stated in Strouds Judicial Dictionary, Vol. 3 1953 Edition, Note (5), the word of is sometimes equivalent of after.

23. Reliance placed on Danial Latifi is totally misplaced. In that case the Court was concerned with Section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986. Section 3(1)(a) provides that a divorced woman shall be entitled to a reasonable and fair provision

and maintenance to be made and paid to her within the Iddat period by her former husband. This provision is entirely different from Section 142(b) of the N.I. Act, which provides that the complaint is to be made within which the cause of action arises. (emphasis supplied).

24. We may, at this stage, note that learned counsel for the appellant relied on State of Himachal Pradesh where, while considering the question of computation of three months limitation period and further 30 days within which the challenge to the award is to be filed, as provided in Section 34(3) and proviso thereto of the Arbitration Act, this Court held that having regard to Section 12(1) of the Limitation Act, 1963 and Section 9 of the General Clauses Act, 1897, day from which such period is to be reckoned is to be excluded for calculating limitation. It was pointed out by counsel for the respondents that Section 43 of the Arbitration Act makes the Limitation Act, 1963 applicable to the Arbitration Act whereas it is held to be not applicable to the N.I. Act and, therefore, this judgment would not be applicable to the present case. We have noted that in this case reliance is not merely placed on Section 12(1) of the Limitation Act. Reliance is also placed on Section 9 of the General Clauses Act. However, since, in the instant case we have reached a conclusion on the basis of Section 9 of the General Clauses Act, 1897 and on the basis of a long line of English decisions that where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded, it is not necessary to discuss whether State of Himachal Pradesh is applicable to this case or not because Section 12(1) of the Limitation Act is relied upon therein.

25. Having considered the question of law involved in this case in proper perspective, in light of relevant judgments, we are of the opinion that Saketh lays down the correct proposition of law. We hold 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. We hold that SIL Import USA does not lay down the correct law. Needless to say that any decision of this Court which takes a view contrary to the view taken in Saketh by this Court, which is confirmed by us, do not lay down the correct law on the question involved in this reference. The reference is answered accordingly.

[1] (1999) 3 SCC 1

[2] (1999) 4 SCC 567

[3] (1972) 1 SCC 639

[4] (2006) 9 SCC 340

[5] (2008)13 SCC 689

[6] (2010) 12 SCC 210

[7] (2000) 8 SCC 649

[8] AIR 1956 SC 35

[9] AIR 1964 SC 1687

[10] (1999) 9 SCC 700

[11] (2003) 4 SCC 305

[12] (2003) 5 SCC 622

[13] (2001) 7 SCC 740

[14] (1904) 1 K.B, at p. 1, 5

[15] 15 Ves. 248; 10 R. R. 68

[16] 14 M. & W. 574

[17] [1963] 1 All E.R. 11

[18] (1961) 2Q.B. 135

[19] 2nd ed., vol. 32 p. 142

[20] (1892) 1 Q.B.161

[21] (1951) 2 KB 792

[22] (1895) 2 Q.B. 264

[23] 15 Ves. 248

[24] AIR 1967 Bombay 138

[25] (2004) 7 SCC 33

[26] 3rd Edn., vol. 37 p. 95

[27] (1793) 5 Term Rep 283

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DAYAWATI VS YOGESH KUMAR GOSAIN

2017 SCC Online Del 11032

Delhi High Court

Before **Hon'ble The Acting Chief Justice and Hon'ble Ms. Justice Anu Malhotra**

Dayawati ...Petitioner
Through : Mr. Gautam Pal, Adv. for the complainant

Versus

Yogesh Kumar Gosain ...Respondent
Through: Mr. Ajay Digpaul, Adv. for the respondent
Mr. J.P. Sengh, Sr. Adv., Ms. Veena Ralli alongwith Mr. Ravin Kapur and Mr. Siddharth Aggarwal, Advs. as Amici Curiae.

CRL.REF.No.1/2016

Decided on 17 October, 2017

Reserved on : 28th February 2017

Date of decision : 17th October 2017

JUDGMENT

GITA MITTAL, ACTING CHIEF JUSTICE

1. The legal permissibility of referring a complaint cases under Section 138 of the NI Act for amicable settlement through mediation; procedure to be followed upon settlement and the legal implications of breach of the mediation settlement is the subject matter of this judgment. Shri Bharat Chugh, as the concerned Metropolitan Magistrate (NI Act) - Central - 01/THC/ Delhi, when seized of Complaint Case Nos.519662/2016 and 519664/2016 (Old Complaint Case Nos.2429/2015 and 2430/2015) under Section 138 of the Negotiable Instruments Act ("NI Act" hereafter) passed an order dated 13th January, 2016, the following questions under Section 395 of the Code of Criminal Procedure ("Cr.P.C" hereafter) to this court for consideration:

   "1. What is the legality of referral of a criminal compoundable case (such as one u/s 138 of the NI Act) to mediation?

   2. Can the Mediation and Conciliation Rules, 2004 formulated in exercise of powers under the CPC, be imported and applied in criminal cases? If not, how to fill the legal vacuum? Is there a need for separate rules framed in this regard (possibly u/s 477 of the CrPC)?

   3. In cases where the dispute has already been referred to mediation - What is the procedure to be followed thereafter? Is the matter to be disposed of taking the very mediated settlement agreement to be evidence of compounding of the case and dispose of the case, or the same is to be kept pending, awaiting compliance thereof (for example, when the payments are spread over a long period of time, as is usually the case in such settlement agreements)?

4. If the settlement in Mediation is not complied with - is the court required to proceed with the case for a trial on merits, or hold such a settlement agreement to be executable as a decree?

5. If the Mediated Settlement Agreement, by itself, is taken to be tantamount to a decree, then, how the same is to be executed? Is the complainant to be relegated to file an application for execution in a civil court? If yes, what should be the appropriate orders with respect to the criminal complaint case at hand. What would be the effect of such a mediated settlement vis-a-vis the complaint case?" (Emphasis by us)

The reference has been registered as Crl.Ref.No.1/2016.

2. Given the importance of the questions raised in criminal law, by an order dated 15th March, 2016, we had appointed Mr. Siddharth Aggarwal, Advocate as amicus curiae in the matter. On the 20th of July 2016, having regard to the nature of the above issues which had been crystallized by the ld. Metropolitan Magistrate and in view of their extensive experience on all aspects of mediation, we had also appointed Mr. J.P. Sengh, Sr. Advocate as well as Ms. Veena Ralli, Advocate (currently Member and Organizing Secretary respectively of the Organizing Committee of Samadhan - Delhi High Court Mediation and Conciliation Centre), both senior and experienced mediators, as amici curiae in the matter.

3. Court notice was also issued to the counsel for the parties in both CC Nos.2429/2015 & 2430/2015, Dayawati v. Yogesh Kumar Gosain pending in the court of the Metropolitan Magistrate for appearance before us and they stand represented through counsel before us.

4. Written submissions stand filed by learned amici curiae to assist this court. We have had the benefit of hearing Mr. J.P. Sengh, Senior Advocate, Ms. Veena Ralli, Advocate and Mr. Siddharth Aggarwal, Advocate as amici curiae as well as Mr. Gautam Pal, ld. counsel for the complainant and Mr. Ajay Digpaul, ld. counsel for the respondent in the complaints under Section 138 of the NI Act.

5. We set down hereunder the headings under which we have considered the matter :

   I. Factual matrix (paras 6 to 16)

   II. Alternate dispute resolution mechanisms statutorily recognized (paras 17 to 20)

   III. Statutory provisions (paras 21 to 31)

   IV. Scope of Section 89 of the Code of Civil Procedure, 1908 (paras 32 to 41)

   V. Statutory power to refer matters for dispute resolution and effect of a settlement (paras 42 to 49)

   VI. Power of criminal courts to refer cases to mediation (paras 50 to 57)

   VII. Process to be followed in reference of above disputes in criminal law to mediation (para 58)

   VIII. Dispute resolution encouraged in several cases by the Supreme Court in non-compoundable cases as well (paras 59 to 62)

   IX. Nature of proceedings under Section 138 of the NI Act (paras 63 to 67)

   X. Permissibility of settlement of offence under Section 138 of the NI Act (paras 68 to 73)

XI. Mediation and Conciliation Rules, 2004 - notified the Delhi High Court (paras 74 to 77)

XII. Impact of settlement of disputes in a complaint under Section 138 Negotiable Instruments Act by virtue of Lok Adalat under the Legal Services Authorities Act, 1987 (paras 78 to 80)

XIII. What is the procedure to be followed if in a complaint case under Section 138 of the NI Act, a settlement is reached in mediation? (paras 81 to 107)

XIV. Breach of such settlement accepted by the court - consequences? (paras 108 to 117)

XV. Reference answered (para 118)

XVI. Result (paras 119 to 121) We now propose to discuss the above issues in seriatim :

I. Factual matrix

6. Before dealing with the questions raised before us, it is necessary to briefly note some essential facts of the case. The appellant Smt. Dayawati ("complainant" hereafter) filed a complaint under Section 138 of the NI Act, complaining that the respondent Shri Yogesh Kumar Gosain herein ("respondent" hereafter) had a liability of "55,99,600/- towards her as on 7th April, 2013 as recorded in a regular ledger account for supply of fire-fighting goods and equipment to the respondent on different dates and different quantities. In part discharge of this liability, the respondent was stated to have issued two account payee cheques in favour of the complainants of "11,00,000/- (Cheque No.365406/- dated 1st December, 2014) and "16,00,000/- (Cheque No.563707 dated 28th November, 2014). Unfortunately, these two cheques were dishonoured by the respondent's bank on presentation on account of "insufficiency of funds".

7. As a result, the complainant was compelled to serve a legal notice of demand on the respondent which, when went unheeded, led to the filing of two complaint cases under Section 138 of the NI Act before the Patiala House Courts, New Delhi being CC Nos.89/1/15 and 266/1/15. In these proceedings, both parties had expressed the intention to amicably settle their disputes. Consequently, by a common order dated 1st April, 2015 recorded in both the complaint cases, the matter was referred for mediation to the Delhi High Court Mediation and Conciliation Centre.

8. We extract hereunder the operative part of the order dated 1 st April, 2015 which reads as follows

"... Ld. Counsel for accused submits that accused is willing to explore the possibilities of compromise. Ld. Counsel for complainant is also interested (sic) in compromise talk. Let the matter be referred to Mediation Cell, High Court Delhi, Delhi. Parties are directed to appear before the Mediation Cell, Hon'ble High Court, Delhi on 15.04.2015 at 2:30 p.m."

9. It appears that after negotiations at the Delhi High Court Mediation and Conciliation Centre, the parties settled their disputes under a common settlement agreement dated 14th May, 2015 under which the accused agreed to pay a total sum of ^55,54,600/- to the complainant as full and final settlement amount in installments with regard to which a mutually agreed payment schedule was drawn up. It was undertaken that the complainant would withdraw the complaint cases after receipt of the entire amount. In the agreement drawn up, the parties agreed to comply with the terms of the settlement which was signed by both the parties along with their respective counsels. We extract the essential terms of the settlement hereunder :

"xxx xxx xxx

6. The following settlement has been arrived at between the parties hereto :

a) That the second party shall pay a total sum of Rs.55,54,600/- to the first party towards full and final settlement of all the claims of the first party against the second party.

b) That on 25.06.2015, the second party shall pay Rs.11,00,000/- to the first party by way of NEFT/RTGS/demand draft.

c) That on 25.10.2015, the second party shall pay Rs.16,00,000/- to the first party by way of NEFT/RTGS/demand draft.

d) The balance sum of Rs.28,54,600/- shall be paid by the second party to the first party within 18 months from 25.11.2015 by way of NEFT/RTGS/demand draft in equal monthly installments i.e. Rs.1,58,600/-

e) That the second party shall also provide "C-Form (Sales Tax, Mumbai)" to the first party against Bill Nos.R 605 dated 27.02.2013 and R 607 dated 06.03.2013.

f) That the first party undertakes to withdraw the present CC Nos. 89/1/15 and 266/1/15 upon receipt of entire settlement amount from the second party."

(Emphasis by us)

10. This settlement agreement was placed before the court on 1st June, 2015 when the following order was recorded :

"File received back from the Mediation Centre with report of settlement. Settlement agreement dated 14.05.2015 gone through. At joint request, put up for compliance of abovesaid settlement agreement and for making of first installment on 30.06.2015" (Emphasis by us)

11. Unfortunately, the accused/respondent herein failed to comply with the terms of the settlement. Though vested with the obligation thereunder to pay a sum of ^11,00,000/- as the first installment on 25th June, 2015, he paid only a sum of ^5,00,000/- to the complainant through RTGS without giving any justification. On the 30th June of 2015, the Metropolitan Magistrate consequently recorded thus:

"... Ld. Counsel for complainant submits that the accused has not made the payment of first installment in terms of mediation settlement dated 14.05.2015.

Ld. Counsel for complainant further submits that accused was to pay first installment of Rs. 11,00,000/- on or before the 25.06.2015 however he has paid only Rs. 5,00,000/- through RTGS. No reasonable explanation for the non-payment of full amount of first installment is given by the accused. Further, no assurance is given by the accused for making of the due installments within the stipulated time.

Considering the facts of the case and submissions on behalf of both the parties, it is apparent that the accused is not willing to comply with the terms and conditions of the mediation settlement. Hence, mediation settlement failed.

Let the matter be proceeded on merit, put up on 14.08.2015" (Emphasis by us)

12. Thereafter, two more opportunities were given by the Metropolitan Magistrate on 14th August, 2015 and 21st August, 2015 to the accused to comply with the settlement. Finally, in view of the continued non-compliance, the matter was listed for framing of notice on 28th September, 2015 and trial on merits.

13. In the meantime, the Negotiable Instruments (Amendment) Ordinance, 2015, received the assent of the President of India on the 26th of December, 2016. On account of promulgation of the ordinance, Section 142 of the Negotiable Instuments Act, 1881 stood amended with regard to jurisdiction of offences under Section 138 of the enactment and therefore these cases stood transferred from Patiala House Courts to Tis Hazari Courts at which stage the matter came to be placed before the ld. referral judge.

14. At this stage, an application dated 16th November, 2015 was filed by the complainant seeking enforcement of the settlement agreement dated 14th May, 2015 placing reliance on the judicial precedents reported at 2013 SCC OnLine Del 124 Hardeep Bajaj v. ICICI; 2015 SCC OnLine Del 7309 Manoj Chandak v. M/s Tour Lovers Tourism (India) Pvt Ltd and 2015 SCC OnLine Del 9334 M/s Arun International v. State of Delhi. The complainant urged that the settlement agreement was arrived at after long negotiations and meetings; that it was never repudiated by the accused nor challenged on grounds of it being vitiated for lack of free consent or any other ground and lastly, that the accused having paid part of the first agreed installment, has also acted upon the mediation settlement and cannot be allowed to wriggle free of his obligation under the same.

15. The respondent, on the other hand, argued that the settlement agreement was not binding contending primarily, for the first time, that the settlement amount was exorbitant and onerous pointing out that the complaints were filed with regard to two cheques which were for a cumulative amount of “27,00,000/- while the settlement amount was of “55,54,600/- and this by itself was evidence that the agreement was unfair, arbitrary and not binding on the accused. It was further urged that on receipt of the case from the mediation cell, the statement of the parties ought to have been recorded before the court whereby the parties would have adopted the mediation settlement agreement so that the same bore the imprimatur of the court. As per the respondent, absence of such statement in the case denuded the settlement agreement of its binding nature and efficacy.

16. The ld. Metropolitan Magistrate was of the view that these questions had arisen, not just in this case, but a plethora of other cases as well. Consequently, the order dated 13th of January 2016 was passed making the aforestated reference under Section 395 of the Cr.P.C. to this court. At the same time, so far as the complaints under Section 138 of the NI Act are concerned, the ld. MM additionally directed thus :

“In view of the question of law that has arose in the present case, the decision on which is necessary for further proceedings and a proper adjudication of the present case - a reference has been made u/s 395 of the CrPC for consideration and guidance of the Hon’ble High Court of Delhi.

The office attached to this court is directed to send this Reference Order to the Ld. Registrar General, Hon’ble High Court of Delhi in appropriate manner and through proper channel.

List the matter now on 06.06.2016 awaiting the outcome of the reference and clarity on the legal issue."

II. Alternate dispute resolution mechanisms statutorily recognized

17. Let us, first and foremost, briefly examine the genesis, modes and methods of dispute resolution available to disputants. It is common knowledge that other than the traditional adversarial litigation before courts, alternate dispute resolution mechanisms found as being increasingly suited for various classes of cases, stand given statutory recognition and have received judicial recommendation as well.

18. The legislature has increasingly awarded statutory recognition and provided for alternate dispute resolution mechanisms to parties in several enactments, some completely dedicated to this process. These include lok adalats (Section 19 of the Legal Services Authorities Act, 1987); arbitration and conciliation (Parts I & III of Arbitration and Conciliation Act, 1996 as well as Section 89(a) & (b) of the Code of Civil Procedure, 1908 incorporated on 1st of July 2002); judicial settlement and mediation (Section 89(c) & (d) of the Code of Civil Procedure).

19. Some other statutes that recognize and prescribe alternate dispute resolution attempts mandatorily include the Hindu Marriage Act (Section 23), the Family Courts Act, 1984 (Section 9) and; the Industrial Disputes Act, 1947 (Section 10).

20. We find that so far as criminal proceedings are concerned, statutory recognition stands given to settlements between complainants/victims and accused persons under Section 320 of the Cr.P.C which also provides the limits of permissibility and the procedure to be followed by the court in compounding of offences.

III. Statutory provisions

21. Before examining the reference, we may for expediency extract the relevant provisions of the Negotiable Instruments Act, 1881; the Legal Services Authority Act, 1987; the Code of Civil Procedure, 1908 and the Code of Criminal Procedure, 1973 in one place.

22. The relevant statutory provisions of Negotiable Instruments Act, 1881 read as follows:

"138 Dishonour of cheque for insufficiency, etc., of funds in the account. --Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless-¬(a) the 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;

(b) the payee or the holder in due course of the cheque, as the case may be, 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 thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.-- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]"

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143. Power of Court to try cases summarily.- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of Sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials:

Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees:

Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.

(2) The trial of a case under this section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion, unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing.

(3) Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint."

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147. Offences to be compoundable.--Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable." (Emphasis by us)

23. The Legal Services Authorities Act, 1987 provides for constitution of legal services authorities to provide free and competent legal services to the weaker sections of the society as well as to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and also postulates alternate dispute resolution mechanism as lok adalats. The relevant statutory provisions of Legal Services Authorities Act, 1987 regarding dispute resolution are reproduced hereafter :

"19. Organisation of Lok Adalats.--

(1) Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may be, Taluk Legal Services Committee may organise Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit.

xxx xxx xxx

(5) A Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of-¬

(i) any case pending before; or

(ii) any matter which is falling within the jurisdiction of, and is not brought before, any court for which the Lok Adalat is organised: Provided that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law.

20. Cognizance of cases by Lok Adalats.--

(1) Where in any case referred to in clause (i) of sub-section (5) of section 19

(i) (a) the parties thereof agree; or

(b) one of the parties thereof makes an application to the court, for referring the case to the Lok Adalat for settlement and if such court is prima facie satisfied that there are chances of such settlement; or

(ii) the court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat, the court shall refer the case to the Lok Adalat:

Provided that no case shall be referred to the Lok Adalat under sub-clause (b) of clause (i) or clause (ii) by such court except after giving a reasonable opportunity of being heard to the parties.

(2) Notwithstanding anything contained in any other law for the time being in force, the Authority or Committee organising the Lok Adalat under sub-section (1) of section 19 may, on receipt of an application from any one of the parties to any matter referred to in clause (ii) of sub- section (5) of section 19 that such matter needs to be determined by a Lok Adalat, refer such matter to the Lok Adalat, for determination:

Provided that no matter shall be referred to the Lok Adalat except after giving a reasonable opportunity of being heard to the other party.

(3) Where any case is referred to a Lok Adalat under sub- section (1) or where a reference has been made to it under sub-section (2), the Lok Adalat shall proceed to dispose of the case or matter and arrive at a compromise or settlement between the parties.

(4) Every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the

parties and shall be guided by the principles of justice, equity, fair play and other legal principles.

(5) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, the record of the case shall be returned by it to the court, from which the reference has been received under sub-section (1) for disposal in accordance with law.

(6) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, in a matter referred to in sub¬section (2), that Lok Adalat shall advise the parties to seek remedy in a court.

(7) Where the record of the case is returned under sub- section (5) to the court, such court shall proceed to deal with such case from the stage which was reached before such reference under sub-section (1).

21. Award of Lok Adalat.-

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

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

24. Let us also examine Section 89 of the Code of Civil Procedure, 1908 ("CPC" hereafter), relevant statutory provisions whereof also prescribe alternate dispute resolution mechanisms, which are as under:

"89. Settlement of disputes outside the Court (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for-

(a) arbitration;

(b) conciliation

(c) judicial settlement including settlement through Lok Adalat; or

(d) mediation.

(2) Where a dispute had been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.

(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act,

1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed." (Emphasis supplied)

25. So far as the civil suits are concerned, the Legislature has amended the CPC to incorporate Rules 1A, 1B and 1C in Order X which are reproduced hereunder:

"1-A. Direction of the court to opt for any one mode of alternative dispute resolution.-- After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of Section 89. On the option of the parties, the court shall fix the date of appearance before such forum or authority as may be opted by the parties.

1-B. Appearance before the conciliatory forum or authority.-- Where a suit is referred under Rule 1-A, the parties shall appear before such forum or authority for conciliation of the suit.

