THE LAW RELATING TO
THE OFFENCE
UNDER SECTION 138,
NEGOTIABLE INSTRUMENTS ACT

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INTRODUCTION

The Negotiable Instruments Act, 1881 (hereinafter called N.I. Act) was originally drafted in 1866 by the 3rd Indian Law Commission and introduced in December, 1867 in the Council and it was referred to a Select Committee. Objections were raised by the mercantile community to the numerous deviations from the English Law, which it contained. The Bill had to be redrafted in 1877. After the lapse of a substantial period of time due to criticism by the Local Governments, the High Courts and the Chambers of Commerce, the Bill was revised by a Select Committee. Inspite of this, the Bill could not reach the final stage. In 1880 by the Order of the Secretary of State, the Bill had to be referred to a new Law Commission. On the recommendation of the new Law Commission the Bill was redrafted and again it was sent to a Select Committee which adopted most of the additions recommended by the new Law Commission. The draft thus prepared for the fourth time was introduced in the Council and was passed into law in 1881 being the Negotiable Instruments Act, 1881 (Act No.26 of 1881).

The Act was enacted as an attempt to consolidate the law relating to promissory notes, bills of exchange and cheques. The main object of the Act was to legalize the system by which instruments contemplated by it could pass from hand to hand by negotiation like any other goods. Another purpose of the Act was to encourage the culture of use of cheques and enhancing the credibility of the instrument.

Following a century of the enactment of the N.I. Act, Sections 138 to 142, Chapter XVII, were inserted in the Act *vide* Section 4 of the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988, (Act 66 of 1988). These sections came into force w.e.f. 29.3.1989.

WHAT IS A CHEQUE?

This article is concerned with the offence under section 138, N.I. Act and, hence, it would be a redundant exercise to go into other negotiable instruments besides cheques.

To understand the offence under section 138, N.I. Act, one must first understand what a cheque is.

Section 6 of the N.I. Act defines a cheque as a bill of exchange drawn on a specified banker and not expressed to be payable otherwise then on demand and it includes the electronic image of a truncated cheque and a cheque in electronic form.

Explanation I: For the purpose of this section the expression

a) a cheque in the electronic form means a cheque which contains the exact mirror image of a bearer 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.

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.

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 recognized as such by the Reserve Bank of India.

INGREDIENTS OF THE OFFENCE UNDER SECTION 138, N.I. ACT

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

1. Drawing of the cheque.

2. Presentation of the cheque to the bank.

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

4. Issuance of notice in writing to the drawer of the cheque demanding payment of the cheque amount.

5. Failure of the drawer to make the payment within 15 days of receipt of the notice.

TIME FRAMES IN RESPECT OF THE OFFENCE UNDER SECTION 138, N.I. ACT

a) The cheque has to be presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. [Sec. 138 proviso (a)]. The Reserve Bank of India vide Notification No, DBOD.AML BC.No.47/14.01.001/2011-12 has made the period of validity of a cheque to be three months now. Hence, as of now, the cheque has to be presented within three months from the date on which it was drawn.

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

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

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

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

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

In the case of **Saketh India Ltd. v. Indian Securities Ltd.** reported in **(1999) 3 SCC 1**, it was held by the Supreme Court that ordinarily in computing time, the rule observed is to exclude the first day and to include the last, and the period of one month will be reckoned from the day immediately following the day on which the period of 15 days from the date of receipt of notice by the drawer expires. The 15th day is to be excluded for counting the period of one month. The month employed in the Act has not been defined anywhere in the N.I. Act and the same means a British Calender Month and not lunar month, by following the definition given in Sec. 3 (35) of the General Clauses Act meaning thereby that a month means only a period of 30 days.

Saketh India Ltd. (supra) was taken up for reconstruction in **Econ Antri Ltd. v. Rom Industries** reported in **AIR 2013 SC 3283.** The Supreme Court affirmed the judgment in **Saketh India Ltd. (supra)** by holding that for the purpose of calculating the period of one month which is prescribed under Section 142(b) of the N.I. Act, the period has to be reckoned by excluding the date on which the cause of action arose.

For computing the period of limitation, one has to consider the date of filing of the complaint or initiation of criminal proceedings and not the date of taking cognizance by the Magistrate. **[Indra Kr. Patodia v. Reliance Industries Ltd.** reported in **AIR 2013 SC 426**]

STATUS OF PREMATURE COMPLAINT

A question may arise as to what happens if a complaint is filed before the expiry of 15 days from the date of service of the notice on the drawer.

In this regard, the Supreme Court of India has in the case of **Yogendra Pratap Singh v Savitri Pandey** reported in **(2014) 10 SCC 713** held as follows:

> "A complaint filed before 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. A conjoint reading of Section 138, which defines as to when and under what circumstances an offence can be said to have been committed, with Section 142(b) of the N.I. Act, that reiterates the position of the point of time when the cause of action has arisen, leaves no manner of doubt that no offence can be said to have been committed unless and until the period of 15 days, as prescribed Under Clause (c) of the proviso to Section 138, has, in fact, elapsed. Therefore, a Court is barred in law from taking cognizance of such complaint."

SUCCESSIVE PRESENTATION OF CHEQUES FOR ENCASHMENT

In **Sadanandan Bhadran v. Madhavan Sunil Kumar: (1998) 6 SCC 514,** the Supreme Court observed that there can be only one cause of action under Section 142(b), N.I. Act. Section 142 gives cause of action a restrictive meaning, in that, it refers to only one fact which will give rise to the cause of action and that is the failure to make the payment within 15 days from the date of the receipt of the notice. Consequent upon the failure of the drawer to pay the money within the period of 15 days as envisaged under clause (a) of the proviso to Section 138, the liability of the drawer for being prosecuted for the offence he has committed arises, and the period of one month for filing the complaint under section 142 is to be reckoned accordingly. Thus, once cause of action has arisen, the payee or the holder in due course cannot submit the cheque for encashment yet again to create a fresh cause of action. The reason for it is very simple. 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. 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 (a) 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.

However, **Sadanandan Bhadran (supra)** has since been over-ruled in **MSR Leathers v. S. Palaniappan** reported in **AIR 2014 SC 642.**

As of now, a payee or the holder in due course has a right to present the cheque as many number of times for encashment within a period of six months or within its validity period, whichever is earlier. A prosecution based on second or successive dishonor of the cheque is also permissible so long as it satisfies the requirements stipulated under the proviso to Section 138 of the N.I. Act.

CONDONATION OF DELAY-WHETHER THE ACCUSED HAS A RIGHT TO BE HEARD?

It is an established principle of law that at the pre-summoning stage, the accused persons have no right to be heard. After all, the court has not yet decided to proceed against them. The judgment of the Supreme Court in the case of **Chandra Deo Singh v. Prakash Chandra Bose and Anr** reported in **AIR 1963 SC 1340** is very clear on it. In fact, the Supreme Court has held in unequivocal terms that "he (the accused) has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so"

Coming to the issue of condonation of delay, it is true that a court has been given the discretion to condone the delay in preferring the complaint beyond the period prescribed under section 142(b) of the N.I. Act. But that discretion will have to be exercised judiciously. The principles of natural justice also will have to be followed in exercising the discretion by the Court.

Though the accused is out of picture at the pre-summoning stage, an indefeasible right of the accused is found incorporated under section 142(b) of N.I. Act. After all, the Court, exercising its discretion under the proviso to the aforesaid provision of law, is empowered to make a dent in such a right of the accused by extending the period of limitation, on satisfying itself of the reasons assigned by the complainant. The complainant cannot file an application seeking condonation and submit that the accused has no say in the matter, as he has not been summoned on taking cognizance of the case. The order passed by the court condoning the delay will definitely affect the interest of the accused. No order can be passed unless the party who is going to be affected by such an order is afforded sufficient opportunity to air his views on the reasons assigned by the complainant. It is not a matter between the complainant and the court but it is a question of deciding the valuable right of the accused who cannot be shut out from such proceedings. Therefore, the discretion of the court to condone such delay can be exercised only after affording an opportunity to the accused to contest the reasons assigned by the complainant.

In **P.K. Choudhury v. Commander, 48 BRTF (GREF), (2008) 13 SCC 229,** the Supreme Court relying upon **State of Maharashtra v. Sharadchandra Vinayak Dongre [(1995) 1 SCC 42** made it unequivocally clear that for condoning delay in filing a complaint beyond the period of limitation, natural justice warrants notice to the accused so as to grant him an opportunity to show that the delay should not be condoned.

DEMAND NOTICE

The object of the notice required to be given under section 138 (b) of N.I. Act is to give a chance to the drawer of the cheque to rectify his omission and also to protect an honest drawer. It is pertinent to mention here that no form of notice has been statutorily prescribed. That being said, the notice must be in writing and it must be issued within 30 days of receipt of information from the bank, regarding return of the cheque as unpaid.

