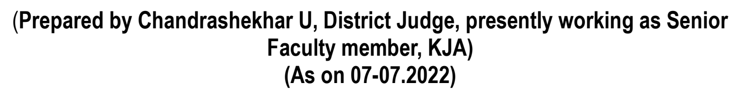
Important decisions
On
Negotiable Instruments Act



(Prepared by Chandrashekhar U, District Judge, presently working as Senior Faculty member, KJA)
(As on 07-07.2022)

NEGOTIABLE INSTRUMENTS ACT

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PRELUDE

The present N.I. Act is nothing but a codification of the English law on the subject with minor deviations. In view of changed circumstances and various business practices, there has been development in law relating to negotiable instruments.

The scheme of the provisions contained in the new Chapter would indicate that it is primarily to provide an additional criminal remedy over and above the Civil remedies available under the Act to the payee or holder in due course that the new provisions in Chapter XVII of the Act have been incorporated in the Act. Punishment imposed is also fairly deterrent. The remedy provided is specifically subject to very strict terms and conditions. In fact, it is a benefit conferred solely for the protection of the interest of the payee or holder in due course of a dishonoured cheque and as such liable to be waived or renounced by the beneficiary on the legal principle *"cuilibet licet renuntiar juri prose introducto"* meaning that "anyone may waive or renounce the benefit of a principle or rule of law that exists only for his protection"

Advent of cheques in the market have given a new dimension to the commercial land corporate world, its time when people have preferred to carry and execute a small piece of paper called cheque than carrying currency worth the value of cheque. Dealings in cheques are vital and important not only for banking purposes but also for the commerce and industry and the economy of the country. But, pursuant to the rise in dealing with cheques also raises the practice of giving cheques without any intention of honouring them. Before 1988, there being no effective legal provision to restrain people from issuing cheque without having sufficient funds in their account or any stringent provision to punish them in the event of such cheques being dishonoured by their bankers and returned unpaid. Of course there is a civil liability for dishnouring of cheques. To ensure promptitude and remedy against defaulters and to ensure credibility of the holders of the negotiable instrument a criminal remedy of penalty was inserted in Negotiable Instruments Act, 1881 in form of the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act 1988.

The Negotiable Instruments Act, 1881 defines a "Negotiable Instruments" as a promissory note, bill of exchange or cheque. A bill of exchange is an instrument in writing containing an unconditional order, signed by he maker, directing a certain person or to the bearer of the

instrument. Even pay order issued by the Bank comes within the purview of negotiable instruments.

An attempt is made to cull out all the relevant decisions relating to negotiable instruments and to show how the law has been developed. This paper is an outcome of questions posed by the judicial officers of 2008-2009 batches. Further, his Lordship Hon'ble Shri. Justice A. V. Chandrashekhar is the soul behind this article and I am grateful to his Lordship.

By

Chandrashekhar U.
District Judge.

NEGOTIABLE INSTRUMENTS ACT

(Prepared by Chandrashekhar. U., the then Assistant Director, presently as senior faculty member KJA)

The objects of Section 138 of N.I.Act

In the world of business, the cheque, as a negotiable instrument, was losing its credibility because of lack of responsibility on the part of the drawer. To bring back that credibility, to inculcate faith in the efficacy of banking operations in transacting business on negotiable instrument in general to bring the erring drawer to book , so that such irresponsibility is not perpetuated, to protect the honest drawer, to safe guard the payee who is almost a loser, this section was brought on statute. This aspect has been stated in the decision reported in **2008(2) SCC 305= AIR 2008 SC 716- Vinaya Devanna Nayak Vs Ryot Sewa Sahakari Bank Ltd.** Also refer the decision in the case of **Bir Singh Vs Mukesh Kumar** reported in **(2019) 4 SCC 197.**

I. Cheque

Q. No. 1) To what period a cheque is valid?

Under the Act, a cheque is valid for a period of six months. **(now it is three months)** If a postdated cheque is drawn, such a cheque will be presentable to the bank only on the date written on it. Therefore, this statutory period of six months has to be reckoned from such date written on the cheque and

not from the date on which it was drawn. In this regard, the decision reported in **AIR 2001 SC page 1161** in the case of **Shri.Ishar Alloy Steels Ltd., Vs Jayaswals NECO Ltd.**, and **AIR 2001 SC 1315** in the case of **Ashok Yashavant Badave Vs Surendra Madhavarao Nigojakar and another.** If there is any material alteration, which is apparent to naked eyes, then, no conviction can be based on it, as held in the decision, reported in **2011-KantLJ-6-476- M.B.Rajasekhar Vs Savithramma.**

Q. NO. 2) Is it possible to revalidate a cheque?

Yes. There is no bar under that to revalidate a cheque. The drawer after six months' time can strike of the date and write another date on the cheque voluntarily thereafter, the cheque is valid for another six months from the changed date. In this regard, the decision reported in **AIR 2002 SC page 38**- in the case of **Veera Expert Vs T. Kalavathy** is relevant.

Q.NO.3) What is the effect of issuing a blank cheque?

Where the cheque is signed leaving blank all other particulars and handed over to the payee authorizing him to fill up the blanks as agreed upon, it is valid in law. Therefore, when such a cheque is dishonoured, Section 138 applies. **"ILR 2001 Kar 4127** in the case of **S.R.Muralidhar Vs**

G.Y.Ashok". In this regard Section 20 of the Act may be perused.

If the accused takes up the contention that the cheque was issued very long back and the same has been made use of subsequently beyond the validity of the cheque, then, it is necessary to know the age of signing and other hand writing. In order to find out the said aspect, it is necessary to send the same to an expert. If any application is made in this regard by the accused, then it would be appropriate on the part of the Court to send the cheque for analysis by an expert. Relevant decisions are reported in **(2007)2 SCC 258-Kalyani Bhasker Vs. M.S. Sampoornam.** The above decision is followed in a subsequent decision of the Apex Court in the case of **T. Nagappa Vs Y.R. Muralidhar** reported in **AIR 2008 SC 2010= 2008(5) SCC 633.** Latest decision on this aspect is in the case of **Bir Singh Vs Mukesh Kumar**, reported in **(2019)4 SCC 197**, wherein it is held that "*the cheque duly signed and voluntarily made over to payee, was in dischage of debt or liability arises irrespective of whether cheque was post dated or blank cheque for filling by payer or any other person, in absence of evidnce of undue influence or coercion*".

Refer the latest decision in the case of **Kalamani Tex and another Vs P. Balasubramanian,** reported in **(2021)5 SCC 283.** It is held that if the accused voluntarily signed and

handed over a cheque, the presumption under Sec. 118 and 139 is available.

Q.No. 4) Whether a 'postdated cheque' is a cheque within the definition of 'cheque' or only a bill of exchange? What is the effect of issuing a postdated cheque?

Under Section 5 & 6 of the Act, a cheque is also a negotiable instrument drawn on a Bank and payable on demand. Thus, a bill of exchange if not payable on demand is not a cheque within its definition. A postdated cheque will not be honoured by the Bank if presented before the date mentioned on it. Since it is not paid on demand, it is not a cheque. Therefore, until the date written on it arrives, it has no effect whatsoever. The relevant decision is **AIR 2001 SC 1315 – Ashok Yashavant Badave Vs Surendra Madhavarao Nigojakar and another, 2003-AIR (SC)-0-2035- Goaplast Private Limited VS. Chico Ursula D'souza and 2008-AIR (SCW)-4034- DCM Financial Services LTD. VS. J. N. SAREEN, AIR 2010 SC 1898-(Head note A) –"Rangappa v. Mohan"**

II. Pay Order

Q.No. 5) Whether a pay order is a cheque?

Yes. As per Section 6 of the Act pay order is also a bill of exchange. The relevant decision is **AIR 2001 SC 3641 –**

Punjab & Sindh Bank Vs Vinkar Sahakari Bank Ltd., wherein, it is held that

"A 'pay order' is a cheque' within the meaning of S. 138 of the Act. A cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand'. The quintessence of Bill of Exchange is that the maker or the drawer of a Bill of Exchange must direct a 'certain person" to pay a particular sum of money. It cannot be said that in every Bill of exchange there must necessarily be three parties, the maker, the payee and the person to whom direction is given to pay and as a draft or a pay order contains only two persons, i.e. the drawer and the payee, a draft may at best be a promissory note. The indispensable postulate for a promissory note is that there should be an unconditional undertaking to pay a certain sum by the drawer. Such an undertaking cannot be read out from a pay order. A pay order is closer to a bill of exchange because of the unconditional order of its maker to the person concerned 'to pay a certain sum'. The postulate in S. 5 of the Act that the bill of Exchange shall contain an unconditional order directing 'a certain person to pay' need not necessarily refer to a third person. Such 'a certain person' could as well be the bank which has drawn the bill of exchange. Even S. 85-A renders a draft a negotiable instrument. Moreover S. 131-A makes all the provisions for crossing of cheques applicable to the drafts also. S. 131- A is intended to widen the scope of crossed drafts as to

contain all incidences of a crossed cheque and is not intended to limit the operation of a draft as a cheque only for crossing purposes. Even if it is possible to construe the draft either as a promissory note or as a Bill of Exchange, law has given the option to the holder to treat it as he chooses. Once the holder, which in this case is the complainant-bank, has elected to treat the instrument as a cheque it cannot but be treated as a cheque thereafter. This is an irretrievable corollary of exercising such an election by the holder himself".

Q.No.6) Whether complaint can be maintained for dishonour of self cheque?

Yes, if endorsement regarding liability is made on the backside of the cheque. Otherwise no. Proof of due endorsement is necessary. Refer the decision reported in **2009-KCCR-1-249- Amolak Textile Vs Uphar Fashions.** Also refer the latest decision reported in **2009-AIRKARR-6-394-Shrimathi Vs Renuka.** Latest decision on this aspect is reported in the case of **B. Sarvothama Vs S.M Haneef,** reported in **2013 (5) Kar.LJ 89.**

Q.No.6A) Whether 'withdrawal slip' comes within the meaning of negotiable instrument?

Yes if it is used for negotiating the transaction. Refer the decision reported in **ILR 2009 Kar 439 – Upendra Kumar Vs Don Finance Corp.**

Q.No. 7) Can a cheque issued as a surety by the guarantor be brought U/S 138?

Yes. The words "where any cheque" and "other liability" take care of the liability of a guarantor also. The criminal liability cannot be avoided. In this regard the decision reported in **AIR 2002 SC 3014 – ICDS Ltd., Vs. Beena Shabeer and another.,** is relevant.

Q.NO.8) How many times a cheque can be presented?

Any number of times within the period of validity i.e. six months. However, if cheque is dishonoured for the reason account closed, then, the said cheque cannot be re-presented to save limitation. **Refer the decision stated in Q.11A.**

However, it is three months now in view of notification of Reserve Bank in RBI/2011-12/251 dated 4-11-2011.

Q.No. 9) What is the effect of issuing a cheque as far as the property thereof is concerned?

Under the negotiable instrument Act a cheque is a bill of exchange it is an order on the drawee bank to pay the amount specified in it to the payee or the bearer until and unless the amount mentioned in the cheque is paid, the disposition of property there in will not take place .

Refer the decision reported in **AIR 2000 SC 1953(B) – Pankaj Mehra and others Vs State of Maharashrta and others.**

III. Stop Payment

Q.No. 10) By issuing 'stop payment' instructions before the cheque is presented for payment and by issuing a notice to the payee not to present the cheque, is the liability of the drawer absolved?

No. If the cheque is issued towards an existing debt or liability, the drawer just cannot issue stop payment instructions to the bank, nor his penal liability be absolved by giving a notice to the payee not to present the cheque. Refer the decision reported in **AIR 1998 SC 1056-Modi Cements Ltd., Vs Kuchil Kumar Nandi.**

Q.No. 11) If 'stop payment' instructions are issued, can the presumption U/S 139 be raised?

Yes. It is for the accused to prove during the course of trail that such instructions were not issued for insufficiency of funds in his account. Relevant decision is **AIR 2002 SC 182 – M.M.T.C. Ltd Vs. Medchi Chemicals & Pharma (Pvt.) Ltd.** It is also held that the complaint need not specifically allege that debt or liability existed. In this regard, the latest decision is reported in **AIR 2010 SC 1898 = 2010 AIR (SCW) 2946** in the case of **Rangappa Vs Mohan,** may be perused, wherein, it is held in para no. 9 that "Ordinarily in cheque bouncing cases, what the Courts have to consider is whether the ingredients of the offence enumerated in Sec. 138 of the Act have been met if so, whether the accused was able to rebut the statutory presumption contemplated by Sec. 139 of he Act. With respect to the facts of the present case, it must be clarified that contrary to the trial court's finding, Sec.138 of the Act indeed be attracted when a cheque is dishonoured on account of 'stop payment' instructions sent by accused to his bank in respect of a post-dated cheque, irrespective of insufficiency of funds in the account. This position was clarified by this Court in Goa Plast (pvt Ltd) Vs Chico Ursula D'Souza- AIR 2003 SC 2035". Latest decision on the point is in the case of **Vijay vs Laxman,** reported in **2013 (3) SCC 86.** Also refer the decision of Apex Court in the case of **Laxmi**

Dyechem Vs State of Gujarat, reported in **2013 AIRSCW 3468.** In the latest decision in the case of **K.Subramani Vs K.Damodara Naidu** reported in **2014(4) KCCR 3661,** it is held that complainant has to show to the Court that he had capacity to lend huge amount to the accused. Also refer **2015(2) KCCR 1115(SC) –Ramadas Vs Krishnanand and HMT watches Ltd vs M A Abida** reported in **(2015) 11 SCC 776.** Latest decision on this aspect is in the case of **A R Radha Vs Dasari Deepthi** reported in **(2019) 15 SCC 550**

IV. Account closed

Q.No. 12) What is the effect of closing the account after the cheque is issued but, before it is presented for encashment?