1-C. Appearance before the Court consequent to the failure of efforts of conciliation.-- Where a suit is referred under Rule 1-A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the court and direct the parties to appear before the Court on the date fixed by it." (Emphasis by us)

26. We may also usefully extract the provisions of Rule 3 of Order XXIII of the CPC which provide the manner in which a civil court will proceed upon adjustment of a suit, wholly or in part, by an agreement or compromise. This provision reads thus :

"3. Compromise of suit.- Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit: -

Provided that where it is alleged by one party and denied by the other than an adjustment or satisfaction has been arrived at, the court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment." (Emphasis by us)

27. At this point, it is also necessary to examine from the Cr.P.C., the provisions of Section 29, which provides the sentence which a magistrate may pass; Section 320 which stipulates cases which may be compounded by the parties as well as those which may be compounded with

the leave of the court or otherwise; Section 357 which provides for award of compensation while awarding a sentence of fine or of which fine forms a part; Section 421 which provides for the manner in which a fine may be recovered and Section 431 which enables a court to recover any money by virtue of an order made under the Cr.P.C.

28. Sections 29 and 320 of the Cr.P.C., are relevant for the present consideration, read as follows :

"29. Sentences which Magistrates may pass (1) The Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.

(2) The Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding five thousand rupees, or of both.

(3) The Court of a Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding one thousand rupees, or of both.

(4) The Court of a Chief Metropolitan Magistrate shall have the powers of the Court of a Chief Judicial Magistrate and that of a Metropolitan Magistrate, the powers of the Court of a Magistrate of the first class."

320. Compounding of offences.--(1) The offences punishable under the sections of the Indian Penal Code (45 of 1860) specified in the first two columns of the Table next following may be compounded by the persons mentioned in the third column of that Table:-¬

xxx xxx xxx

(2) The offences punishable under the sections of the Indian Penal Code (45 of 1860) specified in the first two columns of the Table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that Table:--

xxx xxx xxx" (Emphasis supplied)

29. The provisions of Sections 357, 421, 431 of the Cr.P.C. which enable the court to direct payments of monetary amounts and enable recovery thereof, by the trial courts also may be extracted and read as follows :

"357. Order to pay compensation (1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13

of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto. (2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal. (3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced. (4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision. (5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section."

"421. Warrant for levy of fine (1) When an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may-

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) issue a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter: Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under section 357.

(2) The State Government may make rules regulating the manner In which warrants under clause (a) of sub- section (1) are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the Court issues a warrant to the Collector under clause (b) of sub- section (1), the Collector shall realise the amount in accordance with the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law: Provided that no such warrant shall be executed by the arrest or detention in prison of the offender."

"431. Money ordered to be paid recoverable as fine Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine:

Provided that section 421 shall, in its application to an order under section 359, by virtue of this section, be construed as if in the proviso to sub- section (1) of section 421, after the words and figures" under section 357", the words and figures" or an order for payment of costs under section 359" had been inserted." (Emphasis supplied)

30. Given the questions referred to us, we may also extract hereunder the extent of the rule making power of the High Court under Section 477 of the Cr.P.C. which reads thus :

"477. Power of High Court to make rules -

(1) Every High Court may, with the previous approval of the State Government, make rules--

(a) as to the persons who may be permitted to act as petition-writers in the Criminal Courts subordinate to it;

(b) regulating the issue of licences to such persons, the conduct of business by them, and the scale of fees to be charged by them.

(c) providing a penalty for a contravention of any of the rules so made and determining the authority by which such contravention may be investigated and the penalties imposed;

(d) any other matter which is required to be, may be, prescribed.

(2) All rules made under this section shall be published in the Official Gazette."

(Emphasis supplied)

31. The Delhi High Court has on 11th August, 2005 notified the "Mediation And Conciliation Rules 2004" to guide mediation in Delhi. We extract hereunder the relevant extract, as amended, thereof:

"(TO BE PUBLISHED IN PART IV OF DELHI GAZETTE EXTRAORDINARY) HIGH COURT OF DELHI : NEW DELHI NOTIFICATION No.171/Rules/DHC Dated: 11th August, 2005 In exercise of the rule making power under Part X of the Code of Civil Procedure, 1908 (5 of 1908) and clause (d) of sub-section (2) of Section 89 of the said Code and all other powers enabling it in this behalf, the High Court of Delhi hereby makes the following rules :-

MEDIATION AND CONCILIATION RULES, 2004 Rule 1 : Title "The Rules will apply to all mediation and conciliation connected with any suit or other proceeding pending in the High Court of Delhi or in any court subordinate to the High Court of Delhi. The mediation in respect of any suit or proceeding pending before the High Court of Delhi or any other Court or Tribunal may be referred to the Delhi High Court Mediation and Conciliation Centre or any other Mediation Centre set up by Legal Services Authorities. Upon such a reference being made to Delhi High Court Mediation and Conciliation Centre, the same will be governed by the Charter of the Delhi High Court Mediation and Conciliation Centre and to those mediation proceedings, the present Rules will apply mutatis mutandi." These Rules shall be called the Mediation and Conciliation Rules, 2004.

Rule 2: Appointment of Mediator/Conciliator

(a) Parties to a suit or other proceeding may agree on the name of the sole mediator/ conciliator for mediating between them. ...

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Rule 3 : Panel of mediators/conciliators

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(b) (i) The District & Sessions Judge shall, for the purpose of appointing the mediator/ conciliator to mediate between the parties in the suits or proceedings prepare a panel of the mediators/conciliators within a period of thirty days of the commencement of these rules and shall submit the same to the High Court for approval. On approval of the said panel by the High Court, with or without modification, which shall be done within thirty days of the submission of the panel by the District & Sessions Judge, the same shall be put on the Notice Board.

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Rule 24 : Settlement agreement

a) Where an agreement is reached between the parties in regard to all the issues in the suit or proceeding or some of the issues, the same shall be reduced to writing and signed by the parties or their constituted attorney. If any counsel has represented the parties, the conciliator/mediator may obtain his signature also on the settlement agreement.

(b) The agreement of the parties so signed shall be submitted to the mediator/conciliator who shall, with a covering letter signed by him, forward the same to the Court in which the suit or proceeding is pending.

(c) Where no agreement is arrived at between the parties, before the time limit stated in Rule 18 of where, the mediator/conciliator is of the view that no settlement is possible, he shall report the same to the Court in writing.

Rule 25 : Court to fix a date for Recording settlement and passing decree

(a) On receipt of any settlement, the Court shall fix a date of hearing normally within seven days but in any case not beyond a period of fourteen days. On such date of hearing, if the Court is satisfied that the parties have settled their dispute(s), it shall pass a decree in accordance with terms thereof.

(b) If the settlement dispose of only certain issues arising in the suit or proceeding, on the basis of which any decree is passed as stated in Clause (a), the Court shall proceed further to decide remaining issues." (Emphasis supplied)

IV. Scope of Section 89 of the Code of Civil Procedure, 1908

32. Mediation as a mode of alternate dispute settlement thus finds statutory recognition in Section 89 of the Code of Civil Procedure.

33. Valuable light is thrown on the interpretation of Section 89 in the judicial pronouncements rendered by the Supreme Court of India in (2003) 1 SCC 49, Salem Advocate Bar Assn. v. Union of India (Salem Bar I); (2005) 6 SCC 344, Salem Advocate Bar Assn. v. Union Of India (Salem Bar

II) and (2010) 8 SCC 24, Afcons Infrastructure Ltd. & Anr. v. Cherian Varkey Constructions Co. Pvt. Ltd.

34. Extensive amendments were effected to the Code of Civil Procedure by the Legislature by Act 46 of 1999. Amongst the provisions inserted, was Section 89 which provided for settlement of disputes outside the court through use of alternate dispute redressal mechanisms. Several writ petitions came to be filed before the Supreme Court of India challenging the amendments effected to the Code of Civil Procedure by the Amendment Act 46 of 1999 and Amendment Act 22 of 2002. Amongst these was W.P.(C)No.496/2000 titled Salem Advocate Bar Assn. v. Union of India. This writ petition came to be decided, along with connected writ petitions, by way of the judgment dated 25th October, 2002 reported at (2003) 1 SCC 49, Salem Advocate Bar Assn. v. Union of India (commonly known as Salem Bar I). So far as the amendments and insertion of Section 89 of the Code of Civil Procedure was concerned, the Supreme Court observed that Section 89 was a new provision and even through arbitration or conciliation had been in place as modes of settling the disputes, this had not really reduced the burden of the courts. The court was of the view that modalities had to be formulated for the manner in which Section 89 as well as other provisions which had been introduced by way of amendments, may have to be operated. For this purpose, a Committee was constituted to ensure that the amendments made became effective and resulted in quicker dispensation of justice.

35. This was followed by a later pronouncement in the same case reported at (2005) 6 SCC 344, Salem Advocate Bar Assn. v. Union Of India (commonly referred to as Salem Bar II), whereby the Supreme Court further clarified the position holding as follows :

> "57. A doubt has been expressed in relation to clause (d) of Section 89(2) of the Code on the question as to finalisation of the terms of the compromise. The question is whether the terms of compromise are to be finalised by or before the mediator or by or before the court. It is evident that all the four alternatives, namely, arbitration, conciliation, judicial settlement including settlement through the Lok Adalat and mediation are meant to be the action of persons or institutions outside the court and not before the court. Order 10 Rule 1-C speaks of the "Conciliation Forum" referring back the dispute to the court. In fact, the court is not involved in the actual mediation/conciliation. Clause (d) of Section 89(2) only means that when mediation succeeds and parties agree to the terms of settlement, the mediator will report to the court and the court, after giving notice and hearing to the parties, "effect" the compromise and pass a decree in accordance with the terms of settlement accepted by the parties. Further, in this view, there is no question of the court which refers the matter to mediation/conciliation being debarred from hearing the matter where settlement is not arrived at. The judge who makes the reference only considers the limited question as to whether there are reasonable grounds to expect that there will be a settlement, and on that ground he cannot be treated to be disqualified to try the suit afterwards, if no settlement is arrived at between the parties.
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> 62. When the parties come to a settlement upon a reference made by the court for mediation, as suggested by the Committee that there has to be some public record of the manner in which the suit is disposed of and, therefore, the court has to first record the settlement and pass a decree in terms thereof and if necessary proceed to execute it in accordance

with law. It cannot be accepted that such a procedure would be unnecessary. If the settlement is not filed in the court for the purpose of passing of a decree, there will be no public record of the settlement. It is, however, a different matter if the parties do not want the court to record a settlement and pass a decree and feel that the settlement can be implemented even without a decree. In such eventuality, nothing prevents them in informing the court that the suit may be dismissed as a dispute has been settled between the parties outside the court." (Emphasis by us)

36. In (2010) 8 SCC 24, Afcons Infrastructure Ltd. & Anr. v. Cherian Varkey Constructions Co. Pvt. Ltd., the Supreme Court was called upon to consider the scope of Section 89 of the CPC. Certain errors by the draftsman were noted in Section 89 of the CPC. In this judgment, the court further interpreted the statute to implement the spirit, object and intendment of the provisions. We may usefully refer to para 25 of the judgment in this regard, which reads as follows:

"25. In view of the foregoing, it has to be concluded that proper interpretation of Section 89 of the Code requires two changes from a plain and literal reading of the section. Firstly, it is not necessary for the court, before referring the parties to an ADR process to formulate or reformulate the terms of a possible settlement. It is sufficient if the court merely describes the nature of dispute (in a sentence or two) and makes the reference. Secondly, the definitions of "judicial settlement" and "mediation" in clauses (c) and (d) of Section 89(2) shall have to be interchanged to correct the draftsman's error.

Clauses (c) and (d) of Section 89(2) of the Code will read as under when the two terms are interchanged:

(c) for "mediation", the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authorities Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for "judicial settlement", the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

The above changes made by interpretative process shall remain in force till the legislature corrects the mistakes, so that Section 89 is not rendered meaningless and infructuous."

(Emphasis supplied)

37. With regard to anomalies in Section 89 of the CPC, the Supreme Court has thus held that where the court has referred the matter to mediation, the mediator shall be deemed to be a Lok Adalat under the Legal Services Act. For cases covered under Section 89 of the CPC, it is thus abundantly clear that the mediated settlement and settlement before "another Judge", would have the same efficacy and binding status as an award of the Lok Adalat which is deemed to be a decree.

38. The Supreme Court has also stipulated that mediated settlement would have to be placed before the courts concerned for recording of the settlement and disposal of the case. We extract hereunder para 39 of Afcons wherein this is discussed :

"39. Where the reference is to a neutral third party ("mediation" as defined above) on a court reference, though it will be deemed to be reference to Lok Adalat, as the court retains its control and jurisdiction over the matter, the mediation settlement will have to be placed before the court for recording the settlement and disposal. Where the matter is referred to another Judge and settlement is arrived at before him, such settlement agreement will also have to be placed before the court which referred the matter and that court will make a decree in terms of it." (Emphasis supplied)

As a result of the pronouncement in Afcons, Section 89 of the C.P.C. thus stands modified to the extent noted above.

39. So far as the procedure to be adopted by a court upon reference of the disputes in a civil case to an ADR mechanism is concerned, the same stands further considered in Afcons. The relevant portion of the judgment is reproduced as under :

"43 We may summarise the procedure to be adopted by a court under Section 89 of the Code as under:

(a) When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of the dispute between the parties.

(b) The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes. If it finds that the case falls under any excluded category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial.

(c) In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.

(d) The court should first ascertain whether the parties are willing for arbitration. The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.

(e) If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeable for reference to conciliation which will be governed by the provisions of the AC Act. If all the parties agree for reference to conciliation and agree upon the conciliator(s), the court can refer the matter to conciliation in accordance with Section 64 of the AC Act.

(f) If the parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three ADR processes: (a) Lok Adalat; (b) mediation by a neutral third-party facilitator or

mediator; and (c) a judicial settlement, where a Judge assists the parties to arrive at a settlement.

(g) If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat. In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation. Where the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.

(h) If the reference to the ADR process fails, on receipt of the report of the ADR forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.

(i) If the settlement includes disputes which are not the subject-matter of the suit, the court may direct that the same will be governed by Section 74 of the AC Act (if it is a conciliation settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). If the settlement is through mediation and it relates not only to disputes which are the subject-matter of the suit, but also other disputes involving persons other than the parties to the suit, the court may adopt the principle underlying Order 23 Rule 3 of the Code. This will be necessary as many settlement agreements deal with not only the disputes which are the subject-matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject-matter of the suit.

(j) If any term of the settlement is ex facie illegal or unenforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability." (Emphasis by us)

40. In para 44, the Supreme Court has also laid down certain consequential aspects which have to be borne in mind while giving effect to Section 89 of the Code. Para 44 of the judgment is reproduced as under :

"44. The court should also bear in mind the following consequential aspects, while giving effect to Section 89 of the Code:

(i) If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need be stated in the order-sheet.

(ii) If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may be. There is no need for an elaborate order for making the reference.

(iii) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that the court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process.

(iv) If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for judicial settlement to another Judge.

(v) If the court refers the matter to an ADR process (other than arbitration), it should keep track of the matter by fixing a hearing date for the ADR report. The period allotted for the ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of the alternative forum, the nature of case, etc.). Under no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on the proceedings.

(vi) Normally the court should not send the original record of the case when referring the matter to an ADR forum. It should make available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However if the case is referred to a court annexed mediation centre which is under the exclusive control and supervision of a judicial officer, the original file may be made available wherever necessary."

(Emphasis by us)

41. In para 45, the court had clarified that these were guidelines subject to such changes as the concerned court may deem fit with reference to the special circumstances of the case.

There is thus complete clarity on the manner in which a court must proceed when making a reference to mediation.

V. Statutory power to refer matters for dispute resolution and effect of a settlement

42. We have extracted above Section 19 of the Legal Services Act, 1987 providing for the organization of Lok Adalats. The Lok Adalats have the jurisdiction under sub-section 5 of Section 19 to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of :

(i) any case pending before, or

(ii) any matter which is falling within the jurisdiction of, and is not brought before, any court for which the Lok Adalat is organized.

Provided that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under the law.

Thus so far as criminal cases are concerned, a Lok Adalat has jurisdiction over only such criminal matters that relate to offences compoundable by law i.e. under Section 320 of the Cr.P.C. or under any special enactment.

It is also to be noted that under this enactment, it is also specifically provided that "court" means a "civil, criminal or revenue court".

43. So far as cognizance of cases by Lok Adalats are concerned, the same is taken in accordance with Section 20 of the enactment. This may be by agreement between the parties or upon one party making an application. It can also be by way of a reference by the court.

44. By virtue of Section 21 of the Legal Services Act, an award made by the Lok Adalats shall be final and binding and no appeal shall lie in any court against it. The award is deemed to be "decree of civil court" or, as the case may be, "an order of any other court".

    The statute therefore, makes no distinction between an award in a civil or criminal case.

45. So far as the civil suits which are tried in accordance with the provisions of Code of Civil Procedure are concerned, the mandate of Section 89 of the C.P.C. enables the court to refer the parties for settlement of disputes outside the court including for judicial settlement to Lok Adalats and mediation.

46. Order X of the C.P.C. provides the modalities for implementing the mandate of Section 89 CPC.

47. Additionally the provisions of the Arbitration and Conciliation Act, 1996 enable reference of matters where there is an arbitration agreement, for dispute resolution by arbitration and conciliation.

48. The Code of Criminal Procedure, 1973 and the Negotiable Instruments Act, 1881 unfortunately contain no provisions for reference of the matters thereunder to alternate dispute resolution mechanisms.

49. As the Code of Civil Procedure would have no application to criminal proceedings to which the Code of Criminal Procedure applies, Section 89 of the C.P.C. cannot and would not, in terms, apply to the proceedings under Section 138 of the NI Act.

VI. Power of criminal courts to refer cases to mediation

50. We have found that, though the Code of Civil Procedure contains a specific provision in Section 89 of the C.P.C. enabling reference of matters to alternate dispute redressal, however, so far as criminal cases are concerned, it is amply clear that the Code of Criminal Procedure does not contain any express statutory provision enabling the criminal court to refer the parties to a forum for alternate dispute resolution including mediation. The same is the position regarding cases under the NI Act. Therefore, the question which first begs an answer is whether the criminal court can in any manner refer parties before it to dispute resolution by mediation.

51. In para 18 of Afcons, the Supreme Court has given illustrations of certain categories of cases that were normally not considered suitable for alternate dispute resolution processes. Prosecution for criminal offences has been mentioned as not suitable. The judgment also notes that the categorization enumerated is merely illustrative and not inflexible. As the legal validity of mediation in criminal compoundable cases was not specifically in question, there is thus no authoritative judicial pronouncement prohibiting the same.

52. Out of the alternate dispute redressal mechanisms adopted by this country's legal system, the mediation movement as a reliable mechanism, has gained both acceptability and popularity. In an article titled "Mediation : Constituents, Process and Merit" (http://gujarathighcourt.nic.in/mediation/sbs1.htm) authored by S.B. Sinha, J. (Retd. Judge of the Supreme Court of India), it has been noted that unlike litigation and arbitration, which consists of formal evidentiary hearings and a final adjudication, mediation was a semi- formal negotiation aimed at allowing parties to settle disputes, not only amicably but also economically and expeditiously by a process of self and participatory determination. It is noted that mediation as a method of dispute resolution was not a unique or new concept and that it had in fact evolved through

long standing traditions, was being used by tribes and villages across our country long before it came to be statutorily recognized in the recent past. The roots of mediation have been traced back to texts such as "Kautilya's Arthashastra" as well as the Panchayati Raj system. The references to Lord Krishna's mediation between Kauravas and Pandavas during the Mahabharata are legendary.

53. Mediation undoubtedly provides an efficient, effective, speedy, convenient and inexpensive process to resolve disputes with dignity, mutuality, respect and civility where parties participate in arriving at a negotiated settlement rather than being confronted with a third party adjudication of their disputes. The very fact that it enables warring parties to sit across the table and negotiate, even if unsuccessful in dispute resolution, undergoing the process creates an atmosphere of harmony and peace in which parties learn to 'agree to disagree'.

54. The examination of the statutory regime and the practice governing mediation shows that the genesis of the mediation may rest on a court referral whereby the court refers the parties in a pending case, with their consent, to mediation. However, the availability of mediation as a platform to negotiate a settlement does not rest on a court referral. The parties are enabled to approach the mediation centre or the mediator even without the court order in what is referred to as 'pre-litigation mediation' which is really an effort to resolve the dispute before filing a case to explore the possibility of dispute resolution without court intervention. Inasmuch as we are not concerned with the consequences of a settlement in a pre-litigation mediation or the manner of its enforceability, we do not propose to dwell on it in this judgment.

55. Mr. J.P. Sengh, Senior Advocate would emphasize before us that it is the parties who are referred to the mediation, and, not the lis before the court. It is contended that the power to refer parties to mediation is irrespective of the nature of the case before the court, and that it could be civil or criminal. We find that inasmuch as it is the parties who are referred to mediation, this would be the correct legal position.

56. We have extracted above the provisions of Section 320 of the Cr.P.C. Section 320 of the Cr.P.C. enumerates and draws a distinction between offences as compoundable, either between the parties or with the leave of the court. This provision clearly permits and recognizes the settlement of specified criminal offences. Settlement of the issue(s) is inherent in this provision envisaging compounding. The settlement can obviously be only by a voluntary process inter se the parties. To facilitate this process, there can be no possible exclusion of external third party assistance to the parties, say that of neutral mediators or conciliators.