It is worth adding here that while calculating the period of 30 days, the date of receipt of information from the bank has to be excluded.

In **K. Bhaskaran v. Sankaran** reported in **(1999) 7 SCC 510,** the Supreme Court has pointed out that 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 of the correct address.

In **Dalmia Cement (Bharat) Ltd. v. M/s. Galaxy Traders** reported in **AIR 2001 SC 676,** the Supreme Court held that to constitute an offence under section 138 N.I. Act, the complainant is obliged to prove its ingredients which includes the receipt of notice by the accused under Clause (b). It is to be kept in mind that it is not the 'giving' of the notice which makes the offence but it is the 'receipt' of the notice by the drawer which gives the cause of action to the complainant to file the complaint within the statutory period.

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

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

> "According to Section 114 of the (Evidence) Act, read with illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would

have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the G.C. Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Act is extracted below:

> 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 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.

Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that the notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business."

In **C.C. Alavi Haji (supra),** the Supreme Court further held that a person who does not pay within 15 (fifteen) days of receipt of the summons along with the copy of the complaint

under section 138 of the N.I. Act, cannot obviously contend that there was no proper service of notice as required under section 138 of the Act.

Issuance of Second Demand Notice

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

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

Drawer's Liability Discharged on Payment of Cheque Amount on Receipt of Notice

In **Central Bank of India & Anr. v. M/s. Saxons Farms & Ors., JT (1999) 8 SC 58**, it has been held that the object of the notice is to give a chance to the drawer of the cheque to rectify his omission. If in the notice, a demand for compensation, interest, cost etc. is also made, the drawer will be absolved from his liability under section 138 if he makes the payment of only the amount covered by the cheque of which he was aware within 15 days from the date of receipt of the notice or before the complaint is filed.

Contents of Demand Notice

In **Suman Sethi v. Ajay K. Churiwal and Another, (2000)2 SCC 380**, it has been pointed out that it is a well settled principle of law that the notice has to be read as a whole. In the notice, demand has to be made for the "said amount" i.e. cheque amount. If no such demand is made, the notice no doubt would fall short of its legal requirement. But where in addition to "said amount", there is also a claim by way of interest, cost etc. whether the notice is bad or not would depend on the language of the notice. If in a notice while giving the breakup of the claim, the cheque amount, interest, damages etc. are separately specified, other such claims for interest, cost etc. would be superfluous and these additional

claims would be severable and will not invalidate the notice. If, however, in the notice an omnibus demand is made without specifying what was due under the dishonoured cheque, the notice might fail to meet the legal requirement and may be regarded as bad.

Can a Demand Notice be Sent by Fax or Email?

The notice under section 138 of N.I. Act is required to be served on the accused within 30 days of intimation of dishonour of cheque but no specific format for it has been prescribed. Hence, it can be issued by e-mail as well. As per section 4 of Information Technology Act, it will be recognised as valid proof of being sent in writing. At this juncture, I want to cite the judgment of the Supreme Court in **M/S. Sil Import, Usa vs M/S. Exim Aides Silk Exporters** reported in **AIR 1999 SC 1609** wherein the Supreme Court held:

> "Chapter XVII of the Act, containing Sections 138 to 142, was inserted in the Act as per Banking Public Financial Institution and Negotiable Instruments Laws (Amendment) Act, 1988. When the Legislature contemplated that notice in writing should be given to the drawer of the cheque, the Legislature must be presumed to have been aware of the modern devices and equipment already in vogue and also in store for future. If the court were to interpret the words giving notice in writing in the section as restricted to the customary mode of sending notice through postal service or even by personal delivery, the interpretative process would fail to cope up with the change of time.
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> Facsimile (or Fax) is a way of sending hand-written or printed or typed materials as well as pictures by wire or radio. In the West such mode of transmission came to wide use even way back in the late 1930s. By 1954 International News Service began to use Facsimile quite extensively. Technological advancement like Facsimile, Internet, E-mail etc. were on swift progress even before the Bill for the Amendment Act was discussed by the Parliament. So when Parliament contemplated notice in writing to be given we cannot overlook the fact that Parliament was aware of modern devices and equipment already in vogue.
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> So if the notice envisaged in clause (b) of the proviso to Section 138 was transmitted by fax it would be in compliance with the legal requirement."

Though the aforesaid judgment discusses the validity of issuance of demand notice by fax, the rationale behind it can be imported and applied to issuance of notices by emails as well.

ISSUANCE OF PROCESSES IN CASES UNDER N.I. ACT ON THE AFFIDAVIT SUBMITTED BY THE COMPLAINANT

Following the amendment to section 145 of N.I. Act, the complainant can adduce his evidence by affidavit. The question, however, is whether the statement recorded under section 200, CrPC is evidence within the meaning of section 145 of N.I. Act?

The opening line of section 145 of the N.I. Act starts with a *non obstante* clause and therein, it states, that the provisions contained therein shall prevail over any contrary provisions in the Criminal Procedure Code. Again, sections 4 (2) & 5 of the CrPC also act as saving provisions for special laws, as for instance the N.I. Act. Further, according to the statements of object and reasons for amendments in the N.I. Act, the amendments were done to shorten the preliminary inquiry.

Therefore, the logical conclusion which could possibly be arrived at is that statements under section 200, CrPC may be recorded on affidavits for cases under section 138, N.I. Act. The word "evidence" appearing in section 145 of the Act may mean, in the present context, a statement under section 200, CrPC also.

Initial Deposition on Affidavit to be Treated as Evidence under section 145, N.I. Act

Out of the many guidelines laid down in the case of **Indian Bank Association v. Union of India** reported in **AIR 2014 SC 2528,** one of the most significant ones is perhaps that the initial deposition of the complainant which is submitted on affidavit can be treated as evidence under section 145, N.I. Act. It was made clear that the affidavit filed by the complainant along with the complaint for taking cognizance of the offence is enough to be considered in evidence, both in the pre-summoning stage and the post-summoning stage. A complainant is not required to examine himself twice. The Supreme Court observed as follows.

> "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 complainant's statement on affidavit may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceedings."
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> "……..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."

Also, in **A.C. Narayanan and Anr. V. State of Maharashtra and Ors** reported in **AIR 2014 SC 630,** the Supreme Court has held that the Magistrate can rely upon the verification in the form of an affidavit filed by the complainant in support of the complaint under section 138 of the N.I. Act to issue process. The Magistrate need not call upon the complainant to remain present before the court, nor examine the complainant or his witnesses upon oath to issue process on the complaint.

Whether Inquiry under section 202, CrPC is Mandatory if the Accused Resides Beyond the Jurisdiction of the Court?

Section 202, CrPC mandates postponement of issuance of process and prescribes an inquiry if the accused resides beyond the jurisdiction of the court. However, the scope of an inquiry under section 202, CrPC in cases under section 138, N.I. Act is extremely limited. It is worth remembering here that the N.I. Act has been amended from time to time to ensure smooth functioning of business transactions and to restore the sanctity and credibility of issuance of cheques in commercial transaction by speedy trial and expedient disposal of cases under section 138 of the N.I. Act. The object of the Act cannot be ignored at the expense of the rigors of the amended provisions of Section 202, CrPC.

The provisions of Section 142 to 147 of N.I. Act lay down a special code for the trial of offences under the Chapter XVII of the N.I. Act. While considering the scope and ambit of the amended provisions of the Act, the Supreme Court in **Mandvi Co. Op. Bank Ltd. v. Nimesh B. Thakore [(2010) 2 SCC (Cri.) 1]** has held that the provisions of Section 143,

144, 145 and 147 expressly depart from and override the provisions of Criminal Procedure Code, the main body of adjective law for criminal trials. The Apex Court has held that:

> "It is not difficult to see that sections 142 to 147 lay down a kind of a special code for the trial of offences under Chapter XVII of the Negotiable Instruments Act and sections 143 to 147 were inserted in the Act by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 to do away with all the stages and processes in a regular criminal trial that normally cause inordinate delay in its conclusion and to make the trial procedure as expeditious as possible without in any way compromising on the right of the accused for a fair trial."

Section 142 of the N.I. Act underlines the procedure for taking cognizance of offences under the Act. Departing from the general rule that the criminal law can be set in motion by any person either by written complaint or oral information, the provision of section 142 of the Act mandates that the complaint under section 138 of the Act should be in writing and should be filed and signed by the payee or the holder in due course, as the case may be, before the concerned court. The exception engrafted in section 142 serves as a safeguard against false and frivolous complaints and, thus, eliminates the need to hold a preliminary enquiry contemplated by section 202 CrPC.

