THE TOPIC

With the growth in economy and advent of modern business practices cash has lost its role as dominant mode of exchange. Digital payment & cheques are ruling the domain now. This has certainly increased the occurrence of defaults in payments and given way to disputes. The Negotiable Instruments Act, 1881, (hereinafter called N.I. Act) was enacted as an attempt to consolidate the law relating to promissory notes, bills of exchange and cheques.

The main object of the N.I. 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 N.I. Act was to encourage the culture of use of cheques and to enhance the credibility of the instrument.

Today we shall be discussing about the practices and procedures that have been employed and to a great extent still being employed in the trial of cases under Sec. 138 N.I. Act vis-à-vis the change that has been brought about by the Recent Amendments and Landmark Judgements

Before getting started a brief look back at the introduction and **necessity of Sec. 138 N.I. Act** is pertinent.

Section 138 of NI Act *was introduced to inculcate faith in the efficacy of banking operations and credibility in transacting business of negotiable instruments. This provision was not envisioned to be a tool of punishing the offenders rather it was more of a measure to ensure that some sanctity was attached to cheque transactions by virtue of prospective punishment.*

In the case of ***Kaushalya Devi Massand*** v. ***Roopkishore Khore***[1] Hon'ble Supreme Court drew the following distinction between the traditional criminal offences and the offence under Section 138 of NI Act observing thus:

"we are of the view that the gravity of a complaint under the Negotiable Instruments Act cannot be equated with an offence under the provisions of the Penal Code, 1860 or other criminal offences. An offence under Section 138 of NI Act, is almost in the nature of a civil wrong which has been given criminal overtones."

The cases arising under Section 138 of NI Act are really ***"civil cases masquerading as criminal cases".*** The statutory object in effect appears to be both punitive as also compensatory and restitutive in regard to cheque dishonouring cases. The judgment notes that Chapter XVII of the enactment is a unique exercise which bears the dividing line between civil and criminal jurisdictions and that it provides a single forum to enforce a civil and criminal remedy.

Unlike that for other forms of crime, the punishment under Section 138 of NI Act is not a means of seeking retribution, but is more a means to ensure payment of money. The complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery.

The purpose of highlighting this somewhat primary objective is not without a reason. Though the aspects of compensation and restitution are basal to the whole exercise, still, some courts have tended to lose sight of this fact and continue to pass sentences of imprisonment coupled with meagre amount

1 (2011) 3 SCR 879

of fine and thus failing to discharge the duty enjoined upon them by the legislation as well as by the Hon'ble Supreme Court through precedential mandate.

Not only does it leave the complainant awfully disenchanted with the criminal justice administration but also compels him to initiate further litigation for recovery of his money. Hence grant of proper compensation under Sec. 357 (3) CrPC is to be religiously adhered to at the time of passing of judgement.

At the cost of reiteration, I would re-emphasize that even though the statute is punitive in nature, however, its spirit, intendment and object is to provide compensation and ensure restitution as well and these aspects must receive priority over punishment. The proceedings under Section 138 of the NI Act are therefore, distinct from other criminal cases.

Now, having thus considered about the requirement of heeding to the compensatory intendment of the N.I. Act I would now like to draw the attention towards the focal issue of today's workshop i.e. its Procedural Aspect and Best Practices.

PROCEDURAL ASPECT IN THE TRIAL OF NEGOTIABLE INSTRUMENT ACT CASES

Over the years there have been many important changes in the way cheques are issued/bounced/dealt with. Commercial globalisation has resulted in giving a big boost to our country. With the rapid increase in commerce and trade, use of cheque also increased and so did the cheque bouncing dispugtes.

The object of Sections 138-142 of the Negotiable Instruments Act, 1881 is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. Section 138 casts a criminal liability punishable with imprisonment or fine or with both on a person who issues a cheque towards discharge of a debt or liability as a whole or in part and the cheque is dishonoured by the bank on presentation. Section 138 was enacted to punish unscrupulous drawers of cheques who, though purport to discharge their liability by issuing cheque, have no intention of really doing so. Apart from civil liability, criminal liability is sought to be imposed by the said provision on such unscrupulous drawers of cheques.

