e-Digest
on
Cases Under Section 138
(Upto 15th January, 2022)

GUJARAT STATE JUDICIAL ACADEMY

EDITORIAL

"The business was in a very difficult stage when I first took over the company, I walked into a situation where cheques were getting written, popped in drawers, so that when people phoned up, they could honestly say, 'look, we've signed the cheque, you'll get it ultimately."

-Gina Rinehart

Exactly, above is a situation for cases filed for dishonor of cheque under Section 138 of Negotiable Instruments Act in our country. Complainant is waiting and waiting for years together for decision after filing of complaint. We say you have filed the case, you'll get result ultimately. But the question arises, when? A recent study of the pending cases reflects pendency of more than 35 lakhs cases under N.I. Act which constitute more than 15% of the total criminal cases pending in subordinate judiciary. Hon'ble Supreme Court in ***MakwanaMangaldasTulsidas vs. State of Gujarat &Ors., AIR 2020 SC 2447***, while referring above statistics directed to register the case *suomoto* in order to know the bottlenecks, roadblocks and hindrances in the disposal of the cases which clearly signifies the concern requires to be paved to the issue.

Law makers, in order to regulate the growing business requirements to match with global economy and to increase the use of cheque as an instrument and to enhance credibility to the transactions inter-se, penalize the dishonor of cheque by incorporating Chapter XVII by Amendment Act No.66 of 1988 Section 4 (w.e.f. 01.04.1989). It was expected that by penalizing the act of dishonor of the cheque not only the credibility of the instrument would be enhance and flow of business would be secured but also the unscrupulous drawers would be prevented from issuing cheque with ulterior motive and for this reason only the Act provides that the complaint has to be adjudicated by summary trial, but even above aspect failed to achieve the desired results. *Status quo* has remained in place even

after amendment introduced in the year 2002 when the punishment for the offence was made double by prescribing two years imprisonment. Thus even periodical statutory amendments have failed to create the atmosphere inspiring confidence of complainant that his grievance would be redressed in the period of six months as prescribed by the Act. The complexity in the cases and a typical mind set to prolong the case under the N.I. Act, restrained the courts in disposing the cases speedily. Ultimate result is steady increase in the docket burden.

It goes without saying that in constantly changing statutory provisions and issuance of periodic directions from Hon'ble Apex court and Hon'ble High Courts it is *sine qua non* for the judicial officers dealing with the complaints, Appeals and Revisions under section 138 of N.I. Act to update themselves with the latest legal position to decide the issue most effectively, efficiently and efficaciously. **Team Academy @ GSJA** under the auspicious guidance of **Hon'ble the Chief Justice High Court of Gujarat & Patron-in-Chief, Gujarat State Judicial Academy, and Hon'ble the President of GSJA**, herewith has taken a little step in this regard to facilitate one of the most important stake holders of the system – Subordinate Judicial Officers [Learned Sister and Brother Judges] by providing "***e*-digest**" – compilation of relevant and important judgments of Hon'ble Apex Court and Hon'ble High Courts. By taking recourse to above compilation the judicial officers can decide the legal issue involved in the matter in most effective and efficient manner. Along with the compilation of judgments some **Model Orders** on the issues crop up frequently before the courts dealing with N.I. Act matters are also provided.

It is hoped that the "***e*-digest**" will sub-serve purpose and will be useful in a great way, in disposing cases under N.I. Act as early as possible.

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TEAM ACADEMY

SUBJECT INDEX

1. OBJECT of N.I. ACT

1.1 <u>Object & Purpose:</u>

The object of this amendment Act is:,
1. To regulate the growing business, trade, commerce and Industrial activities.
2. To promote greater vigilance in financial matters.
3. To safeguard the faith of creditors in drawer of cheque.
<u>(Krishna vs. Dattatraya 2008(4) Mh.L.J.354 (Supreme Court)</u>

1.2 <u>Electronics Trade & Technology Development Corporation Ltd., Secunderabad v/s Indian Technologists & Engineers (Electronics) (P) Ltd. and Another (1996) 2 SCC 739</u>,

"Para 6 The object of bringing Section 138 on statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Despite civil remedy, Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a book and induce the payee or holder in due course to act upon it. Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly. It is seen that once the 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 to dishonour of cheque and it comes within the meaning of Section 138"

1.3 <u>Goa Plast (P) Ltd. v/s Chico Ursula D'Souza (2004) 2 SCC 235,</u>

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

1.4 Indra Kumar Patodia V/S Reliance Industries Limited (2012) 6 SCC 463

The Negotiable Instruments Act was amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act 1988 wherein new Chapter XVII was incorporated for penalties in case of dishonour of cheques due to insufficiency of funds in the account of the drawer of the cheque. These provisions were incorporated in order to encourage the culture of use of cheques and enhancing the credibility of the instrument. The insertion is aimed at early disposal of cases relating to dishonour of cheques , enhancing punishment for offenders, introducing electronic image of a truncated cheque and a cheque in the electronic form as well as exempting an official nominees of director from prosecution under the Act.

1.5 M/s. Dalmia Cement (Bharat) Ltd v/s M/s. Galaxy Traders & Agencies Ltd. & Ors. 2001 6 SCC 463; Supreme Court of India

Para 3. The Act was enacted and Section 138 thereof incorporated with a specified object of making a special provision by incorporating a strict liability so far as the cheque, a negotiable instrument, is concerned. The law relating to negotiable instrument is the law of commercial world legislated to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another. In the absence of such instruments, including a cheque, the trade and commerce activities, in the present day would, are likely to be adversely affected as it is impracticable for the trading community to carry on with it the bulk of the currency in force. The negotiable instruments are in fact the instruments of credit being convertible on account of legality of being negotiated and are easily passable from one hand to another.

To achieve the objectives of the Act, the legislature has, in its wisdom, thought it proper to make such provisions in the Act for conferring such privileges to the mercantile instruments contemplated under it and provide special penalties and procedure in case the obligations under the instruments are not discharged. The laws relating to the Act are, therefore, required to be interpreted in the light of the objects intended to be achieved by it despite there being deviations from the general law and the procedure provided for the redressal of the grievances to the litigants. Efforts to defeat the objectives of law by resorting to innovative measures and methods are to be discouraged, lest it may affect the commercial and mercantile activities in a smooth and healthy manner, ultimately affecting the economy of the country.

Para 4. Section 138 of the Act makes a civil transaction to be an offence by fiction of law. Where any cheque drawn by a person on an account

maintained by him with a banker for payment of any amount of money to another person is returned by the bank unpaid either because of the amount or money standing to the credit of that person being insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account, such person, subject to the other conditions, shall be deemed to have committed an offence under the Section and be punished for a term which may extend to one year or with fine which may extend to twice the amount of cheque or with both. To make the dishonour of the cheque as an offence, the aggrieved party is required to present the cheque to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier and the payee or the holder in due course of the cheque makes a demand for payment of the cheque amount by giving a notice in writing to the drawer of the cheque within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid and drawer of the such cheque fails to make the payment of the amount within 15 days of the receipt of the said notice.

1.6 IMPORTANT INGREDIENTS OF S. 138

A mere presentation of delivery of cheque by the accused would not amount to acceptance of any debt or liability. Complainant has to show that cheque was issued for any existing debt or liability. Thus, if cheque is issued by way of gift and it gets dishonored offence u/s. 138 of the will not be attracted.

These provisions deal with procedure, trial, cognizance, defence and punishment relating to offences of dishonour of cheques. Dishonour of a cheque is by itself not an offence u/s 138 of Negotiable Instruments Act. To come within the ambit of offence in such a case following elements have to be fulfilled:

1. Drawing the cheque.
2. Presentation of the cheque to the Bank.
3. Returning the cheque unpaid by the drawee Bank.
4. Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount.
5. Failure of the drawer to make payment within 15 days of the receipt of notice.

The offence of dishonor of cheque has been made cognizable only on a written complaint by the payee or holder in due course. Sections 138 to 147 of Negotiable Instruments Act as inserted by the Amendment Act 2002, further lay down a kind of complete Code for trial of offences under the Negotiable Instruments Act. Thus, if the provision of Negotiable Instruments Act specially sections 138 to 147 are followed strictly by the Courts, a large number of such cases will reach their final fate within a fair and reasonable

time. These provisions have been incorporated with a view to encourage the culture of use of cheques and enhancing credibility of the Instrument.

1.7 VALIDITY OF CHEQUE
Anil Vasudev Rajgor V/s State Of Gujarat, 2017 (3) GLH 802

Negotiable Instruments Act 138 held, provisions of S. 138 of Negotiable Instruments Act are enacted taking into consideration of currency of cheques for a period of six months from the date of issue or the reduced period of validity, whichever is earlier , therefore, this provision of Negotiable Instruments Act contemplates cheque with lesser period of validity than six months, which is general banking practise and stipulates **that cheque should be presented for encashment either within period of six months or within period of validity of cheque, whichever is earlier , hence cheque which is issued with reduced validity period has to be presented for encashment within expiry of that period so as to attract provisions of S. 138 of Negotiable Instruments Act** , further, cheque was presented by appellant for encashment after expiry of currency of three months, provisions of S. 138 of Negotiable Instruments Act are not attracted in this case in view of clause (a) of the proviso to S. 138 of the Act – impugned proceedings quashed , applications allowed.

1.8 Nandeshwari Steel Ltd.Thro Mitesh Ashwinbhai Patel V/s State Of Gujarat 2018 (1) DCR 181.

Held Cheques issued before determination of debt, before adjudication of debt if cheques are obtained – complaint not maintainable. Accused no. 1 as a director of the company willingly tendered seven post dated cheques towards evasion of excise duty and wrong availment of Cenvat Credit, complaint for dishonour of cheque ,contention of applicant that the cheques were obtained by threat, pressure and duress are without any basis and are palpably false, question as to legally enforceability of debt , held, demand of payment towards evasion of excise duty without adjudication in accordance with the provisions of Excise Act and Rules framed there under, requirement of satisfaction of two conditions u/s 138 of Act for the attraction of complaint u/s 138 of NI Act , cheque is required to be issued to towards discharge wholly or in part or any debt or other liability of the drawer to the payee without adjudicating upon evasion of excise duty by the competent authority, cheques in question obtained by the complainant, in the absence of any adjudication by a competent authority under the provisions of the Act as regards the liability of the applicants to pay the excise duty, it cannot be said that on the date when the cheques were drawn there was an existing enforceable debt or liability, complaints quashed,applications allowed.

2. SCOPE

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

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

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

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

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

(d)The cheque is presented within 6 or now (3) months from the date on which it is drawn or within the period of its validity.

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

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

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

3. RECENT AMENTMENT IN ACT – HIGHLIGHTS 2015 (w.e.f. 15-6-2015). & 2018

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

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

3.1 142 (A). , Validation for transfer of pending cases

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

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

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

3.2 Mahendra Kumar Kedarnath Modi and Ors.Vs.State of Gujarat and Ors. 2018(2)Crimes441(Guj.), 2018GLH(1)288

Para 38. Thus, although the cheques issued by the accused were collected by the **complainant at New Delhi and were presented for clearance with the Corporation Bank at New Delhi, yet in my view, it could be said that the cheques were presented through an account, i.e., the account maintained by the complainant with the Bank of Baroda, Fertilizer Nagar Branch, Vadodara.** Without the account of the complainant

maintained with the Bank of Baroda, Fertilizer Nagar Branch, Vadodara, the Corporation Bank could not have given credit if, ultimately, the cheques would have been cleared. **What is important is the account maintained by the complainant with the Bank of Baroda, Fertilizer Nagar Branch at Vadodara.** The Corporation Bank has made itself very clear in the certificate dated 07.09.2015 that the cheques were deposited and dishonored to the account No. 02090500000002 at the Bank of Baroda, Fertilizer Nagar Branch, Vadodara, Gujarat. Giving strict interpretation to the words "through an account", as suggested by the learned counsel appearing for the applicants will frustrate the very object, with which, section 142 of the N.I. Act came to be amended. I find it extremely difficult to accept the argument of Mr. Parikh that in the case on hand, the payee could not be said to have used his account nor his Bank to deal with the cheques. If the cheques are account payee, such cheques, for the purpose of clearance, are bound to be "through an account". Of course, it is the argument of Mr. Parikh that a situation like the one on hand would fall within the clause (b) to section 142(2) and presenting the cheques across the counter is not the only mode, which wouldbring the case within the ambit of clause(b). However, I do not find merit in such submission. It is also difficult for me to accept the argument that the original account of the complainant with the Bank of Baroda has nothing to do with the independent agreement and understanding between the GSFC and the Corporation Bank. **As noted above, it is the original account of the complainant maintained with the Bank of Baroda, which is important and without the said account, the arrangement with the Corporation Bank can never come into play.**

Para 39. My above noted interpretation of the words "through an account" would sub serve the object of the amendment of section 142 of the N.I. Act and insertion of new section 142(a) by amendment. Any other interpretation would frustrate the object. The complainant company is a government undertaking and its business is spread across the various parts of the country. The Fast Collection Service provided by the Corporation Bank helps the complainant to a considerable extent. The cheques received at the different places in the country can be deposited at a convenient FCS Branch of the Corporation Bank and the funds so collected are credited to the bank account of the complainant.

Para 40. The effect of the rule of strict construction might almost be summed up in the remark that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. But it yields to the paramount rule that every statute is to be expounded according to its expressed or manifest intention and that all cases within the mischief aimed at are, if the language permit, to be held to fall within its remedial influence.

3.3. Brijendra Enterprise and Ors.v/s State of Gujarat and Ors 2016(3) GLH 143

Para24. Let me give an example to understand the jurisdiction according to the amendment:

"(1) 'A' holds an account with the Navrangpura Branch, Ahmedabad, of 'XYZ' Bank, issues a cheque payable at par in favour of 'B'. 'B' holds an account with the M.S. University Road Branch, Vadodara, of the 'PQR' Bank, deposits the said cheque at the Surat Branch of the 'PQR' Bank and the cheque is dishonoured. The complaint will have to be filed before the Court having the local jurisdiction where the M.S. University Road Branch, Vadodara, of the 'PQR' Bank is situated.

(2) 'A' holds an account with the Navrangpura Branch, Ahmedabad, of 'XYZ' Bank, issues a cheque payable at par in favour of 'B'. 'B' presents the said cheque at the Vadodara Branch of the 'XYZ' Bank (but 'B' does not hold account in any branch of the 'XYZ' Bank) and the cheque is dishonoured. The complaint will have to be filed before the Court having the local jurisdiction where the Navrangpura Branch, Ahmedabad, of the 'XYZ' Bank is situated."

Para25. Therefore, to summarise, first, when the cheque is delivered for collection through an account, the complaint is to be filed before the Court where the branch of the bank is situated, where the payee or the holder in due course maintains his account and, secondly, when the cheque is presented for payment over the counter, the complaint is to be filed before the Court where the drawer maintains his account.

Para26. Secondly, once a complaint for dishonour of the cheque is filed in one particular Court at a particular place, then later on if there is any other cheque of the same party (drawer) which has also dishonoured, then all such subsequent complaints for dishonour of the cheques against the same drawer will also have to be filed in the same Court (even if the person presents them in some bank in some other city or area). This would ensure that the drawer of the cheques is not harassed by filing multiple complaints for dishonour at different places. It necessarily implies that even multiple complaints for dishonour of cheques against the same party can be filed only in one Court even though the cheques might have been presented in different banks at different places.

3.4 Siddharth Exports V/s Kotak Mahindra Bank Ltd. High Court Of Gujarat R/Special Criminal Application No. 2528 Of 2019 Date : 04/09/20192019 (0) AIJEL,HC 241156

Para2.2 The firm Sidharth Exports made a loan agreement bearing No.152532177 dated 31.07.2016 with Kotak Mahindra Bank Ltd. with personal finance, Delhi, Noida. The Kotak Mahindra Bank Ltd. financed the

petitioner firm a sum of Rs.25,00,000/(Rupees Twenty Five Lacs) vide its letter dated 31.07.2016.

Para2.3 The petitioner firm had issued the security cheques for ECS purpose but, said cheques according to the petitioner firm, have been misused by the respondent intentionally presenting them for encashment at Ahmedabad so as to create jurisdiction within the jurisdiction of Ahmedabad.

Para14 It is quite apparent from the said provision that ordinarily, at two places, jurisdiction would lie (1) when cheque is presented for collection through an account, the branch where the payee or holder in due course, maintains the account, is situated (2) when presented otherwise through an account, the branch of bank where the drawer maintains the account. In case of the corporates, banks jurisdiction would lie with the Court having jurisdiction over the branch bank of drawer for the cheque having been presented otherwise through an account.

Para15 In the case on hand, drawer's bank is at Noida and the head quarter of Kotak Mahindra Bank is at Mumbai, it also has its branch in Noida and yet, it has chosen to tender the cheque at the branch bank at Ahmedabad.

Para16 Complainant being the Bank, it naturally would have branches almost in all parts of the country, but, what would be relevant for the purpose of deciding the aspect of jurisdiction is whether the Bank ought to have deposited the cheque at Ahmedabad and whether it had valid reason for such deposits.

Para17 This Court notices that the entire transaction is at Noida, New Delhi. The notice of dishonour of cheque also has been from Noida, New Delhi. The Head Office of the Bank is at Mumbai. Ahmedabad branch does not come into the picture at all so far as the customer is concerned. An attempt is made by the learned counsel on raising of query by the Court that the loan department is being handled at Ahmedabad. It is surprising as to how Ahmedabad would have a jurisdiction because each branch would have a loan department.

Para18.2 This Court fails to fathom this approach of secrecy on the part of the bank, which chose not to reveal this vital aspect to the petitioner also, although, relationship of the parties is governed by the terms of contract/loan agreement. It is admitted by the learned Senior counsel Mr. Pahwa when this Court raised a specific query as to whether anywhere, in any document, reference is made of loan account being maintained at Ahmedabad, that no such whisper is made. How in that case this internal

arrangement of the bank would lend jurisdiction to the Court at Ahmedabad.

18.3 This is anathema to the citizen centric approach, much emphasized upon in all service rendering institutes. This also brings to the fore yet another unpalatable detail that all matters of dishonoured cheques are tried at Ahmedabad, no matter where the loan transaction is made. All customers of the bank are required to defend themselves at Ahmedabad due to maintenance of loan account at Ahmedabad. There is no justifiable ground, except the administrative convenience of banking authority or an attempt to force compromise in cases of dishonoured cheques by maintaining the loan account at Ahmedabad for the purpose of deposit of cheques…

It is one thing to maintain details of loan accounts centrally by the bank, but, it is quite different to insist on such administrative modality to be used for the purpose of ousting jurisdiction of the court, which otherwise would get or to confer jurisdiction upon the Court, when in fact it did not exist. Again, not to reveal this vital information to the loanee/customer, even while issuing the mandatory notice before initiating proceedings under section 138 of the N.I. Act also need not be encouraged merely because the customer is a voiceless majority largely.

Para20 It is not revealed as to whether there has been initiation of proceedings under section 138 of the N.I.Act for some of the dishonoured cheques, other than the cheque in question.. Admittedly, it is not done at Ahmedabad. Section 142A also makes it very clear that if the prosecution is going on between the same parties, the Court proceedings shall be transferred. The remaining proceedings under section 138 of the Negotiable Instruments Act shall not cause unnecessary harassment to the parties.

This Court cannot be oblivious to the decision of *Dashrath Rupsinh Rathod(supra) where the Apex* Court came down heavily upon the Banks and the financial institutions, which would file proceedings for dishonour of the cheques at different places. Being conscious of the fact that in post *Dashrath Rupsinh Rathod decision, the amendment in 2015 has been brought on* the statute, that may not take away the requirement of all the matters to be tagged together. Assuming that there is no other matter pending against the petitioner, when the entire transaction is at Noida, New Delhi, with no cause of action having arisen at Ahmedabad, for the purpose of jurisdiction the amended provisions of section 142 and 142A if are kept in view, in the opinion of this Court, Ahmedabad will have no jurisdiction with no cause of action at all having arisen here.

However, on the issue of jurisdiction, the Court is of the firm opinion that the matter shall need to be filed at Noida, New Delhi.

Para23 Let the original complainant be handed over the original complaint for him to file it before the Court at Noida since the proceedings at Ahmedabad will not lie.

3.5 Gautam Industrial Corporation Pvt Ltd Thro' Naresh Annraj Bhansali (Deceased) Vs State Of Gujarat, 05 Aug 2016, 2017 1 Glr 793

Section 142(2)(a), amended through the Negotiable Instruments (Amendment) Second Ordinance, 2015, vests jurisdiction for initiating proceedings for the offence under Section 138 of the Negotiable Instruments Act, inter alia in the territorial jurisdiction of the Court, where the cheque is delivered for collection (through an account of the branch of the bank where the payee or holder in due course maintains an account)The conjoint reading of the newly inserted provision of the N.I Act and the judgment of the Supreme Court in Bridgestone India Private Limited it is vividly clear that the newly inserted provisions of the N.I Act are applicable with retrospective effect of 15.6.2015 and the decision of the Supreme Court in the case of Dashrath Rupsingh Rathod is statutorily superseded.

3.6 Gulf Asphalt Private Limited Known as Aspam Petronergy Pvt. Ltd. VS Dipesh Sinh Kishanchandra Rao, 08 May 2015 2016 2 DCR 228; 2015 0 Supreme(Guj) 260;

Complaint filed by proprietary concern through its proprietor During pendency of trial entire running business of proprietary concern taken over by a Private Ltd. Company with all its assets and liabilities , Subsequent addition/Substitution of Accused , Permissibility of Held, Wrong number on dishonor cheque is of no relevance for drawer to pay amount covered by such cheque, have also been referred in Pt. Gorelal's case, evidence that this Court has taken a consistent view that there is no provision for amendment in the Code of Criminal Procedure and the amendment in the complaint cannot be permitted, but in the case of Pt. Gorelal taking note of the aforesaid cases, it has been held that application for correction of cheque number can be allowed , in judicial administration precedents which enunciate the rules of law from the foundation of the administration of justice under our system, it has always been insisted that the decision of a coordinate Bench must be followed, Court passed a correct order allowing the application Exh.3 and permitting the applicant herein to be substituted as a complainant in place of the original proprietary concern Application is quashed.