Moreover, unlike general trial, in a case under section 138, N.I. Act, the complainant's evidence is supported by documentary evidence of the ingredients of the offence under section 138, N.I. Act (such as the dishonoured cheque, the cheque return memo, demand notice etc.). There is, thus, no scope to refer the case for police investigation or enquiry.

That an inquiry under section 202, CrPC is not necessary can also be gauged from the guideline set forth in **Indian Bank Association v. Union of India [AIR 2014 SC 2528]** to the effect that Metropolitan Magistrate/Judicial Magistrate 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 an affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons.

In **2018 Cri LJ 3769, S.S. Binu v. State of West Bengal,** the Calcutta High Court held that in cases falling under Section 138 read with Section 141, N.I. Act, the Magistrate is not mandatorily required to comply with Section 202 (1) CrPC before issuing summons to an accused residing outside his territorial jurisdiction.

The Gauhati High Court in the case of **Mohit Dwivedi v. Jagajog, (2019) 8 GLR 224** has gone further and held that Section 202 CrPC is not applicable to case under section 138, NI Act.

Is the Evidence on Affidavit under section 145, N.I. Act a legal evidence? Does the Deponent have to Appear for Examination in Chief Again?

The Supreme Court while examining the scope of Section 145, N.I. Act 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."

DEFECTS IN THE COMPLAINT

What if the Complaint is Not Signed by the Complainant?

Indra Kumar Patodia v. Reliance Industries Ltd. [AIR 2013 SC 426]

> "….the Legislature has made it clear that wherever it required a written document to be signed, it should be mentioned specifically in the section itself, which is missing both from Section 2(d) as well as Section 142."

> "…….the complaint under section 138 of the Act without signature is maintainable when such complaint is verified by the complainant and the process is issued by the Magistrate after due verification."

Amendment of Complaint-If Permissible?

Answering the issue whether an amendment to a complaint is impermissible in law, the Supreme Court of India has held in a judgment in **S.R. Sukumar vs. S.Sunaad Raghuram** reported in **AIR 2015 SC 2757** that if the amendment sought to be made relates to a simple infirmity which is curable by means of a formal amendment and by allowing such amendment, no prejudice could be caused to the other side, notwithstanding the fact that there is no enabling provision in the Criminal Procedure Code for entertaining such amendment, the Court may permit such an amendment to be made.

WHO CAN FILE THE COMPLAINT?- AN ISSUE OF MAINTAINABILITY

At the outset, it must be understood that the cases under the N.I. Act have a distinction from other criminal cases in the fact that *locus standi* to prosecute is an essential requirement for the trial. A complaint under section 138 of the Act can be filed only by the payee of the dishonoured cheque or by the holder in due course as mandated by Section 142 of the Act. However, this requirement has been qualified with an addendum. The complaint under section 138 of the Act can be filed by the payee through his power of attorney holder/duly authorized representative as held in **Sankar Finance and Investment v. State of A.P. & Others** reported in **(2008) 8 SCC 536.**

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

Where the payee is a proprietary concern

The complaint can be filed

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

ii. the proprietary concern describing itself as a sole proprietary concern, represented by its sole proprietor; and

iii. the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor."

Where the payee is a partnership firm

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

Thus, any of the active partners can institute a complaint under section 138, N.I. Act on behalf of the partnership firm. The partnership firm can also authorize a Power of Attorney holder to prosecute a complaint on its behalf. The question of launching a valid criminal prosecution under section 138 of N.I. Act with the aid of power of attorney is no more *res integra* in view of the authoritative judgment of the Supreme Court in **A.C. Narayanan v. State of Maharashtra and Another** reported in **AIR 2014 SC 630.**

However, a question may arise as to whether a single partner can grant Power of Attorney to a representative to file a complaint. Sections 9, 12(a), 12(b), 18 and 19 of the Partnership Act, 1932 which read as under can shed some light on this matter:

> "9. General duties of partners:- Partners are bound to carry on the business on the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative.
>
> 12. The conduct of the business: Subject to contract between the partners-
>
> (a) every partner has a right to take part in the conduct of the business
>
> (b) every partner is bound to attend diligently to his duties in the conduct of the business
>
> 18. Partner to be agent of the firm:- Subject to the provisions of this Act, a partner is the agent of the firm for the purpose of the business of the firm.
>
> 19. Implied authority of partner as agent of the firm:
>
> (1) Subject to the provisions of section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.
>
> The authority of a partner to bind the firm conferred by this section is called his "implied authority".
>
> (2) In the absence fo any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to:

(a) submit a dispute relating to the business of the firm to arbitration,

(b) open a banking account on behalf of the firm in his own name,

(c) compromise or relinquish any claim or portion of a claim by the firm

(d) withdraw a suit or proceeding filed on behalf of the firm,

(e) admit any liability in a suit or proceeding against the firm

(f) acquire immovable property on behalf of the firm,

(g) transfer immovable property belonging to the firm, or

(h) enter into partnership on behalf of the firm."

Thus, it is seen that a partner of the firm has an implied authority to act on behalf of the firm. The limitations on the implied authority of a partner do not include a limitation to prosecute a complaint on behalf of the firm.

Situated thus, a single partner can also file a complaint on behalf of the firm or he may authorize a Power of Attorney holder to do so on behalf of the firm and it would not be necessary that all the partners would have to sign the Power of Attorney.

Whether a Partner of an Unregistered Firm can File a Complaint under section 138, N.I. Act?

Section 69 of the Partnership Act, deals with the effect of non-registration of a firm.

"69. EFFECT OF NON-REGISTRATION:-
(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the

persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to claim of set- off or other proceeding to enforce a right arising from contract, but shall not affect-

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realize the property of a dissolved firm; or

(b) the powers of an official assignee, receiver or Court under the Presidency-Towns Insolvency Act, 1909, (2 of 1909) or the Provincial Insolvency Act, 1920, (5 of 1920). to realize the property of an insolvent partner.

(4) This section shall not apply-

(a) to firms or to partners in firms which have no place of business in the territories to which this Act extends, or whose places of business in the said territories are situated in areas to which, by notification under section 56, this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882,(15 of 1882) or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Causes Courts Act, 1887, (9 of 1887) or to any proceeding in execution or other proceeding incidental to or arising from any suit or claim."

On bare perusal, it appears that Section 69 concentrates on the non-maintainability of suits. But the issue of complaints differs from suits. On the issue as to whether an unregistered partnership firm is entitled to maintain a complaint under section 138 of the Act, the law is not consistent as different views have been expressed by various High Courts.

However, in **Dabasree Das Baishnab vs. FI Multimedia Consultants, 2011 (1) Crimes (HC) 131**, the Gauhati High Court has held as under:

"8.....For the purpose of resolving the controversy raised in these petitions, I

feel it appropriate to refer to the provisions of Section 69(2) of the Partnership Act which reads as follows:

'No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.'

9. From a careful reading of Section 69(2) it appears that the said section prohibits institution of suits by or on behalf of an unregistered firm against a third party for enforcing the rights and liabilities arising from a contract. This Court in the case of **Indrajit Gogoi v. Auto Sales and Service Station, (2008) 3 GLR 440**, while disposing a criminal petition filed under Section 482, Cr.P.C observed as follows:

> 'More importantly, nothing contained in Section 69, prohibits prosecution, in terms of Section 138 of the Act, by an unregistered firm, of a person, who may have issued a cheque addressed to such a firm, when such a cheque is dishonoured and, upon notice of demand for payment having been received by the drawer, the drawer fails to make payment. Considering this, it is clear that there was no bar, on the part of the present unregistered firm, to institute criminal prosecution against the petitioner, as accused, for dishonour of the said cheque.'"

Thus, going by the judgment of the Gauhati High Court, it is seen that a complaint under section 138, N.I. Act filed by a partner of an unregistered firm is also maintainable.

Where the Payee is a Company

When the payee or holder in due course happens to be a company, then the question arises as to who may file the complaint. It has been held in **Dale & Carrington Investment (P) Ltd. and Another v. P.K. Prathapan and Others** reported in **(2005) 1 SCC 212** that company being an incorporeal juristic person, acts through its Board of Directors and the Board of Directors takes decisions on the activities of the company by adopting resolutions in its meetings as per the memorandum and articles of the company.

It does not require pointing out here that a single director cannot act on his own on behalf of the company. His actions require ratification from the Board. The Board of Directors of

the complainant company will have to take a resolution whereby the person who is likely to act as the *de facto* complainant would have to be granted a Power of Attorney to do so.

It is pertinent to mention here that the Power of Attorney as well as the Board Resolution will have to be adequately proved during the course of the trial or the complaint will cease to be maintainable.

Is the Certified Copy of the Board Resolution Admissible in Evidence?