However, with a view to avert unnecessary prosecution of an honest drawer of the cheque and with a view to give an opportunity to him to make amends, the prosecution under Section 138 of the Act has been made subject to certain conditions. These conditions are stipulated in the proviso to Section 138. In criminal law, commission of of-

fence is one thing and prosecution is quite another. Commission of offence is governed by Section 138 of the Act. Prosecution is governed by Section 142 of the Act.

It is also noteworthy that Section 138 while making dishonour of a cheque an offence punishable with imprisonment and fine, also provides for safeguards to protect drawers of such instruments where dishonour may take place for reasons other than those arising out of dishonest intentions. It envisages service of a notice upon the drawer of the instrument calling upon him to make the payment covered by the cheque and permits prosecution only after the expiry of the statutory period and upon failure of the drawer to make the payment within the said period.

THE OFFENCE

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

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

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

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

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

5.Drawer of cheque must fail to make payment within 15 days of receipt of the notice.

There are three distinct conditions precedent, which must be satisfied before the dishonour of a cheque can constitute an offence and become punishable.

(i) The cheque ought to have been presented to the bank within a period of 3 months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(ii) The payee or the holder in due course of the cheque, as the case may be, ought to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.

(iii) The drawer of such a cheque should have failed to make payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within 15 days of the receipt of the said notice.

It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to Section 138 as clauses (a), (b) and (c) thereof that an offence under Section 138 can be said to have been committed by the person issuing the cheque. ***MSR Leathers v. S. Palaniappan, (2013) 1 SCC 177.***

PRESUMPTIONS

There is presumptions under Section 118 and 139 of the Negotiable Instruments Act in favour of holder of the cheque. Until contrary is proved, pre-

sumption is in favour of holder of cheque that it has been drawn for discharge of debt or liabilities. However, it is rebutable one and accused can rebut it without entering into witness box, through cross examination of the prosecution witnesses. Complainant is not absolved from liability to show that cheque was issued for legally enforceable debt or liability.

Existence of legally recoverable debt is not a matter of presumption u/s 139. It merely raises a presumption in favour of holder of the cheque that the same has been issued for discharge of any debt or other liability.

Once the execution of cheque is admitted, Section 139 creates a presumption that the holder of a cheque receives the cheque in discharge, in whole or in part, of any debt or other liability. ***Basalingappa v. Mudibassapa, 2019 SCC OnLine SC 491.***

If a signed blank cheque is voluntarily handed over 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. 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. ***Bir Singh v. Mukesh Kumar, (2019) 4 SCC 197.***

GROUNDS OF DISHONOUR OF CHEQUE

Section 138, N.I. Act suggests that only a drawer whose cheque is dishonored for insufficiency of funds or for exceeding arrangement with the bank is liable for prosecution. Thus, a question may arise as to whether a cheque

which has been dishonoured for grounds such as closure of account or stoppage of payment would attract punishment under Section 138.

The answer is found in the case of **Laxmi Dychem v. State of Gujarat and Ors. (2012) 13 SCC 375** wherein Hon'ble Supreme Court after analyzing a catena of judgments including the ones in **Modi Cements Ltd. v. Kuchil Kumar Nandi (1998) 3 SCC 249** and **Goaplast (P) Ltd. v. Chico Ursula D'Souza and Anr 8 (2003) 3 SCC 232** has 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.

CALCULATION OF THE PERIOD OF LIMITATION

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

It must be borne in mind that 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. AIR 2013 SC 426]**

Status of a 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 in the case of **Yogendra Pratap Singh v. Savitri Pandey (2014) 10 SCC 713** has 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.**"

Condonation of Delay

While Section 142(b), N.I. Act makes it clear that cognizance can be taken of an offence under Section 138 only when a complaint is filed within onemonth of the date on which the cause of action arises under clause (c) of the proviso to Section 138, however, the proviso to Section 142(b) clearly provides that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

Whether the Accused has a Right to be Heard While Deciding the Issue of Condonation of Delay?

As a general principle of law, 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. Prokash Chandra Bose and Anr. 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 specific 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 will have to be followed by the Court in exercising the discretion.**

*In **K.S. Joseph v. Philips Carbon Black Ltd. and Another (2016) 11 SCC 105,** the Supreme Court has endorsed the contention that any delay in filing of a complaint under Section 138 of the N.I. Act cannot be condoned without notice to the accused.*

THE COMPLAINT

What if the Complaint is Not Signed by the Complainant?