3.7 Bridgestone India Pvt.Ltd. Vs Inderpal Singh, 24 Nov 2015, 2016 2 Scc 75.

Held In view of section 142 (2)(a), inserted by Negotiable Instruments (Amendment) Second Ordinance, 2015, the court at the place where the

payee maintains his account and where the cheque was intimated to have been dishonored would have jurisdiction u/s 138.

Facts of the case:

A cheque No.1950, drawn on the Union Bank of India, Chandigarh, was issued by Inderpal Singh to the appellant M/s Bridgestone India Pvt. Ltd. The cheque was in the sum of Rs.26,958/,. The appellant M/s Bridgestone India Pvt. Ltd. presented the above cheque at the IDBI Bank in Indore. The appellant received intimation of its being dishonored on account of "exceeds arrangement" on 04.08.2006 at Indore. Proceedings were initiated by the appellant in the Court of the Judicial Magistrate, First Class, Indore, under Section 138 of the Negotiable Instruments Act, 1881. The accused-respondentInderpal Singh, preferred an application before the Judicial Magistrate, First Class contesting the territorial jurisdiction with respect to the above cheque drawn on the Union Bank of India, Chandigarh. The Judicial Magistrate, First Class, Indore held that he had the territorial jurisdiction to adjudicate upon the controversy raised by the appellant M/s Bridgestone India Pvt.Ltd. under Section 138 of the Negotiable Instruments Act, 1881. The High Court accepted the prayer made by the accused-respondent Inderpal Singh by holding, that the jurisdiction lay only before the Court wherein the original drawee bank was located, namely, at Chandigarh, wherefrom the accused-respondent had issued the concerned cheque bearing No.1950, drawn on the Union Bank of India, Chandigarh.

3.8 The Amendment 2018 incorporates Section 143A in the Negotiable Instrument Act, 1881which provides for the Power to provide for interim compensation to the complainant.

The insertion of new provisions in the NI Act aims at addressing the issue of undue delay in finality of cheque dishonor cases. It is believed that the amendment will strengthen the credibility of cheques and help trade and commerce in general.

3.9 NEGOTIABLE INSTRUMENTS (AMENDMENT) ACT, 2018

Preliminary,NO. 20 OF 2018 [2nd August, 2018.]

An Act further to amend the Negotiable Instruments Act, 1881, BE it enacted by Parliament in the Sixty-ninth Year of the Republic of India as follows:,

S.1 Short title and commencement

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

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

S.2 Insertion of new section 143A

In the Negotiable Instruments Act, 1881 (26 of 1881) (hereinafter referred to as the principal Act), after section 143, the following section shall be inserted, namely:,**Power to direct interim compensation :143A.**

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Court trying an offence under section 138 may order the drawer of the cheque to pay interim compensation to the complainant,

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

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

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

(3) The interim compensation shall be paid within sixty days from the date of the order under sub-section (1), or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque.

(4) If the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

(5) The interim compensation payable under this section may be recovered as if it were a fine under section 421 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) The amount of fine imposed under section 138 or the amount of compensation awarded under section 357 of the Code of Criminal Procedure, 1973 (2 of 1974), shall be reduced by the amount paid or recovered as interim compensation under this section."

S.3 INSERTION OF NEW SECTION 148

In the principal Act, after section 147, the following section shall be inserted, namely:, Power of Appellate Court to order payment pending appeal against conviction :

S.148 Power of Appellate Court to order payment pending appeal against conviction

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

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

(2) The amount referred to in sub-section (1) shall be deposited within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the appellant.

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

Provided that if the appellant is acquitted, the Court shall direct the complainant to repay to the appellant the amount so released, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

JUDGMENT OF INTERIM COMPENSATION

3.10 M/S Smart Options Services Vs State Of Gujarat On 26 June, 2019 Special Criminal Application No. 6791 Of 2019,
Court Cannot Struck-off The Defence On Account Of Non Payment Of 20% Of The Interim Compensation

1. Prima facie, it appears that the Court cannot struck-off the defence on account of non-payment of 20% of the interim compensation amount at the time of recording of plea.
2. Looking to the provisions contained under Section 143A of the Negotiable Instruments Act, it cannot be applied to the pending cases as per the decision of the Hon'ble Punjab and Haryana High Court at Chandigarh rendered in the case of M/s.Ginni Garments and another V/s. M/s.Sethi Garments passed in CRR No.9872,2018 (O&M) on 04.04.2019.
3. Apart from it, if any order is passed under Section 143A of the Negotiable Instruments Act, in that event, the complainant can recover such amount as provided under Section 421 of the Code of Criminal Procedure. Therefore, present petition deserves consideration.
4. Meanwhile, the learned trial Judge is at liberty to proceed with hearing of Criminal Case No.5381 of 2019 (Old No.218 of 2015 and C.C. No.1422 of 2016) without insisting payment of 20% of the amount of cheque in question. Direct service today is permitted.

NATURE OF AMENDMEND IS PROSPECTIVE

3.11 G. J. Raja VS Tejraj Surana, 30 Jul 20192019 0 AIR(SC) 3817; 2019 0 Supreme(SC) 811;

Section 143A of the Act was inserted in the statute book with effect from 01.09.2018.

QUESTION: The question that arises therefore is whether Section 143A of the Act is retrospective in operation and can be invoked in cases where the offences punishable under Section 138 of the Act were committed much prior to the introduction of Section 143A. We are concerned in the present case only with the issue regarding applicability of said Section 143A to offences under Section 138 of the Act, committed before the insertion of said Section 143. ?

ANSWER:

(1) Applicability of Section 143A of Negotiable Instruments Act, 1881 must be **held to be prospective in nature** and confined to cases where offences were committed after introduction of Section 143A.

(2) Section 143A of Negotiable Instruments Act, 1881not only creates a new disability or an obligation but also exposes the accused to coercive methods of recovery of such interim compensation through machinery of State as if interim compensation represented arrears of land revenue.

Para 22. In our view, the applicability of Section 143A of the Act must, therefore, be held to be prospective in nature and confined to cases where offences were committed after the introduction of Section 143A, in order to force an accused to pay such interim compensation.

Para 24. In the ultimate analysis, **we hold Section 143A to be prospective in operation and that the provisions of said Section 143A can be applied or invoked only in cases where the offence under Section 138 of the Act was committed after the introduction of said Section 143A in the statute book**. Consequently, the orders passed by the Trial Court as well as the High Court are required to be set aside. The money deposited by the Appellant, pursuant to the interim direction passed by this Court, shall be returned to the Appellant along with interest accrued thereon within two weeks from the date of this order.

NEED OF APPLICATION FOR COMPENSATION UNDER SECTION 143 A?

3.12 Jisha, W/o. Praveen V/s State of Kerala &Ors. –Crl. M C.No.3136 of 2019 Decided On : 25,06,2019, 2019 0 Supreme(Ker) 691 2019 5 KHC 729; 2019 4 KLT 558 HIGH COURT OF KERALA

The complainant has approached the court by filing a petition under Section 143A N.I. Act. But on a reading of the provision **it is clear that for invoking the power under the provision, an application need not be filed by the complainant**. The power can be exercised by the court in seizing of the prosecution suo motu at the relevant time when a plea that the accused is not guilty of the offence alleged against him is raised by him.

There is no need for the complainant to apply for getting the relief of the nature as contemplated by the provision.

7. It is indicative on a reading of **Section 143A which has been newly introduced into the N.I Act that the Court trying an offence under section 138 shall suomotu exercise the power. There is no need for an application to be filed by the complainant in that regard.** Likewise, the section also does not provide for an opportunity, for the accused to be heard. Nowhere under Section 143A N.I. Act, it is provided that prior to passing of an order directing payment of interim compensation, the accused needs to be granted an opportunity of being heard. Even though the word 'may' is in use in the provision, it will have the impact of 'shall' since prosecutions launched under Section 142 cannot be identified as scrupulous or unscrupulous ones at the preliminary stage when complaint is filed. Interim compensation contemplated under Section 143A N.I. Act is something meant to be imposed on all accused irrespective of the amount involved in the prosecution filed under Section 142 N.I Act. Therefore, the argument of the learned counsel that the objection filed by him to the application under Section 143A N.I. Act was not considered by the court is of not that much relevance.

Para 9. Going by Annexure A1 it is seen that it is an order of attachment passed before judgment, in favour of the complainant, who was a plaintiff in a suit pending before a civil court. Therefore, the order of attachment will only act as security for realization of money when ultimately a decree is passed against the defendant in the civil case. Only when a decree is passed in favour of the plaintiff in the civil suit, the attachment order will be enforceable. That has no relevance when the power under Section 143A is invoked by the trial court in a case under Section 138 N.I. Act. Section 143A is an independent and self contained provision. Therefore, the argument of the learned counsel that the trial court ought not to have passed an order under Section 143A, when an attachment order is obtained by the complainant against the accused from a Civil Court will Oct 14 2020 Page 4 of 5 not sustain. Moreover, in case the prosecution under Section 142 N.I Act turns unsuccessful, sub-section (4) of Section 143A N.I Act provides for repayment of the interim compensation along with interest at the rate specified therein. For the reasons that argument is also repelled.

10. Going by the order under challenge, it is noticed that the order has been passed by the court invoking power under Section 143A N.I. Act. It has been passed at a stage when the plea of the accused was recorded. In the case on hand, the complainant has approached the court by filing a petition under Section 143A N.I. Act. But on a reading of the provision it is clear that for invoking the power under the provision, an application need not be filed by the complainant. The power can be exercised by the court in seizing of the prosecution suo motu at the relevant time when a plea that the accused is not guilty of the offence alleged against him is raised by him. There is no need for the complainant to apply for getting the relief of the nature as

contemplated by the provision. In the case on hand, it is evident from the impugned order that an application was filed by the complainant under Section 143A N.I. Act and the power was exercised by the Court at the right point of time when the plea of the accused on guilt was recorded. Therefore, the challenge of the order for the reason that the power under Section 143A was invoked incorrectly by the court will not sustain. By the impugned order the accused was directed to pay 20% of the cheque amount as interim compensation within a period of 60 days from the date of the order. This Court does not find anything unreasonable or illegal in the direction imposed by the impugned order. In view the above discussion, the order under challenge is liable to be confirmed.

3.13 Jatin Chawla Vs.Rakesh Jindal Crm,M,7430,2020 Decided On : 19,02,2020 Punjab And Haryana High Court

Para 8. In the present case the cheque was dishonoured vide memo dated 09.08.2018 on which the respondentcomplainantserved legal notice dated 29.08.2018 and the offence under Section 138 of the N.I. Act wascommitted after 01.09.2018 on nonpayment of the amount of the cheque within 15 days from receipt of theabove said legal notice. Since the offence was committed after 01.09.2018, Section 148,A of the N.I Act isapplicable to the case and the order passed by the learned Judicial Magistrate 1st Class, Patiala does not sufferfrom any illegality so as to warrant interference in exercise of jurisdiction under Section 482 of the Cr.P.C.

3.14. JSB Cargo and Freight Forwarder (P) Ltd. v. State, 2021 SCC OnLine Del 5425, decided on 20-12-2021

The provision of Section 143A of the NI Act, 1881 has essentially to be held to be 'directory' and cannot be termed to be 'mandatory' to the effect that the trial court had mandatorily to award the interim compensation under Section 143A of the NI Act in all proceedings tried under Section 138 NI Act on the mere invocation thereof by a complainant and thereby order in terms of Section 143A(2) thereof, the interim compensation to the tune of 20% of the amount of the cheque invoked.

4. SPEEDY AND EXPEDITIOUS DISPOSAL OF SUCH CASES.

4.1 <u>Saxchinsingh Rakeshsingh Chauhan v/s Tribhuvanbhai Bhailal Vasava *Criminal Appeal (Against Acquittal) No. 30 of 2018 Decided On, 19 January 2018*</u>

"18. From the above discussion following aspects emerge:
i) Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C., 1973 will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

ii) The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

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

iv) Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C., 1973 to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C., 1973 With this approach, prison sentence of more than one year may be required in all cases.

v) Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonor of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other

proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C., 1973 The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances.

19. In view of the above, we hold that where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings in exercise of its powers under Section 143 of the Act read with Section 258 Cr.P.C., 1973 As already observed, normal rule for trial of cases under Chapter XVII of the Act is to follow the summary procedure and summons trial procedure can be followed where sentence exceeding one year may be necessary taking into account the fact that compensation under Section 357(3) Cr.P.C., 1973 with sentence of less than one year will be adequate, having regard to the amount of cheque, conduct of the accused and other circumstances.

20. In every complaint under Section 138 of the Act, it may be desirable that the complainant gives his bank account number and if possible email ID of the accused. If email ID is available with the Bank where the accused has an account, such Bank, on being required, should furnish such email ID to the payee of the cheque. In every summons, issued to the accused, it may be indicated that if the accused deposits the specified amount, which should be assessed by the Court having regard to the cheque amount and interest/cost, by a specified date, the accused need appear unless required and proceedings may be closed subject to any valid objection of the complainant. If the accused complies with such summons and informs the Court and the complainant by email, the Court can ascertain the objection, if any, of the complainant and close the proceedings unless it becomes necessary to proceed with the case. In such a situation, the accused's presence can be required, unless the presence is otherwise exempted subject to such conditions as may be considered appropriate. The accused, who wants to contest the case, must be required to disclose specific defence for such contest. It is open to the Court to ask specific questions to the accused at that stage. In case the trial is to proceed, it will be open to the Court to explore the possibility of settlement. It will also be open to the Court to consider the provisions of plea bargaining. Subject to this, the trial can be on day to day basis and endeavour must be to conclude it within six months. The guilty must be punished at the earliest as per law and the one who obeys the law need be held up in proceedings for long unnecessarily."

15. In the said decision, the Apex Court mandates to adopt very pragmatic approach to ensure the speedy disposal of all the matters under section 138

of the Negotiable Instruments Act and also expects the trial Court to issue the summons at the outset-on due examination of material, to enable the accused to pay the amount specified therein without further loss of time. Pro forma summons is being given herein below, which can be used by the Court by making necessary changes while issuing summon to the respondent-accused by also specifying therein that if he is desirous of paying the amount straightway in the bank account of the applicant he may so do it, on intimation to the Court online of such payment on the official email Id, to provided in the summons itself, and straightway thereafter, he can be given a discharge by closing the case qua him. However, if the compounding at the initial stage is feasible, even at a later stage, the attempt should be made to ensure that the parties amicably arrive at a conclusion and subject to the appropriate compensation, as found acceptable to the parties, the matter can be put an end to. For the sake of convenience in the present matter and so as to have uniformity in other cases, before any change is made by way of amendment in the code, a DRAFT SUMMONS is provided as under for the Court to make use of the same:

4.2 <u>Modern Denim Limited Thro' Arun Triloknath Bhargava V/s State Of Gujarat Criminal Misc.ApplicationNO. 9774 of 2014.,25/3/2015.</u>
<u>Para 23 DIRECTIONS:</u>

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

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

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

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

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

accepting affidavits of the witnesses, instead of examining them in Court. Witnesses to the complaint and accused must be available for cross-examination as and when there is direction to this effect by the Court."

4.3 <u>Indian Bank Association & Others v/s Union of India & OthersAIR 2014 SC 2528</u>

In the across country Negotiable cases are huge pendency and they constitute a large portion of the overall pending cases in courts. In order to ensure the speedy and expeditious disposal of such cases, the Supreme Court has in the Indian Bankers Association case directed all criminal courts dealing with Section 138 cases to observe the following process:

1. The Metropolitan Magistrate/ Judicial Magistrate should scrutinize the complaint and other accompanying documents (if any) on the day they are filed. If the same are found to be in order, the Court should take cognizance of the matter and direct issuance of summons to the accused.
2. Summons to the accused must be properly addressed and sent by post as well as by email using the address obtained from the complainant. The Court may in appropriate cases take the assistance of the police or the nearby Court to serve the notice. A short date should be fixed for notice of appearance.
3. The summons may indicate that accused may make an application for compounding of the case at the first hearing, in which case the court may pass orders at the earliest.
4. The accused should be asked to furnish a bail bond to ensure his/ her appearance during trial. The court will also ask the accused to take notice under Section 251, Cr.P.C so as to enter his/her plea of defence and will then fix the case for defence evidence, unless an application is made by the accused under section 145(2) of the NI Act for recalling a witness for cross examination.
5. The examination-in-chief, cross-examination and re-examination of the complainant must be conducted within three months of assigning the case. The court has the option of accepting affidavits of the witnesses, instead of examining them in court.

4.4 <u>Rajesh Agarwal & Others v/s State & Another 2011 (2) CRIMES 711 Delhi High court</u>

<u>The summary trial procedure to be followed for offences u/s 138 N.I. Act would thus be as under:</u>

Step I :On the day complaint is presented, if the complaint is accompanied by affidavit of complainant, the concerned MM shall scrutinize the complaint & documents and if commission of offence is made out, take cognizance & direct issuance of summons of accused, against whom case is made out.

Step II :If the accused appears, the MM shall ask him to furnish bail bond to ensure his appearance during trial and ask him to take notice u/s 251 Cr. P.C. and enter his plea of defence and fix the case for defence evidence, unless an application is made by an accused under section 145(2) of N.I. Act for recalling a witness for cross examination on plea of defence.Step III :If there is an application u/s 145(2) of N.I. Act for recalling a witness of complainant, the court shall decide the same, otherwise, it shall proceed to take defence evidence on record and allow cross examination of defence witnesses by complainant.

Step IV :To hear arguments of both sides.

Step V : To pass order /Judgment.

4.5 Makwana Mangaldas Tulsidas V/S The State Of Gujarat And Anr. Hon'ble Supreme Court Of India Air 2020 Sc 2447

The Court stated in its order:"With ensuring the credibility of cheques, it is equally important that cheques are not allowed to be misused giving cause to frivolous litigation. The Reserve Bank of India may consider developing a new proforma of cheques so as to include the purpose of payment, along with other information mentioned above to facilitate adjudication of real issues."

IMP POINT

1. Ensure Electronic Mechanism To Issue Process

2. New Cheque May Show The Purpose./Banks Should Provide Cheque Details

"The Reserve Bank of India, being the regulatory body may also evolve guidelines for banks to facilitate requisite information for the trial of these cases and such other matters as may be required. A separate software,based mechanism may be developed to track and ensure the service of process on the accused in cases relating to an offence under Section 138 of N.I. Act. The Reserve Bank of India, being the regulatory body may also evolve guidelines for banks to facilitate requisite information for the trial of these cases and such other matters as may be required. A separate software,based mechanism may be developed to track and ensure the service of process on the accused in cases relating to an offence under Section 138 of N.I. Act

3. Attach Property To Ensure Presence Of The Accused /Section 143A Of The N I Act As Well As Fine Or Compensation To Be Recovered As Per Section 421 Of The Crpc.

The Bench has also observed that a mechanism may be developed to ensure the presence of the accused even by way of coercive measure, if required, taking effect from Section 83 of Cr.P.C. which allows attachment of property, including movable property. A similar coordinated effort may be

evolved to recover interim compensation under Section 143A of the N.I. Act as well as fine or compensation to be recovered as per Section 421 of Cr.P.C. The Bank may facilitate mechanism for transferring requisite funds from the bank account of the accused to the account of the holder in due course, as may be directed by the Court.

4. Pre-Litigation Settlement

The Bench also suggested that with the ever-growing institution of N.I. cases, there is a need for developing a mechanism for pre-litigation settlement in these cases. The Legal Services Authorities Act, 1987 provides for a statutory mechanism for disposal of case by Lok Adalat at pre-litigation stage under Sections 19 and 20 of the Act. Further, Section 21 of the Act, recognises an award passed by Lok Adalats as a decree of a civil court and gives it a finality.

"The effect of the above legal proposition is that an Award passed at the pre-litigation stage or pre-cognizance stage shall have an effect of a civil decree. The National Legal Services Authority, being the responsible Authority in this regard, may evolve a scheme for settlement of dispute relating to cheque bounce at pre-litigation i.e. before the filing of the private complaint. This measure of prelitigation ADR process can go a long way in settling the cases before they come to Court, thereby reducing docket burden"

5. Need for exclusive courts for cheque cases.

The Bench observed that to work out a mechanism for expeditious and just adjudication of cases relating to dishonour of cheques, fulfilling the mandate of law and reduce high pendency, various duty-holders like Banks, Police and Legal Services Authorities may be required to take measures and prepare schemes."The High Courts, in addition to the above, may also consider setting up of exclusive courts to deal with matters relating to Section 138, especially in establishments where 8 the pendency is above a standard figure. Special norms for assessment of the work of exclusive courts may also be formulated giving additional weightage to disposal of a case within the time-frame as per legal requirement""Thus, we find it necessary to hear them for evolving a concerted, coordinated mechanism for expeditious adjudication of these cases as per the legal mandate".The Court has issued notice to the Union of India through Law Secretary, Registrar General of all the High Courts, the Director-General of Police of all the States and Union Territories, Member Secretary of the National Legal Services Authority, Reserve Bank of India and Indian Bank Association, Mumbai as the representatives of banking institutions.