Under Section 195 of the Companies Act, where minutes of the proceedings of any general meeting of the company have been kept in accordance with the provisions of section 193, then, until the contrary is proved, the meeting shall be deemed to have been duly called and held, and all proceedings there at to have duly taken place. Section 194 of the Companies Act provides that the minutes of meetings kept in accordance with the provisions of section 193 shall be evidence of the proceedings recorded therein.

However, there is no provision in the Companies Act which provides that the certified copy or extract of the minutes would be admissible in evidence without proof of the original. Section 65(f) of the Evidence Act provides that secondary evidence may be given of the existence, condition and contents of the document when the original is the document of which a certified copy is permitted by the Evidence Act or by any other law in force in India to be given in evidence.

As there is no provision in the Companies Act under which the certified copy of the minutes of the meetings of the board of directors is admissible in evidence without proof of the original, it must be said that the copy of the minutes cannot be admitted in evidence directly unless the original is proved or the copy is admitted by opposite party. Therefore, even if such a document is given an exhibit number, it cannot be treated to have been proved, unless the complainant leads appropriate evidence to prove the minutes.

Lack of Authorization is a Curable Defect

In **M.M.T.C. Ltd. and Another v. Medchl Chemicals and Pharma (P) Ltd. And Another** reported in **(2002) 1 SCC 234**, the Supreme Court has held that the only eligibility criteria prescribed by Section 142, N.I. Act for maintaining a complaint under section 138 is that the complainant must be the payee or the holder in due course. However, in case of a company, if the *de facto* complainant did not have authority in the

initial stage, still the company can, at any stage, rectify that defect at a subsequent stage, and the company can send a person who is competent to represent it.

In **Samrat Shipping Co. Pvt. Ltd. v. Dolly George** reported in **(2002) 9 SCC 455**, the Supreme Court termed the dismissal of the complaint at the threshold by the Magistrate on the ground that the individual through whom the complaint was filed had not produced the resolution of the Board of Directors of the Company authorizing him to represent the Company before the Magistrate to be not justified and termed this exercise to be "too hasty an action". A three Judge Bench of the Supreme Court in **M/S Haryana State Co.Op. Supply and Marketing Federation Ltd. v. M/S Jayam Textiles and Another** reported in **AIR 2014 SC 1926** held that the dismissal of the complaint for mere failure to produce authorization would not be proper and an opportunity ought to be granted to produce and prove the authorization.

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

A.C. Narayanan and Anr. v. State of Maharashtra and Ors reported in **AIR 2014 SC 630** has made it clear that sub delegation of functions *vis a vis* filing of a complaint is only permissible when the same is duly and explicitly mentioned in the authority granted to the delegator.

Power of Attorney Holder Must Have Personal Knowledge of the Transaction

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

SUBSTITUTION OF COMPLAINANT

The Gauhati High Court in the case of **Kushal Kumar Talukdar v. Chandra Prasad Goenka** reported in **2004 (3) GLT 465** has made it clear that there is no provision for substitution of a complainant under the CrPC, but a Magistrate has the power under section 302, CrPC to permit any one to conduct the prosecution.

DEATH OF COMPLAINANT

If in a case under Section 138, N.I. Act, the complainant dies while it is still pending in the court for adjudication, in that case, the legal heirs of the complainant can move an application under Section 302 CrPC for permission to prosecute in the case. **[Chand Devi Daga & Ors. v. Manju K. Humatani & Ors., 2017 (4) RCR (741) SC]**

TERRITORIAL JURISDICTION

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

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

Following the amendment, Section 142 (2), N.I. Act reads as follows:

> 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.

TRIAL OF CASES UNDER SECTION 138, N.I. ACT

[In View of Indian Bank Association v. Union of India (AIR 2014 SC 2528)]

1. The Metropolitan Magistrate/Judicial Magistrate, 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 an affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons.

2. Affidavit filed by the complainant along with the complaint for taking cognizance of the offence is enough to be considered in evidence, both in the pre-summoning stage and the post-summoning stage. A complainant is not required to examine himself twice.

3. The Metropolitan Magistrate/Judicial Magistrate 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 should be fixed. If the summons is received back un-served, immediate follow up action be taken.

4. 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.

5. The Court should direct the accused, when he appears to furnish a bail bond, to ensure his appearance during the 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), N.I. Act for recalling a witness for cross-examination.

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

CAN THE ACCUSED ADDUCE EVIDENCE ON AFFIDAVIT?

Section 145 of the N.I. Act provides for adducing of evidence on affidavit of the complainant. Now a question may arise as to whether the accused can also adduce evidence on affidavit? The scope of Section 145, N.I. came up for consideration before the Supreme 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. As such, the trial Magistrate cannot accord permission to the accused to adduce his evidence on affidavit.

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

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

> "Sub-section (1) of Section 143 of the N.I. Act makes it clear that all offences under Chapter XVII of the N.I. Act shall be tried by the Magistrate 'summarily' applying, as far as may be, provisions of Sections 262 to 265 of Code of Criminal Procedure. It further provides that in case of conviction in a summary trial, the Magistrate may pass a sentence of imprisonment for a term not exceeding one year and a fine exceeding Rs. 5,000/-. Sub-section (1) of Section 143 of the N.I. Act further provides that during the course of a summary trial, if the Magistrate is of the opinion that the nature of the case requires a sentence for a term exceeding one year or for any other reason, it is undesirable to try the case summarily, the Magistrate shall, after hearing the parties, record an order to that effect and thereafter recall any witness whom he had examined, or proceed to rehear the case. Sub-section (2) mandates that so far as practicable, the trial has to be conducted on a day to day basis until its conclusion.
>
> An analysis of Section 143 brings out that the Magistrate, initially, should try the case 'summarily' if he is of the opinion that he is not going to pass sentence of imprisonment not exceeding one year and fine of Rs. 5,000/- In case during the course of trial, if the Magistrate forms a different opinion that in the circumstances of the case, he may order a sentence of a term exceeding one year, or for any other reason it is undesirable to try the case summarily, he must record the reasons for doing so and go for a 'regular trial'. Thereafter, the Magistrate can also recall any witness who has been examined and proceed to hear or rehear the case. So, the second proviso to sub-section (1) of Section 143 gives discretion to the Magistrate to conduct the case other than in summary manner."

GUIDELINES AS TO COMPOUNDING OF OFFENCES

Sec. 147, N.I. Act has made the offence under section 138 compoudable. The Supreme Court of India has laid down certain guidelines as to compounding of offences in the case of **Damodar S. Prabhu v. Sayed Babalal H.** reported in **AIR 2010 SC 1907.**

a. The Writ of Summons should 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.

It is pertinent to mention here that compounding is entirely the prerogative of the complainant. However, if during the course of the trial, the accused comes forward and wants to pay the cheque amount and the complainant is not desirous of either compounding the offence under section 147, N.I. Act or withdrawing the complaint under section 257, CrPC, what happens then?

The Supreme Court of India is **M/S. Meters and Instruments Pvt. Ltd. & ANR. Vs. Kanchan Mehta. [Criminal Appeal No. 1731 of 2017**] has laid down the following principles in regards to the aforesaid scenario wherein the accused comes forward to pay the cheque amount.

i) The offence under section 138 of the Act is primarily a civil wrong. Burden of proof

is on accused in view of the 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 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 a 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.

MODE OF SERVICE OF SUMMONS ON ACCUSED (SECTION 144, N.I. ACT)

(1) Notwithstanding anything contained in the Code of Criminal Procedure and for the purposes of this Chapter, a Magistrate issuing a summon to an accused or a witness may direct a copy of summons to be served at the place where such accused or witness ordinary 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 acknowledgement purporting to be signed by the accused or the witness or an endorsement purported to be made by any person authorized by the postal department or the courier services that the accused or witness refused to take delivery of summons has been received, the Court issuing the summons may declare that the summons has been duly served.

Note : For the service of notice of summons on the accused person, summons should be sent through speed post/ registered post/ courier and its receipts should be attached to the Case Record. By resorting to the amended provision in this regard, the greatest hurdle to service of notice of summons on the accused persons may be removed. It enables the Magistrate to discard the elaborate procedure for serving summons as required by CrPC. This provision is analogous to the principle incorporated in Section 27 of the General Clauses Act, 1897. Where the sender has dispatched the summons by registered post with correct address written on it, then it can be deemed to have been served on the accused unless he proves that it was really not served.

STATUS OF ACCUSED

Only the Drawer is Liable under section 138, N.I. Act

It is only the drawer of the dishonoured cheque who can be prosecuted under section 138, N.I. Act and no one else.

So what happens if the dishonoured cheque has been issued out of a joint account and only one of the account holders has signed it. The answer is found in the case of **Aparna A. Shah v. Sheth Developers Private Limited and Another** reported in **(2013) 8 SCC 71**, wherein the Supreme Court has held that each and every joint account holder cannot be prosecuted unless he has signed the cheque.