In **Indra Kumar Patodia v. Reliance Industries Ltd. AIR 2013 SC 426**, Hon'ble Supreme Court has held as follows:

"....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, Hon'ble Supreme Court of India has held in the case of **S.R.Sukumar v. S. Sunaad Raghuram 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.

Lack of Authorization is a Curable Defect

In **M.M.T.C. Ltd. and Another v. Medchl Chemicals and Pharma (P) Ltd. And Another (2002) 1 SCC 234**, Hon'ble Supreme Court has held that the only eligibility criterion 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 rectify that defect at a subsequent stage, and the company can send a person who is competent to represent it.

Substitution of Complainant

Hon'ble Gauhati High Court in the case of **Kushal Kumar Talukdar v. Chandra Prasad Goenka 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 and continue the prosecution.

Death of Complainant

If the complainant dies while the case is still pending adjudication, the legal heirs of the complainant can move an application under Section 302 CrPC for permission to prosecute the case. **[Chand Devi Daga & Ors. v. Manju K.Humatani & Ors. (2018) 1 SCC 71]**

WHO CAN FILE COMPLAINT

Payee or holder in due course is a competent person to file complaint. Complaint must be by corporal person capable of making physical appearance in court. In case of company and firm natural person should represent it. Com-

plaint can be filed by Power of Attorney Holder. It is not requirement that the person whose statement was taken on oath at the first instance should alone represent the company till the proceeding have ended. Even if the person sent earlier had no authority, the company can at subsequent stage send a person competent to represent the company. ***Associated Cement Company Ltd. vs. Keshavanand (1998) 91 company cases 3619SC.***

It is further observed in the above case that a complaint which is made in the name and behalf of company can be made by any officer of that company and the section does not require that complaint must be signed and presented only by authorized agent or a person empowered under the Articles of association or by any resolution of the Board of Directors.

In Vinita S. Rao vs. M/s Essen Corporate Services Pvt. Ltd. And another, 2015 AIR (SC) 882 it was held by the Hon'ble Supreme Court that complaint can be filed by the complainant through his Power of Attorney but the power of attorney must have knowledge about the relevant transactions.

THE ACCUSED

Ordinarily, it is only the drawer of the dishonoured cheque who can be prosecuted under Section 138, N.I. Act and no one else. However, the Statute also attaches certain qualifications to this general rule. Who is liable for the offence under Section 138, N.I. Act will depend on the nature of the liability of the drawer as well as the status of the drawer himself.

Liability of Joint Account Holder

In the case of **Aparna A. Shah v. Sheth Developers Private Limited and Another (2013) 8 SCC 71**, wherein Hon’ble 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

Will the guarantor be liable for prosecution under Section 138, N.I. Act? The answer will have to be in the affirmative. The matter gets cleared up once and for all if we consider the judgment of **I.C.D.S. Ltd. v. Beena Shabbir & Anr. AIR 2002 SC 3014**. Hon'ble Supreme Court has 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 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.

Liability of Directors/Partners

Section 141 of Negotiable Instruments Act shows that person who is in charge or responsible to the company is ipso facto liable and deemed to be guilty only if offence is committed with his consent/connivance or due to any neglect on his part. Similar is the case with any Director, Manager, Secretary or other officer of company. If such person shows that offence was committed without his knowledge or that he had exercised due diligence to prevent commission of such offence, he may be immune from prosecution. Similarly, Directors nominated by Central Government or State Government by virtue of their holding any office or employment in such Government or Financial Corporation owned or controlled by such Government are kept outside the purview of such section.

It is primary duty of the Magistrate to find out whether the complainant has shown that accused persons falls into one of the categories of persons envisaged in sec. 141. Onus is on complainant to make out prima facie case i.e. to show that accused, at the time of commission of offence, was in charge of and responsible to company. Such person need not be a Director, Manager, Secretary or other officer of the company.

In case of ***Aparna A Shaha vs. Sheth Developers Pvt. Ltd. 2014 (1) Mh L.J.*** Apex court took a view that Joint Account holder cannot be prosecuted unless cheque was signed by each and every person who was Joint Account holder. In this case the cheque was signed by husband of the appellant. Apex court quashed the proceeding against the appellant. Court observed that as a natural corollary each and every joint account holder must sign the cheque before they were considered for criminal action under sec. 138 of the N.I. Act.