6. Explore online disposal of cheque cases

5. VALID NOTICE

5.1 <u>Shree Corporation V/s Anilbhai Puranbhai Bansal, Director For & Behalf Of R/Special Criminal Application No. 3653 of 2012 Date : 23/03/2018 Hon'ble Gujarat High Court/</u>

- Magistrates before issuing the order of process should take the pains of not only reading the complaint, but should read the legal notice and verify whether the same is in accordance with law - if Magistrates finds demand in notice to be absolutely "ominous", then order of process should not be issued - if legal notice as envisaged under provisions of the N.I. Act is found to be not in accordance with law, then complaint should fail - service of a valid legal notice in a case u/s.138 is mandatory - service of a valid notice is imperative in character for maintaining a complaint - unless a notice is served in conformity with the proviso (b) appended to S. 138, the complaint would not be maintainable.
- **<u>The expression "amount of money used in Section 138(b) of Negotiable Instrument Act</u>**, to my mind, in a case of this nature would mean the amount actually payable by the drawer of the cheque to the payee of the cheque. Of course, if the payee of the cheque makes some demands on account of interest, compensation, incidental expenses etc, that would not invalidate the notice so long as the principal amount demanded by the payee of the cheque is correct and is clearly identified in the notice**<u>. When the principal amount claimed in the notice of demand is more than the principal amount actually payable to the payee of the cheque and the notice also does not indicate the basis for demanding the excess amount, such a notice cannot be said to be a legal and valid notice envisaged in Section 138(b) of Negotiable Instrument Act.</u>**

Para 23 The question which comes up for consideration is as to what the expression "amount of money" means in a case where the admitted liability of the drawer of the cheque gets reduced, on account of the part payment made by him, after issuing but before the presentation of cheque in question. No doubt, the expression "amount of money" would mean the amount of the cheque alone in case the amount payable by the drawer, on the date of presentation of the cheque, is more than the amount of the cheque. But, can it be said the expression "amount of money" would always mean the amount of the cheque, even if the actual liability of the drawer of the cheque has got reduced on account of some payment made by him towards the discharge of the debt or liability in consideration of which the cheque in question was issued. If it is held that the expression "amount of money" would necessarily mean the amount of cheque in every case, the

drawer of the cheque would be required to make arrangement for more than the admitted amount payable by him to the payee of the cheque. In case he is not able to make arrangement for the whole of the amount of the cheque, he would be guilty of the offence punishable under Section 138 of Negotiable Instruments Act. Obviously this could not have been the intention of the legislature to make a person liable to punishment even if he has made arrangements necessary for payment of the amount which is actually payable by him. If the drawer of the cheque is made to pay more than the amount actually payable by him, the inevitable result would be that he will have to chase the payee of the cheque to recover the excess amount paid by him. Therefore, I find it difficult to take the view that even if the admitted liability of the drawer of the cheque has got reduced, on account of certain payments made after issue of the cheque, the payee would nevertheless be entitled to present the cheque for the whole of the amount, to the banker of the drawer, for encashment and in case such a cheque is dishonoured for want of funds, he will be guilty of offence punishable under Section 138 of Negotiable Instrument Act.

Para 25 I am conscious of the fact that out of the total liability of Rs. 1,08,43,766/- the liability only to the extent Rs.12,40,000/- came to be discharged. The amount of Rs.96,03,766/- still remained due and payable by the writ applicants to the complainant. However, I am of the view that the quantum of the amount would not be a relevant factor in the case at hand. To put it in other words, whether a substantial amount was paid or a meager amount was paid. A notice of demand which requires the drawer of the cheque to make payment of the whole of the cheque amount, despite receiving some amount against that very cheque, much before issue of notice, cannot be said to be a legal and valid notice envisaged in Section 138(b) of Negotiable Instrument Act. The expression "amount of money" used in Section 138(b) of Negotiable Instrument Act, to my mind, in a case of this nature would mean the amount actually payable by the drawer of the cheque to the payee of the cheque. Of course, if the payee of the cheque makes some demands on account of interest, compensation, incidental expenses etc, that would not invalidate the notice so long as the principal amount demanded by the payee of the cheque is correct and is clearly identified in the notice. When the principal amount claimed in the notice of demand is more than the principal amount actually payable to the payee of the cheque and the notice also does not indicate the basis for demanding the excess amount, such a notice cannot be said to be a legal and valid notice envisaged in Section 138(b) of Negotiable Instrument Act. In such a case, it is not open to the complainant to take the plea that the drawer of the cheque could have escaped the liability by paying the actual amount due from him to the payee of the cheque. In order to make the notice legal and valid, it must necessarily specify the principal amount payable to the payee of the cheque and the principal amount demanded from the drawer of the cheque should not be more than the actual amount payable by him though

addition of some other demands in the notice by itself would not render such a notice illegal or invalid. (see M/s. Alliance Infrastructure vs. Vinay Mittal, Cri. M.C. No.2224 of 2009, decided on 18th January, 2018)

Para 51 I would like to inform the learned Magistrates that before issuing the order of process, they should take the pains of not only reading the complaint, but should read the legal notice and verify whether the same is in accordance with law or not. To put it in other words, if the Magistrates finds the demand in the notice to be absolutely "ominous", then the order of process should not be issued. If the legal notice as envisaged under the provisions of the N.I. Act is found to be not in accordance with law, then the complaint should fail. The service of a valid legal notice in a case under section 138 of the N.I. Act, is mandatory. Service of a valid notice, it is trite, is imperative in character for maintaining a complaint. It creates a legal fiction. The operation of section 138 of the Act is limited by the proviso. When the proviso applies, the main section would not. Unless a notice is served in conformity with the proviso (b) appended to section 138 of the N.I. Act, the complaint would not be maintainable. Therefore, **I am putting a word of caution for the Magistrates in this regard while dealing with the complaint under section 138 of the N.I. Act.**

5.2 M/s. Alliance Infrastructure vs. Vinay Mittal, Cri. M.C. No.2224 of 2009, decided on 18th January, 2018

In order to make the notice legal and valid, it must necessarily specify the principal amount payable to the payee of the cheque and the principal amount demanded from the drawer of the cheque should not be more than the actual amount payable by him though addition of some other demands in the notice by itself would not render such a notice illegal or invalid.

5.3 M/s. Sarav Investment & Financial Consultants Pvt. Ltd. & Anr.V/s Llyods Register of Shipping Indian Office Staff Provident Fund & Anr. Supreme Court of india2007 14 SCC 753

16. Section 138 of the Act contains a penal provision. It is a special statute. It creates a vicarious liability. Even the burden of proof to some extent is on the accused. Having regard to the purport of the said provision as also in view of the fact that it provides for a severe penalty, the provision warrants a strict construction. Proviso appended to Section 138 contains a non-obstante clause. It provides that nothing contained in the main provision shall apply unless the requirements prescribed therein are complied with. Service of notice is one of the statutory requirements for initiation of a criminal proceeding. Such notice is required to be given within 30 days of the receipt of the information by the complainant from the bank regarding the cheque as unpaid. Clause (c) provides that the holder of the cheque must be given an opportunity to pay the amount in question within 15 days of the receipt of the said notice. Complaint Petition, thus, can be

filed for commission of an offence by a drawee of a cheque only 15 days after service of the notice. What are the requirements of service of a notice is no longer res-integra in view of the recent decision of this Court in C.C. Alavi Haji Vs. Palapetty Muhammed & Anr. [JT 2007(7) SC 498].

18.The notice, was only required to be dispatched. Its contents were required to be communicated. Communication to the appellant about the fact of dishonouring of the cheques and calling upon him to pay the amount within 15 days is imperative in character. It is not a case, where, actual communication was not necessary. Service of notice is a part of cause of action for lodging the complaint.

21. In Maxwells Interpretation of Statutes, the learned author has emphasized that "provisions relating to giving of notice often receive liberal interpretation" (vide p. 99 of the 12th Ed.). The context envisaged in Section 138 of the act invites a liberal interpretation for the person who has the statutory obligation to give notice because he is presumed to be the loser in the transaction and it is for his interest the very provision is made by the legislature. The words in clause (b) of the proviso to Section 138 of the Act show that the payee has the statutory obligation to "make a demand" by giving notice. The thrust in the clause is one the need to "make a demand". It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once it is dispatched his part is over and the next depends on what the sendee does."

5.4 <u>Central Bank of India & Another vs. Saxons Farms & Others 1999(8) SCC 221,</u>

The Supreme Court observed that the object of the notice under Section 138(b) of Negotiable Instrument Act is to give a chance to the drawer of the cheque to rectify his omission and also to protect the honest drawer. If the drawer of the cheque is asked to pay more than the principal amount due from him and that amount is demanded as the principal sum payable by him, it is not possible for an honest drawer of the cheque to meet such a requirement.

5.5 <u>Suman Sethi vs. Ajay K. Churiwala, 2000 (2) SCC 380,</u>

The Supreme Court held that where the notice also contains a claim by way of cost, interest etc. and gives breakup of the claim of the cheque amount, interest, damages etc., which are separately specified, the claim for interest, cost etc. would be superfluous and these additional claims being severable would not invalidate the notice. It was further held that if an ominous demand is made in a notice as to what was due against a

dishonoured cheque, the notice might fail to meet the legal requirement and may be regarded as bad.

5.6 WITHIN 15 DAYS FROM DATE OF RECEIPT OF NOTICE
M/s. Rahul Builders vs. M/s. Arihant Fertilizers; 2008 CLJ 452,

The Supreme Court observed that Section 138 of Negotiable Instruments Act contemplates service of notice and payment of amount of cheque within 15 days from date of receipt of notice. It does not speak of 15 days notice. The notice was held to be a valid notice although the accused was asked to make payment only within 10 days instead of 15 days.

5.7 Suo Motu Writ Petition (Civil) No(S).3/2020 In Re : Cognizance For Extension Of Limitation 10.07.2020 Supreme Court Of India

I.A. No. 48461/2020, Service of all notices, summons and exchange of pleadings:,Service of notices, summons and exchange of pleadings/documents, is a requirement of virtually every legal proceeding. Service of notices, summons and pleadings etc. have not been possible during the period of lockdown because this involves visits to post offices, courier companies or physical delivery of notices, summons and pleadings. **We, therefore, consider it appropriate to direct that such services of all the above may be effected by e,mail, FAX, commonly used instant messaging services, such as WhatsApp, Telegram, Signal etc. However, if a party intends to effect service by means of said instant messaging services, we direct that in addition thereto, the party must also effect service of the same document/documents by e,mail, simultaneously on the same date**.

5.8 K.R.Indira vs. Dr.G.Adinarayana, 2003 (3) JCC(NI) 273,

A consolidated notice was sent in respect of four cheques. Two of which were issued in the name of the husband and the two were in the name of the wife. It was noted by the Supreme Court that the cheque amounts were different from the alleged loan and the demand made was not of the cheque amount but was of the loan amount. It was held that the complainant was required to make demand for the amount recovered by the cheque which was conspicuously absent in the notice and, therefore, the notice was imperfect. The same would be the legal effect when a part-payment against a cheque is made, after its issue. The amount covered by the cheque would necessarily mean the principal amount due to the payee after giving credit for the part-payment received by him and, therefore, if the notice does not specifically demand that particular amount, it would not be a valid notice and would not fasten criminal liability on account of its non-compliance.

5.9 SatyavanChaplot vs Rajendra on 16 December, 1997 Rajasthan High Court Equivalent citations: 1998 (2) ALD Cri 868.

Held in para 7: if a period of less than 15 days is mentioned in the notice as the period within which the payment of the amount of cheque is to be made, the notice could not be invalid because the proviso given below under Section 138 of the Act does not require the payee or the holder of the cheque to mention any period in the notice. Having regard to the provisions contained in Section 138 of the Act, I am of the opinion that the principle that the proceedings are vitiated for non-compliance of the statutory provision is not applicable to the notice issued under Clause (b) of the proviso given below Section 138 of the Negotiable Instruments Act because there is no violation of law if any particular period within which payment is to be made is mentioned in the notice and such period is other than the less or more than 15 days. Besides, no prejudice has been caused to the accused petitioner by giving him a notice by which he was required to make the payment of the amount of cheque within a period of seven days. Therefore, the proceedings cannot be dropped nor they can be said to have been vitiated on account of causing any prejudice to the accused-petitioner

5.10 M/S Melton India Pvt. Ltd. &Ors. vs M/S Ester Industries Ltd. Delhi High Court on 28 July, 2010

The complainant demanded payment of the dishonoured cheque amount from the petitioners within 30 days instead of 15 days, the notice sent by the complainant would not become illegal.

5.11 Hammanna S. Nayak vs. Vijay Kumar Kalani; Bombay High Court 2000 CLJ 4438,

It was held, that period of 21 days' mentioned in demand notice will not make it illegal.

5.12 Suman Sethi v. Ajay K. Churiwal and another, 2000 (2) SCC 380,

It was held that the legislative intent as evident from Section 138 of the Act is that if for the dishonoured cheque the demand is not met within 15 days of the receipt of the notice the drawer is liable for conviction. If the cheque amount is paid within the above period or before the complaint is filed, the legal liability under Section 138 ceases to be operative and for the recovery of other demands such as compensation, costs, interests etc. separate proceedings would lie. If in a notice any other sum is indicated in addition to the amount covered by the cheque, that does not invalidate the notice.'

K.R. Indira v. Dr. G. Adinarayana [(2003) 8 SCC 300]

"...However, according to the respondent, the notice in question is not separable in that way and that there was no specific demand made for payment of the amount covered by the cheque. We have perused the contents of the notice. Significantly, not only the cheque amounts were different from the alleged loan amounts but the demand was made not of

the cheque amounts but only the loan amount as though it is a demand for the loan amount and not the demand for payment of the cheque amount, nor could it be said that it was a demand for payment of the cheque amount and in addition thereto made further demands as well. What is necessary is making of a demand for the amount covered by the bounced cheque which is conspicuously absent in the notice issued in this case. The notice in question is imperfect in this case not because it had any further or additional claims as well but it did not specifically contain any demand for the payment of the cheque amount, the non-compliance with such a demand only being the incriminating circumstance which exposes the drawer for being proceeded against under Section 138 of the Act.

5.13. Vijay Gopala Lohar vs Pandurang Ramchandra Ghorpade . 5 April, 2019 ,Criminal Appeal No(S). 607-608 /2019 (Arising Out Of Slp(Crl.) No(S).8655-8656/2015) Supreme Court Of India.

There is no dispute regarding the proposition that the notice issued under Section 138 of the NI Act has to be only for the cheque amount and not for any other amount more than the cheque amount. In the judgments referred to above the notice issued under Section 138 of the NI Act referred to loan amounts which were much higher than the cheque amounts. Whereas, in the instant case, the loan amount and the cheque amount is the same i.e., Rs.50,000/-.

6. SECTION 148 OF N.I. ACT

6.1 Surinder Singh Deswal @ Col. S.S.Deswaland others Vs Virender Gandhi Decided on 29,5 2019 Supreme Court Of India Criminal Appeal Nos.917-944 OF 2019

Para, 9.Now so far as the submission on behalf of the appellants that even considering the language used in Section 148 of the N.I. Act as amended, the appellate Court "may" order the appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial Court and the word used is not "shall" and therefore the discretion is vested with the first appellate court to direct the appellant – accused to deposit such sum and the appellate court has construed it as mandatory, which according to the learned Senior Advocate for the appellants would be contrary to the provisions of Section 148 of the N.I. Act as amended is concerned, considering the amended Section 148 of the N.I. Act as a whole to be read with the Statement of Objects and Reasons of the amending Section 148 of the N.I. Act, though it is true that in amended Section 148 of the N.I. Act, the word used is "may", it is generally to be construed as a "rule" or "shall" and not to direct to deposit by the appellate court is an exception for which special reasons are to be assigned. Therefore amended Section 148 of the N.I. Act confers power upon the Appellate Court to pass an orderpending appeal to direct the Appellant Accused to deposit the sum which shall not be less than 20% of the fine or compensation either on an application filed by the original complainant or even on the application filed by the Appellant Accused under Section 389 of the Cr.P.C. to suspend the sentence. The aforesaid is required to be construed considering the fact that as per the amended Section 148 of the N.I. Act, a minimum of 20% of the fine or compensation awarded by the trial court is directed to be deposited and that such amount is to be deposited within a period of 60 days from the date of the order, or within such further period not exceeding 30 days as may be directed by the appellate court for sufficient cause shown by the appellant. Therefore, if amended Section 148 of the N.I. Act is purposively interpreted in such a manner it would serve the Objects and Reasons of not only amendment in Section 148 of the N.I. Act, but also Section 138 of the N.I. Act. Negotiable Instruments Act has been amended from time to time so as to provide, inter alia, speedy disposal of cases relating to the offence of the dishonoured of cheques. So as to see that due to delay tactics by the unscrupulous drawers of the dishonoured cheques due to easy filing of the appeals and obtaining stay in theproceedings, an injustice was caused to the payee of a dishonoured cheque who has to spend considerable time and resources in the court proceedings to realise the value of the cheque and having observed that such delay has compromised the sanctity of the cheque transactions, the Parliament has thought it fit to amend Section 148 of the N.I. Act. Therefore, such a purposive interpretation would be in

furtherance of the Objects and Reasons of the amendment in Section 148 of the N.I. Act and also Sec 138 of the N.I. Act.

Para,10. Now so far as the submission on behalf of the appellants, relying upon Section 357(2) of the Cr.P.C. that once the appeal against the order of conviction is preferred, fine is not recoverable pending appeal and therefore such an order of deposit of 25% of the fine ought not to have been passed and in support of the above reliance placed upon the decision of this Court in the case of D*ilip S. Dhanukar (supra) is concerned, the aforesaid has no* substance. The opening word of amended Section 148 of the N.I. Act is that "notwithstanding anything contained in the Code of Criminal Procedure…..". Therefore irrespective of the provisions of Section 357(2) of the Cr.P.C., pending appeal before the first appellate court, challenging the order of conviction and sentence under Section 138 of the N.I. Act, the appellate court is conferred with the power to direct the appellant to deposit such sum pending appeal which shall be a minimum of 20% of the fine or compensation awarded by the trial Court.

7. COMPONENT OF OFFENCE

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

The components of offence under this provision are

(a) Drawing of the cheque for some amount;

(b) Presentation of the cheque to the banker;

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

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

(e) Failure of drawer to make payment within 15 days of receipt of such notice. **See Harman Electronics Pvt. Ltd.Vs. National Panasonic India Ltd.(2009)1 SCC 720**

8. COMPLAINT

8.1 Indra Kumar Patodia Vs. Reliance Industries Ltd.(2012) 13 SCC 1

Complaint without the signature of complainant is maintainable when it is verified by the complainant and the process is issued by the Magistrate after due verification.

9. DRAWING OF A CHEQUE/ HOLDER IN DUE COURSE / LIABILITY OF LEGAL HEIRS

9.1 Ratilal Harmanbhai Patel Vs. State of Gujarat and Ors2016 0 CrLJ 4055; 2016 3 GLH 194; 2016 4 GLR 3419; 2016 0 Supreme(Guj) 338; HIGH COURT OF GUJARAT

(A) Negotiable Instruments Act,1881,Sections 8, 9 and 138, 'Holder in due course' is a bonafide transferee for value, Conjoint reading of Sections 8, 9 and 138 would include "holder in due course" as he alone would be entitled to initiate the criminal proceedings under Section 138. Section 138 postulates that where any cheques were drawn by a person on account maintained by him for payment of any amount of money to any other person from out of his account for the discharge of his liability, is returned by the Bank as the same is insufficient to honour the cheque, such person shall be deemed to have committed the offence. Prima facie case made out against the accused to put him to trial for the offence under section 138.

9.2 JyotindraMotibhai Thakkar Vs. State of Gujarat and Ors. Decided On : 28,04,2017 High Court Of Gujarat 2017 3 GLH 453; 2017 4 GLR 3349

Code of Criminal Procedure, 1973, Section 482, Negotiable Instruments Act, 1882Section138**Three question arising: Whether the wife by virtue of her status as a wife of the payee of the cheque can be said to be "a holder in due course"? Whether she can be a competent complainant to lodge complaint under Section 138 of the Negotiable Instruments Act, 1882? Who can be said to be the "holder in due course"?**wife only ontheground of she being a wife or on the ground that she was an heir of the husband toreceivemoney cannot be treated as "holder in due course"locus standi for her cannot beconceivedin law to be one entitled to file a complaint. If she is claiming any right over theamountof cheque in capacity of heir, her remedy would be in civil law. A person in ordertobecome a holder in due course within the meaning of Section 9 of the Act must be inpossessionof a promissory note, bill of exchange or cheque, as is in the present case; merebecoming possessor of the cheque etc., would not suffice. Consideration isindispensableingredient for being clothed with the legal capacity of "holder in due course"is that the person in possession of the instrument must have been in the possession forsomeconsideration.merely being an heir of payee, though may be in possession ofinstrument,would not automatically make such heir or legatee a 'holder in due course' claimedcapacity of heir or legatee or right to inheritance by themselves would not attractorinvest the person in possession of the instrument with the capacity as 'holder in duecourse',**held: death of the payee, heir of legatee thereof does not**

step into the shoe of the deceased payee merely because he happens to be an heir or a relative or a legatee.

9.3 J Chitranjan And Company Proprietor C D Shah Vs. State Of Gujarat And Ors. Criminal Revision Application No. 231 Of 2009 Decided On : 13/10/2016 2017 Eglr_Hc 10006047

"8. from the rival contentions, following legal questions call for determination for this Court:

(1) Meaning of the expression "holder" as contemplated in section 8 and section 139 of N.I. Act and whether the expression comprehends the "holder in due course" and the "payee".

(2) Meaning of expression "legally enforceable debt" or "other liability" as used in explanation to Section 138 of N.I. Act. Whether time barred debt is legally enforceable debt

(3) Competence of power of attorney and/or substitute of the complainant to depose before the court.

(4) Competence of minor to advance loan and prosecuting the accused for dishonour of cheque issued for discharge of the overdue loan.