It amounts to returning the cheque as unpaid because the money standing to the credit of that account is nil. Therefore, closure of the account would be eventuality after the entire amount therein is withdrawn. Thus, If a person chooses to close his account in the bank after issuing the cheque, it amounts to an offence as there is insufficient funds. The important decision in this regard is reported in **AIR 1999 Supreme Court 1952 – NEPC Micon Ltd., Vs Magma Leasing Ltd.,** However, if it is shown that accused had no intention to cheat, then Sec. 138 is not attracted when cheque was post dated, given long back. Refer the decision in the case

of **Subhodh S Salaskar Vs Japrakash M Shah**, reported in **(2008) 13 SCC 689.**

Q.No.13) Whether cheque can be represented when there is an endorsement that the 'account is closed'?

No. Because when once the account is closed, there is no necessity to present the cheque. Cheque can be presented only when an account is in existence. To save limitation, cheque cannot be presented for the second time. Relevant decision is reported in **2007-AIRKarr-(4)-523 , ILR 2007-(Kar) 2706 – H. Nanjundappa Since VS. H. hanumantharayappa.**

Q.No.14) What happens if the account is closed by the Bank? Is it amenable under Sec. 138 of the Act?

No. There is not fault on the fault on the part of the drawer, Refer the decision reported in **2008(1) Crimes 167(Kar)- Nagaraja Upadhyaya Vs Sanjeevan,** wherein, it is held that-

"Account of the accused was closed not on the intimation given by the accused, but the account was closed as per the rules of the bank and therefore, the accused is entitled to acquittal"

Q.15) When the account itself is not in existence, is prosecution possible?

Earlier View changed

No. One of the essentials of offence U/S is that the cheque in question should have been drawn on an account maintained by the drawer in a bank. But situation will be different if accused closes his account after issue of a cheque. The relevant decision reported in **ILR 2001 Kar 4310 – Deepa Finance Corporation Vs. A.K. Mohammed.** However, the Apex Court observed in the case of **N.A.Issac Jeemon Vs P.Abraham & Another reported in 2005(1) Criminal Court Cases 119**[1] (see footnote) that even if the cheque was issued in respect of a closed account, still the accused is liable for an offence under Sec. 138 of the Act. The Apex Court, reiterated its view rendered in the case of **Goaplast (P) Ltd. V. Chico Ursula D'Souza- 2003(3) SCC 232.**

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1 **N.A.Issac Vs Jeemon P.Abraham & Anr**. 2. The interpretation of the High Court of Section 138 of Negotiable Instruments Act, 1881 to the effect that the said provision will not be applicable when the cheque is issued from an already closed account cannot be upheld on the wordings of Section 138. The word `maintained' in Section 138 of the said Act has been narrowly construed by the High Court for coming to the aforesaid conclusion. Such an interpretation would defeat the object of insertion of the provision in Act. Section 138 does not call for such a narrow construction. The approach to be kept in view construing Section 138, has been discussed in detail by this Court in Goaplast (P) Ltd. v. Chico Ursula D'Souza, 2003(2) Criminal Court Cases 450 (S.C.) : 2003(4) CTC 628 : 2003(3) SCC 232. The High Court did not examine the merits while deciding Criminal Appeal No.317 of 2002 in view of its opinion that Section 138 would not apply where cheque is issued from a closed bank account.

3. For the aforesaid reasons, we set aside the impugned judgment of the High Court and remit the aforesaid Criminal Appeal for its fresh decision, on merits, in accordance with law. We express to opinion on merits. All the pleas would be open to be urged before the High Court. The High Court is requested to decide the Criminal Appeal expeditiously.**(Since the above decision is not reported in AIR, SCC, entire text is given for better understanding)**

Q.No.16) Is it possible to initiate prosecution based on the subsequent dishonour?

Yes. As the cheque can be presented any number of times within its validity**, if notice had not been issued on any other earlier occasions**, action can be taken based on the subsequent dishonour by issuing statutory notice of demand. But, once a notice is issued even if the cheque is represented, a notice cannot be issued on such subsequent dishonour. Refer the decision reported in **ILR 1997 Kar 1014 = 1997 (2) KLJ 63.**

Latest decision on this aspect is found in the case of **MSR Leathers Vs S. Palaniappan,** reported in **(2013) 10 SCC 568.**

V. Incomplete Signature

Q.No.17) If cheque is returned for the reason of incomplete signature of the drawer, will it amount to dishonour?

No. U/S 138, returning of a cheque unpaid constitutes an offence only if such return is due to want of funds.

Where the cheque is returned by the bank for want of full signature of the drawer, it does not constitute an offence **U/S 138**. **(2002) 7 SCC 541 – Vinod Tanna Vs. Zaheer Siddiqui.**

Also refer the decision reported in **2006-BC-4-91, 2006-Crlj-0-261(Kar) –Dinesh Harakchand Sankla VS. Kurlon Ltd.**

Note: However, if after notifying the drawer about mismatch of signature with that of specimen signature given to bank, if arrangement is not made by the drawer, then Sec. 138 is attracted as held in the decision in the case of **Laxmi Dyechem Vs State of Gujarat,** reported in **(2012) 13 SCC 375.**

Q.No.18) Is it an offence if the cheque is returned for want of joint account holder signature?

No. If the cheque had to be signed by two persons and cheque was issued with one signature, if the bank returns that cheque for want of the other person's signature, the offence under Section 138 is held not to be made out. Magistrate cannot take cognizance on such complaint. Relevant decision is reported in **2001(4) KLJ 382 = 2000(2) KCCR 1265- MD, Jindal Praxair Oxygen Co. Ltd., Vs. The Asst. Commissioner of Entry Tax.** Also refer **Aparna A. Shah Vs. Sheth Developers Pvt. Ltd – 2013 AIRSCW 4161.** However, it can be proceeded against the person who signs it because, a joint account can be operated by either of the holders. **Suresh Kallappa Makavi VS. Madan Bindurao Desai** reported in **ILR 2008 Kar 3922= 2008(4) KCCR 2173**

VI. Legally enforceable debt or liability

Q.No.19) Who has to prove the element of consideration for issuing the cheque?

The burden to prove the consideration for the cheque lies on the accused. If not rebutted, the presumption is that the cheque was issued for consideration. It is for the accused to prove that the cheque was not issued towards a debt or liability. He has to lead credible evidence for rebuttal of this presumption. Mere denial of averments will not suffice to shift this burden onto the complainant. **AIR 2001 SC 2895 – K.N.Beena Vs Muniyappan & Anr.** Latest decision on the point is in the case of **Vijay vs Laxman,** reported in **2013 (3) SCC 86.**

Q.No.20) When can the presumption U/S 118 be raised in favour of the complainant?

The presumption that the cheque was issued for valid consideration U/S 118 can be raised only when the proceedings are initiated after complying with the statutory requirement of service of notice on the drawer. The relevant decision is reported in **AIR 2001 SC 676 – Dalmia Cement (Bharat) Ltd., Vs. Galaxy Trader and Agencies Ltd., and (1999) 7 SCC 510(D)- K.Bhaskaran Vs. Shankaran Vaidhyal Balan & another.**

Refer the latest decision in the case of **Trimbak S Hegde Vs Sripad** reported in **(2022) 1 SCC 742.** It is held further that rebuttal of presumption must be made before the Trial Court and not before the High Court.

Q.No.21) What is the nature of presumption U/S 139? What is the standard of evidence to be adduced to rebut that presumption?

The presumption U/S. 139 of the Act is a presumption of law, it is not a presumption of fact. This presumption has to be raised by the Court in all the cases once the factum of dishonour is established. The onus of proof to rebut this presumption lies on the accused. The standard of such rebuttal evidence depends on the facts and circumstances of each of case. Such evidence must be sufficient, cogent and should prove beyond any reasonable doubt. Therefore, a mere explanation is not enough to repel this presumption of law. The important decisions are reported in **AIR 2001 SC 3897- Hiten P. Dalal Vs. Bratindranath Banerjee ,AIR 2004 S.C 408(B) – Goa Plast (P) Ltd., Vs. Chico Ursula D'Souza, (2006) 6 SCC 39-M.S. Narayan Menon alias Mani Vs. State of Kerala & another and ILR 2009 Kar 1633- Kumar Exports Vs Sharma Carpets.**

In the decision reported in **AIR 2008 SC 278** in the case of **John K John Vs. Tom Verghees & another,** it is held that

the presumption U/S 139 could be raised in respect of some consideration and burden is on the complainant to show that he had paid amount shown in the cheque. Whenever there is huge amount shown in the cheque, though the initial burden is on the accused, it is equally necessary to know how the complainant advanced such a huge amount.

In the instant case the appellant-complainant is Partner in business of running chitty fund. The fact that the respondent subscribed three chitties and that he could not pay the installments of the prized amount is not in dispute. Pendency of three civil suits filed by the firm through the appellant against the respondent is also not in dispute. Thus, the relationship between the parties is not in dispute. The appellant alleged that despite the fact that the respondent was a defaulted subscriber of two prized *chitties*, he took personal loan from him in his personal capacity. Respondent allegedly issued two cheques in favour of the appellant. The said cheques when presented were dishonoured for want of sufficient funds. The High Court upon analyzing the materials brought on records by the parties arrived at a finding of fact that in view of the conduct of the parties it would not be prudent to hold that the respondent borrowed a huge sum despite the fact that the suits had already been filed against him by the appellant. Presumption raised in terms of Section 139 of the Act is rebuttable. If upon analysis of the evidence

brought on records by the parties, in a fact- situation obtaining in the instant case, a finding of fact has been arrived at by the High Court that the cheques has not been issued by the respondent in discharge of any debt, the view of the High Court cannot be said to be perverse warranting interference in exercise of discretionary jurisdiction under Art. 136.

overruled

In the decision reported in **AIR 2008 SC 1325** in the case of **Krishna Janardhan Bhat Vs. Dattatreya Hegde**, a similar view has been taken by the Apex Court. Further the Apex Court also held that In case of dishonour of cheque it cannot be said that for proving the defence the accused is required to step into the witness-box and unless he does so he would not be discharging his burden.

An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different.

Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is 'preponderance of probabilities.' Inference of preponderance of probabilities can be drawn not only from the materials brought

on record by the parties but also by reference to the circumstances upon which he relies.

A statutory presumption has an evidentiary value. The question as to whether the presumption stood rebutted or not, must, therefore, be determined keeping in view the other evidence on record. For the said purpose, stepping into the witness-box by the appellant is not imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration.

The Apex Court has reiterated the aspects laid down in the above decision in a subsequent decision reported in **AIR 2009 SC 568A-P. Venugopal Vs Madan Sarathi**

Our High Court has reiterated this aspect in the decision reported in **2009-KCCR-1-283 = 2009-AIR Karr-1-565,** in the case of **Sridhar Narayan Hegde vs. Karnataka Bank Limited, Bangalore.**

However, the Apex Court, in the case of **Rangappa Vs Mohan** reported in **AIR 2010 SC 1898,** in para no. 14 has held that "In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by section 139 of the Act does indeed include the existence of a

legally enforceable debt or liability. To that extent, the impugned observations in **Krishna Janardhan Bhat (supra)** may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. 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".

In view of the decision, the burden is on the accused to rebut the presumptions available under Sec. 139 of NI Act. The latest decision on this point is when it is proved that the complainant had no source of income to lend huge amount to the accused, the accused is entitled to acquittal. The judgment is dated 15-11-2014 in the case of **K Subramani Vs K Damodar Naidu** reported in **(2015) 1 SCC 99.**

Regarding the presumption, the latest decision is in the case of **Don Ayengia Vs State of Assam** reported in **(2016)3 SCC 1.** Refer the latest decision in the case of **Uttam Ram Vs Devinder Singh Hudan,** reported in **(2019) 10 SCC 287**. The Apex court has referred earlier decisions rendered by it.

Karnataka High Court, in the case of **National Agricultural Marketing Federation of India Ltd., Vs Disha Impex(Pvt) Ltd., and another,** reported in **2021 SCC online kar. 25,** has held about rebuttal of presumption and extent of evidence required to rebut the presumption. **Basavalingappa Vs Mudibasappa** reported in **(2019)5 SCC 418** also throws light of the rebuttal of presumption.

Q.No.22) Whether the contentions that cheque was issued before closing the account or that the handwriting and ink varies, are sufficient to rebut the presumptions U/S 118 & 139 of the Act?

No. The fact that the cheque was issued before the account is closed & it was presented after, will not absolve the drawer of his criminal liability, because, closing account indicates that the balance in account is nil i.e. insufficient to honour the cheque. As long as the signature on the cheque is admitted, whether the ink with which the other particulars are filled up is different or that the handwriting is not that of the drawer does not matter. Until rebutted, the presumption that the cheque was issued for consideration exists. Relevant decision is reported in **(2002) 7 SCC 150** in the case of **P.K.Manmadhan Kartha Vs. Sanjeev Raj.**

Q.No.22A) Can presumption be raised if cheque found to be *materially altered*?

No. Presumption u/s Sec. 139 cannot be raised. Acquittal on that ground found to be correct. However, Court must ascertain that the alleged alteration is material or formal. Refer the decision reported in **2011(6) KantLJ 476= 2012 Cr.LJ 1463 -M.B.Rajasekhar Vs Savithramma.**

Sec. 20 of the Act permits payee to fill amount as well as date in blank signed cheques and thus complete inchoate instrument delivered to him. Such filling up of date and amount does not constitute alteration within the meaning of Sec. 87 of the Act- **Jaimin Jewelery Exports(P) Ltd Vs State of Maharastra-2917 SCC online Bom 1771.** Also refer **S.R. Muralidar Vs Ashok G.Y-(2001)4 ICC 324(Karnataka decision), V V Chari Vs Meenakshi Developers-2018 SCC Online Kar 3770= ILR 2018 Kar 4775, R Lakshminarasimha Vs Gouthamchand-2018 SCC Online Kar 3860=ILR 2019 Kar 906.**

In case of signed blank cheque, if the drawee dishonestly fills up any excess amount, drawer has no obligation to facilitate the encashment of cheque**-Shreyas Agro Services (P) Ltd Vs S. B Chandrakumar-(2008) 61 AIC 804.**

Q.No.23) Is a power of attorney holder liable U/S 138?