CAUSE OF ACTION

Cause of action arises when notice is served on the drawer and drawer fails to make payment of the amount of cheque within 15 days. Limitation to file complaint is one month from the date of cause of action. However, by Amendment Act of 2002 court is empowered to take cognizance of the offence even if complaint is filed beyond one month by condoning the delay if sufficient cause is shown.

JURISDICTION

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

1. Where cheque is drawn.
2. Where payment had to be made.
3. Where cheque is presented for payment
4. Where cheque is dishonoured.
5. Where notice is served upto drawer.

However, in the case of ***Dashrath Rupsingh Rathod vs. State of Maharashtra, reported in MANU /SC/ 0655/ 2014*** interpreted various provisions of Sec.138 of Negotiable Instruments Act and jurisdiction was given to the place where the questioned cheque is drawn.

However, it was later changed through amendment in Section 142 of the Negotiable Instruments Act, 1881. Jurisdiction under Section 142 as amended by the amendment Act of 2015:

1. Where Cheque is delivered for collection through an account-where payee maintains the account.[Section 142(2)(a)]

2. Where cheque is presented for payment by the payee otherwise through an account-where drawer maintains the account.[Section 142(2)(b)]

NOTICE

Notice must be in writing informing that cheque has been returned unpaid also a demand of cheque amount must be made and it should be within 30 days from receipt of information of dishonour.

When notice by registered post returned unclaimed there is presumption of service. ***Rahul vs. Arihant Fertilizers 2008(4) Mh.L.J. 365 (SC); K. Bhaskaran vs. Shankaran Vidhyabalan 1999 AIRSCW, 3809.***

It is well settled that notice refused to be accepted by addressee can be presumed to have been served on him. Where notice is returned as unclaimed and not as a refused, it can be deemed to have been served on sendee unless

he proves that it was not really served and that he was not really responsible for such non service.

When notice is sent through registered post presumption of due service can be raised in following cases -(a) unclaimed (b) Refused (c) Not available in house(d) House locked(e) Shop closed(f) Addressee not in station. ***Som Nath Versus State of Punjab and another2008(1) RCR(Criminal) 273 (P&H) N. Parameswaran Unni v. G. Kannan, (2017) 5 SCC 737***

Notice sent through courier, No presumption of service.***Deepak Kumar and another Versus State of U.P. and another 2007(2) RCR(Civil) 259 Allahabad.***

Hon'ble Supreme Court in case of ***Saket India Ltd. vs. India Securities Ltd. AIR 1999, SC 1090*** held that the period of one month is to be reckoned according to British Calender as defined in the General Clauses Act and the date on which cause of action arose must be excluded for this purpose. When neither postal acknowledgement nor postal cover is received back by payee the presumption is that notice is served. ***Central Bank of India vs. Saxena Pharma, AIR 1999 SC 3607.***

Section 3(35) General Clauses Act 1897 : Month shall mean a month reckoned according to the British Calender. ***Ramesh Chander Versus State of Gujarat 2014(11) SCC 759.***

Presumption can also be raised under section 114 of Indian Evidence Act Speed post ordinarily the service takes place within a few days. ***Vinay Patni Versus State of U.P. 2013(1) CCC 682***; One week's time considered as

ordinary time to receive letter in ***ICICI Bank Ltd. Versus Praful Chandra 2007(4) RCR(Civil) Delhi 203.***

Thus, It is clear from Section 27 of the General Clauses Act, 1897 and Section 114 of the Evidence Act, 1872 that once notice is sent by registered post by correctly addressing to the drawer of the cheque, the service of notice is deemed to have been effected. However, the drawer is at liberty to rebut this presumption.***N. Parameswaran Unni v. G. Kannan, (2017) 5 SCC 737.***

ADOPTION OF SUMMARY PROCEDURE

Summary procedure is to be followed except in cases where exercise of power under second proviso to section 143 of the Act becomes necessary, where sentence of one year may have to be awarded and compensation under section 357(3) of CrPC is considered adequate, having regard to the amount of cheque, the financial capacity and the conduct of the accused or any other circumstances.

On the appearance of the accused, the court can 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. The Court may consider, that the accused, who wants to contest the case, should disclose Specific defence for such contest. It is open to the court to ask specific questions to the accused at that stage. The plea and examination of accused should be recorded under sections 251, 263(g), 313 read with 281 of CrPC.