(5) What should be the contents of the notice, complaint, verification or power of attorney deed?

(6) Maintainability of complaint by heir or successor in absence of succession certificate.

(7) The effect of not posing incriminating circumstance relevant for determination of the case under Section 313 of Cr. P.C. to the accused. (Books of accounts)

(8) Whether there can be deposition of facts not stated in documents like complaint, power of attorney deed etc.

(9) Whether secondary evidence under section 65(b) was permissible."

Held "The intention of the maker of the cheque to constitute its successor in title a holder would thus be clear by delivering the cheque to a person on free volition or for lawful consideration. Thus, a mere delivery of the cheque by lawful means or for lawful consideration would constitute a person 'holder' of the cheque. The "drawer" or "holder" of a cheque may either endorse the cheque further or the cheque may be discounted so as to constitute the successor "holder in due course". Thus, endorsement or further negotiation in any other manner would be to invest the property in the cheque in successor of the negotiator. It can thus be seen that the transfer or negotiation of the cheque under the provisions of the N.I. Act would be with a definite purpose of transferring the property in the cheque. The property in the cheque so derived would necessarily mean a right to realize the amount stated therein irrespective of a person being a 'payee' or 'holder' or 'holder in due course'."

Standard of proof in discharge of the burden in terms of section 139 of the Act being preponderance of a probability. Question regarding competence of minor to advance loan and pursue the cause for dishonour of

cheque, Nothing is pointed out to warrant inference that no action would lie under section 138 of the N.I. Act on a cheque issued for repaying the debt incurred by minor and in view of the language used in section 138 of the N.I. Act no such limitation can be read therein.

The debt in question was not legally enforceable as the same was barred by limitation under Article19 of the Limitation Act. The witness deposing the facts of the case was not, in fact, the witness with personal knowledge about the facts and therefore his deposition was not entitled to any legal weightage.

Question is with regard to affidavit of power of attorney or substitute of the complainant to be witness of facts deposing before the court in absence of personal knowledge on the subject with him. The legal position in this regard is settled that in absence of personal knowledge with the power of attorney or for that with any other witness, no deposition of such person can be relied upon.

9.4 Mukundlal Mohanlal Gandhi VS State of Gujarat [2015] 0 Supreme(Guj) 1070

Held : Death of complainant during pendency, His son can be impleaded as complainant , Accused can be convicted if son was able to prove that cheque was issued by accused in discharge of legally recoverable debt

18. After considering the relevant provisions of the NI Act and the relevant judgments on the point, this Court clarified the legal position and answered the questions in the following manner :

"(i) Filing of complaint petition under Section 138 of NI Act through power of attorney is perfectly legal and competent.

(ii) The Power of Attorney Holder can depose and verify on oath before the Court in order to prove the contents of the complaint. However, the power of attorney Holder must have witnessed the transaction as an agent of the payee/Holder in due course or possess due knowledge regarding the said transactions.

(iii) It is required by the complainant to make specific assertion as to the knowledge of the power of attorney Holder in the said transaction explicitly in the complaint and the power of attorney Holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

(iv) In the light of section 145 of NI Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the NI Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant or his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the NI Act.

(v) The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person."

9.5 M. Abbas Haji VS T. N. Channakeshava, 19 Sep 2019 2019 0 AIR (SC) 4617, 2019 9 SCC 606

Legal heirs of a person convicted and sentenced u/s 138, NI Act are neither liable to pay the fine or to undergo imprisonment. Proceeding u/s 138, NI Act is a quasi-criminal proceeding. Principles applicable to acquittal in other criminal cases do not apply.

9.6 Shankar Lal — Appellant Vs. Sanyogita Devi (Dead) — Respondent Criminal Appeal No. 485 of 2002 Decided on : 28,10,2009 Supreme Court Of India Division Bench

8. It was further held that "it is not necessary for the person suing on the promissory note to rely only on an endorsement or such other mode as is provided for in the Negotiable Instruments Act and the suit by a person on whom the right devolves by operation of law cannot be defeated by absence of the endorsement."

9. The law applicable in respect of a promissory note would be equally applicable to a cheque as both of them are negotiable instruments within the meaning of the provisions of the said Act. It is clear from the definition of 'holder in due course' that 'holder in due course' means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer. The deceased Dhairyasheel Rao Desmukh was undoubtedly the holder in due course of the cheque. The respondent, being the legal heir of the deceased, stepped into the shoes of her husband and has become the holder of the cheque in due course. All the rights possessed by the original holder of the cheque devolve upon the legal heirs by operation of law. There is no provision in Negotiable Instruments Act prohibiting the legal heirs to file the complaint under Section 138 of the Act. The legal heirs of the holder in due course of the cheque are clearly entitled to rely upon the instrument and there is no provision in the Act which stands in the way of legal heirs initiating proper and appropriate proceedings as they step into the shoes of the original holder in due course of the cheque. 10. The High Court having considered the matter in the right perspective came to the right conclusion that there is no provision under the Act which precludes the legal heir of the holder in due course of the cheque to file complaint under Section 138 of the Act. In our opinion that a heir of the deceased holder in due course of the cheque can bring action on the basis of the cheque to recover the amount due thereon to the deceased holder by reason of the fact that he succeeds to the estate of the deceased holder by inheritance i.e.; operational of law and if that be so there is no reason as to why the legal heirs cannot file complaint under Section 138 of

the Act. There is, therefore, no reason on principle to hold that a complaint filed by a legal heir of the original holder in due course of the cheque cannot be taken cognizance by the court. In our considered view, neither the cause of action nor the right conferred upon the holder in due course of the cheque to proceed and file complaint under Section 142 of the Act for the offence under Section 138 of the said Act comes to an end after the death of the holder in due course of the cheque. The cause of action certainly survives as the legal heirs step into the shoes of the holder of the cheque in due course by operation of law and are entitled to prosecute and initiate the proceedings under Section 142 of the Act.

9.7 Sivakumar Vs. Natrajan (2009) 13 SCC 623.

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

9.8 M/S. Sri Sai Mourya Estates &vs The State Of A.P., Rep., By Its on 13 April, 2018 Criminal Petition No.8862 OF 2011 Andhra Pradesh High Court

The specific contention raised by the petitioners herein, who are the accused in, is that admittedly the 2nd respondent is not a payee or a holder in due course. **The complaint is filed as a legal representative. The legal representative of the payee is not a holder in due course, since the subject instrument/cheque came into possession of the 2nd respondent as a legal representative of the deceased and not by paying consideration by him or an endorsement on the cheque in his favour by the original payee**. In this context, Section 75 of the Act contemplates presentment or to agent, representative of deceased or assignee of insolvent, which reads as follows:

Presentment or to agent, representative of deceased or assignee of insolvent:, Presentment for acceptance or payment may be made to the duly authorized agent of the drawee, maker or acceptor, as the case may be, or where the drawee, maker or acceptor has died, to his legal representative, or, where he has been declared an insolvent, to his assignee.

The above provision provides that if the maker of the cheque is dead, payment can be demanded from the legal representatives of the drawer, maker or acceptor. The heading of the Section is very clear and it shows presentment of the negotiable instrument can be made by the representative of the deceased also. Section 78 of the Act provides to whom payment should be made. Per contra, Section 138 of the Act says that if the amount is paid to the holder of the instrument, there should be sufficient discharge of liability. The Holder as defined under Section 8 of the Act is as follows:

Holder: The Holder of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.

Section 53 of the Act contemplates a holder of a negotiable instrument who derives title from a holder in due course have the rights thereon of that of a holder in due course. Therefore, the holder deriving a title from the holder in due course have all the rights of the holder in due course. Therefore, the legal representative of a holder in due course have all the rights of the holder in due course.

In the case on hand, the deceased mother of the 2nd respondent was the holder in due course. Therefore, the 2nd respondent by virtue of being a legal representative is a holder in due course and he got all the rights to initiate proceedings under the provisions of Sections 138 and 142 of the Act against the petitioners herein. Hence, there is no dispute on the proposition that the legal representative can file/initiate proceedings for realizing the amount.

Section 78 of the Act deals with to whom payment should be made and the same is as follows:

To whom payment should be made:, Subject to the provisions of Section 82, clause (c) payment of the amount due on a promissory note, bill of exchange or cheque must, in order to discharge the maker or acceptor, be made to the holder of the instrument.

From the above provision, it is clear that the 2nd respondent holds **the cheque after the death of his mother being the payee and as a legal heir he is entitled to possess the same in his own name and in view of Section 53 he is the holder in due course and can get a full discharge**. Thus, under Section 53 of the Act, a legal representative/heir of the payee or holder in due course can maintain a complaint under Section 138 of the Act.

The other contention raised by the counsel for the petitioners that there may be other legal representatives and therefore the complaint filed by one legal heir i.e., the 2nd respondent is not maintainable. However, that is a matter of evidence and the same can be cured. Apart from that it is not a matter to be considered for quashing the complaint at the initial stage.

In the above circumstances, this Court is of the opinion that the complaint is maintainable. **The 2ndrespondent being the legal representative of his deceased mother i.e., payee or holder in due course can file a complaint under Section 138 read with Section 142 of the Act**. As such, this Court holds that there are no merits in the criminal petition and the same is dismissed. Interim order, if any, stands vacated.

9.10 Ms. Jai Bajrang Traders — Appellant Vs. Vishal Bansal 2018 (2018) ACD 532 : (2018) 185 AIC 826 : (2018) 70 Orissa CriR 251 Orissa High Court

Dishonour of such self,drawn cheque does not amount to penal offence under section 138 of N.I.

Negotiable Instruments Act, 1881Section 138Criminal Procedure Code, 1978Section 378(4) Dishonour of chequeAppeal against acquittalO.P. faced trial under section 138 N.I. ActSelf drawn cheque not issued in favour of complainantProvisions of sections 118 and 139 of N.I. Act not applicable as complainant neither a payee nor a holder in due courseDishonour of such self-drawn cheque does not amount to penal offence under section 138 of N.I. ActTrial Court properly assessed evidence self drawn cheque neither issued nor endorsed in favour of complainantJudgment of trial Court not illegal or there was perversity in sameLeave petition dismissed.

10. PRESUMPTION UNDER SECTION 118

10.1 Ramilaben Jasubhai Patel Vs. Rasiklal Chunilal Kothari 2015 (1) GLR 597 High Court of Gujarat

N. I. Act Section – 118 & Evidence Act Section-73 Held that There is no presumption, however, as to the execution of the instrument. The presumption statutorily raised u/s 118 would come into operation only after and provided that the factum of execution of the instrument is admitted or established in accordance with rule of evidence in view of clear dispute regarding execution of pro note by accused in w/s the burden rests on the complainant to prove signature and contents of it.

10.2 Alokbhai Pravinchandra Desai Managing Partner Of M/S Yash Chemicals Vs. Jayendrabhai Bhogilal Thakkar. 2017 (1) GLH 288

Negotiable Instruments Act, 1881 S. 138 Complainant has proved that he has borrowed money from other persons to lend it to the accused. The defence witness who is the accountant of the accused proves that the accused had given cheques to complainant in his presence. No entry in account books of accused becomes immaterial. Statutory presumption not rebutted by the accused. Accused defence that cheque taken under threat is having no substance. Conviction upheld.

10.3 Taramanidevi Purushottamdasji Mahota Vs. State Of Gujarat. 2014 (3) GLR 2611.

Negotiable Instruments Act, 1881 S. 118, 138, 139 Code of Criminal Procedure, 1973 S.482 dishonour of cheque. Complainant alleged that accused gave cheque of Rs. 2 crore and gave instructions to Bank to stop payment criminal complaint filed after serving notice. plea to quash the complaint considering contents of the cheque, it is not clear as to for what purpose the cheque was given complainant in first notice stated that the amount was due towards dissolution of HUF while in second notice it is stated that the amount is due towards professional and personal services, held, from facts of the case it appears that some signed blank cheques would have been left with complainant no presumption u/s 138 of Act of 1881 could be made complaint quashed application allowed.

10.4 Dashrath Rupsingh Rathod v/s State of Maharashtra, (2014) 9 SCC 129

Mens rea not required for offence under S. 138

The objective of Parliament was to strengthen the use of cheques, distinct from other negotiable instruments, as mercantile tender and therefore it became essential for Section 138 to be freed from the requirement of proving mens rea [guilty state of mind]. This has been achieved by deeming the commission of an offence dehors mens rea not only under Section 138 but

also by virtue of the succeeding two sections. Section 139 carves out the presumption that the holder of a cheque has received it for the discharge of any liability. Section 140 clarifies that it will not be available as a defence to the drawer that he had no reason to believe, when he issued the cheque, that it would be dishonoured,

10.5 MallavarapuKasivisweswara Rao v/s ThadikondaRamulu Firm, (2008) 7 SCC 655,

Para "17. Under Section 118(a) of the Negotiable Instruments Act, the court is obliged to presume, until the contrary is proved, that the promissory note was made for consideration. It is also a settled position that the initial burden in this regard lies on the defendant to prove the non-existence of consideration by bringing on record such facts and circumstances which would lead the court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal.

11. PRESUMPTION OF LIABILITY U/S. 139

11.1 Dhirubhai Rananbhai Bhanderi VS State of Gujarat, 03 Jul 2018 2018 0 Supreme(Guj) 1098;

4.12 In the chronology of the events, the circumstances which have emerged on record, it would be difficult, to hold that the post dated cheques, which were said to have been given on the date on which, they were issued, the liability or the debts existed or the amount had become legally recoverable. Since, while deciding, whether the dishonored cheques issued were for discharging the existing liability would fall under Section 138 of the NI Act or not, the nature of transaction becomes quite relevant. Opponent No.2 when returned the vehicles with a request that they were not in working condition and it was too heavy a burden for them to incur for starting the vehicles and made a request to the appellant to deduct a sum of Rs. 10/, lakh and return the balance. It is understandable that as an owner it cannot be an agreeable proposal for the appellant. However, the best course would be available to the appellant would have been to get the same adjudicated by a competent Court of law or by another mode or method. Even the lodging of the private complaint before Visavadar Court was a step towards a legal recourse, however, the subsequent developments of executing the settlement agreement on 28.09.2016 at Visavadar Police Station, places this entire transaction into a questionable act. It is also not out of place to make a specific mention that two cheques, which were issued subsequently, cannot be said for discharge of the debt or liability, which existed on the date on which they were issued. Even if, one does not consider the consistent stand of threat and coercion, as taken by opponent No.2, when one of the parties had chosen to rescind from a contract, which was not reduced into writing by way of any registered agreement, the same had given rise to various disputed questions of law and facts, both.

Therefore, in such circumstances, it is not possible to hold that dishonored cheques were issued to discharge any existing liability or debt to attract the provisions of Section 138 of the NI Act.

4.13 The trial Court also, it can be noticed that, noted the fact that in the notice of demand issued by the appellant and also in the complaint made before the Court, there is no detail given of the total number of persons, who had contracted with him. He, further, had agreed, in his cross-examination, that this was a contract agreement with four persons and the unregistered agreement of 2015 was with only opponent No.2. For some strange reasons, Exhibit,17 produced before the trial Court does not have reference of other three persons nor in his demand notice or the complaint there is any mention of other three persons. The complaint also has been

filed only against opponent No.2. In the settlement agreement, which was executed on 28.09.2016 also none of the three associates of opponent No.2 has been referred to. The trial Court, therefore, holds that this lapse on the part of the appellant is delirious and it also proves the version of opponent No.2, who succeeded in rebutting all the positive evidence so also the presumption of legally enforceable debt in favour of the holder of the cheque. Both the cheques, which are impugned in this matter are established to have been issued, without existence of any debt. **The post dated cheques would be considered as a bill of exchange, as per the settled position of law and not a cheque before the date mentioned on the said instrument of demand.** It would become payable only from the date mentioned on the face of the document. By bill of exchange, it would mean that the document would be stated to be unquestionable and would turn into cheque on the date, it would be payable on demand. **Thus, the post dated cheques become cheque only on the date mentioned on the document and prior to the said date, it would be only a bill of exchange. Therefore, the trial Court has rightly held that at the time of issuance of those cheques by opponent No.2, they were bill of exchange only and had not become the cheques,**since, there was no reference of any particular date. The trial Court also held that in his examination-in-chief, opponent No.2 had clearly stated that both the vehicles were taken away by the appellant and there is no dispute with regard to the same in the cross-examination. It also has not been disputed that both the vehicles till the date are in the ownership of the appellant-original complainant, therefore also, with this disputed fact that no change is made in the name of the ownership, no fault can be found with the findings recorded and the conclusions arrived at **by the trial Court that the sale, itself, of the vehicles has not been established. Therefore, there was no question of paying the remaining amount of consideration.**Either the ownership ought to have been changed or the vehicles' possession ought to have been given to opponent No.2 and towards the remaining part of consideration, there ought to have been issuance of those two cheques. With none of these vital aspects having come on record, the trial Court has committed no error, much less any illegality, warranting interference at the hands of this Court.

11.2 Shashikant Naranbhai Rathod Versus State Of Gujarat, 10 Feb 2020, 2020 JX(Guj) 344

Code of Criminal Procedure, 1973 - S. 378(4) - Negotiable Instruments Act, 1881 - S. 138 - dishonour of cheque - appeal against acquittal - improvement during cross-examination - grant of special leave to appeal - transaction of Rs. 3 lakhs claimed in complaint - according to complainant, cheque in dispute came to be issued by accused for that very transaction only - however, through course of cross-examination, complainant admitted that Rs. 3 lakhs were already paid but accused again borrowed Rs. 2 lakhs -

held, in view of his cross-examination, said facts are nothing but an improvement - considering deposition of accused who entered the witness box explaining the transaction, it is revealed that complainant appears to be a loan shark and charging interest @10% p.m. and appears to have misused pre-signed cheques obtained prior to advancing any amount - further, complainant did not cross-examine accused who entered the witness box - accused is supposed to rebut the presumption based on preponderance of probability only - accused successfully rebutted the same by leading her own evidence - therefore, complainant has failed to make out a case to grant Special Leave to Appeal u/s. 378(4) of Cr.P.C. - no interference with order of acquittal - application dismissed.

11.3 <u>Aps Forex Services Pvt. Ltd. Vs Shakti International Fashion Linkers, 14 Feb 2020 2020 0 Air(Sc) 945; 2020 0 Supreme(Sc) 155;</u>

N I Act 139 – Presumption, the accused has admitted the issuance of the cheques and his signature on the cheque and that the cheque in question was issued for the second time, after the earlier cheques were dishonoured and that even according to the accused some amount was due and payable, there is a presumption under Section 139 of the N.I. Act that there exists a legally enforceable debt or liability. Of coursesuch presumption is rebuttable in nature. However, to rebut the presumption the accused was required to lead the evidence that full amount due and payable to the complainant has been paid. In the present case, no such evidence has been led by the accused. The story put forward by the accused that the cheques were given by way of security is not believable in absence of further evidence to rebut the presumption and more particularly the cheque in question was issued for the second time, after the earlier cheques were dishonoured. Therefore, both the courts below have materially erred in not properly appreciating and considering the presumption in favour of the complainant that there exists legally enforceable debt or liability as per Section 139 of the N.I. Act. It appears that both, the Learned Trial Court as well as the High Court, have committed error in shifting the burden upon the complainant to prove the debt or liability, without appreciating the presumption under Section 139 of N.I. Act. As observed above, Section 139 of the Act is an example of reverse onus clause and therefore once the issuance of the cheque has been admitted and even the signature on the cheque has been admitted, there is always a presumption in favour of the complainant that there exists legally enforceable debt or liability and thereafter it is for the accused to rebut such presumption by leading evidence.

11.4 <u>T.P.Murugan Versus Bojan, 2018 (8) SCC 469 : AIR 2018 SC 3601</u>

Para 8 ..... Under Section 139 of the N.I. Act, once a cheque has been signed and issued in favour of the holder, there is statutory presumption that it is issued in discharge of a legally enforceable debt or liability1. This presumption is a rebuttable one, if the issuer of the cheque is able to

discharge the burden that it was issued for some other purpose like security for a loan. In the present case, the respondent has failed to produce any credible evidence to rebut the statutory presumption. This would be evident from the following circumstances:-

(i) The respondent-accused issued a Pronote for the amount covered by the cheques, which clearly states that it was being issued for a loan;

(ii) The defence of the respondent that he had allegedly issued 10 blank cheques in 1995 for repayment of a loan, has been disbelieved both by the Trial Court and Sessions Court, on the ground that the respondent did not ask for return of the cheques for a period of seven years from 1995. This defence was obviously a cover-up, and lacked credibility, and hence was rightly discarded.

(iii) The letter dated 09.11.2002 was addressed by the respondent after he had issued two cheques on 07.08.2002 for Rs.37,00,000/- and Rs.14,00,000/- knowing fully well that he did not have sufficient funds in his account. The letter dated 09.11.2002 was an after-thought, and was written to evade liability. This defence also lacked credibility, as the appellants had never asked for return of the alleged cheques for seven years.

(iv) The defence of the respondent that the Pronote dated 07.08.2002 signed by him, was allegedly filled by one Mahesh-DW.2, an employee of N.R.R. Finances, was rejected as being false. DW.2 himself admitted in his cross-examination, that he did not file any document to prove that he was employed in N.R.R. Finances. On the contrary, the appellants - complainants produced PW.2 and PW.4, Directors of N.R.R. Finances Investment Pvt. Ltd., and PW.3, a Member of N.R.R. Chit funds, who deposed that DW.2 was never employed in N.R.R. Finances.

Para 9 The appellants have proved their case by overwhelming evidence to establish that the two cheques were issued towards the discharge of an existing liability and legally enforceable debt. The respondent having admitted that the cheques and Pronote were signed by him, the presumption under S.139 would operate. The respondent failed to rebut the presumption by adducing any cogent or credible evidence. Hence, his defence is rejected.