57. Therefore, even though an express statutory provision enabling the criminal court to refer the complainant and accused persons to alternate dispute redressal mechanisms has not been specifically provided by the Legislature, however, the Cr.P.C. does permit and recognize settlement without stipulating or restricting the process by which it may be reached. There is thus no bar to utilizing the alternate dispute mechanisms including arbitration, mediation, conciliation (recognized under Section 89 of CPC) for the purposes of settling disputes which are the subject matter of offences covered under Section 320 of the Cr.P.C.

VII. Process to be followed in reference of above disputes in criminal law to mediation

58. So what is the process to be followed in disputes under criminal law? So far as criminal matters are concerned, Section 477 of the Cr.P.C. enables the High Court to make rules regarding any

other matter which is required to be prescribed. The Mediation and Conciliation Rules stand notified by the Delhi High Court in exercise of the rule making power under Part X of the Code of Civil Procedure, Section 89(2)(d) of the C.P.C. as well as "all other powers enabling the High Court" in this behalf. The Rules therefore, clearly provide for mediation not only in civil suits, but also to "proceeding pending in the High Court of Delhi or in any court subordinate to the High Court of Delhi". So far as Delhi is concerned, these rules would apply to mediation in a matter referred by the court concerned with a criminal case as well as proceedings under Section 138 of the NI Act.

VIII. Dispute resolution encouraged in several cases by the Supreme Court in non-compoundable cases as well

59. We note that there have been several instances when the Supreme Court has approved exercise of inherent powers under Section 482 of the Cr.P.C. by the High Court for quashing criminal cases on account of compromise/settlement even though they are not included in the list of compoundable cases under Section 320 of the Cr.P.C. In (2012) 10 SCC 303, Gian Singh v. State of Punjab, it was held that this was in exercise of statutory power of the High Court under Section 482 of the Cr.P.C. The relevant extract of the judgment is reproduced as under :

> "61. ... But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (Emphasis supplied)

60. In a recent pronouncement dated 4th October, 2017, reported at 2017 SCC OnLine SC 1189 Parabatbhai Aahir @ Parbatbhai Bhimsinhabhai Karmur and Ors Vs State of Gujarat and Anr a three-Judge bench of the Supreme Court speaking through D.Y. Chandrachud, J. cited with approval, inter alia, the judgment in Gian Singh reiterating that in exercise of its inherent jurisdiction under Section 482 of the Cr.P.C, the High Court is empowered to quash FIRs/Criminal Proceedings emanating from non-compoundable offences if the ends of justice and the facts of the case, so warrant. While, so approving the Supreme Court, laid down the exposition of the law in the form of exhaustive guidelines which are extracted thus:

'(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non- compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.'

61. The judicial precedent in (2013) 5 SCC 226, K. Srinivas Rao v. D.A. Deepa is in the context of a complaint filed by the respondent wife under Section 498A of the Indian Penal Code, against the appellant husband and his family members, the offence under Section 498A of the IPC being non-compoundable. Noting that mediation, as a method of alternative dispute redressal had got legal recognition, observations regarding settlements of matrimonial disputes were made in paras 39 and 46 by the Supreme Court to the courts dealing with matrimonial matters which read thus :

"39. Quite often, the cause of the misunderstanding in a matrimonial dispute is trivial and can be sorted out. Mediation as a method of alternative dispute resolution has got legal recognition now. We have referred several matrimonial disputes to mediation centres. Our experience shows that about 10% to 15% of matrimonial disputes get settled in this Court through various mediation centres. We, therefore, feel that at the earliest stage i.e. when the dispute is taken up by the Family Court or by the court of first instance for hearing, it must be referred to mediation centres. ...

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44. We, therefore, feel that though offence punishable under Section 498-A IPC is not compoundable, in appropriate cases if the parties are willing and if it appears to the criminal court that there exist elements of settlement, it should direct the parties to explore the possibility of settlement through mediation. This is, obviously, not to dilute the rigour, efficacy and purport of Section 498-A IPC, but to locate cases where the matrimonial dispute can be nipped in bud in an equitable manner. The Judges, with their expertise, must ensure that this exercise does not lead to the erring spouse using mediation process to get out of clutches of the law. During mediation, the parties can either decide to part company on mutually agreed terms or they may decide to patch up and stay together. In either case for the settlement to come through, the complaint will have to be quashed. In that event, they can approach the High Court and get the complaint quashed. If, however, they choose not to settle, they can proceed with the complaint. In this exercise, there is no loss to anyone. If there is settlement, the parties will be saved from the trials and tribulations of a criminal case and that will reduce the burden on the courts which will be in the larger public interest. Obviously, the High Court will quash the complaint only if after considering all circumstances it finds the settlement to be equitable and genuine. Such a course, in our opinion, will be beneficial to those who genuinely want to accord a quietus to their matrimonial disputes.

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46. We, therefore, issue directions, which the courts dealing with the matrimonial matters shall follow.

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46.2. The criminal courts dealing with the complaint under Section 498-A IPC should, at any stage and particularly, before they take up the complaint for hearing, refer the parties to mediation centre if they feel that there exist elements of settlement and both the parties are willing. However, they should take care to see that in this exercise, rigour, purport and efficacy of Section 498-A IPC is not diluted. Needless to say that the discretion to

grant or not to grant bail is not in any way curtailed by this direction. It will be for the court concerned to work out the modalities taking into consideration the facts of each case. 46.3. All mediation centres shall set up pre-litigation desks/clinics; give them wide publicity and make efforts to settle matrimonial disputes at pre-litigation stage."

(Emphasis supplied)

62. Therefore, the Supreme Court has recognized the permissibility of the High Court's quashing the criminal prosecutions in exercise of their inherent jurisdiction under Section 482 of the Cr.P.C. on a consideration of the subject matter of the cases. The Supreme Court has accepted compromises in non-compoundable offences upon evaluation of the genuineness, fairness, equity and interests of justice in continuing with the criminal proceedings relating to non-compoundable offences, after settlement of the entire dispute especially in offences arising from "commercial, financial, civil, partnership" or such like transactions or relating to matrimonial or family disputes which are private in nature.

IX. Nature of proceedings under Section 138 of the NI Act

63. Before proceeding with the examination of the questions under reference, it is necessary to examine the spirit, intendment and object of the incorporation of Section 138 of the NI Act, the Preamble whereof states "Whereas it is expedient to define and amend the law relating to promissory notes, bills of exchange and cheques". It is therefore, evident that Section 138 of the NI Act was introduced to inculcate faith in the efficacy of banking operations and credibility in transacting business of negotiable instruments (Ref.: (2003) 3 SCC 232, Goaplast P. Ltd. V. Chico Ursula D'Souza & Anr.).

64. In (2011) 4 SCC 593, Kaushalya Devi Massand v. Roopkishore Khore, the Supreme Court drew the following distinction between the traditional criminal offences and the offence under Section 138 of the NI Act observing thus :

"11. Having considered the submissions made on behalf of the parties, we are of the view that the gravity of a complaint under the Negotiable Instruments Act cannot be equated with an offence under the provisions of the Penal Code, 1860 or other criminal offences. An offence under Section 138 of the Negotiable Instruments Act, 1881, is almost in the nature of a civil wrong which has been given criminal overtones." (Emphasis supplied)

65. We also find useful the observations of the Supreme Court in (2012) 1 SCC 260, R. Vijayan v. Baby wherein the court was determining an issue in respect of compensation when fine is imposed as the sentence or it forms part of the sentence. In this pronouncement, the Supreme Court noted that cases arising under Section 138 of the NI Act are really "civil cases masquerading as criminal cases". The statutory object in effect appears to be both punitive as also compensatory and restitutive in regard to cheque dishonouring cases. The judgment notes that Chapter XVII of the enactment is a unique exercise which bears the dividing line between civil and criminal jurisdictions and that it provides a single forum to enforce a civil and criminal remedy.

66. In this regard, the observations of the Supreme Court in (2010) 5 SCC 663, Damodar S. Prabhu v. Sayed Babalal H also shed valuable light, relevant extract whereof is as below :

"17. 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 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."

18. It is quite obvious that with respect to the offence of dishonour of cheques, it is the compensatory aspect of the remedy which should be given priority over the punitive aspect. There is also some support for the apprehensions raised by the learned Attorney General that a majority of cheque bounce cases are indeed being compromised or settled by way of compounding, albeit during the later stages of litigation thereby contributing to undue delay in justice delivery. The problem herein is with the tendency of litigants to belatedly choose compounding as a means to resolve their dispute. Furthermore, the written submissions filed on behalf of the learned Attorney General have stressed on the fact that unlike Section 320 CrPC, Section 147 of the Negotiable Instruments Act provides no explicit guidance as to what stage compounding can or cannot be done and whether compounding can be done at the instance of the complainant or with the leave of the court." (Emphasis by us)

67. It is quite apparent that proceedings under Section 138 of the NI Act have a special character. They arise from a civil dispute relating to dishonouring to a cheque but may result in a criminal consequence.

Even though the statute is punitive in nature, however, its spirit, intendment and object is to provide compensation and ensure restitution as well which aspects must received priority over punishment. The proceedings under Section 138 of the NI Act are therefore, distinct from other criminal cases. It is well settled that they are really in the nature of a civil wrong which has been given criminal overtones.

X. Permissibility of settlement of offence under Section 138 of the NI Act

68. So far as the offence/proceedings under Section 138 of the NI Act are concerned, the Legislature has provided Section 147 which specifically stipulates that "every offence punishable under this Act shall be compoundable". It is important to note that Section 147 of the statute contains a non-obstante provision and is applicable notwithstanding anything contained in the Code of Criminal Procedure. Therefore, irrespective of and apart from the offences stipulated under Section 320 of the Cr.P.C., Section 147 of the NI Act makes the offence under Section 138 of the NI Act specifically compoundable.

69. The impact of the non-obstante clause in Section 147 of the NI Act has been considered by the High Court of Gujarat in the judgment reported at (2005) CriLJ 431, Rameshbhai Somabhai Patel v. Dineshbhai Achalanand Rathi wherein the court held thus:

> "8. The victim of the offence can compound the offence notwithstanding anything contained in Cr. P.C. 1973. In other words, the parties can settle the alleged criminal wrong and conclude their dispute under adjudication and request the Court where it is pending to pass appropriate order viz: order of acquittal. Undisputedly, the petitioner accused has approached this Court for scrutiny of the legality and validity of the order of conviction and sentence and, therefore, the original complainant can positively appear before this Court and say that he has compounded the offence with the accused and now he has not to pursue the remedy, that he is not interested in proceeding with the complaint and to see that the accused is sent to the prison. The effect of the same would be practically or say similar to a withdrawal from the prosecution with or without any qualification. So, the original complainant if comes to the Court and says that he is withdrawing himself from prosecution on account of compromise and he has compounded the matter, then obviously the conviction and sentence shall have to be annulled/set aside. Considering the language of the section, even there is no scope for the Court to consider whether such a request should be accepted or not. No formal permission to compound the offence is required to be sought for.
>
> 9. Considering the language of Section 147 of the N.I. Act, it is not necessary to consider the scheme of Section 320 of CrPC, but to appreciate the questions posed, it can still be looked into other relevant provision. Section 320 of CrPC divides compoundable offences in two different parts by Sub-section (1). and Sub-section (2). Subsequent subsections deal with other contingencies, qualifications or embargoes. But Section 147 of the N.I. Act says that offence shall be compoundable and it does not provide for any other or further qualification or embargo like Sub- section (2) of Section 320 of CrPC. The parties can compound the offence as if the offence is otherwise compoundable. Thus, the offence is made straightaway compoundable like the case described under Sub-section (1) of Section 320 of CrPC. Subsection (9) of Section 320 of CrPC has no room to play because of non obstante clause in Section 147 of the N.I. Act
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> 10. The declaration placed before the Court and the presence of the original complainant respondent No. 1 today before the Court takes me to a conclusion that the say of the complainant should be accepted that he has withdrawn from prosecution because he has compounded the offence out of the Court. As per the settled legal position, the effect of compounding of the offence is that of acquittal." (Emphasis by us)

70. On this aspect, valuable light is thrown on this issue also in the pronouncement of the Supreme Court in Damodar S. Prabhu's case wherein the Supreme Court has laid down the guidelines while interpreting Section 138 and 147 of the NI Act to encourage litigants in cheque dishonouring cases to opt for compounding during early stages of the litigation to ease choking of the criminal justice system.

To encourage this, a graded scheme of imposing costs on parties who unduly delay compounding of the offence and for controlling filing of the complaints in multiple jurisdictions relatable to

same transactions has been proscribed. We extract hereunder the relevant directions of the Supreme Court in this regard :

"21. ... In view of this submission, we direct that the following guidelines be followed:

THE GUIDELINES

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

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

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

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

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

71. The court has however, observed in this judgment that Section 147 of the Act did not carry any guidance on how the court will proceed with the compounding of the offence under the enactment and that the scheme legislatively contemplated under Section 320 of the Cr.P.C. cannot be followed in the strict sense. It was to overcome the hurdle because of the legislative vacuum that the graded scheme was provided to give some guidance and to save valuable time of the courts.

72. In this regard, reference may also usefully be made to the pronouncement of the Supreme Court reported at (2014) 5 SCC 590, Indian Banks Association & Ors. v. Union of India wherein the court observed thus :

"21. This Court in Damodar S. Prabhu v. Sayed Babalal H. [(2010) 5 SCC 663 : (2010) 2 SCC (Civ) 520 : (2010) 2 SCC (Cri) 1328] laid down certain guidelines while interpreting Sections 138 and 147 of the Negotiable Instruments Act to encourage litigants in cheque dishonour cases to opt for compounding during early stages of litigation to ease choking of criminal justice system; for graded scheme of imposing costs on parties who unduly delay compounding of offence; and for controlling of filing of complaints in multiple jurisdictions relatable to same transaction, which have also to be borne in mind by the Magistrate while dealing with cases under Section 138 of the Negotiable Instruments Act." (Emphasis by us)

73. The above further reinforces the position that there is no legal prohibition upon a court, seized of a complaint under NI Act, to encourage dispute resolution by recourse to the alternate

dispute resolution methods including mediation. On the contrary, the guidelines laid down by the court in Damodar S. Prabhu unequivocally encourage settlement. Mediation, as a mechanism for dispute resolution and arriving at a settlement automatically gets reinforced so far as a case under Section 138 of the NI Act is concerned.

XI. Mediation and Conciliation Rules, 2004 - notified the Delhi High Court

74. Mediation in Delhi is guided by the Mediation and Conciliation Rules, 2004. These Rules source the rule making power to "Part X and Clause (d) of sub-section (2) of Section 89" of the Code of Civil Procedure, 1908 as well as "all other powers enabling" the High Court of Delhi to make such Rules.

75. The Delhi Mediation and Conciliation Rules, 2004 apply to all mediations and conciliations connected with "any suit or other proceedings pending in the High Court of Delhi or in any other court subordinate to the High Court of Delhi". These rules further state that mediation in respect of any "suit or proceeding pending before the High Court or any other court or tribunal" may be referred to the Delhi High Court Mediation and Conciliation Centre or any other mediation centre set up by the Legal Services Authorities Act, 1987.

76. In this regard, we may advert to Article 227 of the Constitution of India as well as Section 477 of the Cr.P.C. which enables the High Court to make such rules.

77. The Mediation and Conciliation Rules, 2004 stand notified by the High Court of Delhi which would guide the process to be followed even in references to mediation arising under Section 138 of the N.I. Act.

XII. Impact of settlement of disputes in a complaint under Section 138 Negotiable Instruments Act by virtue of Lok Adalat under the Legal Services Authorities Act, 1987

78. Given the reference under examination, it is therefore, necessary to examine what would be the impact of a settlement of disputes in a complaint under Section 138 of the NI Act before the Lok Adalat constituted under the Legal Services Authorities Act, 1987? This issue was the subject matter of consideration before the Supreme Court in the judgment reported at (2012) 2 SCC 51, K. Govindam Kutty Menon v. C.D. Shaji. The Kerala High Court had taken a view that when a criminal case is settled at a Lok Adalat, the award passed by it has to be treated only as an order of the criminal court and that it cannot be executed as a decree of the civil court. This finding was overturned by the Supreme Court. We extract hereunder the observations of the Supreme Court in paras 12, 13 and 26 :

> "12. Unfortunately, the said argument was not acceptable to the High Court. On the other hand, the High Court has concluded that when a criminal case is referred to the Lok Adalat and it is settled at the Lok Adalat, the award passed has to be treated only as an order of that criminal court and it cannot be executed as a decree of the civil court. After saying so, the High Court finally concluded that "an award passed by the Lok Adalat on reference of a criminal case by the criminal court as already concluded can only be construed as an order by the criminal court and it is not a decree passed by a civil court" and confirmed the order of the Principal Munsif who declined the request of the petitioner therein to execute the award passed by the Lok Adalat on reference of a complaint by the criminal court.

13. On going through the Statement of Objects and Reasons, definition of "court", "legal service" as well as Section 21 of the Act, in addition to the reasons given hereunder, we are of the view that the interpretation adopted by the Kerala High Court in the impugned order is erroneous.

xxx xxx xxx

26. From the above discussion, the following propositions emerge:

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

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

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

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

79. The judgment of the Supreme Court reported at (2014) 10 SCC 690 Madhya Pradesh State Legal Services Authority v. Prateek Jain in Civil Appeal No. 8614/2014 decided on 10 th September, 2014, also brings forth that even when cases under Section 138 of the NI Act were settled before the Lok Adalat, the guidelines in Damodar S. Prabhu are to be followed, with modifications, if any, qua reduction of costs if necessary. In para 23 of the judgment, the court stated the legal position thus :

"23. Having regard thereto, we are of the opinion that even when a case is decided in the Lok Adalat, the requirement of following the Guidelines contained in Damodar S. Prabhu [Damodar S. Prabhu v. Sayed Babalal H., (2010) 5 SCC 663 : (2010) 2 SCC (Civ) 520 : (2010) 2 SCC (Cri) 1328] should normally not be dispensed with. However, if there is a special/specific reason to deviate therefrom, the court is not remediless as Damodar S. Prabhu [Damodar S. Prabhu v. Sayed Babalal H., (2010) 5 SCC 663 : (2010) 2 SCC (Civ) 520 : (2010) 2 SCC (Cri) 1328] itself has given discretion to the court concerned to reduce the costs with regard to specific facts and circumstances of the case, while recording reasons in writing about such variance. Therefore, in those matters where the case has to be decided/settled in the Lok Adalat, if the court finds that it is a result of positive attitude of the parties, in such appropriate cases, the court can always reduce the costs by imposing minimal costs or even waive the same. For that, it would be for the parties, particularly the accused person, to make out a plausible case for the waiver/reduction of costs and to convince the court concerned about the same. This course of action, according to us, would strike a balance between the two competing but equally important interests, namely, achieving the objectives delineated in Damodar S. Prabhu [Damodar S. Prabhu

v. Sayed Babalal H., (2010) 5 SCC 663 : (2010) 2 SCC (Civ) 520 : (2010) 2 SCC (Cri) 1328] on the one hand and the public interest which is sought to be achieved by encouraging settlements/resolution of case through the Lok Adalats on the other hand." (Emphasis by us)

80. The Supreme Court has thus declared the legal position that the Legal Services Authorities Act did not make out any distinction between the reference made by a civil court and a criminal court.

Upon settlement before the Lok Adalat even in a criminal case, the award of the Lok Adalat has to be treated as a decree capable of execution by a civil court. The guidelines contained in Damodar S. Prabhu are required to be followed even upon such settlement subject to the discretion to the court concerned to reduce/wave the costs with regard to the specific facts and circumstances of the case.

XIII. What is the procedure to be followed if in a complaint case under Section 138 of the NI Act, a settlement is reached in mediation?

81. So what would be the appropriate procedure for recording a settlement reached by the parties upon their referral to mediation during the pendency of a complaint under Section 138 of the NI Act?

82. The above discussion would show that proceedings under Section 138 of the NI Act stand categorized as quasi-civil. In order to provide meaningful interpretation and to do complete justice in such proceedings, criminal courts are known to have often utilized the principles in the Code of Civil Procedure in such cases. These include the summary proceedings for maintenance under Section 125 of the Cr.P.C. as well as the proceedings under Section 145 of the Cr.P.C.

83. In this regard, reference may usefully be made to a judgment of the High Court of Madhya Pradesh reported at MANU/MP/1150/2012, Sunitabai v. Narayan. The court in this revision petition was considering a challenge to a trial court order rejecting an application for amendment of pleadings in proceedings under Section 125 of the Cr.P.C. While considering the permissibility of amendment of the petition under Section 125 of the Cr.P.C., the court held thus :

"06. As per settled preposition, the proceeding under Section 125 of the Cr.P.C. is treated to be a quasi-civil proceeding and in such premises, the provisions of Order 6 Rule 17 of the CPC or some other provision of such Code could not be applied strictly but whenever the specific provision in this regard is not available in the special enactment then in that position, Court may adopt the principal (sic:principle) laid down by the Apex Court either in the civil case or in the criminal case. In such premises, if the present matter is examined in the light of the decision of the Apex Court in the matter of P. Venkateswarlu v. Motor & General Traders reported in AIR 1975 Supreme Court 1409 holding that the parties have right to amend the pleadings on the basis of the subsequent event which has come into existence during pendency of the suit, then the aforesaid application of amendment deserves to be allowed by allowing this revision." (Emphasis by us)

Thus the court permitted application of the principles which bind a civil court regarding amendment of pleadings, to proceedings under Section 125 of the Cr.P.C. treated as quasi civil in nature and permitted its amendment.