The accused has to disclose his defence in his plea and examination; he has to be ready with his entire defence evidence on the first appearance; he can also file an application under section 145(2) of the Act and if found any

necessity thereof, he can cross-examine the complainant however to a limited extent. After the cross-examination of the complainant (if any), defence witnesses in presence should be examined restricted to the defence taken by the accused.

It has been highlighted by Hon'ble Supreme Court that Magistrate has the discretion under section 143 of the N.I. Act either to follow a summary trial or summons trial. In case the Magistrate wants to conduct a summons trial, he should record the reasons after hearing the parties and proceed with the trial in the manner provided under the second proviso to section 143 of the N.I. Act. Such reasons should necessarily be recorded by the trial court so that further litigation arraigning the mode of trial can be avoided. ***J.V.Baharuni Vs State Of Gujarat, reported in 2014(10) SCC 494 , Meters and Instruments (P) Ltd. v. Kanchan Mehta, (2018) 1 SCC 560.***

PUNISHMENT

After the amendment of 2002 the imprisonment that may be imposed may extend to two years, while fine may extend to twice the amount of cheque. However, if the trial is conducted in summary way as provided under section 143 NI Act, 1881, then Magistrate can pass sentence of imprisonment not exceeding one year and amount of fine exceeding Rs.5,000/. There is no limitation for awarding compensation.

The sentence prescribed under Section 138 is up to two years or with fine which may extend to twice the amount or with both. What needs to be noted is the fact that power under Section 357(3) CrPC to direct payment of compensation is in addition to the said prescribed sentence, if sentence of fine

is not imposed. The direction to pay compensation can be enforced by default sentence under Section 64 IPC and by recovery procedure prescribed under Section 431 CrPC. ***Meters and Instruments (P) Ltd. v. Kanchan Mehta, (2018) 1 SCC 560.***

INTERIM COMPENSATION

Interim compensation to the complainant Section 143-A empowers the Court trying an offence under Section 138, to order the drawer of the cheque to pay interim compensation to the complainant which shall not be more than 20% of the amount of the cheque. Such interim compensation has to be paid by the drawer within a period of 60 days (extendable by 30 days) from the date of the order directing such compensation. Such compensation may be recovered as if it were a fine under Section 421 CrPC. If the drawer of the cheque is acquitted, the complainant has to repay the amount of such compensation received within 60 days (extendable by 30 days) from the date of the acquittal order.

A drawer of cheque who is convicted under Section 138, may file an appeal against his conviction. In such a case, by the provision of Section 148, the Appellate Court can order him to deposit such sum which shall be at least 20% of the compensation or fine awarded by the trial court. Such amount is payable in addition to any interim compensation paid under Section 143-A. The Court can release such amount to the complainant at any time during pendency of the appeal. In case of appellant's acquittal, the complainant has to repay the amount to him in the same manner as mentioned above under "interim compensation to the complainant"

Sec. 143A of the Act is prospective. Court has power to grant interim compensation during pendency of the proceedings.***G. J Raja Vs Tejraj Surana, (2019) 19 SCC 469. Also refer Satyendra Kumar Mehra Vs State of Jharkand (2018)15 SCC 139.***

If trial Court suspends sentence subject to certain conditions, then on non-compliance of it, the said Court can declare that suspension of sentence is vacated as held in the case of ***Surinder Singh Deswal Vs Virendeer Gandhi, reported in (2020) 2 SCC 514.***

Interim compensation is not mandatory but directory as held by Delhi High Court in the case of ***M/S JSB Cargo and freight forwarder Pvt Ltd Vs State and another.*** Similar view has been expressed by Madras High Court in the case ***LGR enterprises Vs P Anbazhvgan. Karnataka High Court in the case of V Krishnamurthy Vs Diary Classic ICE Creams Pvt Ltd, reported in 2022 SCC Online Kar 1047***, has held that the conduct of the accused is relevant consideration while deciding the application for interim compensation. The discretion to be exercised by the magistrate is twofold, how accused co-operates with the Court for early disposal of the case, Etc,. It is not mandatory to award interim compensation in every case.

However, Hon'ble Chhattisgarh High Court in the case of ***Rajesh Soni Vs Mukesh Verma, CRMP No. 562 of 2021; ICL 2021 (6) Chh. 10,*** held that the provision is mandatory in nature.

From perusal of provisions of the Act 1881, considering the aim behind object of the act 1881 and law laid down by supreme court. I am of the con-

sidered view that the amendment in section 143A NI Act 1881 is mandatory in nature.