Yes. The power of attorney holder steps into the shoes of the payee or holder in due course or the drawer as the case may be. Therefore, if the cheque issued by him is dishonoured he becomes liable for prosecution U/S 138 and complaint against him is maintainable. Relevant decision **G.N. Gurappa Reddy Vs. A.S. Finance & Investments ILR 1999 Kar 1655, 2001 KCCR 1388.**

Q.No.23-A) Whether complaint can be filed and represented by Power of Attorney Holder?

Yes. The complaint can be filed by Power of Attorney holder. Refer the decision reported in **(2008) 8 SCC 536** in the case of **Shankar Finance and Investment Co. Vs State of Andhra Pradesh. Subsequently, by relying upon the above decision, the Apex Court has held similarly. The relevant decision is reported in** 2009 Ker LT (2) 991 (SC) –**Praveen Vs Mohd Tajuddin.** In the said case, the complaint was filed by an individual. In the latest decision of the Apex Court in the case of A.C. Narayan Vs State of Maharastra, has reiterated its earlier view with some modification. It is held that however, it is expected that such power of attorney holder or legal representative(s) should have knowledge about transaction in question so as to able to bring on record truth of grievance/offence—If complaint is filed

for and on behalf of payee or holder in due course, that is good enough compliance with Section 142 of N.I. Act. The decision is rendered on 13-9-2013 in Crl. Appeal No.73/2007. Refer **[2013] ACR 976=2013 (6) Supreme 705.**

VII. The offence

Q.No.24) Whether the absence of anyone of the ingredients fatal to the case?

Yes. Refer the decision reported in **AIR 2000 SC 954-M/S.Kusum & Ingos & Alloys Ltd., Vs. M/S. Pennar Peterson Securities Ltd. And others.** Also refer the decision reported in **(2008)13 SCC 77-Samshad Begum Vs B.Mohammad.**

Q.No.25) Does the mere issuing of a cheque constitute an offence if it bounces?

Yes. Relevant decision reported in **AIR 1996 SC 2339 "Electronics T. and T. D. Corpn. Ltd., M/s. v. Indian T. and E. Pvt. Ltd."** It is held that-

"The object of bringing Section 138 on statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments.

Despite civil remedy, Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induces the payee or holder in due course to act upon it. Section 138 draws presumption that one commits the offence if he issues the cheques dishonestly. It is seen that once the cheque has been drawn and issued to the payee and the payee has presented the cheque and thereafter, if any instructions are issued to the Bank for non-payment and the cheque is returned to the payee with such an endorsement, it amounts dishonour of cheque and it comes within the meaning of Section 138".

VIII. Compounding

Q.No.26) Is the offence under S.138 compoundable?

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

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

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

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

(c) I 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. Let it also be clarified that any costs

imposed in accordance with these guidelines should be deposited with the Legal services Authority operating at the level of the Court before which compounding takes place. For instance, in case of compounding during the pendency of proceedings before a magistrate's Court or a Court of Sessions, such costs should be deposited with the District Legal Services Authority. Likewise, costs imposed in connection with composition before the High Court should be deposited with the State Legal services Authority and those imposed in connection with composition before the Supreme Court should be deposited with the National Legal Services Authority.)

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

In the opinion of the Court, since Section 147 of the Act did not carry any guidance on how to proceed with compounding of the offences under the Act and Section 320 of the Code of Criminal Procedure, 1973 could not be followed in strict sense in respect of offences pertaining to Section 138 of the Act, there was a legislative vacuum which prompted the Court to frame those guidelines to achieve the following objectives:

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

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

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

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

Q.No.26-A) What is the course available to the Court when the accused wants to pay the cheque amount and compound the offence, but, complainant is not willing to compound?

Offence under section 138 of the Act is primarily a civil wrong. Burden of proof is on the accused in view of presumption under Section139 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 Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read,

principle of Section 258 Cr.P.C. will apply and the court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect. The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the court. 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. (Paras 18.1, 18.2 and 18.3) **Meters and Instruments Private Ltd., and another vs. Kanchan Mehta – (2018) 1 SCC 560.** Above decision has been followed in subsequent decision in the case of **Gulshan Dhall And Another Vs Sasrbit Singh and another –(2019)11 SCC 671.** As far as closing of case under Sec. 258 is concerned, the view taken in **Meters and instruments** case has been overruled in the case of **Expeditious Trial of cases under Sec. 138 NI Act, Suo Moto writ petition (Crl) 2 of 202** reported in -**2021 SCC online SC 325.**

Q.No.27) What is the effect of compounding or compromising the case?

Once the matter is compromised, then, it must end in acquittal of the accused. There is no question of granting installments and acquitting the accused. Refer the decision reported in **K. J. B. L. Rama Reddy v. Annapurna Seeds 2005 (10) SCC 632**, and **(2005)12 SCC 234- Cochin Hotels Co. Pvt Ltd Vs Kairali Granites & Ors**.

Q.No.28) Whether criminal proceedings are barred due to pendency parallel civil case?

No. Relevant decision is **AIR 2000 SC 1869- Medchi Chemicals & Pharma (P) Ltd. Vs. Biological E. Ltd.** Even if the suit is decreed, continuation of criminal proceedings is not an abuse of process of Court.

IX. Offences by company or firm

Q.No.29) If the offender is a company, what happens the company is declared sick before the payment of cheque amount becomes due?

Nothing. Even if a company is declared sick, the criminal prosecution is not barred. S.22 of Sick Industries Companies (special provisions) Act does not create any legal impediment

to institute proceedings against the company and directors for an offence U/S 138. The relevant decision is reported in **AIR 2000 SC 954 – M/S. Kusum Ingots & Alloys Ltd. Vs. M/S. Pennar Peterson Securities Ltd. & others.** Also refer the decision in the case of **BSI Ltd Vs Gift holdings (P) Ltd,** reported in **(2000) 2 SCC 737**.

Q.No.30) What is effect of filing an application for winding-up before demand notice is issued?

The liability is not absolved because U/S 138, the offence will complete if the amount is not paid within a stipulated time. In case of winding-up of a company other persons can be prosecuted provided it is shown that other persons of the company have committed an offence U/S 138 of the Act. The relevant decision is reported in **2000 SCC (Cri) 556 – Pankaj Mehra & others Vs. State of Maharashtra & others.**

Q.No.31) Is it possible to prosecute the company for an offence U/S 138, if the Court orders winding-up proceedings?

No. If the Court orders winding-up proceedings then proceedings U/S 138 cannot be initiated against such company. This is because even if prosecution is initiated the company cannot be punished by way of fine as the assets cannot be dissolved. The relevant decision is reported in **AIR**

2000 SC 145 – Anil Hada Vs. Indian Acrylic Ltd. Also refer the decision in the case of **Dilip Hasriramani Vs Bank of Baroda** reported in **2022 SCC online SC 579.**

Q.No.32) How can sentence be imposed on a company and punish it?

Since a company does not have a physical body, in the event of conviction, the S.C has held that there is no hurdle for recovery of fine covered by the sentence even from a sick company. The relevant decision is reported in **AIR 2000 SC 926 – M/S. BSI Ltd & Anr. Vs. Gift Holding Pvt. Ltd. & another.** In the latest decision reported in **2012 AIR SCW 1098-CBI Vs Blue Sky Tie-up Pvt. Ltd,** it is held that while imposing substantial sentence, Court can impose fine on the corporate body besides punishing the officer in charge of the affairs of the company.

Q.No.33) When the company as well as its office bearers are arrayed, if the company chooses not lead evidence can the arrayed office bearers lead the rebuttal evidence?

Under law, the payee has got option to take against a company alone or the responsible persons or both. Therefore, other arrayed officers can rebut the presumptions. The relevant decision is reported in **AIR 2000 SC 145 – Anil Hada Vs Indian Acrylic Ltd.**

Q.No.34) In case of company who are liable?

If the company is the offender, either the company alone or the responsible persons alone or both can be held liable. The relevant decisions are reported in **1997(4) KLJ 23 – Vishwa Cement Products Vs. K.S.F.C, AIR 2005 SC 2436 S. V. Muzumdar v. Gujarat State Fertilizer Co. Ltd., AIR 2007 SC 912 – Saroj Kumar Poddar v. State (NCT of Delhi), AIR 2007 SC 1454 – N. K. Wahi v. Shekhar Singh and AIR 2008 SC 2255 – DCM Financial Services Ltd. Vs. J. N. Sareen, 2010-JT-2-161= 2010 (3) SCC 330= 2010 AIR(SCW) 1508- National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal, AIR 2010 SC 2835 "Central Bank of India v. Asian Global Ltd.", A.K Singhania Vs Gujarath State Fertilizer Co. Ltd reported in (2013) 16 SCC 630.**

In a recent decision, in the case of **Standard Charetered Bank Vs State of Maharastra, reported in 2016 AIR SCW 1750** Apex Court has held that considering the totality of assertions made in the complaint and also taking note of the averments put forth relating to the Respondent Nos. 2 and 3 herein that they are whole -time Director and Executive Director and they were in charge of day to day affairs of the Company, we are of the considered opinion that the High Court has fallen into grave error by coming to the conclusion

that there are no specific averments in the complaint for issuance of summons against the said accused persons. We unhesitatingly hold so as the asseverations made in the complaint meet the test laid down in Gunmala Sales Pvt. Ltd. (supra).

Q.No.35) Can a company file complaint?

Yes. Though a company does not have the characteristics of a company of a human body, it is a legal entity. It is a de-jure complainant and it has to be represented by an authorized person. The relevant decision is reported in **AIR 1998 SC 596 – Associated Cement Company Ltd. Vs. Keshvanand.** Also refer the decision of Apex Court in the case of **Milind Shripad Chandurkar Vs Kalim M. Khan & another, reported in 2011 AIR SCW 1773** which deals about the *locus standi* to file complaint. He must be 'payee' or holder in due course of a cheque.

Q.No.36) In case of a company, to whom the demand notice has to be sent?

To any responsible person. If the Managing Director has signed the cheque on behalf of the company, notice served on him is valid. The relevant decision is reported in **AIR 1999**

SCW 2201 – Bilakchand Gyanchand Co. Vs. A. Chennaswami. Also refer **2015(6) Supreme 730** in the case of **Jitendra Vora Vs Bhavana Y shah and others**.

Q.No.37) Is it possible for a successor company to continue the criminal proceedings?

Yes. If the complainant company is wound up, its successor can continue the proceedings U/S 138. The relevant decision is reported in **(2000) 10 SCC 375 – Bombay Offshore Services Ltd Vs. Shankar Narayan.**

Q.No.38) What is the meaning of person in charge?

For the purpose of Section 138, the expression ' person – in –charge ' should mean that such a person should be in control of all the day to day business or affairs of the company or the firm as the case may be.

If the complaint does not attribute any act done on his own or with connivance of some other person of the company or firm which finally lead to filing of complaint, then such person cannot be prosecuted. **– (2002) 7 SCC 655 – Katta Sujata Vs. Fertilizers Chem Travencore Ltd.**

Q.No.39) Whether averments relating how the directors are liable for an offence under Sec. 138 are to be stated in the complaint?

Yes. It is necessary to state about the liability. The persons, who are accused, must have been in charge of the affairs of the Company. Refer the decision reported in **2010-JT-2-161= 2010 (3) SCC 330= 2010 AIR (SCW) 1508-National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal.**

In the decision reported in **2010 (7) JT 546-State of NCT of Delhi Vs Rajiv Khurana, it** is held that "the legal position which emerges from a series of judgments is clear and consistent that it is imperative to specifically aver in the complaint that the accused was in charge of and was responsible for the conduct of business of the company. Unless clear averments are specifically incorporated in the complaint, the respondent cannot be compelled to face the rigmarole of a criminal trial". Also refer the decision reported in **2010 (4) AIR Kar R 336- Sujatha Rana vs Dilip Kumar.**

Q.No.40) If the person who filed the complaint is not duly authorized, can that defect be cured?

Yes. If a person not authorized by the company files a complaint, it is not totally illegal. It cannot be the sole ground

to quash the complaint at the threshold itself. This is a defect that can be cured by the company at any stage of the proceedings.

At any later stage, the company can authorize such person and set-right the defect. The relevant decision is reported in **AIR 2002 SC 182 – M.M.T.C. Ltd. Vs. Medchi Chemicals & Pharma (P) Ltd.,**

Q.No.41) Who has to answer the charge if, more than one person is arrayed?

This is a question to be decided by the Court. Ultimately who should face the trail would have to be considered by the Court at the time of framing charge. The relevant decision is reported in **(2000) 10 SCC 529 – P. Rajarathinam Vs State of Maharashtra.**

Q. No.42) If the company is not made a party, is it permissible to quash the complaint filed against other persons of the company?

Over Ruled

No. Just because, in a complaint U/S 138, the company is not made a party but only the responsible persons made the parties, the complaint cannot quashed. The relevant decision is reported in **AIR 2000 SC 145 – Anil Hada Vs. Indian Acrylic Ltd**., However, in a subsequent decision, the above decision has been overruled by holding that without arraying company as party directors cannot be prosecuted. Refer the

decision reported in **2012-LAWS (SC)-4-31 , 2012-LAWS(SC)-4-31 -Aneeta Hada Vs Godfather Travels and Tours Pvt. Ltd,** wherein it is held that “In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh (supra) which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal (supra) does not correctly lay down the law and, accordingly, is hereby **overruled**. The decision in Anil Hada (supra) is overruled with the qualifier as stated in paragraph 37. The decision in Modi Distilleries (supra) has to be treated to be restricted to its own facts as has been explained by us hereinabove.”

In the latest decision in the case of **Himanshu Vs B. Shivamurthy,** reported in **(2019) 3 SCC 797**, it is held that without making company as a party, complaint is not maintainable.

Q.No.43) Is it possible to prosecute the partners without impleading the firm?

Yes**.** As the firm is a juristic person, it has no blood and flesh. Even if the firm is made a party, except imposing fine

nothing else can be done. Since the partners are the responsible persons of the firm, they can be prosecuted for the offence committed by the firm. Thus, even if the firm is not impleaded, its partners can be held liable. The relevant decision is reported in **ILR 1994 Kar 2991 – V.N. Samanth Vs. K.G.N. Traders.**

Q.No.44) Whether the accused who was not the director as on the date of issue of cheque, liable under Section 138 of the Act.