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

What happens if a guarantor issues a cheque on behalf of the principal debtor and the same gets dishonoured? Will the guarantor be liable for prosecution under section 138, N.I. Act. The answer will have to be in the affirmative. Let me enunciate why.

Section 138, N.I. Act penalizes the dishonour of any cheque which has been issued in the discharge of the whole or part of "any debt or other liability". And the liability of the guarantor and principal debtor is co-extensive. Hence, the guarantor cannot escape liability under section 138, N.I. Act if he has issued a cheque for the discharge of the liability of the principal debtor.

The matter came up for consideration before the Gauhati High Court in the case of **Don Ayengia v. State of Assam & Another (Cri. Apl. No. 10 of 2012).** The Gauhati High Court answered the question "*Whether a person indemnifying the holder of a cheque can be said to have legally enforceable debt or other liability towards the holder of the cheque when the payer defaults in payment of the cheque amount under section 138, N.I. Act?*" in the negative. The High Court held that no person can be convicted or prosecuted in a proceeding under Section 138 of the N.I. Act, who indemnifies the principal debtor for his liability towards the complainant unless such guarantor enters into an agreement with the holder of the cheque.

However, an appeal was preferred against this judgment before the Supreme Court of India and the judgment and order of the Gauhati High Court was set aside.

The matter gets cleared up once and for all if we consider the judgment of **I.C.D.S. Ltd. v. Beena Shabbir & Anr.** reported in **AIR 2002 SC 3014.** The Supreme Court held therein

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

Offences by Companies

Sub-section (1) of Section 141 of the N.I. Act provides that if a person committing an offence under the section is a company, every person who, at the time offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Sub-section (2) of Section 141 of the N.I. Act further provides that where any offence under the N.I. Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

The offender in section 138 of the N.I. Act is the drawer of the cheque. He alone would have been the offender thereunder if the Act did not contain other provisions. It is because of section 141 of the N.I. Act that penal liability under section 138 is cast on other persons connected with the company.

Three categories of persons can be discerned from the said provision who are brought within the purview of the penal liability through the legal fiction envisaged in the section.

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

The Legislature has thought fit to provide an Explanation to Section 141 of the N.I. Act and the plain reading of the expression "company" as used in sub clause (a) of the Explanation appended to Section 141 of the N.I. Act shows that it is inclusive of any body corporate, firm or "other association of individuals".

Though the heading of Section 141 of the N.I. Act reads "offences by companies" but according to the Explanation to that Section, "company" means "any body corporate and includes a firm or other association of individuals and "director", in relation to a firm means "a partner in the firm".

It is only the drawer of the cheque, who can be held responsible for an offence under Section 138 of the N.I. Act. Section 141, however, provides for constructive liability. It postulates that a person, in charge of and responsible to the company, in the context of the business of the company, shall also be deemed guilty of the offence.

The drawer can be a company, a firm or an association of individuals, but only those directors, partners, or officers can be held responsible for the offence punishable under Section 138 of the N.I. Act who are responsible for the conduct of its business.

I want to add here that that the prosecution launched against the directors without joining the company (or against the partners of the partnership firm, without joining the partnership firm) cannot be maintainable. **Aneeta Hada v. Godfather Travels & Tours Private Limited [(2012) 5 SCC 661]** is unequivocally clear on this point.

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

Status of Nominated Directors

A question may arise as to the culpability of nominated directors of a company.

The second proviso appended to Section 141, N.I. Act provides the answer in this regard.

> "where a person is nominated as a Director of a Company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter."

Liability of a Company in respect of which Winding Up Proceedings have been Initiated

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

BURDEN OF PROOF *VIS A VIS* OFFENCE UNDER SECTION 138, N.I. ACT

It is a cardinal principle of criminal jurisprudence that it is the burden of the prosecution to prove the guilt of the accused beyond reasonable doubt. Statutory presumptions, wherever available, create an exception to this cardinal principle by shifting the burden of proof to the opposite party.

Among the notable presumptions available under the scheme of the N.I. Act, two are essential when it comes to the proof of the offence under section 138. They are available under sections 118(a) and 139 of the Act.

Section 139 of the N.I. Act has clearly spelled out a presumption as to the existence of a debt or liability in favour of the holder of a cheque.

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

Similarly, Section 118 (a), N.I. Act provides as follows:

> Presumptions as to Negotiable Instruments. —
>
> Until the contrary is proved, the following presumption shall be made:—
>
> (a) of consideration —that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

However, there has been some amount of dispute as to when the presumption under section 118 (a) and especially the one under section 139, N.I. Act start to run.

In the case of **Angelus Topno v. Shree Kanta Sharma** reported in **(2016) 5 GLR 242,** the Gauhati High Court has held that the presumption is not for a legally enforceable debt or liability and the burden for proof of the same lies on the complainant.

However, in **Angelus Topno (supra)**, the Gauhati High Court has relied on the judgment of the Supreme Court in the case of **Krishna Janardhan Bhat v. Dattatraya G. Hegde** reported in **(2008) 4 SCC 54.**

But the Supreme Court in the case of **Rangappa v. Sri Mohan** reported in **(2010) 11 SCC 441** has made it clear 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 (supra)** may not be correct."

Thus, it is clear that the presumption under section 139 of the Act covers a legally enforceable debt or liability.

The law as it stands now after **Rangappa (supra)** is that once the issuance of the cheque is admitted or proved, the trial court is duty bound to raise the presumption that the dishonoured cheque placed before it was indeed issued in discharge of a legally enforceable debt or liability of the amount mentioned therein.

That being said, let me also point out that the presumption is a rebuttable one; it is up to the accused to prove that the cheque in question had not been issued in discharge of a legally enforceable debt or liability.

Now, the question arises as to how the accused shall discharge this burden.

It has been held in **Hiten P Dalal v. Bratindranath Banerjee** reported in **(2001) 6 SCC 16** that a mere plausible explanation given by the accused is not enough to rebut the presumption and the accused has to necessarily disprove the prosecution case by leading cogent evidence that he had no debt or liability to issue the said cheque.

The Supreme Court in the case of **Rangappa (supra)** has further clarified the issues in the following terms:

> "Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption

> under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard of proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of `preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.

Thus, it appears that the prosecution can fail if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability. And it is not necessary for the accused to take the witness stand in his favour. He can rely upon the prosecution evidence in order to raise his defence.

I want to add here that the accused is not expected to rebut the presumption beyond all reasonable doubt. The standard of disproof is only on the level of preponderance of probabilities. The nature of burden of proof has been succinctly laid down by the Supreme Court in **M.S. Narayana Menon v. State of Kerala and Another** reported in **AIR 2006 SC 3366,** wherein the Supreme Court held that the initial burden is upon the accused to rebut the presumption under section 139 of the Act. Only in the event of discharging the said initial burden, the onus shifts to the complainant.

<u>The Issue of Financial Competence of Complainant</u>

In **John K. Abraham v. Simon C. Abraham & Anr.** reported in **(2014) 2 SCC 236,** the Supreme Court has observed in Paragraph 9 that in order to draw the presumption under

sections 118 and 139 of the Act, the burden is cast heavily upon the complainant to show that he had the requisite funds for advancing the money to the accused.

In **Basalingappa vs. Muudibasappa (Criminal Appeal No. 636 of 2019)**, the Supreme Court observed that a complainant in a cheque bounce case is bound to explain his financial capacity, when the same is questioned by the accused, by leading evidence to that effect.

However, **Rangappa (supra)** would prevail over both **John K. Abraham (supra)** and **Basalingappa (supra)** in so much so that it as it has been decided by a full bench as opposed to **John K. Abraham (supra)** and **Basalingappa (supra)** which have been decided by division benches. Moreover, **Rangappa (supra)** has extensively discussed the issues of presumption and how it comes to play *vis a vis* a dishonoured cheque.

Furthermore, the observations in **John K. Abraham (supra)** and **Basalingappa (supra)** are more in the domain of *obiter* being guided by the peculiar factual matrices of those cases.

> [*In **John K. Abraham (supra)**, it was the claim of the complainant that the source for advancing the sum of Rs.1,50,000/- to the accused was from the sale of his portion of his family property and a loan taken from the co-operative society. The complainant also told the trial court that he would be able to produce the documents in support of his stand but he failed to do so. There were also contradictory pleas as to who wrote the contents of the cheque. It was only on consideration of such factual lacunae in the case of the complainant that the Supreme Court set aside the judgment of the High Court and upheld the one of the trial court.*
>
> *In the case of **Basalingappa (supra),** apart from loan of Rs.6,00,000/- given to the accused, within 2 years, an amount of Rs.18,00,000/- had been given out by the complainant to different persons. His financial capacity was directly questioned by the defence in his cross-examination (as he was retired State Govt. employee who had enchased only Rs. 8,00,000/- in post retirement benefits) and he failed to give a satisfactory answer to it . So it was held that it was incumbent on the complainant to have explained his financial capacity.]*

Thus, if all the aforementioned judgments cited above are read conjointly, a clearer picture emerges. If the defence brings on record credible material challenging the financial competence of the complainant, only then the complainant would have to discharge the burden of proving his financial competence else the presumption under section 139 will fail.