11.5 <u>Bir Singh v. Mukesh Kumar, 2019 4 SCC 197 this Court held that presumption under Section 139 of the Act is a presumption of law.</u>

The Court held as under:

- **Para 9** The object of Section 138 of the Negotiable Instruments Act is to infuse credibility to negotiable instruments including cheques and to encourage and promote the use of negotiable instruments including cheques in financial transactions. The penal provision of Section 138 of the Negotiable Instruments Act is intended to be a deterrent to

callous issuance of negotiable instruments such as cheques without serious intention to honour the promise implicit in the issuance of the same.

- **Para** 20. Section 139 introduces an exception to the general rule as to the burden of proof and shifts the onus on the accused. The presumption under Section 139 of the Negotiable Instruments Act is a presumption of law, as distinguished from presumption of facts. Presumptions are rules of evidence and do not conflict with the presumption of innocence, which requires the prosecution to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law and presumptions of fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact as held in Hiten P. Dalal [Hiten P. Dalal v. Bratindranath Banerjee, (2001) 6 SCC 16 : 2001 SCC (Cri) 960].

  xxx xxx xxx
- **Para 36** The proposition of law which emerges from the judgments referred to above is that the onus to rebut the presumption under Section 139 that the cheque has been issued in discharge of a debt or liability is on the accused and the fact that the cheque might be post dated does not absolve the drawer of a cheque of the penal consequences of Section 138 of the Negotiable Instruments Act.
- **Para 37** A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that **the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.**
- **Para 38 If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque.** The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.
- **Para 39** It is not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor is it the case of the respondent-accused that the unfilled signed cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act, in the absence of evidence of exercise of

undue influence or coercion. The second question is also answered in the negative.

- **Para 40 Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.**
- **Para 41** The fact that the appellant-**complainant might have been an Income Tax practitioner conversant with knowledge of law does not make any difference to the law relating to the dishonour of a cheque. The fact that the loan may not have been advanced by a cheque or demand draft or a receipt might not have been obtained would make no difference**. In this context, it would, perhaps, not be out of context to note that the fact that the respondent-accused should have given or signed blank cheque to the appellant complainant, as claimed by the respondent-accused, shows that initially there was mutual trust and faith between them.
- **Para 42** In the absence of any finding that the cheque in question was not signed by the respondent-accused or not voluntarily made over to the payee and in the absence of any evidence with regard to the circumstances in which a blank signed cheque had been given to the appellant-complainant, it may reasonably be presumed that the cheque was filled in by the appellant-complainant being the payee in the presence of the respondent-accused being the drawer, at his request and/or with his acquiescence. The subsequent filling in of an unfilled signed cheque is not an alteration. There was no change in the amount of the cheque, its date or the name of the payee. The High Court ought not to have acquitted the respondent-accused of the charge under Section 138 of the Negotiable Instruments Act.
- **Case of a fiduciary relationship between complainant and accused relationship of trust and confidence :** The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139, in the absence of evidence of exercise of undue influence or coercion.

11.6 Basalingappa Vs Mudibasappa, 09 Apr 2019, 2019 0 AIR(SC) 1983, 2019 0 Supreme(SC) 423.

Presumption u/s 139 is rebuttable on preponderance of probabilities. Court cannot insist on a person to lead negative evidence.

22. Another judgment which needs to be looked into is Rangappa v/s Sri Mohan (2010) 11 SCC 441.: (AIR 2010 SC 1898) A three,Judge Bench of this Court had occasion to examine the presumption under Section 139 of the 1881 Act. This Court in the aforesaid case has held that in the event the accused is able to raise a probable defence which creates doubt with regard

to the existence of a debt or liability, the presumption may fail. Following was laid down in paras 26 and 27: (SCC pp. 453,54) : (at p. 1906,07, paras 14 of AIR)

"26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat, 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.

22. The above case was a case where this Court did not find the defence raised by the accused probable. The only defence raised was that cheque was stolen having been rejected by the trial court and no contrary opinion having been expressed by the High Court, this Court reversed the judgment of the High Court restoring the conviction. The respondent cannot take any benefit of the said judgment, which was on its own facts.

Para 23. We having noticed the ratio laid down by this Court in above cases on Sections 118(a) and 139, we now summaries the principles enumerated by this Court in following manner:,

(i) **Once the execution of cheque is admitted Section 139 of the act mandates a presumption** that the cheque was for the discharge of any debt or other liability.

(ii) The presumption under **Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence**. The **standard of proof for rebutting the presumption is that of preponderance of probabilities.**

(iii) To rebut the presumption, it is open for the **accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence**. 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 they rely.**

(iv) That it is not necessary for the **accused to come in the witness box in support of his defence,** Section 139 imposed an evidentiary burden and not a persuasive burden,

(v) It is not necessary for the accused to come in the witness box to support his defence.

24. Applying the preposition of law as noted above, in facts of the present case, it is clear that signature on cheque having been admitted, a

presumption shall be raised under Section 139 that cheque was issued in discharge of debt or liability. The question to be looked into is as to whether any probable defence was raised by the accused. In cross-examination of the PW1, when the specific question was put that cheque was issued in relation to loan of Rs.25,000/,taken by the accused, the PW1 said that he does not remember. PW1 in his evidence admitted that he retired in 1997 on which date he received monetary benefit of Rs. 8 lakhs, which was encashed by the complainant. It was also brought in the evidence that in the year 2010, the complainant entered into a sale agreement for which he paid an amount of Rs.4,50,000/,to Balana Gouda towards sale consideration. Payment of Rs.4,50,000/,being admitted in the year 2010 and further payment of loan of Rs.50,000/,with regard to which complaint No.119 of 2012 was filed by the complainant, copy of which complaint was also filed as Ex.D2, there was burden on the complainant to prove his financial capacity. In the year 2010,2011, as per own case of the complainant, he made payment of Rs.18 lakhs. During his cross-examination, when financial capacity to pay Rs.6 lakhs to the accused was questioned, there was no satisfactory reply given by the complainant. The evidence on record, thus, is a probable defence on behalf of the accused, which shifted the burden on the complainant to prove his financial capacity and other facts.

25. There was another evidence on the record, i.e., copy of plaint in O.S. No. 148 of 2011 filed by the complainant for recovery of loan of Rs. 7 lakhs given to one Balana Gouda in December, 2009. Thus, there was evidence on record to indicate that in December, 2009, he gave Rs.7 lakhs in sale agreement, in 2010, he made payment of Rs.4,50,000/,towards sale consideration and further he gave a loan of Rs.50,000/,for which complaint was filed in 2012 and further loan of Rs.6 lakhs in November, 2011. Thus, during the period from 2009 to November, 2011, amount of Rs.18 lakhs was given by the complainant to different persons including the accused, which put a heavy burden to prove the financial capacity when it was questioned on behalf of the accused, the accused (sic) being a retired employee of State Transport Corporation, who retired in 1997 and total retirement benefits, which were encashed were Rs.8 lakhs only. The High Court observed that though the complainant is retired employee, the accused did not even suggest that pension is the only means for survival of the complainant. Following observations were made in Paragraph 16 of the judgment of the High Court:

"16. Though the complainant is retired employee, the accused did not even suggest that pension is the only means for survival of the complainant. Under these circumstances, the Trial Court's finding that the complainant failed to discharge his initial burden of proof of lending capacity is perverse."

26. There is one more aspect of the matter which also needs to be noticed. In the complaint filed by the complainant as well as in examination-in-chief

the complainant has not mentioned as to on which date, the loan of Rs.6 lakhs was given to the accused. It was during cross-examination, he gave the date as November, 2011. Under Section 118(b), a presumption shall be made as to date that every negotiable instrument was made or drawn on such date. Admittedly, the cheque is dated 27.02.2012, there is not even a suggestion by the complainant that a post dated cheque was given to him in November, 2011 bearing dated 27.02.2012. Giving of a cheque on 27.02.2012, which was deposited on 01.03.2012 is not compatible with the case of the complainant when we read the complaint submitted by the complainant especially Para 1 of the complaint, which is extracted as below:

"1. The accused is a very good friend of the complainant. The accused requested the Complainant a hand loan to meet out urgent and family necessary a sum of Rs.6,00,000/, (Rupees Six Lakh) and on account of long standing friendship and knowing the difficulties, which is being faced by the accused the complainant agreed to lend hand loan to meet out the financial difficulties of the accused and accordingly the Complainant lend hand loan Rs.6,00,000/, (Rupees Six Lakh) dated 27.02.2012 in favour of the Complainant stating that on its presentation it will be honored. But to the surprise of the Complainant on presentation of the same for collection through his Bank the Cheque was returned by the Bank with an endorsement "Funds Insufficient" on 01,03 2012."

27. Thus, there is a contradiction in what was initially stated by the complainant in the complaint and in his examination-in-chief regarding date on which loan was given on one side and what was said in cross-examination in other side, which has not been satisfactorily explained. The High Court was unduly influenced by the fact that the accused did not reply the notice denying the execution of cheque or legal liability. Even before the trial court, appellant, accused has not denied his signature on the cheque.

28. We are of the view that when evidence was led before the Court to indicate that apart from loan of Rs.6 lakhs given to the accused, within 02 years, amount of Rs.18 lakhs have been given out by the complainant and his financial capacity being questioned, it was incumbent on the complainant to have explained his financial capacity. Court cannot insist on a person to lead negative evidence. The observation of the High Court that trial court's finding that the complainant failed to prove his financial capacity of lending money is perverse cannot be supported. We fail to see that how the trial court's findings can be termed as perverse by the High Court when it was based on consideration of the evidence, which was led on behalf of the defence. This Court had occasion to consider the expression "perverse" in ***GaminiBala Koteswara Rao and others v/s State of Andhra Pradesh through Secretary, (2009) 10 SCC 636 : (AIR 2010 SC 589)***, 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 judgment is against the weight of evidence. In Paragraph No.14 (Para 8 of AIR) following has been held:,

"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."

29. High Court without discarding the evidence, which was led by defence, could not have held that finding of trial court regarding financial capacity of the complainant is perverse. We are, thus, satisfied that accused has raised a probable defence and the findings of the trial court that complainant failed to prove his financial capacity are based on evidence led by the defence. The observations of the High Court that findings of the trial court are perverse are unsustainable. We, thus, are of the view that judgment of the High Court is unsustainable.

30. In result, the appeal is allowed and the judgment of the High Court is set aside and that of the trial court is restored.

11.7 <u>Uttam Ram Versus Devinder Singh Hudan, 2019 (10) SCC 287</u>
<u>HELD, Mere discrepancies in the statement in respect of the cartons, trays or the packing material or the rate charged will not rebut the statutory presumption.</u>

- **Para 20** The Trial Court and the High Court proceeded as if, the appellant is to prove a debt before civil court wherein, the plaintiff is required to prove his claim on the basis of evidence to be laid in support of his claim for the recovery of the amount due. A dishonour of cheque carries a statutory presumption of consideration. The holder of cheque in due course is required to prove that the cheque was issued by the accused and that when the same presented, it was not honoured. Since there is a statutory presumption of consideration, the burden is on the accused to rebut the presumption that the cheque was issued not for any debt or other liability.
- **Para 21** There is the mandate of presumption of consideration in terms of the provisions of the Act. The onus shifts to the accused on proof of issuance of cheque to rebut the presumption that the cheque was issued not for discharge of any debt or liability in terms of Section 138 of the Act which reads as under:

- 138. Dishonour of cheque for insufficiency, etc., of funds in the account. Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall .

- **Para 27** Once the agent of the respondent has admitted the settlement of due amount and in absence of any other evidence the Trial Court or the High Court could not dismiss the complaint only on account of discrepancies in the determination of the amount due or oral evidence in the amount due when the written document crystalizes the amount due for which the cheque was issued.
- **Para 28** The accused has failed to lead any evidence to rebut the statutory presumption, a finding returned by both the Trial Court and the High Court. Both Courts not only erred in law but also committed perversity when the due amount is said to be disputed only on account of discrepancy in the cartons, packing material or the rate to determine the total liability as if the appellant was proving his debt before the Civil Court. Therefore, it is presumed that the cheques in question were drawn for consideration and the holder of the cheques i.e., the appellant received the same in discharge of an existing debt. The onus, thereafter, shifts on the accusedappellant to establish a probable defence so as to rebut such a presumption, which onus has not been discharged by the respondent.

11.8 <u>Krishna Reddy VS Syed Hafeez (Died) Per Lr. Smt. Naseema Begum, 30 Sep 2019 2019 0 AIR(SC) 5123</u>

Offence alleged was that a cheque was given towards consideration for purchase of a property – Neither any document was produced on record nor there was any evidence that any conveyance was executed in favour of appellant – Submission of appellant that there was no existing debt or liability against which cheque was given had to be accepted – High Court was in error in accepting appeal and upsetting view taken by Trial Court – Decision of High Court set aside and judgment and order of acquittal passed by Trial Court restored. (Paras 9 and 10)

11.9 <u>Kumar Exports v. Sharma Carpets (2009) 2 SCC 513, the Supreme Court in paras (14-15) and paras (18-20)</u> held as under:-

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

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

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

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

20. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and

debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the nonexistence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act.

11.10 <u>Krishna Rao Vs. Shankaragauda 2018 SCC Online SC 651</u>

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

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

<u>Para 15.</u> Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable), (2) "shall presume" (rebuttable), and (3) "conclusive presumptions" (irrebuttable). The term "presumption" is used to designate an inference, affirmative or dis-affirmative of the existence of a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal

evidence to the satisfaction of the tribunal. Presumption literally means "taking as true without examination or proof".

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

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

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

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

Para 18. From the above discussion following aspects emerge:

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

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

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

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

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

Para 19. In view of the above, we hold that where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings in exercise of its powers under

Section 143 of the Act read with Section 258 Cr.P.C. As already observed, normal rule for trial of cases under Chapter XVII of the Act is to follow the summary procedure and summons trial procedure can be followed where sentence exceeding one year may be necessary taking into account the fact that compensation under Section 357(3) Cr.P.C. with sentence of less than one year will not be adequate, having regard to the amount of cheque, conduct of the accused and other circumstances.

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

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

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

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

11.11 Rahul Sudhakar Anantwar VS Shivkumar Kanhiyalal Shrivastav, 21 Oct 2019 2019 0 AIR(SC) 5520;

(1) Issuance of cheque carries presumption of liability to pay money.

(2) Dishonour of cheque – Amount awarded as compensation and cost should not be on higher side.

Para 7. Admittedly, the parties had entered into an Agreement of Sale dated 28.02.2012. It is also an admitted fact that the respondent-complainant had paid Rs. 2,50,000/, (Rupees Two Lakhs Fifty Thousand) as an advance/earnest money to the appellant-accused as per the terms of the Agreement. As pointed out by the High Court, the appellant-accused has not disputed his signature on the said cheque presented for clearance. Contention of the appellant that the cheque issued in the name of the Firm, named, Synergy and Solution Incorporation was removed from his office table is not convincing nor the same is supported by any evidence. As pointed by the High Court in the statutory presumption under Section 139 of N.I. Act, the appellant-accused has not satisfactorily rebutted the statutory presumption. In view of the above, we do not find any ground warranting interference with the conviction of the appellant-accused under Section 138 of N.I. Act.

11.12 Laxmi Dyechem, M/s. Vs. State of Gujarat 2013 CRI. L. J. 3288 Supreme Court

Presumption under S. 139 Category of 'stop payment cheques' Would be a category of cases which would be subject to rebuttal , Hence, it would be an offence only if drawer of cheque fails to discharge burden of rebuttal. (Paras 27 , 28 , 29) Category of 'stop payment' instruction to bank as cheque in question returned due to mismatching of signatures. Petitioner neither raised nor proved to contrary that cheques were not for discharge of lawful debt. Plea of rebuttal envisaged under S. 139 not attracted. (Para 30)

11.13 Anss Rajashekar Versus Augustus Jeba Ananth 2020 (15) SCC 348 : AIR 2019 SC 942

FACT OF CASE

Para 3 The case of the respondent-complainant is that on 09 March 2005, the appellant issued a cheque in the sum of Rs.5 lakhs in his favour, towards discharge of a liability of Rs.15 lakhs, in repayment of an amount which was borrowed in the month of February, 2004. According to the complainant, the amount was repayable within six months. When the complainant presented the cheque on 23 March 2005, it was returned by the bank for insufficiency of funds. The complainant presented the cheque again for realisation on 14 July, 2005 but it was returned with the same result. A notice of demand was issued by the complainant on 10 August, 2005. In response, the appellant-accused denied that there was a legally enforceable debt.

Para 10 Section 139 of the Act mandates that it shall be presumed, unless the contrary is proved, that the holder of a cheque received it, in discharge, in whole or in part, of a debt, or liability. The expression "unless the contrary is proved" indicates that the presumption under Section 139 of the Act is rebuttable. Terming this as an example of a reverse onus clause the three Judge Bench of this Court in Rangappa (supra) held that in determining whether the presumption has been rebutted, the test of proportionality must guide the determination. The standard of proof for rebuttal of the presumption under Section 139 of the Act is guided by a preponderance of probabilities. This Court held thus:

28 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. (emphasis supplied)

Para 11 In the present case, it is necessary now to consider whether the presumption under Section 139 stands rebutted by the accused-appellant. The defence of the appellant is that he has not borrowed the amount of Rs. 15 lakhs from the complainant as alleged nor had he issued the cheque (Exhibit P-1) in discharge of a legally enforceable debt. Specifically, the defence of the accused is that no payment was made by the complainant to him, in discharge of which the cheques have been issued. His defence was that the cheque was issued to the complainant on an assurance of a loan which would be obtained from a financial institution. This, as we have noted, was also the defence in reply to the notice of demand issued by the complainant.

Para 11 In the present case, it is necessary now to consider whether the presumption under Section 139 stands rebutted by the accused-appellant. The defence of the appellant is that he has not borrowed the amount of Rs. 15 lakhs from the complainant as alleged nor had he issued the cheque (Exhibit P-1) in discharge of a legally enforceable debt. Specifically, the defence of the accused is that no payment was made by the complainant to him, in discharge of which the cheques have been issued. His defence was that the cheque was issued to the complainant on an assurance of a loan which would be obtained from a financial institution. This, as we have noted, was also the defence in reply to the notice of demand issued by the complainant.

Para 12 It is in this background, it would be necessary to advert to the material which was relied upon by the first appellate court to acquit the accused-appellant. During the course of his cross-examination, PW-1 admitted that a General Power of Attorney was executed by the appellant in his favour. Admittedly the appellant and the respondent are related and there was some civil litigation between the father of the complainant and the appellant. The complainant admitted that, as a matter of fact, he himself received an amount of Rs.10 lakhs from the appellant under a loan transaction but stated that he had repaid that amount to the appellant. PW-1 stated that the appellant had requested him for a loan of Rs.15 lakhs in February 2004. The defence of the appellant being that no amount was actually paid by the complainant to him, the evidence of PW-1 in regard to the payment of the loan assumes significance. According to PW-1, the loan of Rs.15 lakhs was paid into the hands of a representative of the appellant at his request. The appellant failed to indicate even the name of the representative to whom the alleged amount of Rs.15 lakhs is stated to have been paid over in cash. The entire amount, significantly, is alleged to have been paid over without obtaining a receipt or document evidencing the payment of the amount. In the notice of demand that was issued by the complainant to the appellant after the cheque had been returned for want of funds, the complainant stated that the appellant had sought a 'financial accommodation' of Rs.15 Lakhs and paid a sum of Rs.20,000 (corrected thereafter in a corrigendum). The first appellate court noted in the course of its judgment that while conducting the cross-examination of the accused, the complainant had stated that the accused had demanded a loan of Rs.15 lakhs, but at that time the complainant had only paid an amount of Rs.5 Lakhs as a loan for which the accused issued Exhibit P1. This suggestion was specifically denied by the accused. In this context, the first appellate court observed that whether the complainant had furnished a hand loan of Rs.15 lakhs to the accused as stated in the complaint or whether the complainant had paid Rs.20 lakhs as mentioned in the legal notice dated 10 August 2004 or whether he had paid an amount of Rs.5 lakhs as suggested during the course of cross-examination was a matter of serious doubt. If the complainant had paid Rs.15 lakhs to the accused, the suggestion during the course of cross-examination of having paid an amount of Rs.5 lakhs casts serious doubt on the existence of a debt in the first place.

Para 13 Besides what has been set out above, an important facet in the matter was that the complainant failed to establish the source of funds which he is alleged to have utilized for the disbursal of the loan of Rs.15 lakhs to the appellant. During the course of his cross-examination the complainant deposed that earlier, the appellant had furnished two cheques, one of ICICI Bank for Rs.5 lakhs and another of Canara Bank for Rs.10 lakhs which he had presented. The complainant admitted that he had not mentioned anything about the accused having issued these two cheques in

his complaint. Nothing was stated by the complainant in regard to the fate of the earlier two cheques which were allegedly issued by the appellant. The non-disclosure of the facts pertaining to the earlier two cheques, and the steps, if any, taken for recovery was again a material consideration which indicated that there was a doubt in regard to the transaction.

Para 14 On a totality of the facts and circumstances and based on the evidence on the record, the first appellate court held that the presumption under Section 139 of the Act stood rebutted and that the defence stood probabalised. From the judgment of the High Court, the significant aspect of the case which stands out is that there has been no appreciation of the evidence or even a reference to the reasons furnished by the first appellate court. The High Court adverted to the judgment of this Court in Rangappa (supra). Having adverted to that decision, the High Court reversed the order of acquittal by holding that a mere denial of the transactions or an omnibus denial of the entire transaction could not be considered as a tenable defence. The judgment of the High Court is unsatisfactory and does not contain any reference to the evidence whatsoever. There was absolutely no valid basis to displace the findings of fact which were arrived at by the first appellate court, while acquitting the accused.