No. Unless the complainant shows that the accused was the director of the company as on the date of issue of cheque, prosecution against such director is not maintainable. Refer **ILR 2010 Kar 435- M. Mukesh P. Patel Vs M/S Vijay Mukesh Chits(P) Ltd.**

Q.No. 45) What happens if the director of company resigns and the resignation is accepted before the commission of the offence?

Such director is not liable for offence under Sec. 138 of the Act. Refer the decision reported in **2011 AIR SCW 1199 = AIR 2011 SC (Criminal) 544 = AIR 2011 SC (Civil) 535 – Harshendra Kumar D vs Rebatilata Koley Etc**.

Q.No.46) What happens if an employee of a company issues cheque belonging to his personal account for the dues of company? Whether company and directors are liable?

The Company and directors are not liable. Complaint is tenable against the drawer of cheque. Refer the decision reported in **2010 AIR SCW 4616= AIR 2010 SC 2596** in the case of **P.J. Agro Tech Ltd & others Vs Waster Base Ltd**. Karnataka High Court has also reiterated the same view in the decision reported in **2011-AIRKarR-2-627 –Rasheeda Mehaboob Vs Replicon Software (India) Pvt. Ltd.**

In case of initiation of insolvency proceedings against the corporate debtor, it is impossible to initiate or continue the proceedings under sec. 138 of the Act. Refer the decision in the case **of P. Mohanraj Vs Shah Bros.Ispat (P) Ltd** reported in **(2021)6 SCC 258**.

When it is a case against a company, the company and the person who is responsible for the affairs of the company must be arrayed as accused. Basic averments to that effect are required in the complaint. Refer the decision in the case of **G Ramesh Vs Kankike Harish Kumar Ujwal – (2020)17 SCC 239**

Q.No.47) If plea of vicarious liability is taken by the partners on the ground of their not acting as partners at the relevant point of time, then, against whom the burden of proof lies?

Burden of proof that at the relevant point of time they were not the partners lies specifically on them. This onus is required to be discharged by them by leading evidence and unless it is so proved, in accordance with law, they cannot be discharged of their liability. Refer the decision in the case of **Rallis India Ltd. V. Poduru Vidya Bhusan & Ors. – 2001(3) Supreme 244.**

Q.No.47A) What is Proprietary concern and who is liable incase of issue of cheque?

A proprietary concern, however, stands absolutely on a different footing. A person may carry on business in the name of a business concern, but he being proprietor thereof, would be solely responsible for conduct of its affairs. A proprietary concern is not a company. Company in terms of the Explanation appended to Section 141 of the Negotiable Instruments Act, means anybody corporate and includes a firm or other association of individuals. Director has been defined to mean in relation to a firm, a partner in the firm. Thus, whereas in relation to a company, incorporated and registered under the Companies Act, 1956 or any other

statute, a person as a Director must come within the purview of the said description, so far as a firm is concerned, the same would carry the same meaning as contained in the Partnership Act. Refer the decision in **Raghu Lakshminarayanan v. Fine Tubes- (2007) 5 SCC 103, at page 106:**

Q.No. 47B) Whether an unregistrered partnership firm can file complaint for the offence under Sec. 138? What is the effect of Sec. 69(2) of the Indian Partnership Act?

Yes, it can file complaint. Sec. 69(2) of Indian Partnership Act is applicable to civil suits only. Refer the decision reported in the case of **Gowri Containers VS. S C Shetty –ILR 2007 Kar 4586.**

X. The Demand notice

Q.No.48) What are the requirements of a demand notice?

The notice of demand U/S 138 is a statutory notice. The section requires it to be in writing and it has to be issued within thirty days of the receipt of information from the bank about the dishonour of cheque by the payee. The section though requires a notice to give raise cause of action, it seldom mentions any form, nor does it mention the basic requirements of a valid notice. Therefore, great precaution has

to be taken while affecting such a statutory notice. **AIR 2003 SC 4689 –K. R. Indira vs. Dr. G. Adinarayana.**

Q.No.49) In case of dishonour of cheque, when does the cause of action arise?

To make out an offence U/S.138 of the Act, the complainant has to prove the ingredients of the offence. A statutory obligation is imposed on the payee to issue a demand notice to the drawer. Mere giving this notice in writing will have no effect at all. The notice so issued should be received by the drawer of the cheque. Only upon such receipt of the notice and upon the same is acknowledged, but the drawer failed to pay the cheque amount, the cause of action arises to initiate proceedings against the drawer whose cheque is dishonoured. The relevant decision is reported in **AIR 2001 SC 676 – M/S. Dalmia Cement (Bharat) Ltd., Vs. M/S. Galaxy Traders and Agencies & Others.**

Q.No.50) is it possible to include any amount other than the cheque amount in the demand notice?

Yes. While issuing a notice, demand should be made to pay the cheque amount. If no such demand is made, the notice becomes invalid. Since the 'said amount' found in Section 138 refers to the cheque amount, if the demand notice claims other sums like interest, cost, damages etc., separately,

the notice will not be invalidated. That is, a demand notice cannot make an omnibus demand without giving break-up figures as to which amount is what. If so, such a notice may fail to meet the legal requirement and courts may invalidate it.

If the cheque amount is paid up by the drawer before the specified time or before the proceedings are instituted, to realize other amounts mentioned in the notice like interest, cost etc, the payee has to initiate separate civil proceedings. The relevant decision is reported in **AIR 2000 SC 828 – Suman Sethi Vs. Ajay K. Churiwal & Another and AIR 2003 SC 4689 – K. R. Indira v. Dr. G. Adinarayana.**

Q.No.51) Can demand notice be issued to a director where the cheque was issued by the company?

Yes. If the company has issued the cheque through one of its directors, then the notice issued to such director is valid. In the case on hand, the cheque was signed by the director and demand notice was served on him. The purpose of such a notice is to indicate the factum of dishonour. Since the director had signed the cheque, it is the duty of the director to see that the payment is made within the stipulated time. The fact that he signed the cheque and that he is the director was not under dispute. Therefore, it cannot be contended that the demand notice was not issued to the accused company. The

relevant decision is reported in **AIR 2001 SC 518– Rajneesh Agarawal Vs. Amit J. Bhalla.**

Q.No.52) Whether full or part payment of cheque amount absolves the liability of the accused under Sec. 138?

No. Refer the decision reported in **AIR 2001 SC 518(B) – Rajneesh Aggrawal Vs. Amit J. Bhalla,** wherein it is held that "Once the offence of dishonour of cheque is committed, any payment made subsequent thereto will not absolve the accused drawer of the liability of criminal offence, though in the matter of awarding of sentence, it may have some effect on the Court trying the offence. But by no stretch of imagination, a criminal proceeding could be quashed on account of deposit of money in the Court or that an order of quashing of criminal proceeding, which is otherwise unsustainable in law, could be sustained because of the deposit of money in this Court".

The latest decision on this aspect has been dealt with by the Apex Court in the case of **M/S Moser Baer photo Votltaic Ltd Vs M/S Photon Energy systems Ltd and Others,** reported in **2016(2) Supreme 466,** wherein, it is held that In the instant proceeding the parties have agreed that between the parties the total outstanding amount shall be treated as Rs.1,80,00,000/ - (Rupees one crore eighty lac only) and the same shall be paid by the respondents to the appellant in regular monthly instalments of Rs.15,00,000/ -

(Rupees fifteen lac). We accordingly direct that the respondents shall pay the first instalment of Rs.15 lac by first week of April 2016. The remaining 11 instalments of Rs.15 lac each shall be paid regularly by the first week of each succeeding month. On admission or proof of such payments in accordance with the aforesaid arrangement, the complaint case shall stand quashed if the entire amount of Rs.1,80,00,000/ - is paid by the respondents to the appellant by the first week of March 2017. Till then the complaint case shall remain in abeyance. It is made clear that if the entire payment is not made within the time indicated above then this order shall stand recalled and the complainant will be at liberty to move the concerned court for proceeding with the criminal case any time in April 2017 by virtue of the present order.

Q.No.53) What is the purpose of demand notice?

To protect the honest drawer. The moment a cheque is bounced, it cannot be presumed that the drawer is dishonest. There may be genuine reasons for the return of the cheque. Therefore, it is necessary to bring the factum of dishonour to the notice of the drawer so that, he can rectify his omission or commission avoiding the payee resorting to criminal prosecution. The relevant decision is reported in **(1999) 8 SCC 221 – Central Bank of India Vs. Saxons Farms.** Also

refer the decision in the case of **Chikkachowdappa Vs Seetharam,** reported in **2013(6) LAWS Kar 4.**

Q.No.54) Cheque was dishonoured prior to the amendment to Sec.138(b) extending 30 days' time for issue of demand notice, but, complainant fails to issue demand notice within 15 days but issued notice within 30 days after the amendment. Is it a valid demand? Whether amendment to Sec. 138 (b) has got retrospective effect?

Notice is not valid. Amendment has no retrospective effect. Refer the decision reported in **2010-TLKAR-0-75 = 2010 AIR KAR (2) 473 – Geetha vs. Vasanthi S. Shetty.**

Q.No.55) Is the notice issued under Section 434 of the Companies Act sufficient for the purpose of Section 138 of the N.I. Act?

Yes. If notice is issued U/S 434 of the Companies Act within fifteen days (now it is thirty days) of the information regarding the return of the cheque as unpaid, is valid under clause (b) of the proviso to Section 138. The relevant decision is reported in **AIR 2001 SC 2625 – M/S. Uniplast India Ltd. & Others Vs. State.**

Q.No.56) If the notice states that in addition to action U/S 138, action also would be taken under IPC by informing the police, then, is such a notice valid?

Yes. Though the police cannot investigate U/S 138, the dishonour of cheque is liable to prosecution under I.P.C also and investigation by police is not illegal under the Code. Therefore, no infirmity can be found with the notice. The relevant decision is reported in **(1999) 8 SCC 221 – Central Bank of India Vs. Saxons Farms = AIR 1999 SC 3607**

Q.No.57) Whether a notice dispatched by fax, telegram, served by the payee himself or through a special messenger is a valid "notice in writing"?

Yes. All that the section contemplates is a notice in writing. It does not say anything about the mode of its service. Hence, if the notice is sent by any other mode other than the registered post, it is valid for the purpose of Section 138. The relevant decision is reported in **AIR 1999 SC 1609 – SIL Import – USA Vs. Exim Aides Silk Exporters.**

Q.No.58) Where demand notice is sent both by fax as well as by registered post, which is the date to be taken into account for calculating limitation period to file the complaint?

The date of fax. Where notice is sent both by fax as well as by registered post, obviously the fax reaches faster than the registered post. If receipt of the registered post is taken for filing the complaint, it is delayed for the period between the date of fax and receipt of registered post; hence it is barred by limitation. The relevant decision is reported in **AIR 1999 SC 1609 – SIL Import, USA Vs. Exim Aides Silk Exporters.**

Q.No.59) Can notice be issued on every successive dishonour?

OVERRULED

No. Under law, the payee can present the cheque to the bank any number of times within its period of validity. But if he issues notice to the drawer on any one of those occasions, neither can he present the cheque once more not he can issue a notice one more time. The relevant decisions are reported in **1998(2) KLJ 1 – Y. Krishna Murthy Vs. Sharanappa and 2010 AIR SCW 828A-Tameeshwar Vaishnav Vs Ramvishal Gupta.**

However, above view has been overruled by the Apex Court in the decision reported in **2012 (7) Supreme 68 -Msrs**

Leathers Versus. Palaniappan, wherein, it is held that "In the result, we overrule the decision in Sadanandan Bhadran 's case (supra) and hold that prosecution based upon second or successive dishonour of the cheque is also permissible so long as the same satisfies the requirements stipulated in the proviso to Section 138 of the Negotiable Instruments Act". Also refer the decision in **Kamlesh Kumar VS. State Of Bihar 2014(1) Crimes(SC) 108.**

Q.No.60) When does the demand notice is deemed to have been served?

Or

What is the effect of the expressions 'Left, not known', 'not available in the house', 'house locked', 'shop closed' etc.?

The only requirement for the service of demand notice is that, the notice should have been sent to the correct address of the drawer. Since the mode of service is not prescribed by the law, it can be sent either by registered post or under certificate of posting or otherwise. The expressions 'Left, not known', 'not available in the house', 'house locked', shop closed etc., are all synonyms. Therefore, if the address of the drawer is proved to be correct, even if the notice is returned with the above remarks, then the notice is deemed to have

been served on the drawer. The relevant decision is reported in **2002 Cri. LJ 1926(Kar) – Fakirappa Vs. Shiddalingappa.** Also refer the decision **2013 LAWS(kar) (6)page 4** in the case of **Chikkachowdappa Vs S.M. Seetharam.**

Q.No.61) Can notice be issued to the payee who endorsed the cheque?

No. Notice as contemplated by law has to be served on the drawer. If the payee has endorsed the cheque to a holder in due course, notice issued to such a payee does not amount to compliance of Section 138. Because, he only endorses the cheque issued to him by the drawer. That means he is not the drawer by himself. Thus, if a notice is issued to any person, other than the drawer, further proceedings cannot be instituted. The relevant decision is reported in **ILR 2001 Kar 101 – L.G. Narayana Swamy Vs. Vijayananda Road Lines Ltd.,**

Q.No.62) If cheque number is not mentioned in the notice is it fatal to the payee's case?

Not always. For example, in near past, only one cheque was issued by the drawer to the payee, and then if all other particulars are mentioned, such notice cannot be invalidated. If more than one cheque is issued to the same person, then which of them is dishonoured is important and the number

has to be mentioned. The relevant decision is reported in **ILR 2001 Kar 5469 – Nityanand Vs. Jamuna Prakash.**

Q.No.63) Can demand notice be sent within the shorter period than prescribed?

Yes. If notice is sent within the prescribed period of 15 days (now 30 days), such a notice is valid, because the words used in the Section are 'within'. The relevant decision is reported in **ILR 1994 Kar 2991 – V.N. Samanth Vs. K.G.N. Traders.**

Q.No.64) What is the meaning of giving notice?