Otherwise, a mere suggestion or question on the financial competence of the complainant will not suffice in rebutting the presumption under section 139, the burden of which remains on the defence.

Before concluding, I find it relevant to cite the case of **Rohitbhai Jivanlal Patel v. State of Gujarat** reported in **2019 (5) SCALE 138** In this case, even after purportedly drawing the presumption under Section 139 of the N.I. Act, the trial court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. The Supreme Court observed that this approach of the trial court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused-appellant.

Another issue that requires clarity is whether the complainant has to specify that the accused had a legally enforceable debt or liability towards him. In other words, does the failure of the complainant to mention the existence of a legally enforceable debt or liability vitiate the case of the prosecution?

In the case of **Ghanashyam Das v. Madhab Ch. Das & Anr.** reported in **(2018) 3 GLR 664,** the Gauhati High Court had held therein that presumption under section 139 of the Act does not come into the picture if the complainant does not mention that the dishonoured cheque had been issued in the discharge of a legally enforceable debt or liability. However, in the case of **M.M.T.C. Ltd. & Anr. v Medchl Chemicals and Pharma (P) Ltd. & Anr.** reported in **(2002) 1 SCC 234**, the Supreme Court has already held that there is no requirement under the law that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability is on the accused.

The Plea of Security Cheque

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

In the case of **I.C.D.S. Ltd. v. Beena Shabbir & Anr.** reported in **AIR 2002 SC 3014,** the Supreme Court has observed as follows.

> ".....The commencement of the Section stands with the words "where any cheque". The above noted three words are of extreme significance, in particular, by reason of the user of the word "any" the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well...."

Thus, even if the dishonoured cheque in question was issued as a security cheque, it will still come under the ambit of Section 138 of the Act. The only condition is that the cheque must be backed by some form of legally enforceable debt or liability towards the holder.

Moreover, unless and until, the defence is able to prove that the cheque was never meant to be presented for encashment, a mere claim to that effect does not rebut the presumption under section 118 (a) of the Act that every negotiable instrument is made or drawn for consideration.

Issuance of a Blank Cheque and its Repercussions

What happens when the drawer of the cheque takes the plea that he had only issued a blank cheque and it was the complainant who filled up the contents thereof?

It is pertinent to mention here that each case has to be adjudicated upon in the light of the facts and circumstances peculiar to it. There is no hard and fast generic rule that can be

ascribed to the dishonour of such blank cheques. However, let me point out here that under section 20 of the N.I. Act, it is perfectly possible for the drawer of a cheque to give a blank cheque signed by him to the payee and consent either impliedly or expressly to the said cheque being filled up at a subsequent point in time and presented for payment by the payee. Therefore, as long as the cheque has been signed by the drawer, the fact that the name and figures are written or the date filled up by the complainant is not a material alteration for the purposes of section 87 of the Act. The only requirement is that the cheque must be backed by a legally enforceable debt or liability.

The issue has since been given the status of law by the Supreme Court of India in the case of **Bir Singh vs. Mukesh Kumar (Criminal Appeal No. 230-231 of 2019).** The Supreme Court has held as follows.

> "If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted."

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

In **Indus Airways Pvt. Ltd & Ors v. Magnum Aviation Pvt. Ltd & Anr** reported in **2014 (2) Crimes (SC) 105,** the Supreme Court has held that where payment was made by cheque in the nature of advance payment, it indicates that at the time of drawal of cheque, there was no existing liability and as such no offence was made out. In a recent judgment [**Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Limited** reported in **(2016) 10 SCC 458],** the Supreme Court has had the

occasion to analyze the judgment of **Indus Airways (supra).** The Supreme Court has made it abundantly clear that the culpability under section 138 of the Act is extinguished only when the dishonoured cheque was issued for the purpose of an advance payment.

INSUFFICIENCY OF FUNDS- NOT THE ONLY GROUND OF DISHONOUR COVERED BY SEC. 138

The Supreme Court of India has in the case of **Laxmi Dychem v. State of Gujarat and Ors.** reported in **(2012) 13 SCC 375** made it categorically clear that the expression "amount of money.....is insufficient" appearing in Section 138, N.I. Act is a genus and dishonour for reasons such as "account closed", "payment stopped", "referred to the drawer" are only species of that genus and would attract penal liability under section 138, N.I. Act.

BANK SLIPS AND MEMO *PRIMA FACIE* EVIDENCE

In light of Section 146, N.I. Act, a trial court shall presume the fact of dishonour of a cheque on the grounds mentioned in the bank slip or return memo having official marks on production of the same.

CHEQUE HAS TO BE PRESENTED IN THE DRAWEE BANK WITHIN THE PRESCRIBED PERIOD

Shri Ishar Alloy Steels Ltd. v. **Jayaswals NECO Ltd. [AIR 2001 SC 1161]**

The payee of the cheque has the option to present the cheque in any bank including the collecting bank where he has his account but to attract the criminal liability of the drawer of the cheque such collecting bank is obliged to present the cheque in the drawee bank on which the cheque is drawn within the period of six months (now it is three months) from the date on which it is shown to have been issued.

The 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 N.I. Act.

WHETHER CONVICTION UNDER SECTION 138 N. I. ACT ABSOLVES DRAWER OF CHEQUE FROM CIVIL LIABILITY?

It is the settled position of law that if an act of a person accrues to him both criminal and civil liability, he would be liable for both. Liability in one cannot absolve him of liability from the other. Therefore, conviction in the criminal proceeding under section 138 N. I. Act will have no bearing on the decree which may be passed in the civil suit.

In the case of **Golden Menthol Export Pvt. Ltd. v. Sheba Wheels (P) Ltd.** reported in **2007 (2) GLJ 211**, the Gauhati High Court has observed in Para 9 that a proceeding under section 138 N. I. Act cannot be construed to be an alternative to a civil suit or any other proceeding for realization of the amount remaining unpaid as a debt following the dishonour of a cheque by the debtor.

Thus, taking the spirit of the aforesaid observation made by Gauhati High Court, it can be safely concluded that a conviction under section 138 N. I. Act will never absolve the drawer of the cheque from civil liability.

APPLICABILITY OF SECTION 319, CRPC *VIS A VIS* THE OFFENCE UNDER SECTION 138, N.I. ACT

Section 319, CrPC empowers a trial court to proceed against such person or persons for the offence which he or they appears or appear to have committed and issue process for the purpose.

At the outset, I would like to make it clear that there is no exception *per se* when it comes to the applicability of section 319, CrPC when it comes to the offence under section 138, N.I. Act.

That being said, I believe a recent reportable judgment of the Supreme Court in the case of **N. Harihara Krishnan v. J. Thomas (Criminal Appeal No. 1534 of 2017)** would be apposite here. The relevant portion of the judgment is reproduced below.

> "By the nature of the offence under Section 138, of The Act, the first ingredient constituting the offence is the fact that a person drew a cheque. The identity of the drawer of the cheque is necessarily required to be known to the complainant (payee) and needs investigation and would not normally be in dispute unless the person who is alleged to have drawn a cheque disputes that very fact. The other facts required to be proved for securing the punishment of the person who drew a cheque that eventually got dishonoured is that the payee of the cheque did in fact comply with each one of the steps contemplated under Section 138 of The Act before initiating prosecution. Because it is already held by this Court that failure to comply with any one of the steps contemplated under Section 138 would not provide "cause of action for prosecution". Therefore, in the context of a prosecution under Section 138, the concept of taking cognizance of the offence but not the offender is not appropriate. Unless the complaint contains all the necessary factual allegations constituting each of the ingredients of the offence under Section 138, the Court cannot take cognizance of the offence. Disclosure of the name of the person drawing the cheque is one of the factual allegations which a complaint is required to contain. Otherwise in the absence of any authority of law to investigate the offence under Section 138, there would be no person against whom a Court can proceed. There cannot be a prosecution without an accused. The offence under Section 138 is person specific. Therefore, the Parliament declared under Section 142 that the provisions dealing with taking cognizance contained in the CrPC should give way to the procedure

> prescribed under Section 142. Hence the opening of non-obstante clause under Section 142."