Para 15 For the reasons indicated above, we are of the view that having regard to the law laid down by the three Judge Bench in Rangappa (supra) the appellant duly rebutted the presumption under Section 139 of the Act. His defence that there was an absence of a legally enforceable debt was rendered probable on the basis of the material on record. Consequently, the order of acquittal passed by the first appellate court was justified.

11.14 Rohitbhai Jivanlal Patel Versus State Of Gujarat, 2019 (18) SCC 106

Held,

- **Mere denial or mere creation of doubt,** the appellant had successfully rebutted the presumption as envisaged by Section 139 of the NI Act. In the scheme of the NI Act, **mere creation of doubt is not sufficient.**
- There may not be sufficient negative evidence which could be brought on record by the accused to discharge his burden, yet mere denial would not fulfil the requirements of rebuttal as envisaged under Section 118 and 139 of the NI Act.
- **Not filing of Income tax Retuns :**Assuming that cheque transaction of lending of amount is absent and income-tax returns also do not reflect such amount, that at the best would hold the assessee or lender liable for action under the Income-tax laws. **if the complainant succeeds in showing the lending of amount, the existence of legally enforceable debt cannot be denied.**

TRIAL COURT FINDING IN THIS CASE

6.1. Trial Court found several factors in favour of the accused and observed, inter alia, that:

(a) there was no documentary evidence to show the source of income for advancing the loan to the accused;

(b) the complainant failed to record the transaction in the form of receipts, promissory notes or even kaccha notes;

(c) vague and uncertain statement was made by the complainant as compared to the statement of his witness-Shri Jagdishbhai;

(d) the complainant had no knowledge about the dates and other particulars of such cheques; (e) the witness of complainant was in know of the facts more than the complainant;

(f) the complaint allegedly extended the loan to the tune of Rs. 22,50,000/- but the 7 cheques in these cases were of Rs. 3,00,000/- each and there was no explanation from the complainant as regards the remaining Rs. 1,50,000/-; and

(g) the suggestion about washing away of the earlier cheques in rains was also doubtful when the complainant's office was on the 8th floor of Windor Plaza.

Para 7 Against the aforementioned judgment and orders of acquittal, the complainant preferred appeals before the High Court of Gujarat, which have been considered and decided together by the impugned common judgment and order dated 08.01.2018. The High Court observed that the presumption under Sections 118 and 139 of the NI Act was required to be drawn that the cheques were issued for consideration and until contrary was proved, such presumption would hold good; that the complainant had proved legally enforceable debt in the oral as also documentary evidence, including the written acknowledgment by the accused on stamp paper; and that except bare denial, nothing was brought on record by the accused to dislodge the proof adduced by the complainant.

7.1 The High Court observed that if the transaction in question was not reflected in the accounts and income-tax returns, that would at best hold the assesse or lender liable for action under the income-tax laws but, if the complainant succeeds in showing the lending of amount, the existence of legally enforceable debt cannot be denied. The High Court also observed that the issue regarding washing away of the cheques in rain water was of no significance when the accused had accepted his liability in clear terms. The High Court found that the defence plea of the accused that the money was given as hand loan by his friend Shri Jagdishbhai got falsified by the version of the said Shri Jagdishbhai, who was examined as a witness on behalf of the complainant. The High Court, therefore, set aside the impugned orders and, while convicting the accused-appellant for the offence under Section 138 of the NI Act, sentenced him in the manner noticed hereinbefore. The High Court, inter alia, observed and held as under:

24. It is necessary at this stage also to refer to the emphasis laid by the learned counsel appearing for the respondent No.2 on the source of the fund which has been lent by the appellant. It has emerged from the detailed examination of the record, as also detailed examination-in-chief as well as cross-examination, that the complainant runs the business. He also maintains the books of account and he has his own factory in the name and style of Ashirwad Enterprise and manufactures plastic. The said factory is situated at Jambusar. Ordinarily, any prudent business person would prefer to transact by cheque while lending money, but it is quite often noticed that the cash transactions in the business would allow huge sum of money as cash, which sometimes are shown in the books of account as cash on hands or otherwise as amount available on books. Assuming that cheque transaction of lending of amount is absent and income-tax returns also do not reflect such amount, that at the best would hold the assessee or lender liable for action under the Income-tax laws. However, otherwise, if he succeeds in showing lending of such amount, both by oral evidence of himself and his friend, on whom even respondent No.2 relies upon and from the writing of the respondent No.2 given separately along with seven cheques signed by him, what possible reasons could weigh with the Court to deny the existence of legally enforceable debt in such glaring circumstances.

25. Considering the fact that the complainant maintains his books of account, coupled with the fact that the respondent No.2 had merely refuted on flimsy ground of his having transacted with witness Jagdishbhai and not with the complainant, has failed to discharge the burden which had shifted upon him. It is to be noted that the respondent No.2 has admitted his signature on the impugned cheque. At no point of time, the cheque has been disputed Once this fact is acknowledged that the signature on the cheque is that of the respondent No. 2-accused, section 139 of the Negotiable Instruments Act would mandate the presumption that the cheque concerns a legally enforceable debt or liability. Of course, this presumption is in the nature of rebuttal and onus is on the accused thereafter to raise a probable defence.

25.1 As can be noted from the chronology of events and the material that has been placed before this Court that the defence raised by the accused is not at all probable. The respondent No.2-accused states that the money was given as a hand loan by his friend Jagdishbhai and not the appellant, also gets falsified completely by the version of Jagdishbhai. It appears that in case of all the seven cheques when notices were given prior to the filing of the complaint, he has chosen not to reply to four of the notices. Either on account of insufficiency of the funds or because he has closed account that the cheques could not be realized. All these circumstances cumulatively lead this Court to conclude that the appellant succeeded in proving the legally enforceable debt and no probable defence for rebutting the statutory presumption is raised by the respondent No.2.

25.2 Initial presumption as contemplated under section 139 of the Negotiable Instruments Act, when the proof of lending of the money and acceptance of the signatures on the cheques, shall need to be raised by the Court in favour of the appellant.

*** *** ***

28. . Reasonably, when the appellant had proved the legally enforceable debt, not only through his own evidence, but also through the evidence of his friend Jagdishbhai and also other contemporaneous record, more particularly, the document at Exhibit 24, which is a writing by which the respondent No.2 clearly indicates and accepts his liability to the tune of Rs. 22.50 lakh. Thus, the burden had shifted upon the respondent No. 2. The presumption which was needed to be drawn by the Court under section 118 of the Negotiable Instruments Act would oblige the Court to presume that the cheque had been issued for consideration and until contrary is proved, such presumption would hold the ground. Except the bare denial, nothing has been found to come on record to dislodge the positive proof that has been adduced by the appellant.

29. In the opinion of this Court, the entire argument that the rainy water could not have washed away the cheques, pales into insignificance and is not argument worth consideration, more particularly, when the respondent-accused in no unclear terms had accepted his liability of his having accepted the amount of Rs. 22.50 lakh from the complainant and it also declared the issuance of seven cheques of particular dates towards such legally enforceable debt. If it was an understanding between the parties qua issuance of fresh cheques, with an ostensible reason of old cheques having washed away, those are the non-issues. This Court cannot be oblivious of the fact that section 138 of the Negotiable Instruments Act has been made a penal provision not only for the cheques to give acceptability in the transaction, but it is the economic blood-line of the country and, therefore, the law makers have made the special rules of evidence by introducing sections 118 and 139 of the Negotiable Instruments Act.

30. The trial Court has committed a serious error by not discharging its obligation of recognizing the evidentiary value and not appreciating the positive evidence which led to the reasonable proof of legally enforceable debt existing on the side of the original complainant."

Para 16 On the aspects relating to preponderance of probabilities, the accused has to bring on record such facts and such circumstances which may lead the Court to conclude either that the consideration did not exist or that its nonexistence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that the consideration did not exist. **This Court has, time and again, emphasized that though there may not be sufficient negative evidence which could be brought on record by the accused to discharge his burden, yet mere denial would not fulfil the requirements of rebuttal as envisaged under Section 118 and 139 of the NI Act.**

Para 17 In the case at hand, **even after purportedly drawing the presumption under Section 139 of the NI Act, the Trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused.** This approach of the Trial Court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused-appellant. The aspect relevant for consideration had been as to whether the accused-appellant has brought on record such facts/material/circumstances which could be of a reasonably probable defence.

Para 19 Hereinabove, we have examined in detail the findings of the Trial Court and those of the High Court and have no hesitation in concluding that the present one was clearly a case where the decision of the Trial Court suffered from perversity and fundamental error of approach; and the High Court was justified in reversing the judgment of the Trial Court. **The observations of the Trial Court that there was no documentary evidence to show the source of funds with the respondent to advance the loan, or that the respondent did not record the transaction in the form of receipt of even kachcha notes, or that there were inconsistencies in the statement of the complainant and his witness, or that the witness of the complaint was more in know of facts etc. would have been relevant if the matter was to be examined with reference to the onus on the complaint to prove his case beyond reasonable doubt. These considerations and observations do not stand in conformity with the presumption existing in favour of the complainant by virtue of Sections 118 and 139 of the NI Act.** Needless to reiterate that the result of such presumption is that existence of a legally enforceable debt is to be presumed in favour of the complainant. When such a presumption is drawn, the factors relating to the want of documentary evidence in the form of receipts or accounts or want of evidence as regards source of funds were not of relevant consideration while examining if the accused has been able to rebut the presumption or not. The other observations as regards any variance in the statement of complainant and witness; or want of knowledge about dates and other particulars of the cheques; or washing away of the earlier cheques in the rains though the office of the complainant being on the 8th floor had also been of irrelevant factors for consideration of a probable defence of the appellant. **Similarly, the factor that the complainant alleged the loan amount to be Rs. 22,50,000/- and seven cheques being of Rs. 3,00,000/- each leading to a deficit of Rs.**

1,50,000/-, is not even worth consideration for the purpose of the determination of real questions involved in the matter. May be, if the total amount of cheques exceeded the alleged amount of loan, a slender doubt might have arisen, but, in the present matter, the total amount of 7 cheques is lesser than the amount of loan. Significantly, the specific amount of loan (to the tune of Rs. 22,50,000/-) was distinctly stated by the accused-appellant in the aforesaid acknowledgment dated 21.03.2017.

Para 20 On perusing the order of the Trial Court, **it is noticed that the Trial Court proceeded to pass the order of acquittal on the mere ground of 'creation of doubt'**. We are of the considered view that the Trial Court appears to have proceeded on a misplaced assumption that by mere denial or mere creation of doubt, the appellant had successfully rebutted the presumption as envisaged by Section 139 of the NI Act. In the scheme of the NI Act, mere creation of doubt is not sufficient.

Para 21 The result of discussion in the foregoing paragraphs is that the major considerations on which the Trial Court chose to proceed clearly show its fundamental error of approach where, even after drawing the presumption, it had proceeded as if the complainant was to prove his case beyond reasonable doubt. Such being the fundamental flaw on the part of the Trial Court, the High Court cannot be said to have acted illegally or having exceeded its jurisdiction in reversing the judgment of acquittal. As noticed hereinabove, in the present matter, the High Court has conscientiously and carefully taken into consideration the views of the Trial Court and after examining the evidence on record as a whole, found that the findings of the Trial Court are vitiated by perversity. Hence, interference by the High Court was inevitable; rather had to be made for just and proper decision of the matter.

Para 22 For what has been discussed hereinabove, the findings of the High Court convicting the accused-appellant for offence under Section 138 of the NI Act deserves to be, and are, confirmed.

Para 23 Coming to the question of punishment for the offence aforesaid, as noticed, the High Court has awarded the punishment of simple imprisonment for a period of one year together with fine to the extent of double the amount of cheque (i.e., a sum of Rs. 6 lakhs) with default stipulation of further imprisonment for a period of one year in each case; and, out of the amount payable as fine, the complainant-respondent No. 2 is ordered to be compensated to the tune of Rs. 5.5 lakhs in each case. In the totality of the circumstances of this case and looking to the nature of offence which is regulatory in nature, while we find that the punishment as regards monetary terms calls for no interference but then, the sentence of imprisonment deserve to be modified.

23.1 In the singular and peculiar circumstances of this case, where the matters relating to 7 cheques issued by the appellant in favour of respondent No. 2 for a sum of Rs. 3 lakhs each are being considered together; and the appellant is being penalised with double the amount of

cheques in each case i.e., in all a sum of Rs. 42,00,000/-, in our view, the appellant deserves to be extended another chance to mend himself by making payment of fine, of course, with the stipulation that in case of default in payment of the amount of fine, he would undergo simple imprisonment for a period of one year.

Para 24 Therefore, this appeal is partly allowed in the following terms: The common judgment and order dated 08.01.2018 in R/Criminal Appeal No. 1187/2017 connected with R/Criminal Appeal Nos. 1191/2017 to 1196/2017 by the High Court of Gujarat at Ahmedabad is maintained as regards conviction of the accused-appellant for the offence under Section 138 of the Negotiable Instruments Act, 1881 for dishonour of 7 cheques in the sum of Rs. 3 lakhs each, as drawn by him in favour of the complainant-respondent No. 2; however, the sentence is modified in the manner that in each of these 7 cases, the accused-appellant shall pay fine to the extent of double the amount of each cheque (i.e., a sum of Rs. 6 lakhs in each case) within 2 months from today with the stipulation that in case of default in payment of fine, the accused-appellant shall undergo simple imprisonment for a period of one year. On recovery of the amount of fine, the complainant-respondent No. 2 shall be compensated to the tune of Rs. 5.5 lakhs in each case. In the event of imprisonment for default in payment of fine, the sentences in all the 7 cases shall run concurrently.

11.15 Buday Miyan Vs. M.C. Venkatesh Criminal Appeal No.918 of 2010 Decided on : 25,01,2019 (2019) 1 NIJ 329 Karnataka High Court

Held: There is no hard and fast rule as to how and in what manner accused has to establish particular defence taken up by him.

Negotiable Instruments Act, 1881 , Sections 138 and 139 Criminal Procedure Code, 1973 Section 378 Dishonour of cheque, Appeal against acquittal , There is no hard and fast rule as to how and in what manner accused has to establish particular defence taken up by him in order to rebut presumption under Section 139 of NI Act ,**Accused has probabilised his defence by proving the circumstances that notices have not been served upon him**, Complainant has not proved guilty of accused beyond all reasonable doubts , No strong reasons to interfere with impugned judgment of acquittal rendered by Trial Court , Appeal dismissed.

Para 11. The next important aspect raised is that the accused himself has taken up the contention that the cheques were issued as security and he has not taken any money in lieu of the said cheques nor there was any existence of an earlier debt or liability. When once the defence has been taken in that manner, it should be probabalised in the course of cross-examination of the complainant or the accused by leading independent evidence before the Court. **There is no hard and fast rule as to how and in what manner the accused has to establish this particular defence taken up by him in order to rebut the presumption under section 139 of the NI Act.**

Para 12. Of course, section 139 of the NI Act raises a presumption in favour of the complainant that unless it is rebutted the Court has to presume the existence of a legally recoverable debt by the accused to the complainant. In this particular case, though that presumption could be raised, the Court has to look into whether the said presumption has been rebutted in the course of cross examination with regard to the existence of any debt or liability.

11.16 Alka Khandu Avhad V/S Amar Syamprasad Mishra & Anr 2021 LawSuit(SC) 175.

Negotiable Instruments Act, 1881 Sec 138 AND 141 - SCOPE OF LIABILITY

[7] On a fair reading of Section 138 of the NI Act, before a person can be prosecuted, the following conditions are required to be satisfied:

i) that the cheque is drawn by a person and on an account maintained by him with a banker;

ii) for the payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability; and

iii) the said cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account. Therefore, a person who is the signatory to the cheque and the cheque is drawn by that person on an account maintained by him and the cheque has been issued for the discharge, in whole or in part, of any debt or other liability and the said cheque has been returned by the bank unpaid, such person can be said to have committed an offence. Section 138 of the NI Act does not speak about the joint liability. Even in case of a joint liability, in case of individual persons, a person other than a person who has drawn the cheque on an account maintained by him, cannot be prosecuted for the offence under Section 138 of the NI Act. A person might have been jointly liable to pay the debt, but if such a person who might have been liable to pay the debt jointly, cannot be prosecuted unless the bank account is jointly maintained and that he was a signatory to the cheque.

[8] Now, so far as the case on behalf of the original complainant that the appellant herein - original accused No. 2 can be convicted with the aid of Section 141 of the NI Act is concerned, the aforesaid has no substance. 8.1 Section 141 of the NI Act is relating to the offence by companies and it cannot be made applicable to the individuals. Learned counsel appearing on behalf of the original complainant has submitted that "Company" means any body corporate and includes, a firm or other association of individuals and therefore in case of a joint liability of two or more persons it will fall within "other association of individuals" and therefore with the aid of Section 141 of

the NI Act, the appellant who is jointly liable to pay the debt, can be prosecuted. The aforesaid cannot be accepted. Two private individuals cannot be said to be "other association of individuals". Therefore, there is no question of invoking Section 141 of the NI Act against the appellant, as the liability is the individual liability (may be a joint liabilities), but cannot be said to be the offence committed by a company or by it corporate or firm or other associations of individuals. The appellant herein is neither a Director nor a partner in any firm who has issued the cheque. Therefore, even the appellant cannot be convicted with the aid of Section 141 of the NI Act.

11.17 Sumeti Vij V/S M/S Paramount Tech Fab Industries, 2021 Lawsuit(Sc) 182

Degree Of Evidence For Rebut Presumption

[16] It is well settled that the proceedings under Section 138 of the Act are quasi criminal in nature, and the principles which apply to acquittal in other criminal cases are not applicable in the cases instituted under the Act.

[17] Likewise, under Section 139 of the Act, a presumption is raised that the holder of a cheque received the cheque for the discharge, in whole or in part, of any debt or other liability. To rebut this presumption, facts must be adduced by the accused which on a preponderance of probability (not beyond reasonable doubt as in the case of criminal offences), must then be proved. In Rohitbhai Jivanlal Patel vs. State of Gujarat and Another, 2019 18 SCC 106, this Court has examined the scope of Sections 138 and 139 of the Act, which reads as under:-

"15. So far the question of existence of basic ingredients for drawing of presumption under Sections 118 and 139 of the NI Act is concerned, apparent it is that the appellant accused could not deny his signatures on the cheques in question that had been drawn in favour of the complainant on a bank account maintained by the accused for a sum of Rs 3 lakhs each. The said cheques were presented to the bank concerned within the period of their validity and were returned unpaid for the reason of either the balance being insufficient or the account being closed. All the basic ingredients of Section 138 as also of Sections 118 and 139 are apparent on the face of the record. The trial court had also consciously taken note of these facts and had drawn the requisite presumption. Therefore, it is required to be presumed that the cheques in question were drawn for consideration and the holder of the cheques i.e. the complainant received the same in discharge of an existing debt. The onus, therefore, shifts on the appellant-accused to establish a probable defence so as to rebut such a presumption.

.....

17. On the aspects relating to preponderance of probabilities, the accused has to bring on record such facts and such circumstances which may lead the Court to conclude either that the consideration did not exist or that its

non-existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that the consideration did not exist. This Court has, time and again, emphasised that though there may not be sufficient negative evidence which could be brought on record by the accused to discharge his burden, yet mere denial would not fulfil the requirements of rebuttal as envisaged under Sections 118 and 139 of the NI Act. This Court stated the principles in Kumar Exports [Kumar Exports v. Sharma Carpets, 2009 2 SCC 513] "

20. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act.

21. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the

evidential burden shifts back to the complainant and, therefore, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue." It was further considered by this Court in Uttam Ram vs. Devinder Singh Hudan and Another, 2019 10 SCC 287.

11.18 M/S Kalamani Tex & Anr V/S P Balasubramanian, 2021 Law Suit(SC) 77

PRESUMPTION UNDER SEC 139 Section 118 and Section 139-- 'The Statute mandates that once the signature(s) of an accused on the cheque/negotiable instrument are established, then these 'reverse onus' clauses become operative'

[14] Adverting to the case in hand, we find on a plain reading of its judgment that the trial Court completely overlooked the provisions and failed to appreciate the statutory presumption drawn under Section 118 and Section 139 of NIA. The Statute mandates that once the signature(s) of an accused on the cheque/negotiable instrument are established, then these 'reverse onus' clauses become operative. In such a situation, the obligation shifts upon the accused to discharge the presumption imposed upon him. This point of law has been crystalized by this Court in Rohitbhai Jivanlal Patel v. State of Gujarat, 2019 18 SCC 106, in the following words: "In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the trial court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the trial court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the appellant-accused .."

[15] Once the 2nd Appellant had admitted his signatures on the cheque and the Deed, the trial Court ought to have presumed that the cheque was issued as consideration for a legally enforceable debt. The trial Court fell in error when it called upon the Complainant- Respondent to explain the circumstances under which the appellants were liable to pay. Such approach of the trial Court was directly in the teeth of the established legal position as discussed above, and amounts to a patent error of law.

EVEN IN BLANK CHEQUE PRESUMPTION UNDER SEC 139 ATTRACTED

[18] Even if we take the arguments raised by the appellants at face value that only a blank cheque and signed blank stamp papers were given to the respondent, yet the statutory presumption cannot be obliterated. It is useful to cite Bir Singh v. Mukesh Kumar, 2019 4 SCC 197, where this court held that:
"Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt."