84. In a decision dated 3rd February, 2010 in Crl.R.C.No.780/2006 entitled Chinnappaiyan v. Chinnathayee, a Single Judge of the Madras High Court held that:

"...though a petition under Section 125 (1) of the Code is made before the criminal court - as defined under Section 6 of the Code essentially, the right that is decided by the said Court is purely civil in nature. Therefore, undoubtedly, the order made by the Magistrate under Section 125 (1) of the Code for maintenance is the culmination of such a civil right of an individual. But, Section 125(3) of the Code empowers the Court to impose a sentence of imprisonment, in the event of failure to obey such order made under Section 125(1) of the Code. To this extent, the proceeding is criminal in nature. To put it comprehensively, a proceeding initiated under Section 125 of the Code is quasi-civil and quasi-criminal. The Hon'ble Supreme Court has held so in several judgments. Regarding the procedure for making claim before the Court for maintenance, what is filed under Section 125 (1) of the Code is pure and simple a petition and not a complaint as defined in Section 2(d) of the Code. This would again indicate that a proceeding under Section 125 of the Code is treated as a quasi-civil and quasi criminal proceeding." (Emphasis furnished)

85. In the context of proceedings under Section 145 of the Cr.P.C., in 1963 CriLJ 491, Madansetty Tirpataiah v. Stats S.I.P. Atmakur, the High Court of Andhra Pradesh was considering a revision petition challenging the order of the Sub-Divisional Magistrate whereby the petitioner's application for inter alia filing additional documents was rejected. The court was therefore, called upon to rule on jurisdiction of the SDM to permit filing of documents at a late stage. While considering such question, the court also observed on the nature of the proceedings and held thus :

"6. Further, to my mind, proceedings under Section 145 of the Cr PC are more or less of a quasi-civil nature. So that on analogy of Civil Suit, in cases under this Section if within the time fixed by the Magistrate, the party is not in a position to file documents in his possession which support his claim, and he is able to satisfy the Court that for sufficient and valid reasons he could not file the said documents with in the prescribed time, it would be open to the Magistrate in the ends of justice to allow a party to file the said documents.

7. It is no doubt true that there is no provision in the Criminal Procedure Code analogous to Civil Procedure, for filing of documents at a late stage, but having regard to the nature of the proceedings in the ends of justice such exercise of discretion cannot entirely be ruled out.

xxx xxx xxx." (Emphasis by us)

86. Thus courts have had regard to the nature of proceedings, and, wherever found that criminal proceedings are really quasi-civil in nature, so far as matters of procedure is concerned, consistently expanded the limits of specific statutory prescription in order to do complete justice between the parties, keeping in mind the elements of public interest as well as the spirit, object and intendment of the legislation.

87. In the present case, other than the settlement agreement, there is no judicial order of any court that binds the respondent to honour the settlement arrived at during mediation.

88. It is reported that even if a mediated settlement agreement is reached, generally criminal complaints under Section 138 of the NI Act are withdrawn/compounded by the complainants only after receipt of the entire amount(s) agreed as part of the settlement. The criminal courts thus necessarily have to keep the complaint pending, awaiting the implementation of the negotiated settlement.

89. The present reference manifests that in the event of breach of the settlement, the courts have to recommence proceedings on merits and the evidentiary/legal value of the mediated settlement remains undetermined. This has enabled many accused to divert the complaint to mediation only with the intent to effectively delay the proceedings under Section 138 of the NI Act.

90. Mr. Siddharth Aggarwal, ld. amicus curiae has placed certain judicial precedents on this aspect before us. In (2013) SCC OnLine Del 124, Hardeep Bajaj v. ICICI Bank Ltd., the petitioner had entered into an amicable settlement dated 26th May, 2012 for payment to the respondent bank in mediation undertaken during the pendency of the complaint under Section 138 of the NI Act to make payment of Rs.9,08,800/- in full and final settlement of the bank claim in monthly installments of Rs.1,50,000/- commencing from 26th May, 2012, the last of which was payable on 26th October, 2012. Without abiding with the settlement, the petitioner approached the ld. MM for modifying the settlement. The ld. MM noticed that the petitioner had violated the successive undertakings given by him and dismissed the application for modification with costs. The petitioner approached this court by way of a revision petition which was dismissed. In para 10 of the judgment, the ld. Single Judge of this court has noted that "once the settlement reached is accepted by the court or an undertaking is given, it becomes binding on the parties".

91. In (2015) SCC OnLine Del 7309, Manoj Chandak v. Tour Lovers Tourism (India) Pvt. Ltd., the respondent failed to honour the mediated settlement dated 26th July, 2013 reached in complaints under Section 138 of the NI Act, 1881. Instead, after three months, it filed an application for reconsideration of the settlement on the ground that the signatures of its authorized representatives were forcibly obtained and that he had no instructions to agree to the terms of the settlement. This application was allowed by the trial court by the order dated 25 th April, 2014 and the parties were again referred to mediation. A challenge was laid regarding the voluntariness of the mediated settlement. The learned Single Judge therefore, held that "since question of fact are being raised regarding voluntariness of the mediated settlement, therefore, it would be appropriate that an opportunity is granted by trial court to respondents to lead evidence to show that the mediated settlement was not a voluntary one".

92. In yet another pronouncement reported at (2015) SCC OnLine Del 9334, M/s Arun International v. State of Delhi & Anr., a settlement regarding the subject matter of the complaint under Section 138 of the NI Act was reached before the Court annexed mediation centre in the Rohini District Courts which was placed before the magistrate in the pending proceedings. The court recorded the statement of the respondent no.2 admitting the claim of the complainant and seeking an adjournment to pay the agreed amount. Two years were sought by the respondent no.2 from the the 25th November, 2013 being the date of making of the statement before the ld. Metropolitan Magistrate. Vide order dated 16th February, 2015, the ld. Metropolitan

Magistrate returned the complaints for want of territorial jurisdiction, in view of the ratio of the Supreme Court in the pronouncement of Dashrath Rupsingh Rathore v. State. The ld. Single Judge held that the order dated 16th February, 2015 was illegal and contrary to law, in view of the fact that the matter stood settled before the Mediation Centre as also that the decision in Dashrath Rupsingh Rathore was inapplicable, the complaint cases having gone to the stage of Section 145(2) of the Cr.P.C. In para 7, the learned Single Judge had observed that "it is settled law and even otherwise the settlement of the mediation as well is deemed to be a decree and cannot be challenged".

In view of the above enunciation of the law, this position is not legally correct.

93. Our attention is also drawn to the pronouncement of the ld. Single Judge of the Kerala High Court in the judgment reported at (2014) 3 KLJ 637, Sreelal v. Murali Menon & Anr. The petitioner in this case was the complainant in a complaint under Section 138 of the NI Act. On the date for evidence, on the request of the accused, the matter was referred for mediation where a settlement dated 17th February, 2014 was reached and six months time was given for payment. In the settlement, the parties had agreed that in default, the complainant was allowed to proceed with the case and, if the amount was paid, then the complainant would have to withdraw the case. While the petitioner/complainant was willing to wait the agreed period for payment, the respondent was insisting that the mediated agreement had the effect of an award; that the petitioner was not entitled to proceed with the case; and that his remedy was to execute the agreement as if it was an award under the Legal Services Act. In paras 12 and 13 of the judgment, the court has explained the alternative dispute resolution process in cases under Section 138 of the NI Act thus :

"12. Then, the question is what is to effect of mediation agreement in a criminal matter. Admittedly, if the matter is referred for mediation, the mediator is not acting neither as Adalath nor as an Arbitrator or Conciliator to resolve the disputes by passing an award either under the provisions of Legal Services Authorities Act or under the provisions of the Arbitration and Conciliation Act. Even if, the matter is referred in a civil case for mediation under S. 89 of the Code of Civil Procedure, even then, the mediator is not passing any judgment, but he is only facilitating the parties to arrive at the settlement and help them to draw the mediation agreement and after the agreement is signed by the parties, and counter signed by the Advocates, then, it will be forwarded to the Court which referred the matter and that Court will pass a decree on the basis of the agreement applying the principle under O. 23 R. 3 of Code of Civil Procedure accordingly. Till, the seal of the court is affixed on the agreement, and a decree is passed on that basis that agreement, it has no legal effect in the eye of law. So, even if a mediation agreement reaches the criminal court, agreeing to settle the issue on certain terms, the criminal court cannot rely on that agreement and pass a civil decree, relegating the parties to get the amount realized by filing execution petition before the Civil Court and it can only on the basis of the evidence either convict or acquit the accused and if the case is compounded, if it is a compoundable offence, then it can record compounding and that compounding will have the effect of an acquittal under S. 320(8) of Code of Criminal Procedure.

13. Further, the counsel for the respondent relied on the decision reported in Govindankutty Metion v. Shaji (2011 (4) KLT 857 (SC)) and argued that since the matter is referred for

mediation and the parties have settled the dispute in the mediation, then it will have the effect of a civil decree and the complainant cannot proceed with the criminal case and he can only execute the award as though it is a civil decree. It is true that in the decision relied on by the counsel for the respondent namely, Govindankutty Menon's case (supra), the Hon'ble Supreme Court has held that if the case under S. 138 of the Negotiable Instruments Act is referred to Adalath by a criminal court and if the matter is settled in the Adalath, then by virtue of the deeming provision, an award passed by the Adalath based on the compromise has to be treated as a decree capable of execution by a civil court. In that case, a case under S. 138 of the Negotiable Instruments Act was referred to Adalath constituted under the Legal Services Authorities Act by a Criminal Court and in the Adalath, parties have agreed on terms and provided time for payment of the amount and that compromise was recorded and accordingly an award was passed in the Adalath and the criminal case was closed. When, the complainant filed an execution petition before the Munsiff s Court for realisation of the amount and the Munsiff dismissed the execution petition on the ground that Criminal Court cannot pass a civil decree even in Adalath which was affirmed by this court but when that was challenged before the Hon'ble Supreme Court, the Hon'ble Supreme Court reversed the finding and held that by virtue of the deeming provision under S. 21 of the Legal Services Authorities Act, even, in cases under S. 138 of the Negotiable Instruments Act if a compromise was accepted and an award has been passed in the Adalath, then that will have the effect of a civil decree and that can be executed through civil court as though it is a decree of a civil court. The facts are different in this case as already discussed, the mediation cannot be treated at par with Lok Adalath as mediator has no power to pass any award as provided under the Legal Services Authorities Act. So the dictum is not applicable to the facts in this case." (Emphasis by us)

In view of the position in legislation, the court had declared the correct legal position that mediation cannot be treated at par with the Lok Adalat and that the mediator has no power to pass an award as a Lok Adalat which is deemed to be a decree under the Legal Service Authority Act, 1987.

94. In para 14, the Kerala High Court considered the question as to whether such agreement could be treated as evidence in a criminal matter. While answering this question, it was observed by the court that even if the complainant had agreed in the mediation to settle the matter for a lesser amount than the amount mentioned in the cheque, it could not be said that the actual amount due is the amount agreed in the mediation. Para 14 of the judgment reads as follows:

"14. Then, the question is whether the agreement entered into between the parties in a mediation can be treated as evidence in a criminal matter. It may be mentioned here, unless the agreement is accepted by the court and a decree is passed under S. 89 of the Code of Criminal Procedure r/w O. 23 R. 3 of Code of Civil Procedure, that will have no effect, unless that has been converted into a conciliation agreement based on which an award is passed by the Conciliator under the provisions of the Arbitration and Conciliation Act. Further, it is the cardinal principle in the mediation that whatever transpired in the mediation cannot be disclosed even before the court of law and that cannot be called upon to be produced as evidence as well as it will affect the confidentiality of the things transpired in the process of mediation. So the party who did not honour the settlement

which was effected in the process of mediation, then, is not entitled to use the same as evidence before the court and agreement also cannot be marked in evidence as it has no legal effect unless it is accepted by the court and a decree is passed under S. 89 r/w O. 23 R. 3 of the Code of Civil Procedure. That cannot be possible in a Criminal Court. Further even if the party had agreed to settle the matter for a lesser amount than the amount mentioned in the cheque in the mediation, it cannot be said that, that was the amount payable as in the mediation, parties can forgo so many things for the purpose of achieving harmony between the parties and restore their relationship. So the amounts arrived in a mediation also cannot be used as evidence for coming to the conclusion that the amount mentioned in the cheque is not the real amount due, and the complainant is not entitled to maintain the action on the basis of that cheque. The court has to allow the parties to adduce evidence ignoring the mediation agreement and dispose of the case on the basis of evidence adduced by parties as it should not be put in evidence in view of the bar under rules 20, 21 and 22 of the Civil Procedure (Alternative Disputes Resolution) Rules Kerala 2008 which reads as follows:-¬Rule 20:-- Confidentiality, disclosure and inadmissibility of information--

(1) The mediator shall not disclose confidential information concerning the dispute received from any party to the proceedings unless permitted in writing by the said party.

(2) Parties shall maintain confidentiality in respect of events that transpired during mediation and shall not rely on or introduce the said information in any other proceedings as to:

(a) views expressed by a party in the course of the mediation proceedings;

(b) documents obtained during the mediation which were expressly required to be treated as confidential or other notes, drafts or information given by parties or mediators;

(c) Proposals made or views expressed by the mediator.

(d) Admission made by a party in the course of mediation proceedings.

(e) The fact that a party had or had not indicated willingness to accept a proposal.

(3) There shall be no stenographic or audio or video recording of the mediation proceedings.

Rule 21:-- Privacy- Mediation sessions and meetings are private; only the concerned parties or their counsel or authorised representatives can attend. Other persons may attend only with the permission of the parties or with the consent of the mediator.

Rule 22:-- Immunity- No mediator shall be held liable for anything bona fide or omitted to be done by him during the mediation proceedings for civil or criminal action nor shall he be summoned by any party to the suit to appear in a court of law to testify in regard to information received by him or action taken by him or in respect of drafts or records prepared by him or shown to him during the mediation proceedings."

95. It was held by the court that the agreement arrived at in the mediation cannot be used as the evidence to contend that the amount mentioned in the cheque was not the real amount.

In these circumstances, the party violating the mediation agreement, cannot use the same as evidence before the court and that the agreement has no legal effect unless it has been "accepted by the court and a decree is passed under Section 89 r/w Order 23 Rule 3 of the Code of Civil Procedure." which was not possible in a criminal court.

96. So far as mediation in Delhi is concerned, in the "Mediation and Conciliation Rules, 2004", Rule 20 is concerned with "confidentiality, disclosure and inadmissibility of information", Rule 21 mandates privacy in the mediation sessions while Rule 22 prescribes immunity from civil/ criminal proceedings to the mediator for anything done bona fide or omitted to be done during the mediation proceedings.

97. In cases under Section 138 of the NI Act, judicial reinforcement of this sound principle is to be found in the encouragement by the Supreme Court to settlements of the disputes between parties at early stages. This is in keeping with the legislative mandate of Section 147, so that the spirit, intendment and object of this statutory provision can be effectively realized.

98. We have noted above that Section 147 of the NI Act has made the offence under Section 138 of the NI Act compoundable. Proceedings under Section 138 of the NI Act have been considered as quasi civil by the courts. Therefore, in principle, the procedure which applies to recording a settlement in civil cases could guide the procedure to be followed and be applied for recording a settlement between the parties to a complaint under Section 138 of the NI Act.

Guidance on this aspect is provided by the provisions of Order XXIII Rule 3 of the CPC and the practice followed by the civil courts upon a compromise arrived at between the parties to a suit.

99. So far as the statutory provision is concerned, Order XXIII Rule 3 of the CPC reads as follows :

> "3. Compromise of suit.- Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit: -
>
> Provided that where it is alleged by one party and denied by the other than an adjustment or satisfaction has been arrived at, the court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment." (Emphasis by us)

100. The Code of Criminal Procedure as well as the NI Act have provided only for compounding of offences. No procedure regarding the manner in which a settlement agreement required to be placed or considered by the court has been provided.

101. Reference can usefully be made to certain pronouncements under the Code of Civil Procedure, wherein the Legislature has provided Rule 3 of Order XXIII, which specifically provides for "Compromise of suits". The Legislature has prescripted that if it is "proved to the satisfaction of the court" that a suit has been adjusted wholly or in part by any "lawful agreement or compromise in writing and signed by the parties", the court shall order such agreement or

compromise to be recorded and shall pass a decree in accordance thereof, so far as it relates to the parties in the suit. It is important to note that Order XXIII Rule 3 of the CPC permits the consideration of the agreement, whether or not the subject matter of the agreement or compromise is the same as the subject matter of the suit. While the Code of Civil Procedure would have no application to the proceedings which are guided by the Criminal Procedure Code, however, given the legislative vacuum, there appears to be no reason as to why the principles which apply to consideration of a settlement under Order XXIII Rule 3 of the CPC cannot be applied for consideration of a settlement which is the subject matter of consideration by a court under Section 320 of the Cr.P.C. or Section 147 of the NI Act. The principles of Rule 3 or Order XXIII of the C.P.C., as laid in judicial pronouncements, can be summarized thus:

(i) For a compromise to be held to be binding, it has to be signed either by the parties or by their counsels or both, failing which Order XXIII Rule 3 of the CPC would not be applicable. (Ref. : (1988) 1 SCC 270, Gurpreet Singh v. Chatur Bhuj Goel; (2009) 6 SCC 194, Sneh Gupta v. Devi Sarup & Ors.)

(ii) Order XXIII Rule 3 of the CPC casts an obligation on the court to be satisfied that the settlement agreement is lawful and is in writing and signed by the parties or by their counsels. (Ref. : (1978) 2 SCC 179, Suleman Noormohamed & Ors. v. Umarbhai Janubhai; (2006) 1 SCC 148, Amteshwar Anand v. Virender Mohan Singh & Ors.).

(iii) An obligation is cast on the court under Order XXIII Rule 3 of the CPC to order the agreement to be recorded and pass a decree in accordance thereof.

(Ref. : (2006) 1 SCC 148, Amteshwar Anand v. Virender Mohan Singh & Ors. (paras 26 and 27)).

(iv) A consent decree is really a contract between the parties with the seal of the court superadded to it.

(Ref. : (1969) 2 SCC 201, Baldevdas Shivlal & Anr. v. Filmistan Distributors (India) P. Ltd. & Ors.; (2002) 100 DLT 278, Hindustan Motors Ltd. v Amritpal Singh Nayar & Anr.; (2007) 14 SCC 318, Parayya Allayya Hittalamani v. Sri Parayya Gurulingayya Poojari & Ors.).

(v) A consent decree may operate as an estoppel as well.

[Ref. : AIR 1956 SC 346, Raja Sri Sailendra Narayan Bhanja Deo v. State of Orissa; (2007) 14 SCC 318, Parayya Allayya Hittalamani v. Sri Parayya Gurulingayya Poojari & Ors. (para 15)].

102. The practice followed by the civil court before whom the settlement in writing, duly signed by the parties, is placed, is to record the statements of parties confirming that the settlement was entered into voluntarily, without any force, pressure or undue influence; that it contained the actual terms of the settlement; and undertakings of the parties to remain bound by the terms thereof. Upon being satisfied that the settlement was voluntary and lawful, the civil court takes it on record accepting the undertaking and passing a decree in terms thereof.

103. In the pronouncement of the Allahabad High Court reported at AIR 1930 All 409 : 1929 SCC OnLine All 140, Emperor v. Jhangtoo Barai & Anr., the court was considering whether there was in fact a composition of the offence or not? It was observed that the best possible evidence was that of the document signed by the parties which was in the handwriting of the complainant

himself that the composition was correct. In para 6, it was also observed that if all the parties were present in court, it was entirely unnecessary for any verification of such composition. The court noted that "The complainant was literate. He signed the document in his own writing. It must presumed, unless it is proved to the contrary, that the complainant well understood the one small paragraph that appeared in the document. In any case, the only verification that was required was a simple question to the parties whether they signed the document and whether they understood its contents. There can be no doubt that on that day there was a valid composition within the meaning of section 345 of the Code of Criminal Procedure before the court. It was therefore the duty of the Magistrate upon that day, and without any unnecessary delay, to have pronounced an acquittal. I am clear that it is incompetent for any person, once having entered into a valid composition, to withdraw from it."

104. Binding the parties to a settlement agreement entered into through a formal mediation process and being held accountable for honouring the same is really enforcing the legislative mandate in enacting Sections 138 and 147 of the NI Act i.e. to ensure an expeditious time bound remedy for recovery of the cheque amounts. Breach of a lawful entered agreement would not only frustrate the parties to the mediation, but would be opposed to the spirit, intendment and purpose of Section 138 of the NI Act and would defeat the ends of justice. The courts cannot permit use of mediation as a tool to abuse judicial process.

105. There is no legal prohibition upon a criminal court seized of such complaint, to whom a mediated settlement is reported, from adopting the above procedure. Application of the above enunciation of law to a mediation arising out of a criminal case manifests that a settlement agreement would require to be in writing and signed by the parties or their counsels. The same has to be placed before the court which has to be satisfied that the agreement was lawful and consent of the parties was voluntary and not obtained because of any force, pressure or undue influence. Therefore, the court would record the statement of the parties or their authorized agents on oath affirming the settlement, its voluntariness and their undertaking to abide by it in the manner followed by the civil court when considering a settlement placed before it under Order XXIII Rule 3 of the CPC. The court would thereafter pass an appropriate order accepting the agreement, incorporating the terms of the settlement regarding payment under Section 147 of the NI Act and the undertakings of the parties. The court taking on record the settlement stands empowered to make the consequential and further direction to the respondent to pay the money in terms of the mediated settlement and also direct that the parties would remain bound by the terms thereof.