It is worth understanding here that Section 319, CrPC is only a device through which the trial court is empowered to take cognizance against a person who has not yet been prosecuted. Now, cognizance against the newly to be added accused has to be taken in the same manner in which cognizance was first taken of the offence against the earlier accused.

Thus, it is incumbent upon the complainant to fulfill the conditions laid down in the proviso to Section 138 N.I. Act for the new to be added accused as well prior to initiating his prosecution. The rigours of Section 138, N.I. Act cannot be bypassed to initiate prosecution. Unless and until they are fully complied with in spirit, section 319, CrPC cannot be invoked to arraign a drawer of a cheque as an accused.

> Let me illustrate. **A** files a complaint against **B** (a firm) and **C** (one of the partners) for dishonour of a cheque. The cheque was signed by **C** as well as **D** (the other partner). **D** was initially not made an accused in the case. Subsequently, during trial, **A** files a petition under section 319, CrPC for impleading **D** as an accused in the case. The petition is liable to be rejected despite the fact that **D** was also a drawer of the dishonoured cheque. This is because no notice was issued to **D** and hence no cause of action arose against him.

As held in **N. Harihara Krishnan v. J. Thomas (supra)**, the offence under section 138, N.I. Act is person specific. Hence, all the rigours laid down in the proviso to Section 138 must be fulfilled for each individual person.

LIABILITY UNDER SECTION 138, N.I. ACT FOR A TIME BARRED DEBT

Prosecution under section 138, N.I. Act is only maintainable against a legally enforceable debt. A time barred debt, however, is a not a legally enforceable debt.

In **Girdhari Lal Rathi v. P.T.V. Ramanujachari [1997 (2) Crimes 658],** the Andhra Pradesh High Court clearly held that if a cheque is issued for a time barred debt and it is dishonoured, the accused cannot be convicted under section 138 of the N.I. Act simply on the ground that the debt is not legally recoverable.

The same ratio has also been laid down by the Bombay High Court in **Ashwini Satish Bhat** reported in **(1999)1 Goa L.T. 408** and **Narendra V. Kanekar** reported in **2006 Cri.L.J. 3111** and by a single judge of the Kerala High Court in the case of **Sasseriyil Joseph** reported in **2001 Cri.L.J 24**.

Interestingly, a division bench of the Kerala High Court in **Ramakrishnan v.Parthasaradhy** reported in **2003(2) Ker L.T 613**, a single judge of the Kerala High Court in **Ramakrishnan v. Gangadharan Nair** reported in **2007 Cri.L.J. 1486** and the Karnataka High Court in **H. Narasimha Rao v. Vebkataram R.** reported in **2007 CRI.L.J. 583** have held to the contrary.

That being said, **Sasseriyil Joseph (supra)** reached the Supreme Court and the judgment was affirmed by the Apex Court. This vindicates the stand that a criminal prosecution under section 138, N.I. Act is not maintainable in respect of a time barred debt. **Ramakrishnan v.Parthasaradhy (supra)**, **Ramakrishnan v. Gangadharan Nair (supra)** and **H. Narasimha Rao v. Vebkataram R. (supra)** do not lay down the correct law being in the teeth of the Supreme Court affirmation of **Sasseriyil Joseph (supra).**

PROBATION *VIS A VIS* THE OFFENCE UNDER SECTION 138, N.I. ACT

At the outset, let me point out here that there is no exception created for the offence under section 138, N.I. Act when it comes to extending the benefits of probation.

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.

It has been authoritatively held by Kerala High Court, after referring to the objects of Probations of Offenders Act and to the objects of 138 of the N.I. Act, in a judgment dated 30.01.2009 reported as **M.V. Nalinakshan V. M. Rameshan [2009 Cri. L.J 1703]** as follows:

> "In my view, having regard to the object of introducing Section 138 of the Act and the nature of that offence, there is little scope for reforming a person who is proved to have committed the offence punishable under Section 138 of the Act and directing him to execute bond and in the meantime be of good behaviour and keep peace in the locality for any period whatsoever. As such it is not expedient to release a person convicted of the offence under Section 138 of the Act on probation under Section 4(1) of the PO Act. Learned Magistrate was not correct in invoking Section 4(1) of the PO Act. The part of the judgment therefore, is liable to be set aside and, I do so."

SENTENCE UNDER SECTION 138, N.I. ACT

A person convicted under section 138, N.I. Act may 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.

It is worth pointing out here that Section 29, CrPC deals with the sentences which Magistrates may pass. The Chief Judicial Magistrate is empowered to pass any sentence authorized by law (except sentence of death or imprisonment for life or imprisonment for a term exceeding seven years). On the other hand, sub-section (2) of Section 29 empowers a court of a Magistrate of First Class to pass a sentence of imprisonment for a term not exceeding three years or fine not exceeding Rs.10,000/- or of both . Prior to 23-06-2006, (at the relevant point of time), the maximum fine that the First Class Magistrate could impose was Rs.5,000/-.

Thus, it would seem that a Magistrate of First Class would not be able to impose a fine more than Rs.10,000/-.

The difficulty caused by the ceiling imposed by section 29(2), CrPC has been subsequently solved by insertion of section 143 in the N.I. Act (by Amendment Act No.55 of 2002) with effect from 6.2.2003. Section 143(1) provides that notwithstanding anything contained in the Code, all offences under Chapter XVII of the Act should be tried by a Judicial Magistrate of the First Class or by a Metropolitan Magistrate and the provisions of sections 262 to 265 of the Code (relating to summary trials) shall, as far as may be, apply to such trials. The proviso thereto provides that 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 Rs.5,000/- (now, Rs.10,000/-), in case of conviction even in a summary trial under that section. In view of conferment of such special power and jurisdiction upon the First Class Magistrate, the ceiling as to the amount of fine stipulated in section 29(2), CrPC is removed. Consequently, in regard to any prosecution for offences punishable under section 138 of the N.I. Act, a First Class Magistrate may impose a fine exceeding Rs.5000/- (now, Rs.10,000/-), the ceiling being twice the amount of the cheque.

Moving on, if the Magistrate sentences the convict to pay fine, then the whole or any part of the fine may be awarded as compensation under section 357(1), CrPC to the complainant.

However, if the Magistrate chooses not to impose fine and confines the sentence to imprisonment, he can award compensation under section 357(3), CrPC.

Sub-section (3) of section 357, CrPC is categorically clear that compensation can be awarded only where fine does not form part of the sentence. Section 357(3) has been the subject-matter of judicial interpretation by the Supreme Court in several decisions. In **State of Punjab vs. Gurmej**, the Apex Court held:

> "A reading of sub-section (3) of Section 357 would show that the question of award of compensation would arise where the court imposes a sentence of which fine does not form a part."

In **Sivasuriyan versus Thangavelu [2004 (13) SCC 795]**, the Supreme Court held:

> "In view of the submissions made, the only question that arises for consideration is whether the court can direct payment of compensation in exercise of power under sub- section (3) of Section 357 in a case where fine already forms a part of the sentence. Apart from sub-section (3) of Section 357 there is no other provision under the Code whereunder the court can exercise such power:"

After extracting section 357(3) of the Code, the Court proceeded to hold thus:

> "On a plain reading of the aforesaid provision, it is crystal clear that the power can be exercised only when the court imposes sentence by which fine does not form a part."

<u>Compensation Awarded under section 138, N.I. Act Recoverable as a Fine</u>

According to Section 431, CrPC, 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.

Section 431 makes it clear that any money other than a fine payable on account of an order passed under the Criminal Procedure Code shall be recoverable as if it were a fine.

This takes us to Section 64 IPC. Section 64, IPC makes it clear that while imposing a sentence of fine, the court would be competent to include a default sentence to ensure

payment of the same. **[Kumaran v. State of Kerala 2017 (7) SCC 471]**, [**R. Mohan v. A.K. Vijaya Kumar, (2012) 8 SCC 721]**

Is the Compensation Payable by the Convict Recoverable if He Undergoes the Default Sentence?

When an order has been passed for payment of compensation or fine, recovery of the same should be pursued, and in such cases, the fact that the sentence of imprisonment in default has been fully undergone should not be a bar to the issue of a warrant for levy of the fine.

At this juncture, it is important to note that in **Vijayan v. Sadanandan K.** reported om **(2009) 6 SCC 652**, the Supreme Court held:

> "29. To appreciate the said legal position, the provisions of Section 431 are set out hereinbelow:
>
> "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."
>
> Section 431 makes it clear that any money other than a fine payable on account of an order passed under the Code shall be recoverable as if it were a fine which takes us to Section 64 IPC. 30. Section 64 IPC makes it clear that while imposing a sentence of fine, the court would be competent to include a default sentence to ensure payment of the same. For the sake of reference, Section 64 IPC is set out hereinbelow:
>
> "64. Sentence of imprisonment for non-payment of fine.- In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine, it shall be competent to the court which sentences such offender

> to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence."
>
> 31. The provisions of Sections 357(3) and 431 CrPC, when read with Section 64 IPC, empower the court, while making an order for payment of compensation, to also include a default sentence in case of non-payment of the same."