11.19 RAJESH KUMAR versus MEHROTRA IMPEX PVT. LTD. ICL 2020 (12) Del. 492,

Negotiable Instruments Act, 1881 – Section 138 – Dishonour of Cheques – Unlike the prosecution, accused is not required to establish his defence beyond all reasonable doubts. He is only required to create a hole in the story of prosecution to get the benefit of acquittal. Accused can say that the version brought forth by the complainant is inherently unbelievable and therefore the prosecution cannot stand. Or the accused can give his version of the story and say that on the basis of his version the story of the complainant cannot be believed. Negotiable Instruments Act, 1881 Section 138 Dishonour of Cheques, the presumption of law, though rebuttable, works in favour of the complainant. However, the presumption gets rebutted if the defence raises a reasonable suspicion in the prosecution story by raising a probable defence. In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory presumption. However, this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary.

UNDERTAKING BEFORE COURT AND PRESUMPTION

11.20 RAMDAS HANUMANT PALANKAR VERSUS N.D. VEMEKAR AIR(BOM) 2009 0 722, LAWS(BOM) 2008 6 62 HIGH COURT OF BOMBAY

A. The applicant-complainant has preferred this application for leave to file an appeal against the judgment and order dated 20-1-2007 passed by the learned 6th Judicial Magistrate, F. However, thereafter in his evidence, the complainant has stated that he did not pay cash amount to the accused but he handed over gold to the accused as a loan and for the repayment of the said loan, accused issued the cheque.
B. The said admission of the complainant is completely contradictory to the previous statement made by him where at paragraph 13 of cross examination of complainant, he has categorically admitted that there was no any cash transaction or loan transaction between accused and himself other than present disputed transaction.

C. 2 lakhs from the complainant and hence, he was liable to pay the same In relation to the said document, the complainant stated that he does not understand Marathi language and hence, he is not aware about the contents of the said document Hence, complaint came to be filed From the record, it is seen that the cheque was not issued for any legally enforceable debt or liability and therefore, giving of such an undertaking by the accused would be of no help to the complainant

D. Looking to the evidence on record and the admissions given by the complainant there is sufficient evidence to discharge the burden upon the accused regarding presumption. The learned Magistrate after through the evidence has observed, that the disputed chequr issued for a legally enforceable liability.

Accused had given undertaking (Exhibit-30) to the trial Court that he will make payment to the complainant. True that there is such an undertaking on record but giving of such undertaking does not necessarily indicate that the accused had taken a loan of Rs. lakhs from the complainant and hence, he was liable to pay the same. There are various reasons to give such undertaking before this Court and it does not necessarily indicate the guilt of the person. The necessary ingredient under the Negotiable Instruments Act, is that the cheque should be given in respect of any legally enforceable debt or liability. From the record, it is seen that the cheque was not issued for any legally enforceable debt or liability and therefore, giving of such an undertaking by the accused would be of no help to the complainant. (Para 9)

11.21 Kali Ram Vs. State of Himachal Pradesh, reported in (1973) 2 SCC 808, a three Judges Bench of the Supreme Court, reiterating the cardinal principles of criminal justice delivery system, observed as under:-

> 23. Observations in a recent decision of this Court, Shivaji Sahabrao Bobade & Anr. Vs. State of Maharashtra, (1973) 2 SCC 793, to which reference has been made during arguments were not intended to make a departure from the rule of the presumption of innocence of the accused and his entitlement to the benefit of reasonable doubt in criminal cases. One of the cardinal principles which has always to be kept in view in our system (1) Cr. App.Ho.26 of 1970 decided on August 27, 1973 734 of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are

shown by the prosecution to exist, the court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal.

11.22 Rajeshbhai Muljibhai Patel Versus State Of Gujarat, AIR 2020 SC 818

- Accused admitted issuance of cheques - held, once issuance of cheque is admitted/established, presumption would arise u/s. 139 of N.I. Act in favour of holder of cheque that is complainant appellant - nature of presumptions u/s. 139 Act and S. 118(a) of N.I. Act are rebuttable.
- **Para 19** It is also to be pointed out that in terms of Section 45 of the Indian Evidence Act, the opinion of handwriting expert is a relevant piece of evidence; but it is not a conclusive evidence. It is always open to the plaintiff-appellant No.3 to adduce appropriate evidence to disprove the opinion of the handwriting expert. That apart, Section 73 of the Indian Evidence Act empowers the Court to compare the admitted and disputed writings for the purpose of forming its own opinion.

11.23 Rangappa Versus Sri Mohan, 2010 (11) SCC 441 : AIR 2010 SC 1898

Convition

- **Rebutting the presumption: : Held,** When an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the accused is able to raise a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his own.
- **Lost cheque:** Cheque was dishonoured as accused had given instructions of "stop payment" - accused's defence that the cheque was Blank and it was lost and complainant had misused it, there was no legally enforceable debt and accused had not asked for loan - material on record revealed that there was no mention in instructions for "stop payment" that the cheque was lost - moreover accused did not give reply to the notice - in cross-examination it was revealed that accused was aware that cheque was with complainant - held, accused failed to rebut statutory presumption.

Para 10 It has been contended on behalf of the appellant-accused that the presumption mandated by Section 139 of the Act does not extend to the existence of a legally enforceable debt or liability and that the same stood rebutted in this case, keeping in mind the discrepancies in the complainant's version. It was reasoned that it is open to the accused to rely on the materials produced by the complainant for disproving the existence of a legally enforceable debt or liability. It has been contended that since the complainant did not conclusively show whether a debt was owed to him in respect of a hand loan or in relation to expenditure incurred during the construction of the accused's house, the existence of a legally enforceable debt or liability had not been shown, thereby creating a probable defence for the accused. Counsel appearing for the appellant- accused has relied on a decision given by a division bench of this Court in Krishna Janardhan Bhat V/s. Dattatraya G. Hegde, (2008) 4 SCC 54, the operative observations from which are reproduced below (S.B. Sinha, J. at Paras. 29-32, 34 and 45):

> "29. Section 138 of the Act has three ingredients viz.:
>
> (i) that there is a legally enforceable debt
>
> (ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and
>
> (iii) that the cheque so issued had been returned due to insufficiency of funds.
>
> 30. The proviso appended to the said section provides for compliance with legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.
>
> 31. The courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also. The courts below, in our opinion, committed a serious error in proceeding on the basis 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. Such an approach on the part of the courts, we feel, is not correct.
>
> 32. 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 the accused and that of the prosecution in a criminal case is different.
>
> 34. 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 the 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."(emphasis supplied)

Specifically in relation to the nature of the presumption contemplated by Section 139 of the Act, it was observed;

"45. We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have been rebutted. Other important principles of legal jurisprudence, namely, presumption of innocence as a human right and the doctrine of reverse burden introduced by Section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same."(emphasis supplied)

Para 11 With respect to the decision cited above, counsel appearing for the respondent-claimant has submitted that the observations to the effect that the `existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act' and that `it merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability' [See Para. 30 in Krishna Janardhan Bhat (supra)] are in conflict with the statutory provisions as well as an established line of precedents of this Court. It will thus be necessary to examine some of the extracts cited by the respondent-claimant. For instance, in Hiten P. Dalal V/s. Bratindranath Banerjee, (2001) 6 SCC 16, it was held (Ruma Pal, J. at Paras. 22-23):

"22. Because both Sections 138 and 139 require that the Court `shall presume' the liability of the drawer of the cheques for the amounts for which the cheques are drawn, ..., it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption has been established. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused (...). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court may presume a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused

beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable probability of the non-existence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exists, the discretion is left with the Court to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man." (emphasis supplied)

Para 14 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 or 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.

Para 15 Coming back to the facts in the present case, we are in agreement with the High Court's view that the accused did not raise a probable defence. As noted earlier, the defence of the loss of a blank cheque was taken up belatedly and the accused had mentioned a different date in the `stop payment' instructions to his bank. Furthermore, the instructions to `stop payment' had not even mentioned that the cheque had been lost. A perusal of the trial record also shows that the accused appeared to be aware of the fact that the cheque was with the complainant. Furthermore, the very fact that the accused had failed to reply to the statutory notice under Section 138 of the Act leads to the inference that there was merit in the complainant's version. Apart from not raising a probable defence, the appellant-accused was not able to contest the existence of a legally enforceable debt or liability. The fact that the accused had made regular payments to the complainant in relation to the construction of his house does not preclude the possibility of the complainant having spent his own money for the same purpose. As per the record of the case, there was a slight discrepancy in the complainant's version, in so far as it was not clear whether the accused had asked for a hand loan to meet the construction-related expenses or whether the complainant had incurred the said expenditure over a period of time. Either way, the complaint discloses the prima facie existence of a legally enforceable debt or liability since the complainant has maintained that his money was used for the construction-expenses. Since the accused did admit that the signature on the cheque was his, the statutory presumption comes into play and the same has not been rebutted even with regard to the materials submitted by the complainant.

Para 16 In conclusion, we find no reason to interfere with the final order of the High Court, dated 26-10-2005, which recorded a finding of conviction against the appellant. The present appeal is disposed of accordingly.

11.24 Shree Daneshwari Traders Versus Sanjay Jain, AIR 2019 SC 4003

Dispute about rice bag & Defence that the subject cheques were issued as security towards the goods supplied for which payment was subsequently made by cash.

- **Para 18** In the present case, by examining himself as PW-1, the complainant has discharged the initial burden cast upon him that the cheques were issued for the rice bags purchased on credit. With the examination of PW-1, the statutory presumption under Section 139 of the Act arises that the cheques were issued by the respondent-accused

for the discharge of any debt or other liability in whole or in part. The courts below disbelieved the evidence of the complainant on the ground that there are no averments in the complaint that the commodities were sold for cash and that the rice bags were sold on credit and the cheques were issued for the goods sold on credit. Though the complaint contains no specific averments that the cheques were issued for the purchase made on credit, in his evidence, PW-1 clearly stated that the cheques were issued for the commodities purchased on credit.

  - The courts below erred in brushing aside the evidence of PW-1 on the ground that there were no averments in the complaint as to the purchases made by cash and purchase. The courts below also erred in not raising the statutory presumption under Section 139 of the Act that the complainant received the cheques to discharge the debt or other liability in whole or in part.

- **Para 19** It is for the respondent-accused to adduce evidence to prove that the cheques were not supported by consideration and that there was no debt or liability to be discharged by him. The receipts-Ex.-22/C (colly) relied upon by the respondent accused do not create doubt about the purchases made on credit and the existence of a legally enforceable debt for which the cheques were issued. The courts below erred in saying that by the receipts-Ex.22/C (colly), the respondent-accused has rebutted the statutory presumption raised under Section 139 of the Negotiable Instruments Act. The oral and the documentary evidence adduced by the complainant are sufficient to prove that it was a legally enforceable debt and that the cheques were issued to discharge the legally enforceable debt. With the evidence adduced by the complainant, the courts below ought to have raised the presumption under Section 139 of the Act. The evidence adduced by the respondent-accused is not sufficient to rebut the presumption raised under Section 139 of the Act. The defence of the respondent that though he made payment for the commodities/rice bags, the blank cheques were not returned by the appellant-complainant is quite unbelievable and unacceptable. The impugned judgment of the High Court cannot be sustained and is liable to be set aside. The respondent-accused is convicted under Section 138 of the Negotiable Instruments Act in both the complaints; however, considering that the cheque transaction was of the year 2003, at this distant point of time, we do not deem it appropriate to impose any sentence of imprisonment on the accused.

11.25 <u>T.Vasanthakumar Versus Vijayakumari, 2015 (8) SCC 378 : AIR 2015 SC 2240</u>

- **Para 10** Therefore, in the present case since the cheque as well as the signature has been accepted by the accused respondent, the presumption under Section 139 would operate. Thus, the burden was on the accused to disprove the cheque or the existence of any legally

recoverable debt or liability. **To this effect, the accused has come up with a story that the cheque was given to the complainant long back in 1999 as a security to a loan; the loan was repaid but the complainant did not return the security cheque. According to the accused, it was that very cheque used by the complainant to implicate the accused.** However, it may be noted that the cheque was dishonoured because the payment was stopped and not for any other reason. This implies that the accused had knowledge of the cheque being presented to the bank, or else how would the accused have instructed her banker to stop the payment. Thus, the story brought out by the accused is unworthy of credit, apart from being unsupported by any evidence.

- **11** Further, the High Court relied heavily on the printed date on the cheque. However, we are of the view that by itself, in absence of any other evidence, cannot be conclusive of the fact that the cheque was issued in 1999. The date of the cheque was as such 20/05/2006. The accused in her evidence brought out nothing to prove the debt of 1999 nor disprove the loan taken in 2006.
- **12** In light of the above reasoning, we find that the learned High Court was misplaced in putting the burden of proof on the complainant. As per Section 139, the burden of proof had shifted on the accused which the accused failed to discharge. Thus, we find merit in this appeal.
- **13** The appeal is allowed. The judgment and order passed by the High Court is accordingly set aside and the judgment dated 22.01.2011, delivered by the Presiding Officer, Fast Track Court-I, Bengaluru, confirming the order passed by the XIIth Addl. Chief Metropolitan Magistrate, Bengaluru, convicting the restore.

11.26 Shaikh Yusufkhan Hamidkhan Versus State Of Gujarat, 2021 (4) GLR 3121 : 2021 (2) GLH 665

Para 5 It is further pertinent to note that the applicant-**complainant in his cross-examination recorded on 01.07.2017 had also admitted that he had not made any transaction with the accused and that there was no legally recoverable debt from the accused.** An evidence with regard to the legally enforceable debt being one of the main ingredients to constitute the offence under Section 138 of the said Act, and in the instant case, the complainant himself having admitted that there was no legally enforceable debt, which could be recovered from the accused, the offence under Section 138 could not be said to have been made out. The proviso appended to the said section provides for compliance of the legal requirements before a complaint could be acted upon by the Court of law. It is well settled legal position that Section 139 of the said Act merely raises a presumption in regard to the second aspect of the matter. The existence of legally recoverable debt is not a matter of presumption under Section 139 of the

Act. It merely raises a presumption in favour of the holder of the cheque that the same has been issued for discharge of any debt or any other liability. It is also needless to say that the presumption under Section 139 of the said Act is rebbutable.

Para 6 In any case, in the instant case**, the applicant-complainant himself in his cross-examination had admitted that he had no legally enforceable debt against the accused. Under the circumstances, the trial Court has rightly appreciated the evidence on record and acquitted the respondent-accused for the charges under Section 138 of the said Act.** There being no illegality or infirmity in the impugned judgment and order of acquittal passed by the trial Court, this Court is not inclined to entertain the present application. Hence, the same is rejected. As a result of the dismissal of the present application, the appeal also stands dismissed in limine.

11.27 <u>Triyambak S Hegde V/S Sripad, 2021 Lawsuit(Sc) 551</u>
<u>Once Signature On Cheque Admitted By Accused- Presumption Under S. 139 Arise</u>

[11] From the facts arising in this case and the nature of the rival contentions, the record would disclose that the signature on the documents at Exhibits P-6 and P-2 is not disputed. Exhibit P-2 is the dishonoured cheque based on which the complaint was filed. From the evidence tendered before the JMFC, it is clear that the respondent has not disputed the signature on the cheque. If that be the position, as noted by the courts below a presumption would arise under Section 139 in favour of the appellant who was the holder of the cheque. Section 139 of the N.I. Act reads as hereunder: - "139. Presumption in favour of holder- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

[12] Insofar as the payment of the amount by the appellant in the context of the cheque having been signed by the respondent, the presumption for passing of the consideration would arise as provided under Section 118(a) of N.I. Act which reads as hereunder: - "118. Presumptions as to negotiable instruments - Until the contrary is proved, the following presumptions shall be made: - (a) of consideration - that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration."

[13] The above noted provisions are explicit to the effect that such presumption would remain, until the contrary is proved. The learned counsel for the appellant in that regard has relied on the decision of this

court in K. Bhaskaran vs. Sankaran Vaidhyan Balan & Anr., 1999 7 SCC 510 wherein it is held as hereunder: - "9. As the signature in the cheque is admitted to be that of the accused, the presumption envisaged in Section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. Section 139 of the Act enjoins on the Court to presume that the holder of the cheque received it for the discharge of any debt or liability. The burden was on the accused to rebut the aforesaid presumption. The Trial Court was not persuaded to rely on the interested testimony of DW-1 to rebut the presumption. The said finding was upheld by the High Court. It is not now open to the accused to contend differently on that aspect."

11.28 K S Ranganatha V/S Vittal Shetty, 2021 Law Suit(SC) 811
Negotiable Instruments Act , 1881- 139- Presumption and its rebuttal

[11] The position of law as noted above makes it crystal clear that when a cheque is drawn out and is relied upon by the drawee, it will raise a presumption that it is drawn towards a consideration which is a legally recoverable amount; such presumption of course, is rebuttable by proving to the contrary. The onus is on the accused to raise a probable defence and the standard of proof for rebutting the presumption is on preponderance of probabilities.

12. CHEQUE NOT ISSUED FROM THE ACCOUNT OF THE ACCUSED

12.1 Krishna Trading Company, Proprietorship Firm VS State of Gujarat[2017] 2 GLH 87 / [2017] 0 Supreme(Guj) 37

Principal endowed son with Power of attorney Held: No vicarious liability in NI Act – only the drawer of the cheque, who can be held responsible for the dishonor – only the mandate holder, who has drawn the cheque, can be held liable under Section 138 of the N.I. Act and not the principal – maker of cheque is a person who orders payment and signs the cheque – drawer of a cheque is the person who orders payment and signs it. – only the 'drawer' of a cheque who can be held liable – principal(appellant), in present case, not drawer, thus cannot be held liable

Power of Attorney Holder, who ordered payment and signed the cheque, is primarily held liable to be proceeded against for the commission of the offence under Section 138 of the N.I. Act, caused by the drawing and issuing of the cheque, when there is no sufficient fund in the account. Unlike Indian Penal Code, there is no enabling provisions akin to Sections 34 to 38, 107, 149, 120B etc. under the Negotiable Instruments Act so as to rope in the person who caused the commission of the offence by sharing of mind or abetting or conspiring to do an act that constitutes an offence. According to the statutory mandate under Section 138 of the N.I. Act, a person who has drawn and issued the cheque is liable to be proceeded against for the offence under Section 138 of the N.I. Act.

12.2 Patel Nitaben Chetanbhai V/s State Of Gujarat, 2 017 JX(Guj) 259

Only Drawer Of Cheque Is Liable:,cheque in question was not signed by the applicant, but it was signed by her husband , case of Mrs. Aparna A Shah (Supra) relied upon , no liability of applicant – complaint qua applicant quashed , application allowed.

12.3 Sejal Brijalbhai Shah Vs. State Of Gujarat And Other (2019) 2 Nij 5Gujarat High Court,R/Criminal MISC.Application No. 1427 of 2019Decided on : 27,02,2019

4.2 The insistence on the part of respondent No.2 that the petitioner-wife was dealing intermittently or on regular basis with respondent No.2 in the business would have no basis to prosecute her under section 138 of the NI Act. Assuming that she would be helping her husband in the business that ipso facto also would not be a ground to continue prosecution qua her. section 138 of the NI Act clearly provides that where a cheque is drawn of an account maintained by him with a banker for payment of any amount of money in their personal capacity out of that account for the discharge, in

full or in part of any debt or liability, is returned by the Bank unpaid, which is either due to insufficient funds or because the amount of money standing to the credit of the account holder is insufficient or it exceeds the amount arranged to be paid from that account by an agreement made with the bank, such a person shall be deemed to have committed the offence and the mandatory requirement also provides for issuance of notice to such a person.

4.3 Admittedly, the present petitioner is not the person, who has issued the cheque nor is it in discharge of any debt or liability of hers either in whole or in part. She being neither the holder in due course nor the authorized signatory nor being the joint account holder with her husband, as rightly pointed out by learned Advocate, Ms.Pandya, the prosecution qua her is unsustainable. The cheque, which had been dishonoured, also clearly reflects the signature of Mr. B.B. Shah (Mr. Brijalkumar Bharatbhai Shah) and as mentioned herein above, the averments in this petition further vindicates that aspect. From the entire gamut of facts, it is quite clear that the petitioner has

Neither any role to play nor has any legal liability for her to have issued the said cheque and she, in fact, has not signed the said cheque. This prosecution, therefore, must fail qua her.

12.4 <u>Hon'ble Supreme Court in Jugesh Sehgal v/s Shamsher Singh Gogi, (2009) 14 SCC 683</u>

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

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

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

12.5 Aparna A. Shah Vs Sheth Developers Pvt Ltd and Anr(2013) 8 SCC 71

The Supreme Court held that in case of issuance of a cheque from joint account, a joint account holder cannot be prosecuted unless the cheque has been signed by each and every person who has a joint account holder.