THE ROAD TO SETTLEMENT

In **M/S Meters and Instruments Pvt. Ltd. & Anr. v. Kanchan Mehta 112**, has evolved and sanctioned the following principles.

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.

Thus, even if a complainant does not intend to compound the offence against the accused, the trial Court can see to it that the complainant is duly compensated by ensuring that the accused pays the cheque amount along with assessed costs and interest.

LANDMARK JUDGMENTS AND BEST PRACTICES

I. AT THE TIME OF PRESENTATION OF COMPLAINT

The Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinise the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons. *Indian Bank Association and Ors. versus Union of India and Ors*[2] *case . Reiterated in* ***Meters and Instruments (P) Ltd. v. Kanchan Mehta, (2018) 1 SCC 560.***

II. SUMMONS TO CONTAIN FINAL AMOUNT FOR DISPOSAL OF CASE

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. ***Indian Bank Association and Ors. versus Union of India and Ors[3] case . Reiterated in Meters and Instruments (P) Ltd. v. Kanchan Mehta, (2018) 1 SCC 560.***

How it can be achieved: -

2 (2014) 5 SCC 590
3 (2014) 5 SCC 590

- The filing/ registration section of the court may be directed that a regular check is kept in matters of NI Act and the complainant should be guided regarding the same.

- A chart or pamphlet enlisting all the filing requirements of a complaint under section 138 NI Act may be pasted outside the filing/ registration section.

- Hence in view of this guideline there remains no real need for accused to even appear before court in case he ensures payment of amount as indicated in the summons issued by court. If the accused deposits the specified amount, he can be directed to furnish an acknowledgment regarding the same and on the basis of the acknowledgment, the proceedings can be closed. Even otherwise at the time of first appearance before court the accused by tendering requisite amount may get the proceeding closed.

III. EVIDENCE OF COMPLAINANT ON AFFIDAVIT

Evidence can be given on affidavit and such affidavit evidence may be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 CrPC. The court concerned may consider to ensure that examination-in-chief, cross-examination and re-examination of the complainant should be conducted expeditiously. The court may consider accepting affidavits of witnesses instead of examining them in the court. ***Mandvi cooperative bank ltd v. Nimesh b. Thakore (2010) 3 SCC 83.***

Efforts should be made to take affidavit of complainant, witnesses instead of examining them in court. Documents can also be exhibited at the time of filing of evidence in the form of affidavit itself.

IV. DISPENSING WITH THE PERSONAL PRESENCE OF ACCUSED

The magistrate may, after considering the necessity of and hardship caused in personal attendance by an accused particularly where accused is located far away from the jurisdiction of the court where the complaint is filed, may consider to record evidence in presence of counsel under section 273 CrPC and Section 317 CrPC The magistrate may also consider to exercise the jurisdiction under section 205 CrPC.

Apex Court has thus, expressed its view that evidence in the presence of the advocate can be recorded as per section 273 of CrPC and the magistrate is empowered to proceed with trial even in the absence of accused. Even where the case is contested by the accused, the presence of the accused may be allowed through his counsel. Hence insistence for the personal presence of accused may be tempered with appropriately and rather leniently. ***Meters and Instruments (P) Ltd. v. Kanchan Mehta, (2018) 1 SCC 560.***

V. USE OF MODERN TECHNOLOGY FOR SPEEDY DISPOSAL OF CASES

Hon'ble Supreme Court has taken into consideration use of modern technologies for enabling speedy disposal of cases under Section 138 of NI Act and noted that use of modern technology needs to be considered not only for paperless Courts but also to reduce overcrowding of

Courts. There appears to be need to consider categories of cases which can be partly or entirely concluded "online" without physical presence of the parties by simplifying procedures where seriously disputed questions are not required to be adjudicated.