106. In having so proceeded, there is a satisfaction of the voluntariness and legality of the terms of the settlement of the court and acceptance of the terms thereof as well as a specific order in terms thereof. Consequently, the amount payable under the settlement, would become an amount payable under an order of the criminal court.

107. So far as the disputes beyond the subject matter of the litigation is concerned, upon the settlement receiving imprimatur of the court, such settlement would remain binding upon the parties and if so ordered, would be subject to the orders of the court.

XIV. Breach of such settlement accepted by the court -consequences?

108. The instant reference has resulted because of the failure of the court to have recorded the settlement and undertakings binding the accused person in the complaint under Section 138

of the NI Act to abide by the settlement arrived at during mediation. There can be no manner of doubt that once a settlement is reported to the court and made the basis of seeking the court's indulgence, the parties ought not to be able to resile from such a position. So what is the remedy available to a complainant if the respondent commits breach of the mediation settlement and defaults in making the agreed payments?

109. Let us examine as to whether the legislature has provided any mechanism in the Cr.P.C. for recovery of monetary amounts.

110. We have extracted Section 421 of the Cr.P.C. above which provides the mechanism to recover fines, by issuing a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender and/or by issuing a warrant authorizing the realization of amounts as arrears of land revenue from movable and immovable property of the defaulter.

111. In the event of either party resiling from the agreed upon settlement which has received the imprimatur of the court, the party attempting to breach the settlement and undertaking cannot be permitted to avoid making the payment. Such party also should not be allowed to violate such undertaking given to the opposite side as well as the court.

112. In (2009) 6 SCC 652, Vijayan v. Sadanandan K. & Anr., it was held that Section 431 read with Section 421 of the Cr.P.C. is applicable to recovery of compensation ordered under Section 357(5).

113. Section 431 Cr.P.C., also extracted above, provides if any money, other than a fine, is payable by virtue of any order made under the Cr.P.C., the method of recovery whereof is not expressly provided for, shall be recoverable in terms of Section 421 Cr.P.C.

114. In the event that a criminal court passes order accepting the mediated settlement between the parties and directs the accused to make payment in terms thereof, the settlement amount becomes payable under the order of the court. Such order having been passed in proceedings under Section 138 of the NI Act, would be an order under Section 147 of the NI Act and Section 320 of the Cr.P.C.

115. In proceedings where settlement is permitted under Section 320 of the Cr.P.C., it would be an order thereunder.

116. Where proceedings are disposed on settlement terms by the High Court, it would be an order passed in exercise of jurisdiction under Section 482 of the Cr.P.C. Upon breach of such order and non- payment of the agreed amounts, the same may be recoverable in terms of Section 431 read with Section 421 Cr.P.C.

117. In addition, if the party has tendered an undertaking to abide by the terms of the agreement, which stands accepted by the court, in the event of breach of the undertaking, action and consequences under the Contempt of Courts Act could also follow.

XV. Reference answered

118. In view of the above, the reference made by the ld. Metropolitan Magistrate by the order dated 13th January, 2016 (extracted in para 1 above) is answered thus :

Question I : What is the legality of referral of a criminal compoundable case (such as on u/s 138 of the NI Act) to mediation?

It is legal to refer a criminal compoundable case as one under Section 138 of the NI Act to mediation.

Question II : Can the Mediation and Conciliation Rules, 2004 formulated in exercise of powers under the CPC, be imported and applied in criminal cases? If not, how to fill the legal vacuum? Is there a need for separate rules framed in this regard (possibly u/s 477 of the CrPC)?

The Delhi Mediation and Conciliation Rules, 2004 issued in exercise of the rule making power under Part-10 and Clause (d) of sub-section (ii) of Section 89 as well as all other powers enabling the High Court of Delhi to make such rules, applies to mediation arising out of civil as well as criminal cases.

Question III : In cases where the dispute has already been referred to mediation - What is the procedure to be followed thereafter? Is the matter to be disposed of taking the very mediated settlement agreement to be evidence of compounding of the case and dispose of the case, or the same is to be kept pending, awaiting compliance thereof (for example, when the payments are spread over a long period of time, as is usually the case in such settlement agreements)?

In the context of reference of the parties, in a case arising under Section 138 of the NI Act, to mediation is concerned, the following procedure is required to be followed :

III (i) When the respondent first enters appearance in a complaint under Section 138 of the NI Act, before proceeding further with the case, the Magistrate may proceed to record admission and denial of documents in accordance with Section 294 of the Cr.P.C., and if satisfied, at any stage before the complaint is taken up for hearing, there exist elements of settlement, the magistrate shall inquire from the parties if they are open to exploring possibility of an amicable resolution of the disputes.

III (ii) If the parties are so inclined, they should be informed by the court of the various mechanisms available to them by which they can arrive at such settlement including out of court settlement; referral to Lok Adalat under the Legal Services Authorities Act, 1987; referral to the court annexed mediation centre; as well as conciliation under the Arbitration and Conciliation Act, 1996.

III (iii) Once the parties have chosen the appropriate mechanism which they would be willing to use to resolve their disputes, the court should refer the parties to such forum while stipulating the prescribed time period, within which the matter should be negotiated (ideally a period of six weeks) and the next date of hearing when the case should be again placed before the concerned court to enable it to monitor the progress and outcome of such negotiations.

III (iv) In the event that the parties seek reference to mediation, the court should list the matter before the concerned mediation centre/mediator on a fixed date directing the presence of the parties/authorized representatives before the mediator on the said date.

III (v) If referred to mediation, the courts, as well as the mediators, should encourage parties to resolve their overall disputes, not confined to the case in which the reference is made or the subject matter of the criminal complaint which relates only to dishonouring of a particular cheque.

III (vi) The parties should endeavour to interact/discuss their individual resolutions/proposals with each other as well and facilitate as many interactions necessary for efficient resolution within the period granted by the court. The parties shall be directed to appear before the mediator in a time bound manner keeping in view the time period fixed by the magistrate.

III (vii) In the event that all parties seek extension of time beyond the initial six week period, the magistrate may, after considering the progress of the mediation proceedings, in the interest of justice, grant extension of time to the parties for facilitating the settlement. For the purposes of such extension, the magistrate may call for an interim report from the mediator, however keeping in mind the confidentiality attached to the mediation process. Upon being satisfied that bona fide and sincere efforts for settlement were being made by the parties, the magistrate may fix a reasonable time period for the parties to appear before the mediator appointing a next date of hearing for a report on the progress in the mediation. Such time period would depend on the facts and circumstances and is best left to the discretion of the magistrate who would appoint the same keeping in view the best interest of both parties.

Contents of the settlement III (viii) If a settlement is reached during the mediation, the settlement agreement which is drawn-up must incorporate :

(a) a clear stipulation as to the amount which is agreed to be paid by the party;

(b) a clear and simple mechanism/method of payment and the manner and mode of payment;

(c) undertakings of all parties to abide and be bound by the terms of the settlement must be contained in the agreement to ensure that the parties comply with the terms agreed upon;

(d) a clear stipulation, if agreed upon, of the penalty which would enure to the party if a default of the agreed terms is committed in addition to the consequences of the breach of the terms of the settlement;

(e) an unequivocal declaration that both parties have executed the agreement after understanding the terms of the settlement agreement as well as of the consequences of its breach;

(f) a stipulation regarding the voluntariness of the settlement and declaration that the executors of the settlement agreement were executing and signing the same without any kind of force, pressure and undue influence.

III (ix) The mediator should forward a carefully executed settlement agreement duly signed by both parties along with his report to the court on the date fixed, when the parties or their authorized representatives would appear before the court.

Proceedings before the court III (x) The magistrate would adopt a procedure akin to that followed by the civil court under Order XXIII of the C.P.C. III (xi) The magistrate should record a statement on oath of the parties affirming the terms of the settlement; that it was entered into voluntarily, of the free will of the parties, after fully understanding the contents and implications thereof, affirming the contents of the agreement placed before

the court; confirming their signatures thereon. A clear undertaking to abide by the terms of the settlement should also be recorded as a matter of abundant caution. III (xii) A statement to the above effect may be obtained on affidavit. However, the magistrate must record a statement of the parties proving the affidavit and the settlement agreement on court record.

III (xiii) The magistrate should independently apply his judicial mind and satisfy himself that the settlement agreement is genuine, equitable, lawful, not opposed to public policy, voluntary and that there is no legal impediment in accepting the same. III (xiv) Pursuant to recording of the statement of the parties, the magistrate should specifically accept the statement of the parties as well as their undertakings and hold them bound by the terms of the settlement terms entered into by and between them. This order should clearly stipulate that in the event of default by either party, the amount agreed to be paid in the settlement agreement will be recoverable in terms of Section 431 read with Section 421 of the Cr.P.C.

III (xv) Upon receiving a request from the complainant, that on account of the compromise vide the settlement agreement, it is withdrawing himself from prosecution, the matter has to be compounded. Such prayer of the complainant has to be accepted in keeping with the scheme of Section 147 of the NI Act. (Ref.:(2005) CriLJ 431, Rameshbhai Somabhai Patel v. Dineshbhai Achalanand Rathi) At this point, the trial court should discharge/acquit the accused person, depending on the stage of the case. This procedure should be followed even where the settlement terms require implementation of the terms and payment over a period of time.

III (xvi) In the event that after various rounds of mediation, the parties conclude that the matter cannot be amicably resolved or settled, information to this effect should be placed before the magistrate who should proceed in that complaint on merits, as per the procedure prescribed by law.

III (xvii) The magistrate should ensure strict compliance with the guidelines and principles laid down by the Supreme Court in the pronouncement reported at (2010) 5 SCC 663, Damodar S. Prabhu v. Sayed Babalal H and so far as the settlement at the later stage is concerned in (2014) 10 SCC 690 Madhya Pradesh State Legal Services Authority v. Prateek Jain.

III (xvii) We may also refer to a criminal case wherein there is an underlying civil dispute. While the parties may not be either permitted in law to compound the criminal case or may not be willing to compound the criminal case, they may be willing to explore the possibility of a negotiated settlement of their civil disputes. There is no legal prohibition to the parties seeking mediation so far as the underlying civil dispute is concerned. In case a settlement is reached, the principles laid down by us would apply to settlement of such underlying civil disputes as well.

In case reference in a criminal case is restricted to only an underlying civil dispute and a settlement is reached in mediation, the referring court could require the mediator to place such settlement in the civil litigation between the parties which would proceed in the matter in accordance with prescribed procedure.

Question IV : If the settlement in Mediation is not complied with - is the court required to proceed with the case for a trial on merits, or hold such a settlement agreement to be executable as a decree?

In case the mediation settlement accepted by the court as above is not complied with, the following procedure is required to be followed :

IV (i) In the event of default or non-compliance or breach of the settlement agreement by the accused person, the magistrate would pass an order under Section 431 read with Section 421 of the Cr.P.C. to recover the amount agreed to be paid by the accused in the same manner as a fine would be recovered.

IV (ii) Additionally, for breach of the undertaking given to the magistrate/court, the court would take appropriate action permissible in law to enforce compliance with the undertaking as well as the orders of the court based thereon, including proceeding under Section 2(b) of the Contempt of Courts Act, 1971 for violation thereof.

Question V : If the Mediated Settlement Agreement, by itself, is taken to be tantamount to a decree, then, how the same is to be executed? Is the complainant to be relegated to file an application for execution in a civil court? And if yes, what should be the appropriate orders with respect to the criminal complaint case at hand. What would be the effect of such a mediated settlement vis-a- vis the complaint case?

V (i) The settlement reached in mediation arising out of a criminal case does not tantamount to a decree by a civil court and cannot be executed in a civil court.

However, a settlement in mediation arising out of referral in a civil case by a civil court, can result in a decree upon compliance with the procedure under Order XXIII of the C.P.C. This can never be so in a mediation settlement arising out of a criminal case.

XVI. Result

119. The present reference, under Section 395(2) of the CrPC, is answered in the above terms.

120. We place on record our deep appreciation for the amici curiae: Mr. J.P. Sengh, Senior Advocate; Ms. Veena Ralli, Advocate and Mr. Siddharth Agarwal, Advocate, who have rendered indispensable and worthy assistance to us, in this matter.

121. Let the record of Complaint Case Nos.519662/2016 and 519664/2016 be forthwith returned to the trial court, which shall proceed in the matter, in accordance with law.

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N. PARAMESWARAN UNNI VERSUS G. KANNAN AND ANOTHER

(2017) 5 Supreme Court Cases 737 : 2017 SCC OnLine SC 293

Supreme Court of India

Before **Hon'ble Mr. Justice N.V. Ramana and Hon'ble Mr. Justice Prafulla C. Pant**

N. Paraeswaran Unni ...Appellant
Versus
G. Kannan and Another ...Respondents.

[Criminal Appeal No 455 of 2006]

Decided on 1 March, 2017

If within limitation – Two consecutive notices sent by payee by registeres post to correct address of drawer of cheque: first one sent within limitation period of 15 days but same was returned with postal endorsement "intimation served, addressee ansent", whereas second one sent after expiry of stipulated period of limitation. First notice would be deemed to have been duly effected by virtue of S.27 of General Clauses Act and S. 114 of Evidence Act – Though drawer entitled to rebut that presumption, but in absence of rebuttal, requirement of S. 138 proviso (b) would stand complied with – Subsequent notice should be treated only as remainder and would not affect validity of first notice – Provisions should be so interpreted in consonance with object which legislation sought to achieve that right of honest lender is not defeated.

JUDGMENT

N.V. Ramana, J.

1. This appeal arises out of the judgment and order dated 06-10-2003 passed by the High Court of Kerala at Ernakulam in Criminal Revision Petition No. 644 of 1995 whereby the High Court allowed the criminal revision of the first respondent by setting aside the concurrent judgments of Trial Court and Appellate Court, that first respondent cannot be convicted under Section 138 of the Negotiable Instruments Act, 1881 (in short "N.I. Act") as the procedure prescribed under this section was not satisfied in the instant case.

2. Brief facts leading to this criminal appeal, as per the prosecution case, are that the first respondent/accused borrowed Rs. 64,000/- on 13-10-1990 from the appellant/complainant. In lieu of the borrowed amount, first respondent issued two cheques dated 13-10-1990 for Rs. 10,000/- and Rs. 25,000/- respectively both drawn on State Bank of India, Alappuzha Branch. Another cheque for Rs. 29,000/- dated 08-10-1990 was also given to the appellant by first respondent, which was issued by one K Rajesh, Development Officer, LIC drawn on State Bank of Travancore, Vadai Canal branch, Alappuzha.

3. Appellant presented first-two cheques dated 13-10-1990 on 04-04- 1991 to his bank, State Bank of Travancore, Main branch, Alappuzha. First respondent's bank returned the said two

cheques on 05-04-1991 with an endorsement "Refer to drawer." Appellant received intimation memo dated 05-04-1991 from his bank on 08-04- 1991.

4. Appellant got issued a legal notice on 12-04-1991 to the first respondent, which was returned with postal endorsement "intimation served, addressee absent" on 20-04-1991. The same was received by the appellant's advocate on 25-04-1991. Appellant again sent the legal notice on 04-05-1991. The second notice sent to first respondent's address was returned with postal endorsement "Refused, returned to sender." Thus, according to the appellant, first respondent failed to return the borrowed amount Rs. 64,000/- for which statutory notice under proviso (b) of Section 138 of N.I. Act was issued to him to make good the dishonoured cheques due to insufficiency of funds in his bank account.

5. On 23.05.1991 appellant lodged a private complaint before the Judicial First Class Magistrate-II, Alappuzha for the alleged offence under Section 138 of the N.I. Act, which was numbered as Summary Trial No. 34/92. After a full fledged trial and upon appreciating the documentary evidence adduced on behalf of the parties, the Trial Court allowed the complaint as the appellant was successful in proving, the case beyond reasonable doubt that first respondent committed an offence punishable under Section 138 of the N.I. Act. Accordingly, the Trial Court by judgment dated 29- 07-1993 convicted and sentenced the first respondent to undergo simple imprisonment of three months.

6. Aggrieved by the conviction and sentence, first respondent preferred Criminal Appeal No 104 of 1993 before Addl. Sessions Judge at Alappuzha. The Ld. Judge, after perusing the records and on elaborate hearing, by its judgment dated 07-07-1995 dismissed the appeal by upholding and confirming the judgment of the Trial Court.

7. Against the said order, respondent preferred Criminal Revision no 644 of 1995 before the High Court of Kerala. The only ground raised before the High Court was that the provisions of Section 138 of the N.I. Act cannot be invoked as the appellant had not complied with the conditions in Clause (b) of the proviso to the said section. Notice demanding payment of the amount arising from the two dishonoured cheques in question was on 04-05-1991, whereas the intimation regarding dishonour of the said cheques was given by the appellant's bank on 08-04-1991. Therefore, the notice was beyond 15 days. Hence, in such circumstances Section 138 of the N.I. Act was not attracted and no offence was made out.

8. The High Court by its judgment dated 06-10-2003 had allowed the revision by reversing the concurrent findings of the two Courts below holding that the statutory notice was beyond the prescribed limitation period as mentioned under Section 138 of the N.I. Act.

9. Now the issue before us is even though the first notice was issued by the appellant within time to the correct address of the first respondent, whether the High Court was right in rejecting the case of the appellant herein on the ground that second notice was issued beyond the period of limitation i.e. 15 days from the date of receiving dishonour intimation from the bank under Clause (b) of the proviso to Section 138 of the N.I. Act.

10. Before delving into the issue, it would be appropriate to reproduce Section 138 of the Act, as it then stood.

    138. Dishonour of cheque for insufficiency, etc., of funds in the account: Where any cheque drawn by a person on an account maintained by him with a banker for payment of any

amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice. to any other provision of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

a) the 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;

b) the payee or the holder in due course of the cheque as the case may be, 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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice. Explanation.-For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

11. A bare reading of Section 138 of the N.I. Act, indicates that the purport of Section 138 is to prevent and punish the dishonest drawers of cheques who evade and avoid their liability. As explained in Clause (b) of the proviso, the payee or the holder of the cheque in due course is necessarily required to serve a written notice on the drawer of the cheque within fifteen days from the date of intimation received from the bank about dishonour.

12. It is explicitly made clear under Clause (c) of Section 138 of N.I. Act, that this gives an opportunity to a drawer of the cheque to make payment within fifteen days of receipt of such notice sent by the drawee. It is manifest that the object of providing Clause (c) is to avoid unnecessary hardship. Even if the drawer has failed to make payment within fifteen days of receipt of such notice as provided under Clause (c), the drawer shall be deemed to have committed an offence under the Act and thereafter the drawee would be competent to file complaint against the drawer by following the procedure prescribed under Section 142 of the Act.

13. It is clear from Section 27 of the General Clauses Act, 1897 and Section 114 of the Indian Evidence Act, 1972, that once notice is sent by registered post by correctly addressing to the drawer of the cheque, the service of notice is deemed to have been effected. Then requirements under proviso (b) of Section 138 stands complied, if notice is sent in the prescribed manner. However, the drawer is at liberty to rebut this presumption.

14. It is well settled that interpretation of a Statute should be based on the object which the intended legislation sought to achieve. "It is a recognized rule of interpretation of statutes that expressions used therein should ordinarily be understood in a sense in which they best harmonize with the object of the statute, and which effectuate the object of the Legislature. If an expression is susceptible of a narrow or technical meaning, as well as a popular meaning,

the Court would be justified in assuming that the Legislature used the expression in the sense which would carry out its object and reject that which renders the exercise of its power invalid"[1].

15. This Court in catena of cases has held that when a notice is sent by registered post and is returned with postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed[2]. Though in process of interpretation right of an honest lender cannot be defeated as has happened in this case. From the perusal of relevant sections it is clear that generally there is no bar under the N.I. Act to send a reminder notice to the drawer of the cheque and usually such notice cannot be construed as an admission of non-service of the first notice by the appellant as has happened in this case.

16. Moreover the first notice sent by appellant on 12-04-1991 was effective and notice was deemed to have been served on the first respondent. Further, it is clear that the second notice has no relevance at all in this case at hand. Second notice could be construed as a reminder of respondent's obligation to discharge his liability. As the complaint, was filed within the stipulated time contemplated under Clause (b) of Section 142 of the N.I. Act, therefore Section 138 r/w 142 of N.I. Act is attracted. In the view of the matter, we set aside the impugned judgment of the High Court.

17. However, during the course of hearing, learned counsel for first respondent, as agreed by appellant herein, submitted that first respondent was willing to pay Rs. 2,00,000/- (Rupees two lakhs only) in lieu of suffering simple imprisonment of three months as imposed by the Trial Court, as confirmed by the first Appellate Court, and endorsed by this Court.

18. In view of the undertaking given by the learned counsel, we direct the first respondent to deposit the said amount of Rs. 2,00,000/- (Rupees two lakhs only) before the Judicial First Class Magistrate- II at Alappuzha on or before 30.04.2017. Out of the said amount of Rs. 2,00,000/- (two lakhs only) so deposited, Rs.1,30,000/- (one lakh thirty thousand) shall be paid to the appellant as compensation.

19. In the event, first respondent fails to deposit the said amount of Rs.2,00,000/- within the stipulated period as indicated above, the conviction and sentence of three months awarded by the Ld. Trial Court and affirmed by the Appellate Court shall stand restored and bail granted to the first respondent shall stand cancelled.