This statement of the law was reiterated in **R. Mohan v. A.K. Vijaya Kumar, (2012) 8 SCC 721** (see paras 26 to 29).

> "27. These two judgments make it clear that the deeming fiction of Section 431 Cr.P.C. extends not only to Section 421, but also to Section 64 of the Indian Penal Code. This being the case, Section 70 IPC, which is the last in the group of Sections dealing with sentence of imprisonment for non- payment of fine must also be included as applying directly to compensation under Section 357(3) as well. The position in law now becomes clear."

The deeming provision in Section 431 will apply to Section 421(1) as well, despite the fact that the last part of the proviso to Section 421(1) makes a reference only to an order for payment of expenses or compensation out of a fine, which would necessarily refer only to Section 357(1) and not 357(3). Despite this being so, so long as compensation has been directed to be paid, albeit under Section 357(3), Section 431, Section 70 IPC and Section 421(1) proviso would make it clear that by a legal fiction, even though a default sentence has been suffered, yet, compensation would be recoverable in the manner provided under Section 421(1). This would, however, be without the necessity for recording any special reasons. **[Kumaran v. State of Kerala (2017) 7 SCC 471]**

REFERRAL OF A CASE UNDER SECTION 138, N.I. ACT TO MEDIATION

No discussion on the N.I. Act would be complete without mentioning the remarkable judgment of the Delhi High Court in the case of **Dayawati v. Yogesh Kr. Gosain 243 (2017) Delhi Law Times 117 (DB).** The Delhi High Court took on a reference on a multitude of questions therein and answered them as follows.

Question I: What is the legality of referral of a criminal compoundable case (such as on under Section 138 of the N.I. Act) to mediation?

Ans. It is legal to refer a criminal compoundable case as one under Section 138 of the N.I. 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 under Section 477 of the Cr.P.C.)?

Ans. 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)?

Ans. The Delhi High Court in the case also enumerated the procedure that is to be followed for Mediation for offences under Section 138 of NI Act.

Procedure for Settlement of Offence through Mediation under section 138 of NI Act

1. When the respondent first enters appearance in a complaint under Section 138 of the N.I. 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.

2. 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.

    - 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.

        1. 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.
        2. 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.
        3. 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.

- 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.

Contents of the Settlement

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 ensure 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.

Thereafter, 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

The Magistrate would adopt a procedure akin to that followed by the civil court under Order XXIII of the C.P.C. 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.

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.

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.

Pursuant to recording of the statement of the parties, the Mgistrate 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.

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 N.I. Act.

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.

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.

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?

Ans. In case the mediation settlement accepted by the court as above is not complied with, the following procedure is required to be followed:

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.

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?

Ans. 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 23 of the C.P.C. This can never be so in a mediation settlement arising out of a criminal case.

INTERIM COMPENSATION

Section 143A was inserted to the N.I. Act vide the Amendment Act of 2018. It empowers the Court to order the drawer of the cheque to pay interim compensation to the complainant:

iii. in case of a summary trial or a summons case, where the drawer pleads not guilty to the allegations made in the complaint, and

iv. in any other case, upon framing of the charges.

The amount shall not exceed 20% of the amount of the cheque and 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.

In case where the drawer is acquitted then the payee may be directed to refund the entire amount of interim compensation along with the RBI's prevailing interest rate, to the drawer within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

The interim compensation payable under this section may be recovered as if it were a fine under section 421, CrPC.

The amount of fine imposed under section 138, N.I. Act or the amount of compensation awarded under section 357, CrPC shall be reduced by the amount paid or recovered as interim compensation under this section.

The Amendment Act has also inserted Section 148 to the N.I. Act whereby the Appellate Court has been 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.

Section 143-A, NI Act is Prospective

Ordinarily alterations in the form of procedure are always retrospective. Any amended law relating to procedure operates retrospectively unless otherwise provided. That being said, when the provision touches or brings any right into existence, the statute cannot be applied retrospectively in the absence of an express assertion to that effect. Any statute which creates new rights, disabilities and obligations or imposes new duties *vis a vis* transactions

which were complete before the enactment of the statute cannot be retrospectively construed. In other words, retrospectivity is applicable only to statutes which alter the form of procedure but no retrospective effect can be given to statutes which affect vested rights.

Going by this line of reasoning, it would seem that interim compensation under section 143-A, NI Act cannot be allowed retrospectively. Application of section 143-A, IPC would give rise to a legal obligation on the accused (to pay 20 % of the cheque amount). It is not a procedural addition *stricto sensu*. Ergo, there is no scope for its retrospective application.

In **G. J. Raja vs Tejraj Surana (Criminal Appeal No. 1160 of 2019)**, a division Bench of the Supreme Court has very expressly held Section 143A to be prospective in operation and that the provisions of said Section 143A can be applied or invoked only in cases where the offence under Section 138 of the Act was committed after the introduction of said Section 143A in the statute book.

MISCELLANEOUS PROBLEMS:

1. Complainant stops appearing after prosecution evidence has been closed. Will Section 256, CrPC be applicable?

Ans. It has been held by the Madras High Court in **Travel Agents Association of India (TAAI) v.. Eastman Travel & Tours (M) Pvt. Ltd.** reported in **2004 CriLJ 2766** that in case the complainant does not appear after closing his evidence in a summons case, the complaint should not be dismissed for non-prosecution. Rather, the Court should pass orders on the basis of the evidence available on record. [Also see **S. Anand v. Vasumathi Chandrasekhar** reported in **(2008) 4 SCC 67**]

2. Can a criminal court restore a complaint that has been dismissed in default?

Ans. A criminal court has no power to restore a complaint dismissed in default, as the accused stands discharged or acquitted depending on the case being a warrant-case or a summons-case. **Bindeshwari Prasad Singh v. Kali Singh, [AIR 1977 SC 2432].**

3. Can section 155, CrPC be invoked for an offence under section 138, N.I. Act?

Ans. The answer is in the negative. The prosecution for dishonour of cheque has to be initiated by lodging a complaint before a court. Sec. 155 of Cr.P.C. which requires clear permission of a Magistrate for initiating investigation of a non-cognizable offence by police cannot be invoked when special procedure is prescribed under sections 142 and 143 N.I. Act.

4. The complainant had advanced a loan in excess of Rs.20,000/- in cash. Will the violation of the provisions of the Income Tax Act render the debt or liability of the accused illegal and thereby defeat the punishment under section 138, N.I. Act?

Ans. The answer is in the negative. The advancement of loan in cash may entail negative consequences for a party especially an Income Tax assessee as his having acted in breach of Section 269SS of Income Tax Act, 1961.

Chapter XXB provides for the requirement as to the mode of acceptance, payment or repayment in certain cases to counteract evasion of tax. Section 269SS

mandates that no person, after the cut off date shall take or accept from any other person any loan or deposit otherwise than by an account payee cheque or an account payee bank draft if the amount is more than Rs. 20,000/-.

Breach of Section 269SS of the Income Tax Act provides penalty to which a person would be subjected to under Section 271D. The contravention of Section 269 SS though visited with a stiff penalty on the person taking the loan or deposit, nevertheless, the rigor of Section 271D is whittled down by Section 273B, on proof of bona fides and reasonable cause. However, Section 271D does not provide that such transaction would be null and void. The payer of money in cash, in violation of Section 269SS can always have the money recovered.

The Supreme Court in the case of **Assistant Director of Inspection v. A.B. Shanthi, (2002) 6 SCC 259** has held as follows:—

> "The object of introducing S. 269 is to ensure that a tax payer is not allowed to give false explanation for his unaccounted money, or if he has given some false entries in his accounts, he shall not escape by giving false explanation for the same. During search and seizure unaccounted money is unearthed and the tax payer would usually give the explanation that he had borrowed or received deposits from his relatives or friends sand it is easy for the so-called lender also to manipulate his records later to suit the plea of the tax-payer. The main object of S. 269SS was to curb this menace."

In the light of the observations of the Supreme Court, it cannot but be said that Sec. 269SS only provided for the mode of acceptance, payment or repayment in certain cases so as to counteract evasion of tax. Sec. 269SS does not declare all transactions of loan, by cash in excess of Rs. 20,000/-as invalid, illegal or null and void, while as observed by the Supreme Court, the main object of introducing the provision was to curb and unearth black money. To construe Sec. 269SS as a competent enactment declaring as illegal and unenforceable all transactions of loan, by cash, beyond Rs. 20,000/- cannot be countenanced.

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