Only if the accused contests, need for appearance of parties may arise which may be through counsel and wherever viable, video conferencing can be used. Personal appearances can be dispensed with on suitable self-operating conditions. This is a matter to be considered by the High Courts and wherever viable, appropriate directions can be issued. ***Meters and Instruments (P) Ltd. v. Kanchan Mehta, (2018) 1 SCC 560.***

VI. REBUTTING THE PRESUMPTION

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 doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. 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 own.***Rangappa v. Sri Mohan, (2010) 11 SCC 441.***

Complainant to prove financial capacity if disputed by accused It is incumbent upon the complainant to prove his financial capacity to extend the loan in question, if the accused disputes the same. ***Basalingappa v. Mudibassapa, 2019 SCC OnLine SC 491.***

VII. DEBT OR OTHER LIABILITY

Section 138 is abundantly clear that the dishonoured cheque must have been received by the complainant against a "legally enforceable debt or liability"***Nanda v. Nandkishor, 2010 SCC OnLine Bom 54.***

VIII. CAN A CASE BE FILED IF THE CHEQUE IS PRESENTED FOR ENCASHMENT MORE THAN ONCE?

The holder or payee of the cheque may present the cheque for encashment on any number of occasions within the period of its validity [three months from the date of issue]. A dishonour, whether based on a second or any successive presentation of a cheque for encashment, would be a dishonour within the meaning of Section 138.***MSR Leathers v. S. Palaniappan, (2013) 1 SCC 177.***

IX. CASE OF A POST DATED CHEQUE

On the faith of payment by way of a post-dated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of Section 138, it will shake the confidence which a cheque is otherwise intended to inspire regarding payment being available on the due date. ***Goaplast (P) Ltd. v. Chico Ursula D'Souza, (2003) 3 SCC 232.***

X. CASE OF A FIDUCIARY RELATION BETWEEN COMPLAINANT AND ACCUSED (RELATION OF TRUST AND CONFIDENCE)

The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139, in the absence of evidence of exercise of undue influence or coercion. ***Bir Singh v. Mukesh Kumar, (2019) 4 SCC 197.***

So, it is clear that the need to adopt an earnest and combative approach in dealing with N.I. Act cases has consistently been highlighted by Hon'ble Supreme Court through pronouncements such as above-referred. It was in the METER's case wherein a long list of guidelines were laid down and it was **In Re: EXPEDITIOUS TRIAL OF CASES UNDER SECTION 138 OF N.I. ACT 1881, 2021 SCC OnLine SC 325, decided on 16.04.2021**, wherein Hon'ble Supreme Court directed all the High Courts to issue practise directions regarding trial of 138 NI Act cases. After that, Honb'ble High Court of Chhattisgarh issued following practise directions which is required to be followed during the trial of negotiable instrument act cases:

- The Magistrates having jurisdiction to try offences under the Negotiable Instruments Act, 1881 (in short N.1. Act), shall record cogent and sufficient reasons before converting a complaint under Section 138 of the N.I. Act from summary trial to summons trial in exercise of power under the second proviso of section 143 of N.I. Act. Due care and caution shall be exercised in this regard and the conversion of summary trial to summons trial shall not be in a mechanical manner.

- On receipt of any such complaint under Section 138 of N.I. Act, wherever it is found that any accused is resident of the area beyond the territorial jurisdiction of the Magistrate concerned, an inquiry shall be conducted by the Magistrate to arrive at sufficient grounds to proceed against the accused as prescribed under Section 202 Cr.P.c.

- While conducting any such inquiry under Section 202 Cr.P.C., the evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate may restrict the inquiry to examination of documents for satisfaction as to the sufficiency of grounds for proceeding under the said provision.

- Trial Court shall treat service of summons in one complaint under Section 138 N.I. Act forming part of a transaction, as deemed service in respect of all complaints filed before the same Court relating to dishonor of cheques issued as part of the same transaction.

- Trial Courts have no inherent power to review or recall the issue of summons in relation to complaint filed under Section 138 of N.I. Act. However, the same· shall not affect the power of the Trial Court under Section 322 of Cr.P.C. to revisit the order of issue of process in case it is brought to the court's notice that it lacks jurisdiction to try the complaint.

- Section 258 of Cr.P.C. has no applicability to complaints under Section 138 of N.1. Act. The words *"as far as may he"* in Section 143 are used only in respect of applicability of Sections 262 to 265 of the Code and the summary procedure to be followed for trials under the said Code.

- The Appellate Courts before which appeals against the judgments in complaint under Section 138 of N.I. Act are pending are directed to make an effort to settle the dispute through mediation.