20. The appeal is accordingly disposed of in the aforesaid terms.

[1] M/S New India Sugar Mills Ltd. v. Commissioner of Sales Tax, AIR 1963 SC 1207
[2] Jagdish Singh v. Natthu Singh, (1992) 1 SCC 647; State of M.P. v. Hiralal, (1996) 7 SCC 523 and V. Raja Kumari v. P. Subbarama Naidu, (2004) 8 SCC 774.

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RAMESHCHANDRA AMBALAL JOSHI VERSUS STATE OF GUJARAT & ANR

(2014) 11 Supreme Court Cases 759

Supreme Court of India

Before **Hon'ble Mr. Justice Chandramauli Kr. Prasad,**
Hon'ble Mr. Justice Jagdish Singh Khehar

Rameshchandra Ambalal Joshi ...Appellant
Versus
State Of Gujarat & Anr ...Respondents

CRIMINAL APPEAL No. 434 OF 2014

(@ SPECIAL LEAVE PETITION(CRL.)No. 7595 of 2011)

Decided on 18 February, 2014

S. 138 proviso (a) – Period of limitation – Determination of – Principle that cheque should be presented within six months from date on which it is drawn – Six months' period – Reckoning of – (i) Whether the six months' period means 6 calendar months or exactly 180 days, and (ii) what is the date from which the six months' period must commence and end. Limitation period under S. 138 proviso (a) means six calendar months as per British calendar [as per S. 3(35), General Clauses Act, 1897] and "month" does not mean just a period of 30 days as suggested by the accused, and the said period would commence from the day next when the cheque was drawn and will expire a day prior to the corresponding day of the corresponding month and in case no such day falls in the corresponding month, the said period would expire at the end of the last day of the immediately previous month [as per S. 9, General Clauses, Act, 1897].

JUDGMENT

CHANDRAMAULI KR. PRASAD, J.

According to the complainant-respondent No. 2, the accused- petitioner, Rameshchandra Ambalal Joshi was his friend, who had taken a loan of Rs.1,00,000/- (Rupees one lac only) from the complainant. The petitioner issued a cheque dated 31st of December, 2005 towards repayment of the loan. The cheque presented for payment by the complainant on 30th of June, 2006 was dishonoured on the ground of insufficiency of funds on the same day. A registered notice dated 25th of July, 2006 was then sent by the complainant to which the petitioner replied. The complainant then filed Criminal Case No. 2146 of 2006 on 5th of September, 2006 alleging commission of offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the Act) in the Court of Judicial Magistrate, First Class, Borsad, who took cognizance of the offence and issued summons to the petitioner.

An application for discharge was filed by the petitioner before the trial court inter alia contending that as a period of six months had lapsed between the date of drawl of the cheque on 31st of December, 2005 and its presentation by the complainant on 30th of June, 2006 for payment, the petitioner cannot be prosecuted. The prayer of the petitioner was rejected by the trial court on its finding that the provisions of discharge were not applicable to the present proceeding, they being in the nature of summons trial.

A criminal revision application against the aforesaid order, filed by the petitioner before the Court of Sessions, Anand was rejected by an order dated 5th of May, 2009, which the petitioner assailed in a petition filed under Section 482 of the Code of Criminal Procedure before the High Court. The High Court by its order dated 20th of August, 2010 rejected the application of the petitioner, observing as under:

7. Though the submission has been made by the learned counsel, Mr. Hakim raising the contention with regard to the limitation, bare perusal of the provisions of Section 138 of the Negotiable Instrument Act, would make it clear that what law provides is presentation within a period of six months, meaning thereby, the Legislature has provided the period of six months by way of limitation. It is also clear that each month may not have same number of days and, therefore, wisely what has been provided in terms of months and not exact date or days, meaning thereby, 180 days. Therefore, cheque drawn on the last date of month of December would remain valid for a period of six months and the period of six months would expire after the last date of June i.e. 30th June, 2006. Therefore, in the facts and circumstances of the case, as the cheque has already been presented on 30th June, 2006, it cannot be said that it is barred by limitation. Therefore, the submission made by the learned counsel, Hakim cannot be readily accepted. It is against this order that the petitioner has preferred this special leave petition.

Leave granted.

Mr. Huzefa Ahmadi, learned senior counsel draws our attention to proviso (a) of Section 138 of the Negotiable Instruments Act and contends that to attract its mischief the cheque is required to be presented in the Bank within six months from the date of its drawl. Otherwise, Section 138 of the Act would not apply. Section 138 of the Act, which is relevant for our purpose reads as follows:

138. Dishonour of cheque for insufficiency, etc., of funds in the account.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

a) the 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;

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We are in agreement with Mr. Ahmadi and, in fact, it is apparent from a plain reading of proviso (a) aforesaid that Section 138 of the Act would apply only when the cheque is presented to the Bank within a period of six months from the date on which it is drawn or within period of its validity, whichever is earlier.

Mr. Ahmadi then points out that the cheque is valid from the date it is drawn and hence period of six months has to be calculated from the said date. On facts, he points out that the cheque was drawn on 31st of December, 2005 and presented on 30th of June, 2006, which is beyond the period of six months. He submits that cheque is valid from the date shown in it and therefore for calculation of six months, the date on which the cheque is drawn has to be included. He has suggested the following two modes of calculation:

CALCULATION OF THE PERIOD OF 6 MONTHS AS PRESCRIBED UNDER SECTION 138 OF THE NEGOTIABLE INSTRUMENTS ACT, 1881.

DATE OF DRAWL OF CHEQUE	31.12.2005
DATE OF PRESENTATION OF CHEQUE	30.06.2006
|No. of days in the relevant	|Month-wise calculation|
|months|	|
|January 31 days	|1st Month |
|	31st December to 30th January|
|February 28 days	|2nd Month |
|	30th January to 27th February|
|March 31 days	|3rd Month |
|	27th February to 30th March |
|April 30 days	|4th Month |
|	30th March to 29th April |
|May 31 days	|5th Month |
|	29th April to 30th May |
|June 30 days	|6th Month |
|	30th May to 29th June |
OR	
|No. of days in the relevant	|Month-wise calculation |
|months|	|
|January 31 days	|1st Month |
|	31st December to 30th January|
|February 28 days	|2nd Month |

	31ST January to 27th February|
|March 31 days	|3rd Month |
	28th February to 27th March |
|April 30 days	|4th Month |
	28th March to 27th April |
|May 31 days	|5th Month |
	28th April to 27th May |
|June 30 days	|6th Month |
	28th May to 27th June |

To put the record straight, the modes suggested, in fact, do not reflect his submission. He, however, submits that whichever mode is adopted, the cheque was not presented within the period of six months. In support of the submission, he has placed reliance on a decision of the Kerala High Court in the case of K.V. Muhammed Kunhi vs. P. Janardhanan [1998 CRL.L.J. 4330] and our attention has been drawn to the following passage from the said judgment:

3. ..A comparative study of both the Sections in the Act and the General Clauses Act significantly indicate that the period of limitation has to be reckoned from the date on which the cheque or instrument was drawn. The words from and to employed in Section 9 of the General Clauses Act are evidently clear that in cases where there is an ambiguity or suspicion with reference to the date of commencement of period of limitation in any Act or special enactment, the words from and to employed in Section 9 of the General Clauses Act can be pressed into service. But in the instant case before me, Section 138 proviso (a) is involved which is so clear (as extracted above) that the date of limitation will commence only from the date found in the cheque or the instrument. Mr. Ahmadi submits that the aforesaid view has been approved by this Court in the case of Sivakumar vs. Natarajan (2009) 13 SCC 623 in the following words:

14. ..A comparative study of both the Sections in the Act and the General Clauses Act significantly indicate that the period of limitation has to be reckoned from the date on which the cheque or instrument was drawn. The words from and to employed in Section 9 of the General Clauses Act are evidently clear that in cases where there is an ambiguity or suspicion with reference to the date of commencement of period of limitation in any Act or special enactment, the words from and to employed in Section 9 of the General Clauses Act can be pressed into service.

We are in agreement with the aforementioned view. It may look like a repetition of the judgment but its relevance would be apparent from what we have observed in the subsequent paragraphs of this judgement.

Given the general importance of the question involved, we had requested Mr. V.Giri, learned Senior Counsel, to assist us as amicus curiae and he very generously agreed to do so. We have also heard Ms. Hemantika Wahi, learned counsel appearing on behalf of the respondents.

They contend that the period of six months had expired on 30th of June, 2006 i.e. the date on which the cheque was presented, which is within six months from the date it was drawn. They submit that as a general rule, in case of any ambiguity, Section 9 of the General Clauses Act, 1897 provides for exclusion of the first day and inclusion of the last day for the purpose

of calculating commencement or termination of time. They submit that the date of issue of cheque, i.e. 31st of December,2005 is to be excluded and the last day, i.e. 30th of June, 2006 is to be included for the purpose of calculating the period of six months under proviso (a) of Section 138 of the Act. According to the learned counsel, since the last day of the six months period was 30th of June, 2006 and the cheque was presented on that very same day, the complaint under Section 138 of the Act is not time barred.

We have given our most anxious consideration to the submissions advanced and we do not find any substance in the submission of Mr. Ahmadi that the cheque was not presented to the Bank within a period of six months from the date on which it was drawn and the judgments relied on go against him instead of supporting his contention.

The first question which calls for our answer is the meaning of the expression month: whether it would mean only a period of 30 days and, consequently, whether six months would mean a period of 180 days. The word month has been defined under Section 3(35) of the General Clauses Act to mean a month reckoned according to the British calendar. Therefore we cannot ignore or eschew the word British calendar while construing month under the Act. Accordingly, we are of the opinion that the period of six months cannot be calculated on 30 days in a month basis. Therefore, both the modes of calculation suggested by Mr.Ahmadi do not deserve acceptance and are rejected accordingly.

The next question which calls for our answer is the date from which six months period would commence. In case of ambiguity with reference to the date of commencement, Section 9 of the General Clauses Act can be pressed into service and the same reads as follows:

9. Commencement and termination of time.-(1) In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word from, and, for the purpose of including the last in a series of days or any other period of time, to use the word to.

From the judgment of this Court in the case of Sivakaumar(supra) and as quoted in the preceding paragraph of this judgment, it is evident that this Court recorded its agreement to a limited extent that in cases where there is an ambiguity or suspicion with reference to the date of commencement of period of limitation Section 9 of the General Clauses Act can be pressed into service. We would hasten to add that this Court in Sivakumar (supra) did not give nod to the following proposition enunciated by the Kerala High Court in K.V.Muhammed Kunhi (supra).

3. But in the instant case before me, Section 138 proviso (a) is involved which is so clear (as extracted above) that the date of limitation will commence only from the date found in the cheque or the instrument. In the case of K.V.Muhammed Kunhi (supra) the cheque was dated 17.11.1994 and that was presented on 17.5.1995, and in this background the Court observed as follows:

5. . When on the footing of the days covered by the British calendar month the period of limitation in the case on hand is calculated, the cheque ought to have been presented in the Bank for collection on or before 16-5-1995. But in this case, as pointed out above the cheque had been presented for collection only on 17-5- 1995, which is clearly barred by limitation. In this case, six months period expired a day prior to the corresponding month. In the case in hand, no

such day falls in the corresponding month and therefore the last day would be last date of the immediate previous month.

Mr. Ahmadi appeals to us that if we take the view that the cheque was presented to the Bank before the expiry of six months, it would be in the teeth of the judgment of this Court in the case of Sivakumar (supra) and therefore the matter shall be required to be referred to a larger Bench. From what we have observed above, we have not taken a view different than what has been held in Sivakumar (supra) and therefore we do not find any necessity to refer the case to a larger Bench.

Proviso (a) to Section 138 of the Act uses the expression six months from the date on which it is drawn. Once the word from is used for the purpose of commencement of time, in view of Section 9 of the General Clauses Act, the day on which the cheque is drawn has to be excluded.

This Court, relying on several English decisions, dealt with the issue of computation of time for the purpose of limitation extensively in Haru Das Gupta v. State of West Bengal, (1972) 1 SCC 639 wherein Paragraph 5 states as follows:

5. These decisions show that courts have drawn a distinction between a term created within which an act may be done and a time limited for the doing of an act. The rule is well established that where a particular time is given from a certain date within which an act is to be done, the day on that date is to be excluded, (see Goldsmiths Company v. The West Metropolitan Railway Co. (1904 KB 1 at 5). This rule was followed in Cartwright v. Maccormack (1963) 1 All E.R. 11, where the expression fifteen days from the date of commencement of the policy in a cover note issued by an insurance company was construed as excluding the first date and the cover note to commence at midnight of that day, and also in Marren v. Dawson Bentley and Co. Ltd., (1961) 2 QB 135, a case for compensation for injuries received in the course of employment, where for purposes of computing the period of limitation the date of the accident, being the date of the cause of action, was excluded. (See also Stewart v. Chadman [1951] 2 KB 792 and In re North, Ex parte Wasluck [1895] 2 QB 264.) Thus, as a general rule the effect of defining a period from such a day until such a day within which an act is to be done is to exclude the first day and to include the last day. [See Halsburys Laws of England (3rd ed.) Vol.37, pp.92 and 95.] There is no reason why the aforesaid rule of construction followed consistently and for so long should not also be applied here. (underlining ours) This decision was quoted with approval in Saketh India Ltd. v. India Securities Ltd., (1999) 3 SCC 1 in the following words:

7. The aforesaid principle of excluding the day from which the period is to be reckoned is incorporated in Section 12(1) and (2) of the Limitation Act, 1963. Section 12(1) specifically provides that in computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded. Similar provision is made in sub-section (2) for appeal, revision or review. The same principle is also incorporated in Section 9 of the General Clauses Act, 1897 which, inter alia, provides that in any Central Act made after the commencement of the General Clauses Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word from and for the purpose of including the last in a series of days or any other period of time, to use the word to.

8. Hence, there is no reason for not adopting the rule enunciated in the aforesaid case which is consistently followed and which is adopted in the General Clauses Act and the Limitation Act The correctness of this judgment came up for consideration before a three-Judge Bench of this

Court in Econ Antri Ltd. vs. Rom Industries Ltd. & Anr., AIR 2013 SC 3283 which approved the reasoning of this Court given in Saketh (supra) and Haru Das Gupta (supra) and held as under:

16. We have extensively referred to Saketh. The reasoning of this Court in Saketh based on the above English decisions and decision of this Court in Haru Das Gupta which aptly lay down and explain the principle that where a particular time is given from a certain date within which an act has to be done, the day of the date is to be excluded, commends itself to us as against the reasoning of this Court in SIL Import USA where there is no reference to the said decisions.

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22. In view of the above, it is not possible to hold that the word of occurring in Section 138(a) and 142(b) of the N.I.Act is to be interpreted differently as against the word from occurring in Section 138(a) of the N.I.Act; and that for the purposes of Section 142(b), which prescribes that the complaint is to be filed within 30 days of the date on which the cause of action arises, the starting day on which the cause of action arises should be included for computing the period of 30 days. As held in Ex parte Fallon (1793) 5 Term Rep 283 the words of, from and after may, in a given case, mean really the same thing. As stated in Strouds Judicial Dictionary, Vol. 3 1953 Edition, Note (5), the word of is sometimes equivalent of after. At this stage, we would also like to refer to Halsburys Law of England, Vol. 37, 3rd Edn., Paragraph 143 at Pages 83-84 which provides for calculation of a calendar month:

143. Calendar month running from arbitrary date. When the period prescribed is a calendar month running from any arbitrary date the period expires with the day in the succeeding month immediately preceding the day corresponding to the date upon which the period starts; save that, if the period starts at the end of a calendar month which contains more days than the next succeeding month, the period expires at the end of the latter month. Drawing a conclusion from the above mentioned authorities, we are of the opinion that the use of word from in Section 138(a) requires exclusion of the first day on which the cheque was drawn and inclusion of the last day within which such act needs to be done. In other words, six months would expire one day prior to the date in the corresponding month and in case no such day falls, the last day of the immediate previous month. Hence, for all purposes, the date on which the cheque was drawn, i.e., 31.12.2005 will be excluded and the period of six months will be reckoned from the next day i.e. from 1.1.2006; meaning thereby that according to the British calendar, the period of six months will expire at the end of the 30th day of June, 2006. Since the cheque was presented on 30.6.2006, we are of the view that it was presented within the period prescribed.

Viewed from any angle, the prosecution is not time barred and therefore, cannot be scuttled at this stage on this ground. As the matter is pending since long, the learned Magistrate in seisin of the trial shall make endeavour to conclude it within six months from the date the appellant next appears in the case. We direct the appellant to appear before the trial Judge on 3rd of March, 2014 and no notice is to be issued to him for his appearance.

In the result, we do not find any merit in the appeal and it is dismissed accordingly.

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KIRSHNA TEXPORT & CAPITAL MARKETS LIMITED VERSUS ILA A. AGRAWAL & ORS

(2015) 8 Supreme Court Cases 28

Supreme Court of India

Before **Hon'ble Mr. Justice Pinaki Chandra Ghose and Hon'ble Mr. Justice Uday U. Lalit**

Kirshna Texport & Capital Markets Limited
Versus
Ila A. Agrawal & Ors

CRIMINAL APPEAL NO.1220 of 2009

Decided on 6 May, 2015

Ss. 138, 141 and 142 – Dishonour of cheque – Offence by company – Issuance of individual notices under S. 138 to them, held, not required as – For dishonour of cheque drawn by Company, appellant issued notice under S. 138 accused to Company, but no individual notices were given to its Directors – Held, S. 138 does not admit of any necessity or scope for reading into it, requirement that Directors of company in question must also be issued individual notices under S. 138 – Such Directors who are in charge of and responsible for affairs of company, would be aware of receipt of notice by company under S. 138.

JUDGMENT

Uday Umesh Lalit, J.

1. This appeal by Special Leave is directed against the order dated 6.5.2008 passed by the High Court of Judicature at Bombay rejecting Criminal Application No. 2174 of 2007 preferred by the appellant for leave to appeal.

2. On 14.09.1996 a notice under Section 138 of the Negotiable Instruments Act, 1881(hereinafter referred to as the Act) was issued on behalf of the appellant to M/S Indo French Bio Tech Enterprises Ltd (the Company for short). The notice stated that a cheque bearing No. 364776 dated 8.9.1996 drawn by the Company on Dena Bank, New Marine Lines, Mumbai in favour of the appellant was returned on 10.9.1996 with endorsement funds insufficient. The notice therefore called upon the addressee to make the payment of the cheque amount within 15 days of the receipt of such notice. No reply was sent to the aforesaid notice dated 14.9.1996.

3. The appellant thereafter filed Complaint Case No. 243/S/1996 before the Additional Chief Metropolitan Magistrate, 5th Court at Dadar, Mumbai against the Company, Mr. K.J. Bodiwala, the Chairman and Managing Director of the Company and 11 other directors including respondents 1 and 2. In so far as the directors are concerned, it was averred that they were in-charge of the business of the Company and its day to day affairs and were liable. During the pendency of said complaint case, the process issued against Accused Nos. 3 to 5, 7, 9 to 13 was recalled and due to the death of Mr. Bodiwala the proceedings as against him also abated,

which left the Company and the present respondents 1 and 2 namely Ms. Ila A. Agrawal and Mr. Prafulla Ranadive, Accused Nos. 6 and 8 respectively in the array of accused.

4. It was submitted by the appellant that separate notices to the directors were additionally issued but at the stage of evidence it turned out that such individual notices to the directors were with respect to dishonour of a different cheque. The facts as found therefore were that no individual notices were given to the directors. The Metropolitan Magistrate by his judgment and order dated 30.4.2007 convicted the Company but acquitted respondents 1 and 2 of the offence punishable under Section 138 of the Act. Relying on the judgment of the Division Bench of Madras High Court in B. Raman & Ors. Vs. M/s. Shasun Chemicals and Drugs Ltd. reported in 2006 Cril. L.J. Page 4552, it was observed that statutory notice under Section 138 of the Act was required to be issued to every Director and for non- compliance of such mandatory requirement respondents 1 and 2 could not be proceeded against. .

5. The appellant being aggrieved filed Criminal Application No. 2174 of 2007 in the High Court seeking leave to prefer appeal against the judgment acquitting respondents 1 and 2. It was submitted that it was not necessary to serve individual notice upon the directors and it was sufficient if the notice was served on the Company. Reliance was placed on the decision of a Single Judge of the Calcutta High Court in the case of Girish Chandra Pandey Vs. Kanhaiyalal Chandak and Ors. reported in 1999 ALL MR (CRI) JOURNAL 3, wherein it was held that if the partnership firm failed to give the amount within the stipulated time after receipt of notice, each partner need not be served with a separate notice individually. So also reliance was placed on the decision of a Single Judge of Delhi High Court in the case of Jain Associates and Ors. Vs. Deepak Chawdhary & Co. reported in 80 (1999) DLT 654, wherein it was laid down that Section 141 of the Act does not require that each and every partner of the firm is required to be issued notice.

   Similar view was taken by High Court of Andhra Pradesh in K. Pannir Selvan vs. MMTC and another reported in (2000) Cr. L.J. 1002 and by Delhi High Court in Ranjit Tiwari vs. Narender Nayyar reported in 191 (2012) DLT 318.

6. The High Court, relying on the judgment of the Division Bench of Madras High Court B. Raman & Ors. (supra) observed that it was mandatory to have issued separate notices to the directors. The High Court concluded thus:-

   If the legal fiction is created by Section 141 to make directors who are responsible for day to day affairs of the Company, punishable under Section 138, then it is necessary that they get an opportunity to rectify, the mistake or clarify matters after service of notice. So before making the complaint against the directors, notice necessarily must be served on them. In my opinion without service of notice to accused Nos. 6 & 8, vicarious liability of the offence under Section 138 cannot be fixed upon them.