As the section contains the words "within fifteen days of receipt" of notice, giving notice under the section is not same as receipt of notice wherein, giving is a process of which receipt is the accomplishment. Once the payee dispatches the notice, his part of the obligation is done with, and further consequences depend upon what the sendee/drawer does. In any case, the Court should not adopt an interpretation in this context which helps the dishonest drawer, because the payee is presumed to be the loser, his interest has to be safeguarded. The relevant decision is reported in AIR **1999 SC 3762 – K.Bhaskaran vs. Sankaran Vaidhyan Balan.**

Q.No.65) What is the effect of notice returning as unclaimed?

Very technical rulers of interpretation which can defeat the object of the provision, encourage the dishonest drawer, embarrass the honest one or affect the interest of the payee, should not be adopted by the Courts. When the notice is returned as unclaimed but not as refused, then also it is another face of evasion.

Therefore, the principle underlying in Section 27 has to be made applicable. Thus, once the sender dispatches the notice with correct address of the sendee by post, then the notice is deemed to have been served. The relevant decisions are reported in **AIR 1999 SC 3762 – K. Bhaskaran Vs. Sankaran Vaidhyan Balan and AIR 2004 SUPREME COURT 408- Goa Plast (P) Ltd. V. Chico Ursula D'Souza.** Latest decision on this aspect by our High Court is **Chikkachowdappa Vs S.M. Seetharam,** reported in **2013 (4) Kar. LJ 609.**

Q.No.66) If the notice is returned as unclaimed, what is the date of its deemed service?

The date of its return. Where the notice is returned as unclaimed, it indicates that the sendee is very much there at the address mentioned on the cover, but he is not interested to

receive it. Therefore, if the sender had dispatched the notice by post with correct address on the cover, and the same is returned as unclaimed, then, such date on which it is returned is the date on which it is deemed to have been served on the drawer. The relevant decision is reported in **AIR 1999 SC 3762 – K. Bhaskaran Vs. Sankaran Vaidhyan Balan.**

Q.No.67) By the mere fact that the payee has dispatched the notice by post, is the drawer obliged to accept the service upon him?

No. he needs not. Though under law, if the payee has dispatched the demand notice to the correct address of the drawer by post, it is deemed to have been served, the drawer need not accept it. He is at liberty to prove that he actually was not served with or he is no way responsible for non-service of the notice by leading cogent evidence. The relevant decision is reported in **AIR 1999 SC 3762 – K. Bhaskaran Vs. Sankaran Vaidhyan Balan.**

However, in a later decision in the case of **Harman Electronics (p) Ltd. Vs. National Panasonic India Ltd., reported in 2009(1) SCC 720, dated December 12, 2008,** it is held that-

Indisputably, all statutes deserve their strict application, but while doing so the cardinal principles 62herefore cannot

be lost sight of. A Court derives a jurisdiction only when the cause of action arose within his jurisdiction. The same cannot be conferred by any act of omission or commission on the part of the accused. A distinction must also be borne in mind between the ingredient of an offence and commission of a part of the offence. While issuance of a notice by the holder of a negotiable instrument is necessary, service thereof is also imperative. Only on a service of such notice and failure on the part of the accused to pay the demanded amount within a period of 15 days thereafter, commission of an completes. Giving of notice, therefore, cannot have any precedent over the service. It is only from that view of the matter in Dalmia Cement (Bharat) Ltd. V. Galaxy traders and Agencies Ltd. , [(2001) 6 SCC 463] emphasis has been laid on service of notice.

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

For the views we have taken it must be held that Delhi High Court has no jurisdiction to try the case. We, however, while exercising our jurisdiction under Article 142 of the Constitution of India direct that complaint Case No. 1549 pending in the Court of Shri N. K. Kaushik, additional Sessions Judge, New Delhi, be transferred to the Court of the district and Sessions Judge, Chandigarh who shall assign the same to a court of competent jurisdiction. The transferee Court shall fix a specific date of hearing and shall not grant any adjournment on the date on which the complainant and its witnesses are present. The transferee Court is furthermore directed to dispose of the matter within a period of six months from the date of receipt of the records of the case on assignment by the learned District and Sessions Judge, Chandigarh.

Therefore, the complaint cannot be filed in the Court within whose jurisdiction, notice came to be issued. If place of dishonor and issue of notice is same, then above observation is not applicable. The decision in the above case is followed in the case of **Sivakumar vs Natarajan, reported in 2009 (5) Supreme 121= 2009(8) JT 128.** However, the advocates may cite a decision, reported in **AIR 2009 SC 1355**- **Shamshad Begum Vs. B. Mohammed**, wherein, the earlier decision in Bhaskaran's case was followed, but, subsequently, the Apex Court has distinguished the decision in **Bhaskaran's** Case in

Harman's Electronics (citation given above) case, and held that mere place of issue of notice is not sufficient to get cause of action unless such place is a place of dishonour of cheque. Karnataka High Court has followed the decision in **Harman's** case in the case of **Navinbhai Rasikal Shah Vs Kotak Mahindra Bank Ltd**, reported in **ILR 2010 Kar 3654.** Also refer decision in **Nishant Aggarwal Vs Kailash Kumar Sharma** reported in **2013 ACR 618.** However, above view has been changed by the Apex Court, in the decision in **Dashrath Rupsingh Rathod Vs State of Maharastra and another** reported in **(2014)9 SCALE 97,** wherein it is held that Court gets territorial jurisdiction on the basis of place of dishonour, i.e. where payee Bank is situated. Issue of cheque, place of complainant or place where legal notice is issued do not confer territorial jurisdiction. This view has been followed in subsequent decision of Apex Court, in the decision in **K.K. Polycolor India Ltd Vs Global Trade Fin Ltd** reported in **(2014) 9 SCC 225.** As far as pending cases are concerned, those cases which are in pre-process stage, shall be transferred to Courts which has got territorial jurisdiction. Post process stage, i.e. where process is served on the accused, same shall be continued in the Courts where they are pending. The said cases are deemed to have been transferred to the Courts where they are pending, from the Courts, which has got territorial jurisdiction, by virtue of the Judgment of the Apex Court. (read para 20 of the Judgment). However, in view

of amendment to N I Act, the anomaly has been removed by conferring the jurisdiction on the Court, within whose jurisdiction, the cheque is presented for encashment. Therefore, above decisions are of no significance.

In the decision reported in **2010(3) KCCR 1950-Amzad Pasha Vs H.N. Lakshmana**, it is held that unless the address is properly written, cannot be held as valid service and compliance of Sec. 138 of the Act.

Q.No.68) What happens if payee dies before issue of demand notice? Can legal heir of payee issue demand notice and prosecute the case?

Yes. In view of the decision of our High Court, such legal heir can proceed to issue notice and prosecute the case. The decision is reported in **2003-TLKAR-0-236= 2004-ILR (KAR)-0-367, Bhagava vs. Kadasiddeshwara Trading Company**, where it is held in para no. 12 that *"Having regard to the factual aspects and the settled principles of law in this regard, in the opinion of this Court, on the death of the payee, his legal heirs steps into the shoes of the payee for all practical purposes and such a person can also file and prosecute the complaint after completing the legal formalities. It is also necessary to mention that it would be incumbent upon the Complainant to prove that the Complainant is the legal representative of the deceased payee, in the event of accused disputing the same. In*

the case on hand, the payee had died and the wife of the payee, as the legal heir, had presented the cheque in question and on the cheque being dishonoured, legal notice had also been issued and thereafter, the proceedings had been initiated under Section 138 of the NI Act".

XI. The Cause of Action

Q.No 69) What gives rise to cause of action? Is it dishonour of cheque or failure to pay the cheque amount within the time stipulated?

It is the latter. Refer the decision reported in **AIR 1999 SC 3762 - K. Bhaskaran Vs. Sankaran Vaidhyan Balan.**

XII. The limitation

Q.No.70) What is the time limit within which the demand notice be issued?

30 days. The period of limitation has to be counted from the date of receipt by the payee of the information from the Bank. Refer **AIR 2001 SC 2752 in the case of M/S. Munoth Investments Ltd., Vs. M/S. Puttukota Properties Ltd., & Another and 2009(8) SCALE 431-Shivakumar Vs Nataarajan (para 12) (available in laws CD with citation as 2009-TLPRE-0-739 , 2009 (TLS)49117)**

Q.No.71) How to calculate period of limitation for filing the complaint?

The cause of action arises on the 16th day of receipt of demand notice by the drawer and complaint should be filed within one month from that day. Relevant decision reported in **AIR 1999 SC 1090 – Saketh India Ltd., Vs. India Securities Ltd.,** The Supreme Court has held that without excluding any day the period has to be counted. This has been reiterated in a latest decision of Apex Court reported in **2013 (8) LAWS (SC) 58** in the case of **Econ Antri Ltd Vs. Rom Industires Ltd.** Also refer **2014 (3) JT 128- Rameshchandra Ambalal Joshi Vs. State Of Gujarat**

Q.No.72) How to calculate the notice period as prescribed U/S 138 B?

While calculating the limitation of 15 days (Now 30 days) to issue demand notice, the day on which the information of dishonour is received from the bank should be excluded. Relevant decisions are reported in **2001(5)-Kantlj- 449** = **ILR 2001 Kar 4987 – Raju Indani Vs. Veerendra Hegade (para 5), 2008(1) KCCR 112 – P. S. Aithala VS. Ganapathy N. Hegde (para 8).** In view of decisions given in answer to Q.No.58, above decisions cannot be used as law laid down regarding issue of notice.

Q.No.73) Is it necessary to issue notice of delay condonation application to accused before issuing process?

Yes. Relevant decision is reported in **ILR 2006 Kar 3771-Sajjan Kumar Jhunjhunwala VS. Eastern Roadways Pvt. Ltd.**

Q.No.73A) Can a delay of 1233 days be condoned?

No. Refer **2001 (7) JT 613 – Baldev Raj Taneja Vs. Bimal Kumar. Q.No. 73B) Whether period spent in conducting the case before wrong Court can be condoned?**

Yes. If it is shown and made out sufficient grounds, then such delay can be condoned. Refer the decision in the case of **Charanjit Pal Jindal Vs L.N. Metalics- 2015-5 SCALE 16=2015(2) JCC—137.**

XIII. Jurisdiction

Q.No.74) Which Court has jurisdiction to try the offence U/S 138?

The offence U/S 138 is the net result of series of acts, may be omissions and commissions. The place of issue of cheque, place of dishonour, place of receipt of notice, place wherein the complainant & accused reside. Relevant decision reported in **AIR 1999 SC 3762 – K. Bhaskaran Vs. Sankaran Vaidhyan Balan. (Refer later decision in Harmans**

Electronics case stated supra). This aspect has been further reiterated in a subsequent decision in the case of **Nishant Agarwal Vs Kailash Kumar Sharma, reported in 2013 (9) JT 188.**

In view of amendment to Sec. 142 of Negotiable Instruments Act, jurisdiction lies to the Court wherein the complainant's Bank is situated. In view of the above, the decision in **Dashrath Roopsingh Rathod Vs State of Maharastra** is held to be no more good law.

Q.No.75) What is the Course open to the Court if it has no jurisdiction to try the case?

The Court has to return the complaint for proper presentation before the jurisdictional Court instead of dismissing the complaint. Relevant decision is reported in **(Canbank Financial Services Limited v. Pallav Sheth [2001 (5) Supreme 305] = 2001(3) Crimes (SC) 336.**

XIV. The Cognizance

Q.No.76) When should the Magistrate take Cognizance?

Before recording sworn statements of the complainants and his witnesses, the magistrate should take cognizance of offence. Refer **ILR 1998 Kar 666 – Mahadeva Vs. Papireddy, 1997 (4) KLJ 23-Vishwa Cement Products Vs. KSFC, AIR**

2000 SC 2946 – Narsingdas Tapadia Vs. Goverdhan Das Partani.

Q.No.77) Can the Court take cognizance if notice is not served on the drawer?

No. **Refer (1999) 8 SCC 221 – Central Bank of India Vs. Saxons Farms, AIR 2002 SC 182 – MMTC Ltd., Vs. Medchi Chemicals & Pharma Pvt. Ltd.,**

Q.No.78) Whether sworn statement can be recorded by way of affidavit?

Modified

In the decision reported in **ILR 2005 Kar 2890** in the case of **K. Srinivasa Vs Kashinath,** it is held that the Court may accept affidavit in lieu of oral sworn statement before the Court. However, in a subsequent decision reported in **ILR 2008 Kar 424** in the case of **K. Venkatramaiah and others vs Sri. Katterao**, a passing observation is made that affidavit cannot be accepted in lieu of oral sworn statement before the Court. But, Bombay High Court has taken a similar view and ordered to circulate the copy of the order to the Magistrates to follow uniform procedure. The relevant decision is reported in **2007-BCR-2-630-Maharaja Developers VS. Udaysing S/o. Pratapsinghrao Bhonsle (Division bench).** However, this aspect of procedure has been set at rest by our High Court in the decision reported in **ILR 2009 Kar 3477-Smt. B.R.**

Premakumari vs Supraja Credit Co-operative Society Ltd (para 7) that even in an offence under Sec. 138 of the Act, the Sworn statement has to be recorded by the Magistrate and affidavit cannot be accepted in the place of sworn statement. However, on a reference to the divisional bench, the Divisional bench has answered the reference made by single judge stating that sworn statement can be recorded by way of Affidavit. **(Cr. R.P 2604/2012).**

View Changed

Q.No. 79) Is it possible to take cognizance once again, when it is contended by the accused that the issue of process on the basis of sworn statement by way of affidavit is improper?

No, because once cognizance is taken rightly or wrongly, the remedy that is available is only by challenging the same either before the Sessions Court or High Court. Magistrate cannot take cognizance twice. Refer the decisions reported in **AIR 1976 SC 1672 Devarapalli Lakshminarayana Reddy v. V. Narayana Reddy** and **AIR 2004 SC 4674 Adalat Prasad v. Rooplal Jindal.**

Q.No.80) Whether cognizance can be taken immediately after filing of the complaint, when it is noticed that there is delay in filing complaint?