PROBLEMS AND SUGGESTIVE MEASURES

I. SERVICE OF SUMMONS

- In N.I. Act cases More often than not ensuring the appearance of accused has proved to be the most significant hurdle so much so that the appearance of accused is deemed to be half the battle won. There are various factors at work here. The lackadaisical approach of serving agency i.e. police in serving the summons and even returning the same has been proving to be the biggest hindrance. In spite of strongest of strictures by the courts there seems very little improvement on ground. Measures are needed to be put in place to ensure accountability of the persons concerned in this regard so that due sincerity is accorded to the court processes.

- A close look on the pendency of NI Act matters shows that almost 50 percent of the matters are pending at the stage of appearance. Service of process becomes a difficult task because most of the time no report comes and if it comes, it comes unserved. It a major problem in bigger districts.

- Another way possible is if summons may be directed to be served through others agencies e.g. A separate unit/ wing may be constituted in the court itself as also a separate cell may be formed by police authorities to serve these summons.

II. EARMARKED COURTS

- Another problem seen is that almost all the courts are dealing with all kinds of cases, be it civil, criminal, complaint, Domestic violence etc. due to which, it becomes difficult to focus on NI Act matters on regular basis and conduct proceedings in summary manner.

- The direction for setting up of Earmarked courts to deal with N.I. Act cases was with a view that the trial of such cases was going to be expedited. Initially, Earmarked courts have been duly set up as well. However, with the passage of time such Earmarked Courts have been assigned other judicial works also which has resulted in diversion of court's approach. It is imperative that concept of Earmarked Courts is mandatorily adhered to, because, that would allow judges to concentrate singularly on such targeted cases. Moreover, such single-minded approach is rather imperative in order to effectively implement guidelines of Hon'ble Supreme Court regarding summary procedure for expediting disposal of such cases. It is certainly not easy on the part of a judge to sustain desired level of efficiency as the cases of different fields and nature demand expertise in so many laws whereas the Earmarked courts, having only to deal with N.I. Act cases would go a long way in ensuring single-minded and dedicated approach of the judge in disposing such cases swiftly and qualitatively.

- One more advantage of having Earmarked courts can be expected in the way the serving agency i.e. Police deals with the processes of the court. In current scenario Police authorities are being burdened by processes

of so many different courts and their response to such processes has rather been of scant regard. But in case of earmarked courts they may be more vigilant to ensure the execution knowing fully well the added importance of the processes.

III. USE OF SEC. 294 CRPC AT FIRST APPEARANCE OF ACCUSED

- Many a times it is observed that a lot of time is consumed in calling handwriting experts and expert witnesses to prove the signature and documents. This time can be cut short if on the first appearance of the accused, procedure of section 294 CrPC is followed. At the time of appearance, the accused has to be asked about admission of documents under sec. 294 CrPC so as to streamline the trial procedure. On the first appearance of the accused, the accused can be called upon to admit or deny the genuineness of each such document. If the genuineness of any document is not disputed, such document may be read in evidence without proof of the signature of the person by whom it purports to be signed. In this way, a lot of time can be saved for the later stage. Admission of documents at the initial stage would go a long way in ensuring that various uncontroverted facts are identified at the very beginning of the trial and thus allowing the trial to focus solely on disputed facts.

IV. EVIDENCE ON AFFIDAVIT

- On taking evidence on affidavit, one problem that can be faced is regarding exhibiting of documents. The complainant can give his examination/ evidence on affidavit and in the same affidavit can exhibit the relevant documents produced by him. Now at the stage, when the accused

appears, if a dispute arises, regarding exhibited documents, the court may on the very same day may take up the arguments of both the parties and decide the dispute as to whether the document in question has been properly exhibited or needs further proof.

CONCLUSION

Time and again, Hon'ble Constitutional Courts have taken up the initiative and issued guidelines to deal with the pending cheque dishonour cases and to ensure speedy trial of such cases. It is rightly said that **"justice delayed is justice denied"** and an overburdened Court will not be able to serve justice within a reasonable time. Magnitude of cheque bounce cases require urgent attention & constant efforts to impart justice in time.

The procedural guidelines & best practices aim at simplifying the procedure for dealing with 138 cases and the emphasis on compensation in preference to imposing sentence of imprisonment. The new guidelines encourage use of modern technology which will certainly pave way for expeditious disposal of 138 cases. Also, adoption of procedure of summary trial is being emphasized time and again, and the same may be achieved if a uniform practice and procedure is adopted by all. **Therefore, it is a win-win situation for courts, complainants and accused persons, as all get relief by timely justice.**