7. At this stage the decision of the Division Bench of Madras High Court in B. Raman & others (Supra) may also be referred to. Para 2 of said decision sets out that the matter was referred to the Division Bench as a result of divergent views taken by Single Judges of the Court. Paras 25 and 26 of the decision are as under:-

   25. Under Section 141 (1), the persons in charge of and responsible to the Company shall be deemed to have committed the offence. Under sub section (2), even the persons, who are

not stated to be in charge of and responsible to the Company, can be prosecuted, if it is alleged and proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any of those persons prosecuted. So, these Sections would provide that when there are Directors, who are responsible for the conduct of the business of the Company, and when there are other officers, with whose consent the offence has been committed, the complainant shall make averments to the said effect. In that context, the complainant has to start the process of getting back the cheque amount from those persons, who represent the Company, in order to avoid the filing of the Complaint against them. In the said process, he has to necessarily make a demand from those persons, who are part and parcel of the drawer. Only when the process fails, the cause of action, as envisaged in Section 138, would arise against them, to enable the complainant to approach the Court, within the stipulated time. So, the starting of the process is, the service of notice on the persons, who represent the Company, the drawer of the cheque.

26. The object of the notice is to give a chance to the drawer of the cheque to rectify his omission and also to protect an honest drawer. Service of notice of demand in Clause (b) of the proviso to Section 138 is a condition precedent for filing a complaint under Section 138. By sending a notice to the Company as well as the persons in charge of and responsible fore the conduct of the business of the company, he can make a demand, asking them to pay the amount. Some may reply that they are not in charge of and responsible for the conduct of the business of the Company. Some may reply that they are not connected with the Company in any way and some may rectify the omission, by making efforts to pay the amount to the payee, in the name of the Company, in that event, the complainant may either drop the action of filing the Complainant or, in the event of non- payment of the cheque amount, he may choose the persons, who are really responsible fore the commission of offence and, then, initiate prosecution against them.

8. It was submitted by Mr. Ajit Anekar, learned Advocate for the appellant that Section 138 does not contemplate issuance of separate notices to the directors and that no such requirement ought to be read into said Section. Mr. Shree Prakash Sinha and Mr. Ashok Bhatia, learned Advocates appearing for respondents relied upon the decision of the Division Bench of Madras High Court in B. Raman & others (Supra). It was submitted that though the issue whether such separate notices are mandatorily required to be given to the Directors had not squarely arisen, paras 10 & 11 of the decision of this Court in N.K. Wahi v Shekhar Singh[1] did speak of such notices. We quote said paras 10 & 11:- 10. In order to bring application of Section 138 the complaint must show:

1. That Cheque was issued;
2. The same was presented;
3. It was dishonored on presentation;
4. A notice in terms of the provisions was served on the person sought to be made liable;
5. Despite service of notice, neither any payment was made nor other obligations, if any, were complied with within fifteen days from the date of receipt of the notice.

11. Section 141 of the Act in terms postulates constructive liability of the Directors of the company or other persons responsible for its conduct or the business of the company.

9. The question, therefore, is whether notice under Section 138 of the Act is mandatorily required to be sent to the directors of a Company before a complaint could be filed against such directors along with the Company. At the outset we must consider whether the decision of this Court in N.K. Wahi (supra) had considered and concluded that it is obligatory to issue separate notices to the Directors in addition to the Company, before initiating any proceedings against them. We have perused the decision and find that no such issue had arisen for consideration in that case. We, therefore, proceed to consider the question. Before we deal with the matter, Sections 138 and 141 of the Act may be quoted:- 138. Dishonour of cheque for insufficiency, etc., of funds in the accounts Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to two year, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) The 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.

(b) The payee or the holder induce course of the cheque, as the case may be, 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 thirty days of the receipt of information by him from the bank regarding the return of the cheques as unpaid, and

(c) The drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation: For the purpose of this section, debt or other liability means a legally enforceable debt or other liability.

141. Offences by companies- (1) If the person committing an offence under section 138 is a Company, every person who, at the time the 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 proceeded against and punished accordingly;

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

Provided further that 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 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.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this 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 attribute to, any neglect on the part of, any director, Manager, secretary, or other office of the Company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation: For the purpose of this section.

(a) Company means any body corporate and includes a firm or other association of individuals; and

(b) Director, in relating to a firm, means a partner in the firm. The expression drawer used in Section 138 has to be understood in the light of the definition in Section 7 of the Act which is to the following effect :-

..The maker of a bill of exchange or cheque is called the drawer; the person thereby directed to pay is called the drawee.

10. Since the High Court has read into Section 138 of the Act the requirement that separate notices ought to be given to the directors, without which they cannot be made vicariously liable, the principles concerning interpretative function of the Court may be adverted to. In Kanai Lal Sur v. Paramnidhi Sadhukhan[2] it was observed, In support of his argument Mr. Chatterjee has naturally relied on the observations made by Barons of the Exchequer in Heydons case. Indeed these observations have been so frequently cited with approval by courts administering provisions of welfare enactments that they have now attained the status of a classic on the subject and their validity cannot be challenged. However, in applying these observations to the provisions of any statute, it must always be borne in mind that the first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself. If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The words used in the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise. When the material words are capable of two constructions, one of which is likely to defeat or impair the policy of the Act whilst the other construction is likely to assist the achievement of the said policy, then the courts would prefer to adopt the latter construction. It is only in such cases that it becomes relevant to consider the mischief and defect which the, Act purports to remedy and correct.

11. In Nasiruddin and others v. Sita Ram Agarwal[3] this Court stated the law in the following terms:

37. The courts jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when

the language of the provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. It cannot rewrite or recast legislation. It is also necessary to determine that there exists a presumption that the legislature has not used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used...

12. In Nathi Devi v. Radha Devi Gupta[4] a Constitution Bench of this Court was called upon to consider, inter alia, whether the expression, where the landlord is a widow and the premises let out by her, or by her husband, are required by her for her own residence appearing in Section 14- D of the Delhi Rent Control Act would include every widow so as to entitle her to obtain immediate possession of the premises owned by her. While holding that the benefit under Section 14-D is available only to a widow, where premises are let out by her or by her husband, this Court repelled the contention that a widow who had acquired tenanted premises by sale or transfer could also invoke the provisions of Section 14-D. During the course of its decision this Court observed:

The interpretative function of the court is to discover the true legislative intent. It is trite that in interpreting a statute the court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense. When the language is plain and unambiguous and admits of only one meaning, no question of construction of statute arises, for the Act speaks for itself. Courts are not concerned with the policy involved or that the results are injurious or otherwise, which may follow from giving effect to the language used. If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In considering whether there is ambiguity, the court must look at the statute as a whole and consider the appropriateness of the meaning in a [pic]particular context avoiding absurdity and inconsistencies or unreasonableness which may render the statute unconstitutional.

13. With these principles in mind, we now consider the provisions in question. According to Section 138, where any cheque drawn by a person on an account maintained by him is returned by the Bank unpaid for reasons mentioned in said Section such person shall be deemed to have committed an offence. The proviso to the Section stipulates three conditions on the satisfaction of which the offence is said to be completed. The proviso inter alia obliges the payee to make a demand for the payment of said amount of money by giving a notice in writing to the drawer of the cheque and if the drawer of the cheque fails to make the payment of the said amount within 15 days of the receipt of said notice, the stages stipulated in the proviso stand fulfilled. The notice under Section 138 is required to be given to the drawer of the cheque so as to give the drawer an opportunity to make the payment and escape the penal consequences. No other person is contemplated by Section 138 as being entitled to be issued such notice. The plain language of Section 138 is very clear and leaves no room for any doubt or ambiguity. There is nothing in Section 138 which may even remotely suggest issuance of notice to anyone other than the drawer.

14. Section 141 states that if the person committing an offence under Section 138 is a Company, every director of such Company who was in charge of and responsible to that Company for conduct of its business shall also be deemed to be guilty. The reason for creating vicarious

liability is plainly that a juristic entity i.e. a Company would be run by living persons who are in charge of its affairs and who guide the actions of that Company and that if such juristic entity is guilty, those who were so responsible for its affairs and who guided actions of such juristic entity must be held responsible and ought to be proceeded against. Section 141 again does not lay down any requirement that in such eventuality the directors must individually be issued separate notices under Section 138. The persons who are in charge of the affairs of the Company and running its affairs must naturally be aware of the notice of demand under Section 138 of the Act issued to such Company. It is precisely for this reason that no notice is additionally contemplated to be given to such directors. The opportunity to the drawer Company is considered good enough for those who are in charge of the affairs of such Company. If it is their case that the offence was committed without their knowledge or that they had exercised due diligence to prevent such commission, it would be a matter of defence to be considered at the appropriate stage in the trial and certainly not at the stage of notice under Section 138.

15. If the requirement that such individual notices to the directors must additionally be given is read into the concerned provisions, it will not only be against the plain meaning and construction of the provision but will make the remedy under Section 138 wholly cumbersome. In a given case the ordinary lapse or negligence on part of the Company could easily be rectified and amends could be made upon receipt of a notice under Section 138 by the Company. It would be unnecessary at that point to issue notices to all the directors, whose names the payee may not even be aware of at that stage. Under Second proviso to Section 138, the notice of demand has to be made within 30 days of the dishonour of cheque and the third proviso gives 15 days time to the drawer to make the payment of the amount and escape the penal consequences. Under clause (a) of Section 142, the complaint must be filed within one month of the date on which the cause of action arises under the third proviso to Section 138. Thus a complaint can be filed within the aggregate period of seventy five days from the dishonour, by which time a complainant can gather requisite information as regards names and other details as to who were in charge of and how they were responsible for the affairs of the Company. But if we accept the logic that has weighed with the High Court in the present case, such period gets reduced to 30 days only. Furthermore, unlike proviso to clause (b) of Section 142 of the Act, such period is non-extendable. The summary remedy created for the benefit of a drawee of a dishonoured cheque will thus be rendered completely cumbersome and capable of getting frustrated.

16. In our view, Section 138 of the Act does not admit of any necessity or scope for reading into it the requirement that the directors of the Company in question must also be issued individual notices under Section 138 of the Act. Such directors who are in charge of affairs of the Company and responsible for the affairs of the Company would be aware of the receipt of notice by the Company under Section 138. Therefore neither on literal construction nor on the touch stone of purposive construction such requirement could or ought to be read into Section 138 of the Act. Consequently this appeal must succeed. The order passed by the High Court is set aside. Since the matter was at the stage of considering application for leave to appeal and the merits of the matter were not considered by the High Court, we remit the matter to the High Court for fresh consideration which may be decided as early as possible. Concluding so, we must record that the decision of the Division Bench of the Madras High Court in B. Raman & Ors. Vs. M/s.

Shasun Chemicals and Drugs Ltd. (supra) was incorrect and it stands overruled. The appeal is allowed in these terms.

[1] (2007)9 SCC 481
[2] (1958) SCR 360
[3] (2003) 2 SCC 577
[4] (2003) 2 SCC 577

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KAMLESH KUMAR VERSUS STATE OF BIHAR & ANR

(2014) 2 Supreme Court Cases 424

Supreme Court of India

Before **Hon'ble Mr. Justice K.S. Radhakrishnan, Hon'ble Mr. Justice A.K. Sikri**

Kamlesh Kumar ..Appellant
Versus
State of Bihar & Anr. .Respondents

CRIMINAL APPEAL NO. 2083/2013

(arising out of SLP(Criminal) No. 10056 of 2012)

Decided on 11 December, 2013

Re-presentation of cheque after dishonour – Limitation period for filing complaint for dishonour of cheque upon re-presentation of cheque – Date from which to be reckoned – Legal notice to drawer must be issued within 30 days of that dishonour of cheque, which matures into complaint – Though first legal notice was cheque on 17-12-2008 pursuant to dishonour of cheque, second legal notice issued to drawer of beyond limitation period of 30 days – Information as to second time on 10-11-2008 i.e. Bank on the same day itself (i.e. 10-11-2008) –Held, although the complainant had right to present the said cheque for encashment a second time after its dishonour, the legal notice pursuant to second dishonour had to be issued within 30 days of the receipt of information as to second dishonour from Bank, which was not done – Hence, complaint filed on basis of notice dt. 17-12-2008 was not maintainable in view of non-compliance with all the three conditions laid down in S. 138 NI Act as explained in MSR Leathers, (2013) 1 SCC 177.

JUDGMENT

A.K.SIKRI,J.

1. Leave granted.

2. The appellant herein is facing trial in the complaint filed by respondent No.2 under Section 138 of the Negotiable Instruments Act (N.I. Act for short). According to the appellant, criminal complaint is not maintainable and no such proceedings could be launched against him. He, therefore, approached the High Court of Judicature at Patna in the form of a petition under Section 482 of the Cr.P.C. for quashing of the order dated 28.10.2009 whereby the Court of Magistrate had taken cognizance of the complaint filed by the respondent No.2 issued summons to the appellant. This petition, however, has been dismissed by the High Court vide impugned judgment dated 1.11.2012. The solitary reason given by the High Court while dismissing the petition is that trial has already commenced and two witnesses have already been examined and discharged. Hence, at this stage it would not be proper to interfere with the trial. Various contentions which were raised by the appellant questioning the very maintainability of the

complaint under Section 138 of the N.I. Act are not gone into by the High Court with the observations that those contentions would be available to the appellant before the trial court, subject to the rebuttal of respondent No.2.

3. Mr. Mishra, learned senior counsel appearing for the appellant submitted that even on admitted facts the complaint was untenable as it was clearly time barred and not filed within the stipulated period prescribed in law and therefore the High Court could not have scuttled the issue raised by the appellant by merely relegating the appellant to the trial court when the issue could be decided on the admitted facts on records. He, further, submitted that the appellant had approached the High Court without loss of any time and if during the pendency of the petition filed by the appellant under Section 482, Cr.P.C., two witnesses had been examined in the meantime, that factor could not have weighed against the appellant.

4. In order to understand the controversy, we may give basic facts which are undisputed.

5. The complaint under Section 138 of the N.I. Act is filed by respondent No.2 on the basis of cheque bearing No.003285 drawn on Bank of India, Mahua Branch where the appellant holds Bank Account bearing No.23371. This cheque was for a sum of Rs.3,45,000/-. The complainant had presented this cheque on 25.10.2008 which was returned dishonoured by the Bank. The defence on merits set up by the appellant is that he is a doctor by profession who is having his private practice. He found that certain cheques, some signed and some unsigned, were missing from his clinic in December 2006 in respect to which he had even given information to the Sub- Divisional Officer, Mahua, on 30th December 2006. Cheque No. 003285 was also one of those stolen cheques. We have stated this defence of the appellant just for record and are not going into this explanation of the appellant or influenced by it. We only tend to examine as to whether on admitted events, complaint is not maintainable.

6. The cheque in question was presented on 25.10.2008. After it was dishonoured, complainant issued notice dated 27.10.2008 to the appellant. The appellant did not accede to the demand contained in the said notice. Even the complainant chose not to file any complaint under Section 138 of the N. I. Act at that time. Instead, he presented same very cheque again for encashment through his banker on 10.11.2008. It bounced this time as well because of insufficient funds. Another legal notice dated 17.12.2008 was sent to the appellant. As this legal notice also did not invoke any positive response from the appellant, this time the complainant filed the complaint dated 7.01.2009. The summary of the aforesaid events, accordingly, is as under:-

	Date	Events	
	25.10.2008	Cheque presented	
	27.10.2008	Legal Notice	
	10.11.2008	2nd presentation	
	17.12.2008	Legal Notice	
	07.01.2009	Complaint filed	

7. On the basis of the aforesaid facts, the submission of Mr. Mishra was that the complaint was not filed within the limitation prescribed under Section 138 read with Section 142 of the N. I. Act. To appreciate this contention, we first state the aforesaid provision which reads as under:

138. Dishonour of cheque for insufficiency,etc. of funds in the account.-Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the 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, whoever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be , 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 thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawyer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

142. Cognizance of offences.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

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

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138:

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

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

8. In the present case, the complainant had not filed the complaint on the dishonor of the cheque in the first instance, but presented the said cheque again for encashment. This right of the complainant in presenting the same very cheque for the second time is available to him under the aforesaid provision. This aspect is already authoritatively determined by this Court in MSR Leathers vs. S.Palaniappan & Anr. (2013) 1 SCC 177. Specific question which was formulated for consideration by the Court and referred to three Judge Bench in that case, the following question for determination was as under:

Whether the payee or holder of a cheque can initiate prosecution for an offence under Section 138 of the Negotiable Instruments Act, 1881 for its dishonor for the second time, if he had not

initiated any action on the earlier cause of action? This question was answered by the three Judge Bench in the aforesaid matter in the following manner:

What is important is that neither Section 138 nor Section 142 or any other provision contained in the Act forbids the holder or payee of the cheque from presenting the cheque for encashment on any number of occasions within a period of six months of its issue or within the period of its validity, whichever is earlier. That such presentation will be perfectly legal and justified was not disputed before us even at the Bar by the learned counsel appearing for the parties and rightly so in the light of the judicial pronouncements on that question which are all unanimous. Even Sadanandan case, the correctness whereof we are examining, recognized that the holder or the payee of the cheque has the right to present the same any number of times for encashment during the period of six months or during the period of its validity, whichever is earlier.

9. To this extent, there cannot be any quarrel and the act of the complainant in presenting the cheque again cannot be questioned by the appellant. However, we find that when the cheque was presented second time on 10.11.2008 and was returned unpaid, legal notice for demand was issued only on 17.12.2008 which was not within 30 days of the receipt of the information by him from the Bank regarding the return of the cheque as unpaid. Non-issuance of notice within the limitation prescribed has rendered the complaint as not maintainable.

10. In MSR Leathers (supra), this Court analyzed the provisions of Sections 138 and 142 of the N.I. Act in the following manner:

The proviso to Section 138, however, is all important and stipulates three distinct conditions precedent, which must be satisfied before the dishonor of a cheque can constitute an offence and become punishable. The first condition is that the cheque ought to have been presented to the bank within a period of six months from the date on which it is drawn or within the period of of its validity, whichever is earlier. The second condition is that the payee or the holder in due course of the cheque, as the case may be, ought to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. The third condition is that the drawer of such a cheque should have failed to make payment of the said amount of money to the payee or as the case may, to the holder in due course of the cheque within fifteen days of the receipt of the said notice. It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to Section 138 as clauses (a), (b) and (c) thereof that an offence under Section 138 can be said to have been committed by the person issuing the cheque.

Section 142 of the Negotiable Instruments Act governs taking of cognizance of the offence and starts with a non obstante clause. It provides that no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, by the holder in due course and such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138. In terms of clause (c) to Section 142, no count inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class is competent to try any offence punishable under Section 138.

A careful reading of the above provisions makes it manifest that a complaint under Section 138 can be filed only after cause of action to do so has accrued in terms of clause (c) of the

proviso to Section 138 which, as noticed earlier, happens no sooner than when the drawer of the cheque fails to make the payment of the cheque amount to the payee or the holder of the cheque within 15 days of the receipt of the notice required to be sent in terms of clause (b) of the proviso to Section 138 of the Act.

The presentation of the cheque and dishonor thereof within the period of its validity or a period of six months is just one of the three requirements that constitutes cause of action within the meaning of Sections 138 and 142 (b) of the Act, an expression that is more commonly used in civil law than in penal statutes. For a dishonor to culminate into the commission of an offence of which a court may take cognizance, there are two other requirements, namely, (a) service of a notice upon the drawer of the cheque to make payment of the amount covered by the cheque, and (b) failure of the drawer to make any such payment within the stipulated period of 15 days of the receipt of such a notice. It is only when the said two conditions are superadded to the dishonor of the cheque that the holder/payee of the cheque acquires the right to institute proceedings for prosecution under Section 138 of the Act, which right remains legally enforceable for a period of 30 days counted from the date on which the cause of action accrued to him. Therefore, there is, nothing in the proviso to Section 138 or Section 142 for that matter, to oblige the holder/payee of a dishonoured cheque to necessarily file a complaint even when he has acquired an indefeasible right to do so. The fact that an offence is complete need not necessarily lead to launch of prosecution especially when the offence is not a cognizable one. It follows that the complainant may, even when he has the immediate right to institute criminal proceedings against the drawer of the cheque, either at the request of the holder/payee of the cheque or on his own volition, refrain from instituting the proceedings based on the cause of action that has accrued to him. Such a decision to defer prosecution may be impelled by several considerations but more importantly it may be induced by an assurance which the drawer extends to the holder of the cheque that given some time the payment covered by the cheques would be arranged, in the process rendering a time- consuming and generally expensive legal recourse unnecessary. It may also be induced by a belief that a fresh presentation of the cheque may result in encashment for a variety of reasons including the vicissitudes of trade and business dealings where financial accommodation given by the parties to each other is not an unknown phenomenon. Suffice it to say that there is nothing in the provisions of the Act that forbids the holder/payee of the cheque to demand by service of a fresh notice under clause (b) of the proviso to Section 138 of the Act, the amount covered by the cheque, should there be a second or a successive dishonor of the cheque on its presentation.