No., because, if there is delay in filing complaint, it would be proper to issue notice to the accused, of delay condonation application and after deciding delay condonation application, to take cognizance**. Refer the decision reported in AIR 2008 SC 1937 P. K. Choudhury v. Commander, 48 BRTF (GREF)**

XV. The trial

Under **Section 143** of **NI Act**, the cases under Sec.138 of the Act shall be tried summarily as per Sections 262 to 265 of Cr.P.C. If it appears to the Magistrate during the course of a summary trial, that the punishment exceeding one year may have to be imposed, or that it is not desirable to try as summary trial, then, the magistrate shall hear the parties and record an order to that effect and thereafter, recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided in the Code. The decision on the summary trial procedure has been discussed in the case of **Indian Bank Association and others Vs Union Bank of India** reported in **(2014)5 SCC 590** and others and detailed guidelines have been issued by the Apex Court. Other decision is in the case of **Meters and Instruments Private Limited and another Vs Kanchan Mehta,** reported in **(2018) 1 SCC**

560. Further, the Apex Court has also discussed about deposit of cheque amount by the accused in Court and award of compensation etc. In Indian Bank Association Case, the following directions have been issued. They are ;

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

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

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

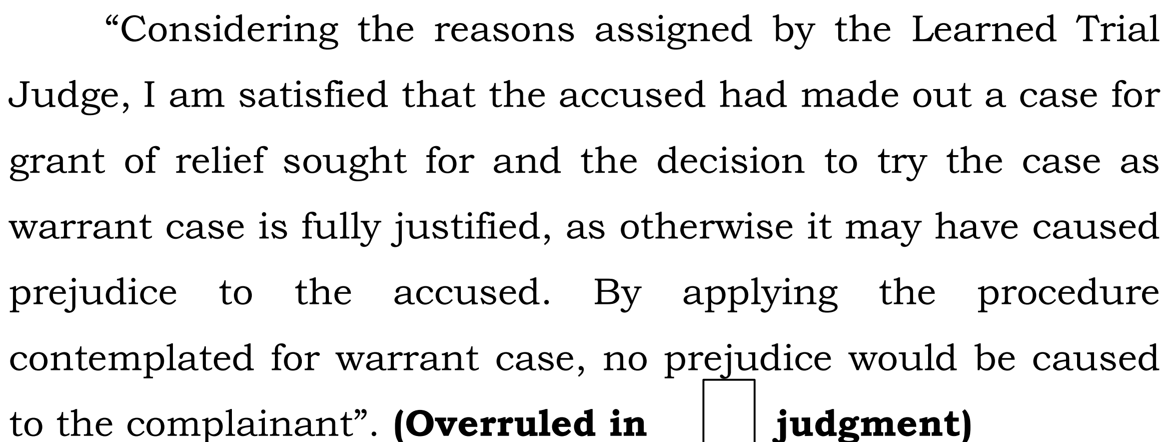
4. Court should direct the accused, when he appears to furnish a bail bond, to ensure his appearance during trial and ask him to take notice under Section 251Cr.P.C. to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused

under Section 145(2) for re- calling a witness for cross-examination.

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

6. 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.

The accused can file application to try the case as warrant case depending on the high stake of the case. Refer the decision reported in **2010 (1) KCCR 621-Leo Granex Vs Pavillion Granites,** wherein, it is held that



"Considering the reasons assigned by the Learned Trial Judge, I am satisfied that the accused had made out a case for grant of relief sought for and the decision to try the case as warrant case is fully justified, as otherwise it may have caused prejudice to the accused. By applying the procedure contemplated for warrant case, no prejudice would be caused to the complainant". **(Overruled in judgment)**

However, in the latest decision of our High Court, in the case of **Mahathru Technologies Vs M/S Creative Infotech, (DB) dated 19th Nov. 2020**, reported in **(2021)2 KCCR 1710**

in view of conflicting decisions, a reference was made by a Single judge for decision on the aspect of warrant trial, it is held that trial of offence under Sec. 138 of the Act, cannot be converted into warrant trial as per Sec. 259 of Cr.PC, and at the most it can be tried as summons case.

Q.No. 80A) Whether the Successor- in –office can decide the case wherein the predecessor has recorded the evidence?

No, if case is tried as summary case. Successor –in-office can decide only when, it is summons or warrant trial as held in the decision, reported in **AIR 2011 SC 3076=2011(6) Supreme 173- Nitinbhai Saevatilal Shah Vs Manubhai Manjibhai Panchal.** However, if evidence is recorded as summons case fully and not as summary manner, then above decision cannot be made applicable, as held in the decision in the case of **Mehsana Nagrik Sahkari Bank Ltd Vs Shreeji Cab Co.** reported in **2013 (4) Crimes 35101**. In the latest decision of Apex Court in the case of **J.V.Baharuni Vs State Of Gujarat,** reported in **2014(10) SCC 494**, it is held that "however, to summarise and answer the issues raised herein, following directions are issued for the Courts seized off with similar cases:

1. All the subordinate Courts must make an endeavour to expedite the hearing of cases in a time bound manner which in

turn will restore the confidence of the common man in the justice delivery system. When law expects something to be done within prescribed time limit, some efforts are required to be made to obey the mandate of law.

2. The learned 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.

3. The learned Judicial Magistrate should make all possible attempts to encourage compounding of offence at an early stage of litigation. In a prosecution under the Negotiable Instruments Act, the compensatory aspect of remedy must be given priority over the punitive aspect.

4. All the subordinate Courts should follow the directives of the Supreme Court issued in several cases scrupulously for effective conduct of trials and speedy disposal of cases.

5. Remitting the matter for de novo trial should be exercised as a last resort and should be used sparingly when there is grave miscarriage of justice in the light of illegality, irregularity,

incompetence or any other defect which cannot be cured at an appellate stage. The appellate Court should be very cautious and exercise the discretion judiciously while remanding the matter for de novo trial

Q.No. 80B) What is the scope of Sec. 205 Cr. PC as far as personal appearance of the accused before trial Court?

Power of the Court under Sec. 205 Cr.PC though discretionary, has to be exercised carefully depending upon the nature of the case. High Court cannot exempt the presence of the accused. It is the power of the Magistrate. Refer the decision reported in the case of **TGN Kumar Vs State of Kerala & Ors dated 14-1-2011 in Criminal Appeal No, 1854/2008** (Yet to be reported)

Q.No. 80C) Whether Court can exercise jurisdiction to receive addl list of witnesses filed by the complainant?

Yes, the power of the Court can be exercised under Sec. 311 Cr.P.C. unless it is shown that it prejudices the accused. Refer the decision in the case of **Sohil Ahamed, VS. R. Ramachandra** reported in **LAWS(KAR)-2012-10-59 (yet to be reported)**

XVI Amendment of Complaint

If there is any typographical error in the complaint, the trial Court can permit the complainant to amend the complaint, complainant need not file revision under 482 of Cr.P C before the High Court. Refer the decision reported in **2004-CrLR-0-483 = 2004 Cr.LJ 4306 – Bhim Singh Vs Kan Singh (Rajasthan).**

Q.No.81) What is the effect of presenting a pre-mature complaint?

Nothing. The Court should adjourn the case till the due date arrives. The accused is not absolved of his liability. Relevant decision is reported in **AIR 2000 SC 2946** – **Narsingdas Tapadia Vs. Goverdhan Das Partani.**

Q.No.82) Can prosecution be initiated for dishonour of a cheque issued towards time barred debt?

Yes. Refer decisions reported in **AIR 2002 SC 985 – A.V. Murthy Vs. B.S.Nagabasavanna,** wherein it is held that-

"Negotiable Instruments Act (26 of 1881), S.138, S.118, S.139 – Dishonour of Cheque – Complaint alleging that cheque was drawn to pay back amount advanced by complainant 4 years back – Dismissal at threshold on ground that as amount was advanced 4 years prior there was no legally enforceable

debt – Not proper – Consideration for cheque is presumed under Ss. 118, 139 – Moreover drawer in his balance sheet prepared for every year, had shown the amount as deposits from friend – This may amount to acknowledgment – Dismissal complaint on ground that cheque drawn was in respect of a debt or liability, which was not legally enforceable – Is illegal and erroneous. However, the above said decision has come in the context, wherein, District Court and High court quashed the proceedings holding that it is a time barred debt. The Apex Court has held that whether time barred debt is amenable under Sec. 138 of the Act can be ascertained only during a full pledged trial. Also refer the decision reported in **ILR 2006 Kar 4242-H. Narasimha Rao VS. Venkataram R.**

However, in the latest decision of our High Court reported in the case of the **Bidar Urban Co-operative Bank Limited v/s Mr. Girish in Crl.A No.200057/2016 of Karnataka High Court, Kalaburagi Bench dated 17.12.2020,** it is held that time barred debt will not come within the purview of legally recoverable debt. It is necessary to know each and every aspect of the case and deal with said aspect.

Q.No.83) Does a third party have a right to prosecute?

Depends on the facts and circumstances of each case. In a case the complaint had used a blank cheque issued to some

other person. Refer **2002 (7) Supreme 598 C. Antony Vs. K.G. Raghavan Nair = AIR 2002 SCW 4617.**

Q.No.84) Can the payee prosecutes the drawer U/S 420 of IPC?

Yes. However, the complainant has to establish the intention to deceive so as to attract an offence U/S 420 IPC. However, if proceedings for an offence under Sec.138 are already initiated on the same transaction, then, complaint for an offence under Sec. 420 is not maintainable. Refer **AIR 2000 SC 754 – G. Sagar Suri & another Vs. State of Uttar Pradesh & Others.** Also refer **2001 Cr.LJ 4301- Nemichand Swaroopclhand Shaha Vs T.H. Raibhagi Firm.** However, if the accused is already convicted for the offence under Sec. 138 of the Act, then he cannot be prosecuted for the offence under Sec. 420 or other offences under IPC if facts are same. Refer the decision of Apex in the case of **Kolla Veera Raghava Rao Vs Gorantla Venkateshwara Rao & another reported in AIR 2011 SC 641.**

If the account is closed subsequent to the issuance of the cheque, offence under S. 420 IPC is not attracted. See **Subodh S. Salaskar v. Jayprakash M. Shah and Anr. – AIR 2008 SC 3086.** The para no. 29 reads as;

"The cheques were postdated ones. Admittedly they were issued in the year 1996. They were presented before the bank

on a much later date. They were in fact presented only on 10.01.2001. When the cheques were issued, the accounts were operative. Even assuming that the account was closed subsequently the same would not mean that the appellant had an intention to cheat when the post-dated cheques were issued. Even otherwise the allegations made in the complaint petition, even if given face value and taken to be correct in its entirety do not disclose commission of an offence under Section 420 of the Indian Penal Code. They do not satisfy the ingredients of the suit provision. It is, therefore, in the fact situation obtaining in the instant case, difficult to hold that the provisions of Section 420 of the Indian Penal Code were attracted".

Also refer the decision reported in **AIR 2011 SC 2751- Anil Sachar & another Vs M/S Shreenath Spinners Ltd.**

Q.No.85) Is a cheque issued towards transaction in securities amenable to Section 138?

Yes. Refer to **AIR 2001 SC 3897 – Hiten P. Dalal Vs. Bratindranath Banaerjee.** Special Court constituted under Special Court for (Trial of Offences relating to Transactions in Securities) Act, 1992 is empowered to deal with offence under Sec.138 of the NI Act.

Q.No.86) Whether cheque issued as security and its dishonour can be brought under Sec.138 of NI ACT?

No. In the decision, reported in **AIR 2006 SC 3366**, in the case of **M. S. Narayana Menon @ Mani VS. State of Kerala,** it is held that if cheque is given for **security purpose**, then Sec.138 is not attracted. So, it is necessary to go through the decisions carefully and apply to case depending upon the facts.

In a decision of our High Court, above aspect has been reiterated and the same is reported in **2009-KCCR-3-2188-Matheson Bonsanquet Enterprises Limited, Bangalore VS. K. V. Manjunatha.**

Refer the decision reported **2009-KCCR-2-1273-P. Satyanarayana VS. C. H. Jayathertha,** also.

However, the later view of the Apex Court is that if accused issues post dated cheques as security for payment of loan installments, and such cheques are dishonoured, as there is legal liability, Sec, 138 is attracted. Refer the decision in the case of **Sampelly Satyanarayana Rao Vs Indian Renewable Energy Development Agency Ltd,** reported in **(2016)10 SCC 458. (Earlier decision in the case of Narayana Menon has not been referred to)**

The latest decision on this aspect is found in the case of **T P Murugan (Dead) through Lrs Vs Bojan,** reported in (2018) 8 SCC 469 wherein, the Apex Court has reiterated the aspect of Security and evidence required to rebut the presumption. Also refer the case of **Shree Daneshwari Traders Vs Sanjay Jain,** reported in **(2019) 16 SCC 83.**

Q.No.87) What happens if the complainant is absent? Can the complaint be dismissed?

Depends on the circumstances. U/S. 256 of Cr. P.C, the Magistrate has discretion, but this discretion has to be exercised very fairly. If the complainant is absent, if the Magistrate thinks it proper to adjourn the case, he can do so. But, he cannot acquit the accused. On a particular day if the Magistrate thinks that the personal presence of the Complainant is not necessary, he is at liberty to proceed with the matter or if he thinks in a given situation the presence of the complainant is very much necessary and the case cannot be adjourned, then also he has discretion to dismiss the complaint and acquit the accused. Once he did this, his order becomes final and he has no power to restore the complaint. Refer **(1998) 1 SCC 687 – Associated Cements Co. Ltd., Vs. Keshvanand.**

Q.No.88) Does Section 138 of NI Act and Section 420 of IPC act as double jeopardy?

No. Dishonour of cheque and cheating are two different offences even though they originate from the same act or omission. Certain acts or omissions are capable of constituting more than one offence under different provisions of law. But, when they are distinct offences and triable separately though originated from the same act, it is not violative of Art.20(2) of the Constitution. What is prohibited under law is that same relief should not be granted in all the proceedings. Therefore, the Court should opt for the relief in the proceedings that are initiated first in point of time. Refer **2003 Cri. LJ 1421 (Kar) – Dr. B.N. Suryanarayana Rao Vs. B. C. Sheshadri.**

Q.No.89) Upon the death of complainant can his legal representatives continue the proceedings?