11. It is thus clear that period of limitation is not to be counted from the date when the cheque in question was presented in the first instance on 25.10.2008 or the legal notice was issued on 27.10.2008, inasmuch as the cheque was presented again on 10.11.2008. For the purposes of limitation, in so far as legal notice is concerned, it is to be served within 30 days of the receipt of information by the drawyee from the bank regarding the return of the cheque as unpaid. Therefore, after the cheque is returned unpaid, notice has to be issued within 30 days of the receipt of information in this behalf. That is the period of limitation provided for issuance of legal notice calling upon the drawer of the cheque to make the payment. After the sending of this notice 15 days time is to be given to the noticee, from the date of receipt of the said notice to make the payment, if that is already not done. If noticee fails to make the payment, the offence can be said to have been committed and in that event cause of action for filing the

complaint would accrue to the complainant and he is given one month time from the date of cause of action to file the complaint.

12. Applying the aforesaid principles, in the present case, we find that cheque was presented, second time, on 10.11.2008. The complainant, however, sent the legal notice on 17.12.2008 i.e. much after the expiry of the 30 days. It is clear from the complaint filed by the complainant himself that he had gone to the bank for encashment the cheque on 10.11.2008 but the cheque was not honoured due to the unavailability of the balance in the account. 13. The crucial question is as to on which date the complainant received the information about the dishonour of the cheque. As per the appellant the complainant received the information about the dishonour of the cheque on 10.11.2008. However, the respondent has disputed the same. However, we would like to add that at the time of arguments the aforesaid submission of the appellant was not refuted. After the judgment was reserved, the complainant has filed the affidavit alleging therein that he received the bank memo of the bouncing of cheque on 17.11.2008 and therefore legal notice sent on 17.12.2008 is within the period 30 days from the date of information. Normally, we would have called upon the parties to prove their respective versions before the trial court by leading their evidence. However, in the present case, as rightly pointed out by the learned senior counsel for the appellant, the complainant has accepted in the complaint itself that he had gone to the bank for encashment of cheque on 10.11.2008 and the cheque was not honoured due to insufficient of funds, thereby admitting that he came to know about the dishonor of the cheque on 10.11.2008 itself. It is for this reason that appellant has filed reply affidavit stating that this is an after thought plea as no material has been filed before the court below to show that the bank had issued memo about the return of cheque which was received by the complainant on 17.11.2008. The specific averment made in the complaint in this behalf is as under:

Subsequently the complainant again went to encash the cheque given by the accused on 10.11.2008 which again bounced due to unavailability of balance in the accused account. It is, thus, clear from the aforesaid averment made by the complainant himself that he had gone to the bank for encashing the cheque on 10.11.2008 and found that because of unavailability of sufficient balance in the account, the cheque was bounced. Therefore, it becomes obvious that he had come to know about the same on 10.11.2008 itself. In view of this admission in the complaint about the information having been received by the complainant about the bouncing of the cheque on 10.11.2008 itself, no further enquiry is needed on this aspect.

14. It is, thus, apparent that he received the information about the dishonor of the cheque on 10.11.2008 itself. However, he did not send the legal notice within 30 days therefrom. We, thus, find that the complaint filed by him was not maintainable as it was filed without satisfying all the three conditions laid down in Section 138 of the N. I. Act as explained in para 12 of the judgment in the case of MSR Leathers, extracted above.

15. We have, thus, no hesitation in allowing this appeal and setting aside the impugned order of the High Court. As a consequence, petition filed by the petitioner under Section 482, Cr.P.C. is also allowed and the complaint of the complainant is dismissed.

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JAGDISH SINGH VERSUS NATTHU SINGH

(1992) 1 Supreme Court Cases 647

Supreme Court of India

Before **Hon'ble Mr. Justice M.N. Venkatachaliah and Hon'ble Mr. Justice S.C. Agrawal**

Jagdish Singh ...Petitioner
Versus
Natthu Singh ...Repondent

Decided on 25 November, 1991

Specific Relief Act, 1963 – S. 21(2), (4) and (5) – Suit for specific performance of contract of purchase of land – Compensation – Can be awarded where contract becomes incapable of specific performance without any fault of the plaintiff – For this amendment of plaint must be sought for conversion of the suit for specific performance into one for damages for breach of contract.

JUDGMENT

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4916 of From the Judgment and Order dated 5.4.1991 of the Allahabad High Court in Second Appeal No. 3395 of 1978. Manoj Swarup and Ms. Lalita Kohli for the Appellants.

B.S. Nagar for Goodwill Indeevar for the Respondent. The Judgment of the Court was delivered by VENKATACHALIAH, J. Special leave 'is granted and the appeal taken-up for final hearing and disposed of by this judgment. We have heard Sri Manoj Swamp, learned counsel for the Appellant and Shri Goodwill Indeevar for the Respondent.

2. Appellant was Defendant in a suit for specific performance. He seeks special leave to appeal to this Court from the judgment and order dated 5.4.1991 of the High Court of Allahabad in Second Appeal No.3395 of 1978 decreeing, in reversal of the decrees of dismissal entered by the two courts below, specific performance of an agreement for sale of land..

3. On 3.7.1973 Respondent-Natthu Singh sold Plot No.195 measuring 5 bighas and 18 biswas and Plot No.196 measuring 9 bighas and 8 biswas of Gulistapur Village, Pargana Dadri to the appellant for a consideration of Rs. 15,000. On the very day, i.e., 3.7.1973, another agreement was entered into between the parties whereunder Appellant agreed to reconvey the said properties to the Respondent against payment of Rs. 15,000/within two years.

   On 2.6.1975, well within the period of two years stipulated for the performance of the agreement to re-sell, Respondent instituted the suit for specific performance alleging that despite offer of performance and tendering the price, Appellant, with the dishonest intention of appropriating the properties to himself refused reconveyance. The Appellant contested the suit principally on the ground that Respondent was never ready and willing to perform the contract and that Respondent himself was in breach.

4. The trial court framed the necessary and relevant issues stemming from the pleadings and on its own appreciation of the evidence on record came to find against the Respondent that he was ready and willing to perform the contract; and that the agreement, being one of reconveyance, time was of its essence. The suit was accordingly dismissed. Respondent's first appeal before the learned IInd Additional District Judge, Bulandshahar was also unsuccessful.

5. However, in Respondent's second appeal, the High Court reversed the findings of the two courts below and allowing the appeal held that Respondent-Plaintiff was ready and willing to perform the contract; that the Appellant was the party in breach; and that, therefore, Respondent was entitled to a decree. This decree is assailed in this appeal.

6. Sri Manoj Swarup appearing in support of the appeal urged two contentions; the first is that the High Court was in error in embarking upon a re-appraisal of the evidence in a second-appeal to distrub concurrent findings of fact that Respondent was-not willing and ready to perform the con¬tract. The second contention is that contract itself became incapable of specific performance in view of the fact that during the pendency of second appeal the State had initiated proceedings for compulsory acquisition of the suit-properties and the subject-matter of the suit itself ceased to be available. Counsel says the power to give compensation as an alternative to specific performance did not extend to a case in which the relief of specific performance had itself become impossible.

7. On the first question, as to the readiness of the Respondent to perform his obligations, the High Court noticed that on 30th January, 1974 even before institution of the suit Respondent and his brother had sold another property belonging to them for a price of Rs. 30,000 and that Respondent had the necessary wherewithal to perform his part of the bargain. The High Court held:

   "...Thus, the plaintiff admittedly had received Rs. 15,000/- on 30.1. 1974 and soon thereafter the first notice was issued to the defendant asking him to indicate a date for executing the saledeed and also expressing his readiness and willingness. There is no evidence on the record that between 30.1.1974 and the date of suit or thereafter the plaintiff had parted with this money."

   The High Court also noticed that the two notices dated 23.3. 1974 and 6.5. 1975 respectively issued by the Respondent to the Appellant before the suit contained the averments that he was ready and willing to perform the contract. The notices were, no doubt, not actually served on the appellant as they had come back unserved upon the alleged refusal by the appellant to accept them. The High Court relied upon the averments in the notices which could be treated as a part to the plaint having been referred to and relied upon therein.

8. In our opinion, the High Court was right in its view. The notices must be presumed to have been served as contemplated by Section 27 of the General .Clauses Act. As to the jurisdiction of the High Court to reappreciate evidence in a second appeal it is to be observed that where the findings by the Court of facts is vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter, the High Court is not precluded from recording proper findings. We find no substance in the first contention.

9. The second contention is, however, not without its interesting aspects. During the pendency of the second appeal, the properties were acquired by the State for a public purpose. This is

not disputed. It would appear that a compensation of Rs. 4 lakhs or thereabouts has been determined. That sum, along with the generous solatium and the rates of interest provided by the statute would now be a much larger amount. Before the High Court, Appellant sought to rely upon the decision of this Court in Piarey Lal v. Hori Lal, [1977] 2 S.C.R. 915. That was a case where in proceedings of consolidation the subject-matter of an agreement to sell was allotted to a person other than the vendor, the relief of specific performance was held not to survive. The High Court rightly held that pronouncement was distinguishable and inapplicable to the present controversy. As to the relief available to a plaintiff where the subject matter was acquired during the pendency of a suit for specific-performance the High Court said:

"...The learned counsel for the respondent has vehemently urged that after the land has been acquired its corpus has ceased to exist and no decree for specific performance can now be granted. In my opinion with the acquisition of)the land plaintiffs rights do not get extinguished in totality. The appellate court always suitably mould the relief which the circumstances of the case may require or permit. The power in this regard is ample and wide enough...

However, in the present case the property has not been totally lost. What happens in the case of the acquisition is that for the property compensation payable in lieu there of is substituted..."

The High Court issued these consequential directions:

"If the decree for specific performance of contract in question is found incapable of being executed due to acquisition of subject land, the decree shall stand suitably substituted by a decree for realisation of compensation payable in lieu thereof as may be or have been determined under the relevant Act and the plaintiff shall have a right to recover such compensation together with solatium and interest due thereon. The plaintiff shall have a right to recover it from the defendant if the defendant has already realised these amounts and in that event' ;the defendant shall be further liable to pay interest at the rate of twelve per cent from the date of realisation by him to the date of payment on the entire amount realised in respect of the disputed land."

We are afraid the approach of the High Court is perhaps somewhat an over-simplification of an otherwise difficult area of law as to the nature of relief available to a plaintiff where the contract becomes impossible of specific performance and where there is no alternative prayer for compensation in lieu or substitution of specific performance. While the solution that has commended itself to the High Court might appear essentially just or equitable, there are certain problems both of procedure and of substance in the administration of the law of specific relief particularly in the area of award of an alternative relief in lieu or substitute of specific performance that require and compel consideration, especially in view of some pronouncements of the High Courts which have not perceived with precision, the nice distinctions between this branch of the law as administered in England and in India.

10. Section 21 of the Specific Relief Act, 1963 corresponding to Section 19 of 1877 Act enables the plaintiff in a suit for specific performance also to claim compensation for its breach either in addition to or in substitution of, such performance. Sub-sections (2), (4) and (5) of Section 21 are material and they provide:

"(2). If, in any such suit, the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant,

and that the plaintiff is entitled to compensation for that breach, it shall award his such compensation accordingly.

(3) [Omitted as unnecessary.]

(4) In determining the amount of any compensation awarded under this section, the Court shall be guided by the principles specified in Section 73 of the Indian Contract Act, 1872, 9 of 1872.

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:

Provided that where the plaintiff has not claimed any such compensation in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation. Explanation-The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section." (emphasis added)

So far as the proviso to sub-section (5) is concerned, two positions must be kept clearly distinguished. If the amendment relates to the relief of compensation in lieu of or in addition to specific performance where the plaintiff has not abandoned his relief of specific-performance the court will allow the amendment at any stage of the proceeding. That is a claim for compensation failing under Secion 21 of the Specific Relief Act, 1963 and the amendment is one under the proviso to sub-section (5). But different and less liberal standards apply if what is sought by the amend¬ment is the Conversion of a suit for specific performance into one for damages for breach of contract in which case Section 73 of the Contract Act is invoked. This amendment is under the discipline of Rule 17 Order 6, C.P.C. The fact that sub-section (4), in turn, invokes Section 73 of the Indian Contract Act for the principles of quantification and assessment of compensation does not obliterate this distinction.

The provisions of Section 21 seem to resolve certain divergencies of judicial opinion in the High Courts on some aspects of the jurisdiction to award of compensation. Subsection (5) seeks to set at rest the divergence of judicial opinion between High Courts whether a specific claim in the plaint is necessary to grant the compensation. In England Lord Cairn's (Chancery Amendment) Act, 1858 sought to confer jurisdiction upon the Equity Courts to award damages in substitution or in addition to specific performance. This became necessary in view of the earlier dichotomy in the jurisdiction between common law and Equity Courts in the matter of choice of the nature of remedies for breach. In common law the remedy for breach of a contract was damages. The Equity Court innovated the remedy of specific performance because the remedy of damages was found to be an inadequate remedy. Lord Cairn's Act, 1858 conferred jurisdiction upon the Equity Courts to award damages also so that both the reliefs could be administered by one court. Section 2 of the Act provided:

"In all cases in which the Court of Chancery has jurisdiction to entertain an application for specific performance of any covenant, contract or agreement it shall be lawful for the same Court if it shall think fit to award damages to the party injured either in addition to or in substitution for such specific performance and such damages may be assessed as the Court shall direct."

This is the historical background to the provisions of Section 21 of the Specific Relief Act, 1963 and its predecessor in Section 19 of the 1877 Act.

11. In Mohamad Abdul Jabbar & Others v. Lalmia &Others. A.I.R (34) 1947 Nagpur 254 specific performance of an agreement of sale dated 16th January, 1934, was sought by the institution of a suit on 15th January, 1937. During the pendency of the suit, on 20th April, 1937, the provincial Government started land acquisition proceedings respecting the subject-matter of the suit and the same was acquired. The High Court upheld the dismissal of the suit for specific performance and referred an amendment for award of damages. On the obvious impermissibility of specific performance the Nagpur High Court said:

"We accordingly conclude that specific performance is now impossible and we cannot decree it for "equity like nature does nothing in vain." We cannot hold the plaintiffs-appellants entitled to the compensation money into which the property was converted because they had no right or interest in that property...." Refusing the amendment for the relief for payment of money the High Court held: "We would not allow amendment also because on the facts found by the trial Court (with which we see no reason, whatever, to differ) we would have refused specific performance, and the claim for damages on this account would also have been negatived because damages could have been awarded only if specific performance could rightly have been claimed. The appeal, therefore, fails and is dismissed with costs."

llmo Support for these conclusions was sought from the oft quoted, but perhaps a little misunderstood, case of Ardeshir H. Mama v. Flora Sassoon A.I.R. 1928 Privy Council 208. The passage in Sassoon's case relied upon by the Nagpur High Court is this:

"In a series of decisions it was consistently held that just as its power to give damages additional was to be exercised in a suit in which the Court had granted specific performance, so the power to give damages as an alternative to specific performance did not extend to a case in which the plaintiff had debarred himself from claiming that form of relief, nor to a case in which that relief had become impossible.

The case of 52 Bombay 597 fell within the first category of cases described above under the alternative relief of damages. This case fails within the second part where the relief of specific performance has become impossible." (emphasis supplied)

The second part of the observation of the Nagpur High Court, with great respect to the learned Judges proceeds on a fallacy resulting from the non-perception of the specific departure in the Indian law. In Lord Cairn's Act. 1858 damages could not be awarded when the contract had, for whatever reason, become incapable of specific performance. But under the Indian law the explanation makes a specific departure and the jurisdiction to award damages remains unaffected by the fact that without any fault of the plaintiff, the contract becomes incapable of specific performance. Indeed, Sassoon's case is not susceptible of the import attributed to it by the Nagpur High Court. Sassoon's case itself indicated the departure made in Indian Law by the Explanation in Section 19 of the 1877 Act, which is the same as the Explanation to Section 21 of the 1963 Act. The Judicial Committee, no doubt, said that Section 19 of the 1877 Act "embodies the same principle as Lord Cairn's Act and does not, any more than did the English Statute enable the court in a specific performance suit to award 'compensation for its breach' where at the hearing the plaintiff debarred himself by his own action from asking for a specific decree"', But what was overlooked was this observation of Lord Blanesburgh, "except as the

case provided for in the explanation us 10 which there is introduced an express divergence from Lord Cairn's Act as expanded in England" (emphasis supplied)

Indeed the following illustration of the Explanation appended to Section 19 of Specific Relief Act, 1877 makes the position clear" "Of the Explanation-A, a purchaser, sues B, his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit the patent expires. The Court may award A compensation for the non--performance of the contract, and may, if necessary, amend the plaint for that purpose When the plaintiff by his option has made specific performance impossible, Section 21 does not entitle him to seek damages. That position is common to both Section 2 of Lord Cairn's Act, 1858 and Section 21 of the Specific Relief Act, 1963. But in Indian Law where the contract, for no fault of the plaintiff, becomes impossible of per¬formance section 21 enables award of compensation in lieu and substitution of specific performance. We, therefore, hold that the second contention of Sri Manoj Swarup is not substantial either.

12. Learned counsel were not specific on the point whether the Respondent had actually asked for compensation in lieu of specific performance. We may assume that it was not so specifically sought. In order that formality in this behalf be completed, we permit the amendment here and now so that complete justice is done.

13. The measure of the compensation is by the standards of Section 73 of the Indian Contract. Here again the English Rule in Bain v. Fothergill, (1874) L.R. 7 House of Lords 158 that the purchaser, on breach of the ,contract, cannot recover, for the loss of his bargain is not applicable. In Pollock & Mulla on Contract (10th Edn.) the law on the matter is set out thus :

"Where, therefore, a purchaser of land claims damages for the loss of his bargain, the question to be decided is whether the damages alleged to have been caused to him 'naturally arose in the Usual course of things from such breach'; and in an ordinary case it would be difficult to hold otherwise." [p. 663] Learned Authors adopt the following observation of Farran C.J. in Nagardas v. Ahmedkhan, (1895) 21 Bom. 175 :

"The Legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities"

In the present case there is no difficulty in assessing the quantum of the compensation. That is ascertainable with reference to the determination of the market value in the land acquisition proceedings. The compensation awarded may safely be taken to be the measure of damages subject, of course, to the deduction therefrom of money value of the services, time and energy expended by the appellant in pursuing the claims of compensation and the expenditure incurred by him in the litigation culminating in the award.

14. We accordingly confirm the finding of the High Court that Respondent was willing and ready to perform the contract and that it was the Appellant who was in breach. However, in substitution of the decree for specific performance, we make a decree for compensation, equivalent to the amount of the land acquisition compensation awarded for the suit lands together with solatium and accrued interest, less a sum of Rs.1,50,000 (one lakh fifty thousand only) which, by a rough and ready estimate, we quantify as the amount to be paid to the appellant in respect of his services, time and money expended in pursuing the legal-claims for compensation.

15. We may here notice one other submission of Sri Manoj Swarup. He found fault with the operative part of the judgment of the High Court, Which, according to Sri Manoj Swarup, had not even provided for the payment to the appellant of Rs. 15,000 the stipulated consideration for reconveyance. There is this apparent omission in the operative part of the High Court's judgment. But this is only a technicality. The operative part granting relief should be read with the relevant prayers in the plaint itself. But that is not of any practical significance here in as much as we have also taken this amount of Rs. 15,000 into account in somewhat generously quantifying the litigation-expenses at Rs. 1,50,000 as payable to the appellant out of the sums awarded for the acquisition. Therefore, there is no need for Respondent to pay the sum of Rs. 15,000 additionally.

16. In the result there will be a decree awarding 10 the Respondent compensation in lieu and substitution of one for specific performance which but for the acquisition Respondent would have been entitled to the quantum and the measure of the compensation being take entire amount of compensation determined for take acquisition of the suit. properties to gather with all the solatium, accrued interest and all other payments under the law authorising the acquisition, less a sum of Rs. 1,50,000 (Rupees one lakh fifty thousand only) which shall go to the Appellant towards his services, time and amounts spent in pursuing the claims for compensation as well as the consideration stipulated for reconveyance

    The sum of Rs.1,50,000 is allowed to be.. paid to the Appellant on his assurance that he has not received any part of the compensation earlier. If any amount has been received by the Appellant out of compensation awarded for the acquisition, such sums shall go in reduction of the sum of Rs.1,50,000, the difference being for the benefit of and be paid to the Respondent additionally.

    This order shall be sufficient authority for the land acquistion authorities or the Courts wherever the matter may be pending for the apportionment and payment of the compensation for the acquisition of the suit property between the Appellant and the Respondent in the manner indicated above. These directions shall, of course, not affect or prejudice the claim of other claimants, if any, whose claims are to be determined in the said land acquistion proceedings, the assumption implicit in this apportionment being. that there are no other claimants in the land acquisition proceedings. If such apportionment and withdrawal is not possible, the decree in terms of this judgment shall be worked out in execution proceedings. The decree under appeal is modified accordingly. No costs.

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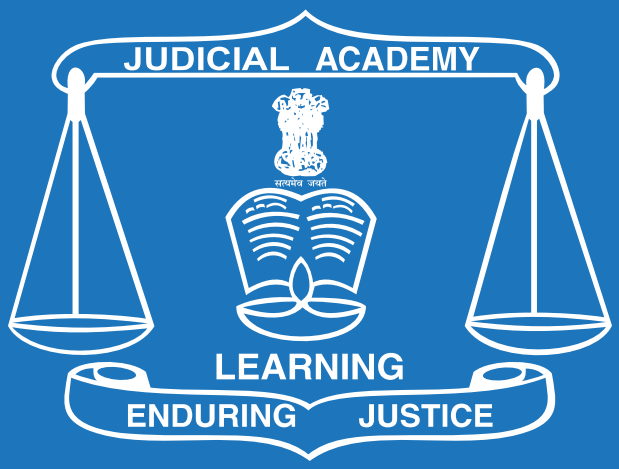

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