Yes. **ILR 2001 Kar 5401 (Divisional Bench) –Jimmy Jahangir Madan Vs. Bolly Cariyappa Hindley**.

Q.No.90) Whether the provisions of the Limitation Act are applicable to the proceedings U/S 138?

No. Refer the decision reported in **ILR 1998 Kar 2143 – C. Kalegouda Vs. Sadashivappa**. Section 142 B expressly provides the period within which complaint should be filed.

However the recent decision of our High Court says that if the Court intends condone the delay, the accused should be heard.

Q.No.91) Whether summons can be issued by substituted service?

Yes. Summons can be issued by way of substituted service. Relevant decision is reported in **ILR 2005 (KAR) 3648, Mac Charles (I) Ltd. VS. Chandrashekar = 2005 Cr.LJ 3700 (Kar)**

Q.No.92) Is it necessary to mark the complaint during evidence of the complainant?

Not necessary. Relevant decision is reported in **ILR 2007 Kar 2709-M. Senguttuvan Vs Mahadevan.**

Q.No.93) What is effect of dismissal for default?

If the complaint is dismissed for default the Magistrate becomes functus Officio and he has no inherent power to restore it. Remedy is available under section 482 of CRPC. Refer **2001 (5) KLJ 634- R. Rajeshwary Vs. H.N. Jagadish**. However if application for restoration is made on the same day then under equity it can be restored. Refer **2001 Cri.LJ. 2821 – Mohammad Ilyas Vs. Abdul Suban.**

Q.No.94) Can the accused insists for list of witnesses?

Yes. Refer **1997 (4) KLJ 23 – Vishwa Cement Products Vs. KSFC**.

Q.No.95): Can an accused be permitted to file affidavit evidence on his behalf?

No. Accused cannot be permitted to file his evidence by way of affidavit. Relevant decision is reported in **2010 AIR SCW 581C=AIR 2010 SC 1402- M/S Mandvi Co-operative Bank Ltd Vs Nimesh B. Thakore.** Above decision has been followed by our High Court in the case of **V Giridhar Vs M A Rehaman,** reported in **2013(2) LAWSKar 46.** However, subsequently, Karnataka High Court has taken a different view stating that accused can also choose to file affidavit evidence. It is in the case of **Afzal Psha Vs Mohamed Ameerjan**, in Criminal Petition No. 1684/2016 dtd 9-8-2016 by distinguishing the decision in M/S Mandvi Co-operative Bank's case. (yet to be reported).

Q.No.96) If more than one cheque is issued by the same person, and single complaint is filed in respect of more than one cheque, whether Court can try the complaint in respect of many cheques?

Yes. Refer **2001 (1) KLJ 360 –Tiruchandur Murugan Spinning Mills Pvt Ltd. Vs. Madan Lal Ram Kumar Cotton and General Merchants.**

Q. No. 97) What Course should be followed when there is a serious dispute about the signature or LTM of the drawer on the cheque?

Relying upon the decision reported in **AIR 1979 SC 14- Palirams** case, it is held in **Thiruvengada Pillai** case that the Judge should not take the risk of comparing the disputed writing with the admitted writing without the aid of evidence of any expert**.** Though Sec. 73 of the evidence Act states that the Court is the expert of experts, prudence demands that such disputed signature/handwriting is referred to an expert and his opinion and evidence is considered. Refer **AIR 2008 S C 1541 –Thiruvengada Pillai v. Navaneethammal.** Also refer the decisions reported in **2009 (5) Supreme 674** in the case of **G. Someshwar RAO VS. Samineni Nageshwar RAO, 2010-KCCR-1-683= 2010-AIRKARR-1-419-ISHWAR S/o Mahadevappa Hadimani VS. Suresh S/o Rachappa Pattepur**

Q.No.98) Is it permissible to exempt the accused from answering Sec. 313 Cr.PC Statement? What is the procedure to be followed?

Guidelines are given in the decision reported in **AIR 2008 SC 1807 Keya Mukherjee v. Magma Leasing Ltd.**, wherein, it is held that

"The object of examination of an accused under S. 313 is for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him. Thus the provision is mainly intended to benefit the accused and as its corollary to benefit the Court in reaching the final conclusion. The provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim *audi alteram partem*. The one category of offences which is specifically exempted from the rigour of S. 313(1)(b) is 'summons cases.' Remaining present personally is therefore the general rule. However if remaining present involves undue hardship to accused the Court can alleviate the difficulties of the accused. Particularly in view of revolutionary change in technology of communication and transmission and the marked improvement in facilities for legal aid in the country. The provisions of Ss. 243, 247 and 233 enabling the accused to put in written statements most of which are prepared by the counsel also supports such view. If such written statements can be treated as statements directly emanating from the accused, hook, line and sinker, why not the answers given by him in a specified manner, in special contingencies, be afforded the same worth. A pragmatic and humanistic approach is therefore warranted in regard to special exigencies. The word 'shall' in Cl. (b) to S. 313(1) is therefore to be interpreted as obligatory on the Court and it should be

complied with when it is for the benefit of the accused. But if it works to his great prejudice and disadvantage the Court should, in appropriate cases, relieve him of such hardship and at the same time adopt a measure to comply with the requirements in S. 313 in a substantial manner".

It is further held that –

"If the accused (who is already exempted from personally appearing in the court) makes an application to the court praying that he may be allowed to answer the questions without making his physical presence in court on account of justifying exigency the court can pass appropriate orders thereon, provided such application is accompanied by an affidavit sworn to by the accused himself containing the following matters:

(a) A narration of facts to satisfy the court of his real difficulties to be physically present in court for giving such answers.

(b) An assurance that no prejudice would be caused to him, in any manner, by dispensing with his personal presence during such questioning.

I An undertaking that he would not raise any grievance on that score at any stage of the case.

If the court is satisfied of the genuineness of the statements made by the accused in the said application and affidavit it is open to the court to supply the questionnaire to his advocate (containing the questions which the court might put to him under Section 313 of the Code) and fix the time within which the same has to be returned duly answered by the accused together with a properly authenticated affidavit that those answers were given by the accused himself. He should affix his signature on all the sheets of the answered questionnaire. However, if he does not wish to give any answer to any of the questions he is free to indicate that fact at the appropriate place in the questionnaire (as a matter of precaution the court may keep photocopy or carbon copy of the questionnaire before it is supplied to the accused for an answer). If the accused fails to return the questionnaire duly answered as aforesaid within the time or extended time granted by the court, he shall forfeit his right to seek personal exemption from court during such questioning. The Court has also to ensure that the imaginative response of the counsel is intended to be availed to be a substitute for taking statement of accused".

Also refer the recent decision of Apex Court in **TGN Kumar Vs Sate of Kerala & Ors dated 14-1-2011 in Criminal Appeal No, 1854/2008** (Yet to be reported)

Q.No.99) Whether the insolvency of the accused absolves him of the liability under Sec. 138 NI Act?

No, it doesn't absolve his liability. Refer the decision reported in **1999 Cr. LJ 2929** in the case of **Bharath N Mehta Vs Mansi Finance(Chennai Ltd.)**

XVII. Absconding Accused

Q.No.100) What is the procedure to be followed in case of absconding accused. Is it permissible to record evidence U/S 299 Cr.P.C.?

Yes. In case of absconding accused, it is necessary to record evidence under Sec. **299** Cr.PC and transfer case into LPR. Relevant decision is reported in **ILR 2005 Kar 3648 – Mac Charles (I) Ltd Vs Chandrashekar.** The case against the absconding accused can be **split up** if there are more than one accused as per the above decision.

XVIII. Conviction and Sentence.

Q.No.101) Can the sentence of imprisonment be altered to fine?

Yes. Refer **2000(4) Crimes 112 – P. Mohanbabu Vs. D. Ramaswamy & another.**

Q.No.102) Can the Court award the fine more than one contemplated U/S 29 CRPC?

Yes. Refer **2006 (1) KCCR 366 - Shaila P. Prabhu Vs. Nagendra Malya.**

Q.No.103) If payment is made can the sentence be reduced to the period already undergone?

Yes. Refer **(2002) 8 SCC 181 – K.L.Kunjappan Vs. Rafeeque**.

Q.No.104) Whether lenient view can be taken while imposing sentence?

Yes, depends upon the circumstances. If the accused is aged and suffering from ill-ness. Refer to **2010 (1) KCCR 278- Smt. Chandrammal Vs Smt. R. Padmavathy.**

Q.No.104A) How to award sentence in case of accused in many offences arising out of same transaction and different transactions?

If the offences arise out of issue of cheques in connection with single transaction, then sentences in different cases shall run concurrently, if offences arise in connection with issue of cheque with different transactions, then sentences shall run consecutively. Refer the decision reported in the case of **V.K**

Bansal Vs State of Haryana, reported in 2013 LAWS(SC) 72= 2013(10) JT 4.

Q.No.105) Since parallel proceedings are pending regarding the same cheque, can lenient sentence be passed?

No. Just because apart from the criminal proceedings, some other parallel action is also pending, the accused is not entitled to lenient sentence. Refer the decision reported in **2003 Crl.LJ 1421 (kar)- Dr. B.N. Suryanarayana Rao Vs B.C. Seshadri.**

However, while decreeing the civil suit the compensation awarded and deposited in the criminal case is required to be taken into consideration as held in the decision reported in **D. Purushotama Reddy v. K. Sateesh- (2008) 8 SCC 505, at page 508 :**

Q.No. 106) When compounding of offence is permissible?

When revision or appeal against conviction is pending, the offence may be compounded. Now in view of amendment to the Act and insertion of Sec.147, compounding is permissible. Refer **2000(1) Crimes 359- M. Rangaswamaiah Vs R. Shettappa and AIR 2010 SC 276A- K.M. Ibrahim Vs K.P. Mohammad & another, AIR 2010 SC 1907**

Q.No.107) Incase, if accused is found guilty of the offence, whether he can be given benefit of Sec. 4 of Probation of Offenders Act.

No. if benefit is given, the object of the Act will be defeated. There is no question of reforming a person who is found guilty of the offence. Relevant decision is reported in **2009-CrLJ-0-1703 – M V Nalinakshan Vs M Rameshan .**

Q.No.108) What happens if accused dies before or after pronouncement of sentence?

If accused dies before conclusion of trial then, the complaint against him abates. If death takes place after conviction, then fine amount and compensation amount can be recovered from the legal heir who is in possession of estate of the deceased accused. In such event also, the legal heirs can challenge the conviction of the deceased accused and compensation granted. Refer the decisions reported in **K. Gopalakrishnan Nair v. The Judicial I Class Magistrate Court-IV (Mobile) & Another. 2008 (2) ILR (Ker) 121 ; 2008 (2) KLT 149 : III (2008) BC 514., 2006-Crlj-0-3864 , 2006-Crimes-4-477 , T. S. Viswanathan VS. State OF Kerala** and refer the decisions of Apex Court reported in **1959-AIR (SC)-0-144=1959-SCR-Supp1-63 –Pranab Kumar Mitra VS. State Of West Bengal** and **AIR 1962 (SC)-1530=1962-SCR-Supp3-943-State of Kerala vs. Y. Narayani Amma Kamala Devi.**

XIX. Compensation:

Q.No.109) Can Court grant compensation?

Yes. The Court can make use Section 357(3) of Cr.P.C and award compensation and also can impose sentence if the accused fails to pay up the compensation so awarded. Refer the decisions reported in **AIR 2002 SC 681-Sugandhi Suresh Kumar Vs Jagadeeshan, 2006 (1) KCCR 366 - Shaila P. Prabhu Vs. Nagendra Malya.**

Refer latest decision **reported in 2009(6) SCC 652-VIJAYAN VS. SADANANDAN K. (para 33).** The latest decision is in the case of **K.A.Abbas H.S.A. Vs Sabu Joseph, reported in 2010 AIR SCW 3398=2010(6) SCC 230= 2010(3) Crimes (SC) 15,** wherein it is held that-

"Section 431 clearly provides that an order of compensation under Section 357 (3) will be recoverable in the same way as if it were a fine. Section 421 further provides the mode of recovery of a fine and the section clearly provides that a person can be imprisoned for non-payment of fine. Therefore, going by the provisions of the code, the intention of the legislature is clearly to ensure that mode of recovery of a fine and compensation is on the same footing. In light of the aforesaid reasoning, ***the contention of the accused that there can be no sentence of imprisonment for default in***

payment of compensation under Section 357 (3) should fail".

The latest case of Apex Court on the aspect of awarding compensation and default sentence is reported in **2012 (4) BCR 535= 2012 AIR SCW 4085** in the case of **R Mohan Vs. A K Vijaya Kumar.**

Interim Compensation

Sec. 143A of the Act is prospective. Court has power to grant interim compensation during pendency of the proceedings, as held in the case of **G. J Raja Vs Tejraj Surana, reported in (2019) 19 SCC 469**

Also refer **(2018)15 SCC 139- Satyendra Kumar Mehra Vs State of Jharkand.**

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 cooperates with the Court for early disposal of the case, Etc,. It is not mandatory to award interim compensation in every case.

Sec. 148: Power of Appellate Court to grant interim compensation.

Above provision is analogous to Sec. 143A of the Act.

The amount deposited can be released to the complainant with condition to refund it back with interest, pending appeal, as held in the decision in the case of **N Narasimhamurthy Vs Santhosh J,** reported in **ILR 2019 Kar 2058=(2019) 2 Kar.LJ 713.**

Recovery of Fine and Compensation

Further, how the fine and compensation can be recovered has been discussed in the decision reported in **Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd., (2007) 6 SCC 528, at page 538, wherein,** it is held that fine for an offence under

Section 138 of the Act can be imposed only in terms of the provisions of the Act, when fine is not imposed, compensation can be directed to be paid for loss or injury caused to the complainant by reason of commission of such offence. The fine can be recovered under Section 421 of Cr P C. Section 431 provides for a legal fiction in terms whereof any money other than a fine shall be recoverable as if it were a fine. Section 357 (2) would be attracted in such a situation. There does not appear to be any reason as to why the amount of compensation should be held to be automatically payable, although, the same is only to be recovered, as if, a fine has been imposed.

Q.No.110) What is the effect of accused depositing the cheque amount when the appeal against his conviction is pending?

When the accused deposited the cheque amount during the pendency of the appeal against the conviction, the Court remitted back the matter and complainant was allowed to withdraw the money so deposited. In such cases, the Court can either set aside the conviction or if it declines to do so, can convict the accused or impose fine. Relevant decision is reported in **AIR 2000 SC 3145-M/S Cranex Ltd & another M/S Nagarjuna Finance Ltd & another.**

Q.No.111) Whether Award passed by the Loka Adalath in a case referred to it can be executed in Civil Court?

Yes. It can be executed before a Civil Court as if as it is passed by a Civil Court. Refer the decision, reported in the case **of K N Govind Kutty Menon Vs C.D Shaji**, arising out of SLP (C) No. 2798/2010 dated 28-11-201, reported in **2011(8) Supreme 292.**

However, in the decision, in the case of **Sri. Somashekhar Reddy Vs Smt. G S Geetha, in WP No. 23519 of 2018(GM-RES),** our High Court has held that 'depending upon the terms of a compromise arrived at before loka-adalath it can be enforced as a Civil Decree or in terms the applicable provisions of Cr.P C including that under Sec. 431 of Cr.P C, if so provided in the compromise. In the event of default of a compromise arrived at before the Lok-Adalath, this court or trial Court can on an application made by the Complainant set-aside the compromise arrived at before the Loka-Adalath, restore the complaint on its file and proceed with the complaint or enforce the compromise as per the terms of the compromise including by issuing of an FLW under Sec. 431 of the Cr.PC.

Role of judges in appeal filed relating to Negotiable Instruments Act

Objects of Appeal

In the decision in the case of **Retti Deenabandhu v. State of A.P., (1977) 1 SCC 742 : 1977 SCC (Cri) 173 at page 743,** it is stated about object as;

'A convicted person challenging his conviction in appeal not only seeks to avoid undergoing the punishment imposed upon him as a result of the conviction, he also wants that other evil consequences flowing from the conviction should not visit him and that the stigma which attaches to him because of the conviction should be wiped out. In case the convicted person undergoes the sentence of imprisonment imposed upon him or he is otherwise entitled to be set at liberty by the time his appeal against conviction comes up for hearing in view of the length of the period he was in detention during the course of investigation, inquiry or trial, such a person would still be entitled to challenge his conviction. The fact that he is set at liberty and would not have to undergo any further sentence of

imprisonment would not debar him from questioning the validity of his conviction. The object of such a challenge to conviction is to avoid the other consequences flowing from conviction and also to erase the stigma resulting from the conviction. The High Court, in our view, was in error insofar as it declined to go into the validity of the conviction of the appellants'.

Powers and duties

The Apex Court in the case of **Basalingappa v. Mudibasappa- (2019) 5 SCC 418 : (2019) 2 SCC (Cri) 571 : 2019 SCC OnLine SC 491 at page 435,** has held that this Court had occasion to consider the expression "perverse" in *Gamini Bala Koteswara Rao* v. *State of A.P.* [*Gamini Bala Koteswara Rao* v. *State of A.P.*, (2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372] , this Court held that although High Court can reappraise the evidence and conclusions drawn by the trial court but judgment of acquittal can be interfered with only (*sic* when the) judgment is against the weight of evidence. In para 14 following has been held: (SCC p. 639)

"*14.* We have considered the arguments advanced and heard the matter at great length. It is true, as contended by Mr Rao, that interference in an appeal against an acquittal recorded by the trial court should be rare and in exceptional circumstances. It is, however, well settled by now that it is open to the High Court to reappraise the evidence and conclusions drawn by the trial court but only in a case when the judgment of the trial court is stated to be perverse. The word "perverse" in terms as understood in law has been defined to mean "against the weight of evidence". We have to see accordingly as to whether the judgment of the trial court which has been found perverse by the High Court was in fact so."

Further, what appellate should do while upsetting judgment of trial Court, has been held in the case of **ANSS Rajashekar Vs Augustus Jeba Ananth,** reported in **2019 SCC online SC 185,** and in the case of **Girish Singh Vs State of Uttarakhand,** reported in **2019 SCC Online SC 897.**

The term 'appeal' has not been defined in Cr.P C. According to the dictionary meaning, an appeal is a complaint or grievance to a superior Court for reconsideration or review of a decision, verdict or sentence of a lower Court. Refer the

decision in the case of **Sita Ram Vs State of U.P,** reported in **AIR 1979 SC 745.**

It has been said that every human being is fallible and a judge is not an exception. It is thus possible that even a Judge may err or commit mistake and his decision may be wrong or faulty. An appeal is thus an integral part of fundamental fairness or due procedure of law.

A right to appeal is not a natural or inherent right. It is a statutory right and must be governed by the Statute which grants it. Refer the decision in the case of **Akalu Ramu Vs Ram Deo,** reported in **AIR 1973 SC 2145.** The right of appeal is a substantive right and not a mere matter of procedure. It is continuation of the original proceeding and it carries with it a right of rehearing. A Court of Appeal is a 'court of error' and its normal function is to correct the decision appealed from and its jurisdiction is co-extensive with that of the trial Court.

Revision jurisdiction is a part and parcel of appellalte jurisdiction. However, there is an essential distinction between

the two. A right of appeal carries with it right of rehearing on law as well as on fact, unless the statute conferring the right limits the ambit and scope of rehearing. Revisional jurisdiction is supervisory. It is discretionary in nature and normally it is to be exercised only in exceptional cases where there is a glaring defect in the procedure or manifest error of law resulting into miscarriage of justice. Refer the decision in the case of **Mahendra Vs Sarju** reported in **AIR 1973 SC 799** and in the case of **Lachhmand Dass Vs Santosh Singh (1995) 4 SCC 20**.

Secs. 375 and 376 of Cr.PC bar appeals in certain cases.

Suspension of sentence:

Sec. 389 deals with suspension of sentence pending appeal against conviction and release of the appellant convict on bail. Whereas Sections 436 to 450 deal with the grant of bail to accused persons before conviction, this Section provides suspension of sentence and grant of bail to a person who is convicted by a competent criminal Court.

The appellate Court, while suspending substantial sentence, can direct to deposit a portion of compensation amount under Sec. 148 of the Act. If order is not complied, then suspension of sentence shall be deemed to have been vacated. However, said amendment is prospective in nature. This is held in the decision in the case of **Surinder Singh Deswal and others Vs Virender Gandhi and another,** reported in **(2020) 2 SCC 514** and earlier decision of the Apex Court between the same parties reported in **(2019) 11 SCC 341.**

The appeal against the acquittal has to be filed before the High Court and complainant cannot invoke Sec. 372 Cr.PC

The Apex Court, in the case of **Nagpal Traders v. Davinder Singh, (2017) 11 SCC 431 : (2017) 4 SCC (Cri) 342 : (2017) 5 SCC (Civ) 121 : 2014 SCC OnLine SC 1217 at page 434** has expressed displeasure stating that 'on several occasions cautioned the courts that undue leniency should not be shown to the accused facing charges under Section 138 of the NI Act'. We may usefully refer to the observations of this Court

in *Suganthi Suresh Kumar* [*Suganthi Suresh Kumar* v. *Jagdeeshan*, (2002) 2 SCC 420 : 2000 SCC (Cri) 344] where this Court has expressed displeasure about Courts imposing a flea-bite sentence on the accused in cases under Section 138 of the NI Act .

However, in case of dismissal of appeal for non-payment of fine amount held to be incorrect as held the decision **Vijay D. Salvi v. State of Maharashtra, (2007) 5 SCC 741.**.

1. An appeal or revision is continuation of the original case. **1987(2) Crimes 113**.

2. Appeal is continuation of the proceedings and accused continues to be so till the proceedings comes to a final conclusion. **Phasalu v/s State of Kerala -1992(1) Crimes – 295.**

When case is ended in acquittal the complainant in N. I. Act cannot be treated as victim. Therefore, Appeal cannot be filed by complainant, questioning the Acquittal, to the Sessions Court.

3. Re-appreciation of evidence by Appellate Court.

Where in Appeal the Sessions Judge has not at all re-appreciated the evidence on record, the judgment of appellate court would be set-aside and case remitted back for re-hearing **Hasnaba v/s State of karnataka – 2003 (5) – KLJ-540= ILR 2003 Kar 3734.**

4. The presence of appellant at the time of hearing of the appeal is not necessary, the Court should dispense with the presence of the appellant. - **Sudarshan Chemicals Industry v/s State of Andhra Pradesh – 2003 – Cr.LJ – 2433 (A.P.).**

5. An amendment to rectify accidental omission in memorandum of appeal to do justice in the case should be allowed – **Dashamani v/s State of U. P. - 1999-Crl.LJ – 2338 (Allahabad).**

6. In appeal against conviction filed by accused, the Appellate Court cannot convict the accused for higher offence in the absence of state appeal. - **B. Ananda v/s State of Karnataka – 2006 (4) AIR-KAR-R-606.**

7. Disposal of appeal without hearing either appellant or his counsel or counsel appointed by the Government is improper. **M. D. Farooq v/s State of Karnataka-1990-Crl.LJ-286 (KANT)**

8. Appeal cannot be disposed on merits unless accused or his counsel is heard, though dismissal for non-prosecution is permissible – **Ram Naresh yadav v/s State of Bihar – AIR-1987-SC-1500.**

9. A Criminal Court i.e, the Appellate Court or Revision Court has no power to dismiss an appeal or Revision for default. **Bani Singh v/s State of U. P- AIR 1996 SC 2439**

What is the course available to the Court in case, the counsel for accused does not appear and conduct the case in any appeal. It is held in the decision of the Apex Court in the case of **Shankar vs State of Maharastra, dated 23rd July 2019 in Criminal appeal number 1106/2019,** that the Court has to appoint **amicus curiae** and dispose of the case

on merit. Also refer the decision in the case of **Mangat Singh Vs State of Punjab, reported in (2005)11 SCC 185.**

10. On sufficient cause being shown the appellate Court may condone the delay, if any, in filing appeal. - **Vedbai v/s Shantharam Baburao Patil.**- **AIR 2001 SC 2582 .**

11. In an appeal for enhancement of sentence, an accused can argue either for acquittal or for lesser sentence. - **State of Karnataka v/s Laxman 2000(1)-Crimes – 43 (KAR-DB).** The accused should be given opportunity of showing cause against enhancement. Where no notice of enhanced sentence was given to the accused, the enhanced sentence is set aside. - **Surjith Singh v/s State of Punjab- AIR-1984-SC-1910.** Also refer the decision in the case of **Vikas Yadav Vs State of U.P.** reported in **(2016) 9 SCC 541,** regarding power of High Court to enhance sentence**.**

Principles for enhancement has been enumerated in the cases of **Kumar Ghimirey Vs State of Sikkim,** reported in **(2019) 6 SCC 166** and **Parvinder Kansal Vs State of NCT of Delhi, (2020)19 SCC 496.**

12. It is held in the case **of National Commission for Women Vs State of Delhi and another** reported in **(2010) 12 SCC 599**, that reduction of sentence by the superior Court, with adequate reasons cannot be interfered with.

Sec. 465 of Cr.PC: Finding or sentence when reversible by reason of error, omission or irregularity:

. (1) Subject to the provisions hereinbefore contained, on finding sentence or order passed by a court of competent jurisdiction shall be reversed or altered by a court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution unless in the opinion of that court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

Scope: This is the residuary section in the chapter intended to cure any error, omission or irregularity committed by a Court of competent jurisdiction in the Courts of a trial through accident or inadvertence, or even an illegality

consisting in the infraction of any mandatory provision of law, unless such irregularity or illegality has in fact occasioned a failure of justice. The object of the section is to secure justice by preventing the invalidation of a trail already held, on the ground of technical breaches of any provisions in the Code causing no prejudice to the accused. The intention is to eliminate all possibilities of acquittal of persons committing offences except on the merits.

Investigation by a Police officer not empowered to investigate offences under relevant Act, when fatal and what is the effect has been decided in the case of **State of Bihar and others Vs Anil Ku,ar and others** reported in **(2017)14 SCC 304.**

Non disclosure of particulars of offence to the accused amounts to 'failure of justice' as held in the decision in the case of **SEBI Vs Gaurav Varshney** reported in **(2016)14 SCC 430.**

Objection touching error, omission or irregularity in trial due to lack of proper sanction for prosecution and power of the trial Court Vis-à-vis those of appellate court has been decided in the case of **Nanjappa Vs State of Karnataka** reported in

(2015)14 SCC186 , wherein it is held that the legal position regarding the importance of sanction under Section 19 of the Prevention of Corruption is thus much too clear to admit equivocation. The statute forbids taking of cognizance by the Court against a public servant except with the previous sanction of an authority competent to grant such sanction in terms of clauses (a), (b) and (c) to Section 19(1). The question regarding validity of such sanction can be raised at any stage of the proceedings. The competence of the court trying the accused so much depends upon the existence of a valid sanction. In case the sanction is found to be invalid the court can discharge the accused relegating the parties to a stage where the competent authority may grant a fresh sanction for prosecution in accordance with law. If the trial Court proceeds, despite the invalidity attached to the sanction order, the same shall be deemed to be *non-est* in the eyes of law and shall not forbid a second trial for the same offences, upon grant of a valid sanction for such prosecution.

In the case at hand, the Special Court not only entertained the contention urged on behalf of the accused about the

invalidity of the order of sanction but found that the authority issuing the said order was incompetent to grant sanction. The trial Court held that the authority who had issued the sanction was not competent to do so, a fact which has not been disputed before the High Court or before us. The only error which the trial Court, in our opinion, committed was that, having held the sanction to be invalid, it should have discharged the accused rather than recording an order of acquittal on the merit of the case. As observed by this Court in Baij Nath Prasad Tripathi's case (supra), the absence of a sanction order implied that the court was not competent to take cognizance or try the accused. Resultantly, the trial by an incompetent Court was bound to be invalid and non-est in law.

Also refer the decision in the case of State of Bihar Vs Rajmangal Ram (2014)11 SCC 388.