The following was observed by the Supreme Court as contained in para 23: "We also hold that under Section 138 of the N.I. Act, in case of issuance of cheque from joint accounts, a **joint account holder cannot be prosecuted unless the cheque has been signed by each and every person who is a joint account holder. The said principle is an exception to Section 141 of the N.I. Act which would have no application in the case on hand**. The proceedings filed under Section 138 cannot be used as an arm twisting tactics to recover the amount allegedly due from the appellant. It cannot be said that the complainant has no remedy against the appellant but certainly not under Section 138. The culpability attached to dishonour of a cheque can, in no case "except in case of Section 141 of the N.I. Act" be extended to those on whose behalf the cheque is issued. This Court reiterates that it is only the drawer of the cheque who can be made an accused in any proceeding under Section 138 of the Act. Even the High Court has specifically recorded the stand of the appellant that she was not the signatory of the cheque but rejected the contention that the amount was not due and payable by her solely on the ground that the trial is in progress. It is to be noted that only after issuance of process, a person can approach the High Court seeking quashing of the same on various grounds available to him. Accordingly, the High Court was clearly wrong in holding that the prayer of the appellant cannot even be considered. Further, the High Court itself has directed the Magistrate to carry out the process of admission/denial of documents. In such circumstances, it cannot be concluded that the trial is in advanced stage

12.6 N Harihara Krishna Vs J. Thomas reported in 2017 SCC Online SC 1017.

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

13. PRESENTATION OF CHEQUE

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

13.1 N. Parameswaran Unni Vs. G. Kannan and Another(2017) 2 Crimes 62 (SC)

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

13.2 Sadanandan Bhadran vs. Madhavan Sunil Kuar [(1998) 6 SCC 514], Supreme Court

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

Re-presentation of cheque after dishonor – Limitation period for filing complaint for dishonor of cheque upon Re-presentation of cheque – Date from which to be reckoned Legal notice to drawer must be issued within 30 days of that dishonor of cheque, which matures into complaint – Though

first legal notice was issued within two days of first dishonor of cheque, second legal notice issued to drawer of cheque on 17,12,2008 pursuant to dishonor of same cheque second time on 10,11,2008 i.e. beyond limitation period of 30 days – Information as to second dishonor was received from Bank on the same day itself (i.e. 10,11,2008)

13.3 MSR Leather, (2013) 1 SCC 177 (2014) 2 SC cases 424 AIR 2014 SC 660 Kamlesh Kumar. Vs. State of Bihar and another.

Held,although the complainant had right to present the said cheque for encashment a second time after its dishonor, the legal notice pursuant to second dishonor had to be issued within 30 days of the receipt of information as to second dishonor from Bank, which was not done, Hence, complaint filed on basis of notice dt. 17,12,2008 was not maintainable in view of non-compliance with all the three conditions laid down in S. 138 NI Act.

13.4 Birendra Prasad Sah VS State of Bihar, 08 May 2019, 2019 2 ACR 1659; 2019 0 AIR(SC) 2496;

Negotiable Instruments Act, 1881 Sections 138 and 142 Dishonour of cheques Complaint Limitation Issuance of successive notices is permissible under provisions of Section 138 having regard to object of legislation Under Section 142(1), complaint has to be instituted within one month of date on which cause of action has arisen under clause (c) of proviso to Section 138. However, cognizance of complaint may be taken by court after prescribed period if complainant satisfies Court that he had sufficient cause for not making a complaint within such period. Appellant had indicated sufficient cause for seeking condonation of delay in institution of complaint. High Court has merely adverted to presumption that first notice would be deemed to have been served if it was dispatched in ordinary course. Even if that presumption applies, sufficient cause was shown by appellant for condoning delay in instituting complaint taking basis of complaint as issuance of first legal notice – Impugned judgment of High Court is unsustainable – Order passed by Single Judge set aside and complaint restored to file of trial court. (Para 7, 11 and 12).

14.RETURNING OF THE CHEQUE UNPAID

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

14.1 NEPC Ltd. Vs. Magma Leasing Ltd. 1999 (4) SCC 253 – Relying upon Modi Cement Ltd. 1998 (3) SCC 249

Held that cheque returned by mentioning account closed is also an offence u/s. 138 N.I. Act. Despite being penal provision it has been interpreted purposefully in furtherance to effectiveness and workability of the enactment. Account closed, stop payment are species of the genus in sufficient fund.

14.2 MMTC Co. Vs. Medchil pharmaceuticals 2002 (1) SCC 234

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

14.3 M/s Laxmi Deyechem Vs. State of Gujarat(2012) 13 SCC 375 – overruling Vinod Tawa & others vs. Zahir&Ors. 2002 (7) SCC 541,

Held that dishonour of cheque on the ground of non-resemblance of signature will also attract offence u/s 138 N.I. Act. Subject to rebuttal evidence of defence against presumption u/s. 139 N.I. Act. It was held that the reasons for dishonour like "as account closed ","payment" "stopped" ,"referred to drawer", "signature do not match" or "image is not found " are only the genus of the species " either because of the amount of money standing to the credit of that account is insufficient to honour the cheque"

14.4 Sil Import U.S.A. Vs. Exim Aides Silk Exporters and 2004 Cri.L.J. 2636

Period of one month for filing complaint from date immediately following the date on which period of 15 days from date of receipt of notice by drawee expired and The day when cause of action arises would excluded and last day included, on being holiday then the next coming day will be counted.

Notice envisaged under S. 138, Proviso (b) to be given by payee to the drawer of the cheque which has been dishonoured can be sent by Fax. The duty cast on the payee on receipt of information regarding the return of the cheque unpaid is mentioned in cl. (b) of S. 138. Within 15 days he has to

make a demand for payment. The mode of making such demand is also prescribed in the clause, that it should be "by giving notice in writing to the drawer of the cheque". Nowhere it is said that such notice must be sent by registered post or that it should be dispatched through a messenger. Chap. XVII of the Act, containing Ss. 138 to 142, was inserted in the Act as per Banking Public Financial Institution and Negotiable Instruments Laws (Amendment) Act, 1988.

Technological advancement take Facsimile, Internet, E,mail etc. were on swift progress even before the Bill for the Amendment Act was discussed by the Parliament. When the legislature contemplated that notice in writing should be given to the drawer of the cheque, the legislature must be presumed to have been aware of the modern devices and equipment already in vogue and also in store for future. If the Court were to interpret the words "giving notice in writing" in the section as restricted to the customary mode of sending notice through postal service or even by personal delivery, the interpretative process would fail to cope up with the change of time. So if the notice envisaged in cl. (b) of the proviso to S. 138 was transmitted by Fax it would be compliance with the legal requirement. (Paras 12 , 13 , 14 , 17)

14.5 Shiv Shakti Cooperative Housing Society vs. Swaraj Developer, AIR 2003 SC 2434

Acquittal of accused on basis of law then in force proper can't be set aside when complainant has not stated a satisfactory reason for condoning delay.

14.6 M/s Mandvi Cooperative Bank Ltd. Vs. Nimesh B. Thakore, JT 2010 (1) SC 259.

Accused has an absolute right to have the complainant and any of his witness summoned for cross examination, but cannot ask for examination-in-chief again. There is no provision in law to permit the accused to file affidavit in evidence.

Para 32 The case of the complainant in a complaint under Section 138 of the Act would be based largely on documentary evidence. The accused, on the other hand, in a large number of cases, may not lead any evidence at all and let the prosecution stand or fall on its own evidence. In case the defence does lead any evidence, the nature of its evidence may not be necessarily documentary; in all likelihood the defence would lead other kinds of evidences to rebut the presumption that the issuance of the cheque was not in the discharge of any debt or liability. This is the basic difference between the nature of the complainant's evidence and the evidence of the accused in a case of dishonoured cheque. It is, therefore, wrong to equate the defence evidence with the complainant's evidence and to extend the same option to the accused as well.

15.NO BAR FOR THE DRAWER OF A CHEQUE TO GIVE AUTHORITY TO A THIRD PERSON TO FILL UP THE CHEQUE SIGNED BY HIM

15.1 S. Gopal v/s D. Balachandran [MANU/TN/0119/2008/ II (2008) BC 614,] held as follows Para's:,

Para 7 : This Court in Rajendran vs. Usharani 2001 LW (Crl.) 319 has observed that no law prescribes that in case of any negotiable instrument, the entire body of the instrument shall be written only by the marker or drawer of the instrument. Once the execution is admitted, it shall be taken that the cheque was issued by the accused in favour of the complainant towards the discharge of the liability even in a case where the cheque was filled up by some other person.

Para 8: It is to be noted that there is no reference to Section 20 of the Negotiable Instruments Act in the aforesaid authority. A general proposition has been made to the effect that there is a presumption, in case a signed cheque is delivered to the payee, that the cheque so issued by the drawer in favour of the payee is only towards the discharge of his subsisting liability.

Para 9. The aforesaid authority does not run counter to the provision under Section 20 of the Negotiable Instruments Act. As rightly observed therein, there is no law which prescribes that a cheque shall be filled up by the drawer himself. If such proposition is accepted, no unlettered person, who knows only to sign his name, can ever be a drawer of a cheque. Further, a person who is physically incapacitated to fill up the cheque cannot also draw a cheque and negotiate it. Of course, as far as the other negotiable instruments viz., pro,notes and bills of exchange, there is a clear mandate under Section 20 of the Negotiable Instruments Act to the effect that such an instrument can be negotiated by the maker thereof by simply signing and delivering the same to the holder in due course giving thereby ample authority to the latter to fill up the content of the instrument as intended by the maker thereof.

Para 10 Even in case of a cheque, as there is no clear provision in the Negotiable Instruments Act, in the light of the above discussion, the court finds that if a drawer of a cheque gives authority to the payee or holder in due course or a stranger for that matter to fill up the cheque signed by him, such an instrument also is valid in the eye of law. There is no bar for the drawer of a cheque to give authority to a third person to fill up the cheque signed by him for the purpose of age negotiating the same

15.2 Sanjay Vs Rajeev (2007(2) MPHT 182) and Satyendra Upadhyaya vs. Omprakash Rathore @ Japan Singh (2010 MPLJ online 1) &Bhadauria Tiles vs. Ramkumar Sing Kushwah (2011 MPLJ online 1), & Sunita Dubey Vs Hukum Singh Ahirwar(2015(1) MPLJ 574)

In the aforesaid judgments, it is held that on the ground that accused has admitted the signature on the cheque, therefore, in view of provisions of Section 20 of the Negotiable Instruments Act, the prayer to send the cheque for the opinion of the handwriting expert cannot be given. Even the other part of the cheque has been wrongly filled by the other persons, the person concerned who has issued the cheque is liable to honour the cheque, therefore no useful purpose will be served by sending the cheque for the opinion of the handwriting expert.

16. COMPLAINT CAN BE DROPPED AS OFFENCE U/S 138 IS CIVIL WRONG

16.1 <u>M/S. Meters and Instruments Private Limited &Anr. Vs. Kanchan Mehta (Criminal Appeal No. 1732 Of 2017)</u>

Hon'ble Supreme Court Section , 138 NI Act matters are primarily Civil wrong, can be dropped w/o Complainant's consent The Hon'ble Supreme Court has clarified that an accused in a case under Section 138 of Negotiable Instruments Act can be discharged even without the consent of the complainant, if the Court is satisfied that the complainant has been duly compensated.

It is also held that the normal role of criminal law that composition of offence is possible only with the consent of complainant/victim is not applicable for cases under Sec.138 of NI Act.

This is because the offence under Section 138 is 'primarily a civil wrong'. Therefore, the power under Section 258 of the Code of Criminal Procedure to stop trial and discharge the accused is available to the Magistrate even though the summary trial under Chapter XXI of Cr.P.C.

<u>The Hon'ble Supreme Court in the judgment has passed following directions:</u>

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

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

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

iv) Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C. to

award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C. With this approach, prison sentence of more than one year may not be required in all cases.

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

CR.P.C U/S. 482

16.2 Sumit Bhasin . Versus State Of Nct Of Delhi & Anr. Crl. M.C. 296/2021 & Crl.M.A. 1529/2021 Date 10.03.2021 High Court Of Delhi At New Delhi..

10. Now coming to the legal position in this case and taking into consideration the various provisions of Cr.P.C. which have been discussed in various judgments time and again demonstrate that the Negotiable Instruments Act, provides sufficient opportunity to a person who issues the cheque. Once a cheque is issued by a person, it must be honored and if it is not honoured, the person is given an opportunity to pay the cheque amount by issuance of a notice and if he still does not pay, he is bound to face the criminal trial and consequences. It is seen in many cases that the petitioners with malafide intentions and to prolong the litigation raise false and frivolous pleas and in some cases, the petitioners do have genuine defence, but instead of following due procedure of law, as provided under the N.I. Act and the Cr.P.C, and further, by misreading of the provisions, such parties consider that the only option available to them is to approach the High Court and on this, the High Court is made to step into the shoes of the Metropolitan Magistrate and examine their defence first and exonerate them. The High Court cannot usurp the powers of the Metropolitan Magistrate and entertain a plea of an accused, as to why he should not be tried under Section 138 of the N.I. Act. This plea, as to why he should not be tried under Section 138 of the N.I. Act is to be raised by the accused before the Court of the Metropolitan Magistrate under Section 251 of the Cr.P.C. & under Section 263(g) of the Cr.P.C. Along with this plea, he can file necessary documents and also make an application, if he is so advised, under Section 145(2) of the N.I. Act to recall the complainant to cross examine him on his plea of defense. However, only after disclosing his plea

of defence, he can make an application that the case should not be tried summarily but as a summons trial case.

11. An offence under Section 138 of the N.I. Act is technical in nature and defences, which an accused can take, are inbuilt; for instance, the cheque was given without consideration, the accused was not a Director at that time, accused was a sleeping partner or a sleeping Director, cheque was given as a security ctc, etc., the onus of proving these defences is on the accused alone, in view of Section 106 of the Indian Evidence Act, 1872. Since the mandate of the legislature is the trial of such cases in a summary manner, the evidence already given by the complainant by way of affidavit is sufficient proof of the offence and this evidence is not required to be given again in terms of section 145(1) of the N.I. Act and has to be read during the trial. The witnesses i.e. the complainant or other witnesses can be recalled only when the accused makes such an application and this application must disclose the reason why the accused wants to recall the witnesses and on what point the witnesses are to be cross examined.

12. The offence under Section 138 of the N.I. Act is an offence in the personal nature of the complainant and since it is within the special knowledge of the accused as to why he is not to face trial under section 138 N.I. Act, he alone has to take the plea of defense and the burden cannot be shifted to complainant. There is no presumption that even if an accused fails to bring out his defense, he is still to be considered innocent. If an accused has a defense against dishonor of the cheque in question, it is he alone who knows the defense and responsibility of spelling out this defense to the Court and then proving this defense is on the accused. Once the complainant has brought forward his case by giving his affidavit about the issuance of cheque, dishonor of cheque, issuance of demand notice etc., he can be cross-examined only if the accused makes an application to the Court as to, on what point he wants to cross examine the witness (es) and then only the Court shall recall the witness by recording reasons thereto,

13. Sections 143 and 145 of the N.I. Act were enacted by the Parliament with the aim of expediting trial in such cases. The provisions of summary trial enable the respondent to lead defense evidence by way of affidavits and documents. Thus, an accused who considers that he has a tenable defense and the case against him was not maintainable, he can enter his plea on the very first day of his appearance and file an affidavit in his defense evidence and if he is so advised, he can also file an application for recalling any of the witnesses for cross examination on the defense taken by him.

14. In view of the procedure prescribed under the Cr.P.C, if the accused appears after service of summons, the learned Metropolitan Magistrate shall ask him to furnish bail bond to ensure his appearance during trial and ask him to take notice under Section 251 Cr.PC and enter his plea of defence and fix the case for defence evidence, unless an application is made under Section 145(2) of N.I. Act for recalling a witness for cross-examination on by an accused of defence. If there is an application u/s 145(2) of N.I. Act for

recalling a witness of complainant, the court shall decide the same, otherwise, it shall proceed to take defence evidence on record and allow cross examination of defence witnesses by complainant. Once the summoning orders in all these cases have been issued, it is now the obligation of the accused to take notice under Section 251 of Cr.P.C., if not already taken, and enter his/her plea of defence before the concerned Metropolitan Magistrate's Court and make an application, if they want to recall any witness. If they intend to prove their defence without recalling any complainant witness or any other witnesses, they should do so before the Court of Metropolitan Magistrate.

15. In the instant case the respondent no. 2/complainant in paragraph (3) and subsequent paragraphs of his complaint under Section 138 of N.I. Act has made specific averments that while Accused Nos. 2 and 3 are directors of the company. He has specifically averred that accused persons were personally known to him through common acquaintances and shared a cordial relationship which was the premise, on the basis of which the complainant invested heavily in the funds of the company. The plea raised by the Ld. Counsel for the petitioner that Sumit Bhasin never participated in any negotiations with the complainant cannot be considered at this preliminary stage since such defense can only be considered during the stage of trial.

16. The prosecution under section 138 of the Act can be launched for vicarious liability against any person, who at the time of commission of offence was in charge and responsible for the conduct of the business of the accused company. Merely because the petitioner did not sign the cheques in question, is not decisive for launching prosecution against him. The plea of the petitioner that the offences were committed without his knowledge cannot be considered at this stage considering the fact that the Complainant has specifically averred that negotiations had taken place with him along with other co-accused persons and they were prima facie aware about the whole series of transaction. After all, it was not small amount that was being invested and it was because of the parties being acquainted with each other that the whole transaction materialized.

18. Now, coming to the jurisdiction, suffice it to say that the Court, in exercise of its jurisdiction under Section 482 Cr.P.C. cannot go into the truth or otherwise of the allegations made in the complaint or delve into the disputed question of facts. The issues involving facts raised by the petitioner by way of defence can be canvassed only by way of evidence before the Trial Court and the same will have to be adjudicated on merits of the case and not by way of invoking jurisdiction under Section 482 Cr.P.C. at this stage.

19. Upon analyzing the provisions of the N.I. Act, it is clear that Section 138 of the Act spells out the ingredients of the offence as well as the conditions required to be fulfilled before initiating the prosecution.

20. These ingredients and conditions are to be satisfied mainly on the basis of documentary evidence, keeping in mind the presumptions under Sections 118 and 139 of the N.I. Act and Section 27 of the General Clauses Act, 1897 as well as the provisions of Section 146 of the Act.

23. In the instant case, all these issues mentioned hereinabove involves disputed question of facts and law and cannot be decided unless and until the parties go to trial and lead their respective evidence. Though invariably the initial phase of a litigation under Section 138 of the N.I. Act depends on how well the pleadings or the allegations are laid down or articulated, by the complaint, in the ultimate analysis it is the trial that alone can bring out the truth so as to arrive at a just and fair decision for the parties concerned.

17. RIGHT OF ACCUSED TO CROSS EXAMINATION

17.1 M/S. Sukhdata Chits Pvt. Ltd. And Others Vs. Shri Rajender Prasad Gupta 2012) 4 Crimes 149 : Criminal M.C. No. 3089 Of 2011 Decided On : 11,01,2012

Para 12. With the legislative intent being not only of summary trial, but of swifter and expeditious disposal ofdishonoured cheques cases, particularly Section 139 of the Act as also Section 118 of the Evidence Act providingpresumption in favour of the complainant that issue of cheque was towards the debt or liability and Section 145providing that the evidence could be led by the complainant by way of the affidavit, the petitioner/accused couldnot be said to have unlimited and unbridled right of subjecting the complainant to the usual and routine type ofcross examination. If that was so, that would apparently be not only against the scheme and object of theprovisions of summary trial, but would be contrary to the provisions of Section 139, 143 and 145 of the Act.

Para 13. Thus it can be said that the phraseology "as to the facts contained therein" in Section 145(2) of the Act cannotbe read to mean that the complainant can be subjected to be cross-examination of everything that he has statedon affidavit. If sub section (2) of Section 145 is interpreted to mean that in every case where the accused appliesto the court to summon the complainant or his witness who has given evidence on affidavit under sub section (1)and the court is obliged to summon him to tender oral examination-in-chief or to allow him to be subjected tocross examination as in summons or warrant trial cases, then the object of inserting such provision would bedefeated. The Sub-section (2) of Section 145 cannot be interpreted in a manner that would render Sub-section (1)thereof or Section 139 & Section 143 redundant.

Para 14. From the above discussion, it can be said that there cannot be any hard and fast rule as to what part ofevidence tendered by way of affidavit could be eligible for cross examination. It was to be decided by theMagistrate depending upon the facts and circumstances of each case and also keeping in mind the scheme andobjective of the Act, particularly Section 139, 143, 145 of the Act as also Section 106 of the Evidence Act.

Para 15. The affidavits of evidence which have been filed in these cases are not only as regard to the averments of thecomplaint, but contained detailed facts attributing liability tothe petitioners/accused. Some of those facts wouldnot be required to be proved because of Section 139 of the Act as also Section 106 of the Evidence Act. ***It would also be unjust to say that in all cases, the cross examination would only be confined to the defences of the petitioners/accused. The petitioners would be entitled to cross examination of complainant as is done in the summary trial case,*** but at the same time, ***they could not be precluded from putting certain questions which would otherwise be relevant and essential for the just decision of the case.*** Limiting the right of the petitioners to crossexamine only with regard to Para 4 and 6 of complainant's application may cause prejudice to the petitioners.

18. NO ILLEGALITY IN PRONOUNCEMENT OF THE JUDGMENT AND ORDER OF CONVICTION AND SENTENCE IN THE ABSENCE OF THE ACCUSED

18.1. Sharad Jethalal Savla Vs. State Of Gujarat And Ors.,Cri. Misc. Application No : 19862 of 2015 Decided on : 14/11/2016 2017 eGLR_HC 10006044

"**Para 15** Having heard the learned counsel appearing for the parties and having considered the materials on record, the following questions fall for my consideration:

(I) Whether on account of the absence of the applicant accused herein on the date of the pronouncement of the judgment, the judgment would become invalid in view of the provisions of Section 353 of the Code of Criminal Procedure, 1973

(II) Whether the trial Court was justified in issuing a non, bailable warrant of arrest of the applicant accused herein having noticed that the accused was not present at the time of the pronouncement of the judgment and order of conviction and sentence

(III) Whether the non-bailable warrant issued by the trial Court for the arrest of the applicant accused herein could be said to be for the purpose of execution of the sentence of imprisonment, as provided under Section 418 of the Cr.P.C.

(IV) Whether the trialCourt was justified in rejecting the application filed under Section 389(3) of the Code or declining to pass an appropriate order on such application for the purpose of suspension of the substantive order of sentence to enable the applicant accused herein to file an appeal before the Sessions Court on the ground of his absence before the Court" To put it in other words,whether the insistence on the part of the trial Court for the personal presence of the accused for the purpose of passing appropriate order on the application filed under Section 389(3) of the Cr.P.C. by the advocate could be said to be justified in law

(V) Whether the Sessions Court was justified in refusing to register the appeal filed by the applicant accused herein through his advocate challenging the judgment and order of conviction and sentence on the ground that the accused had not surrendered before the trial Court and the trial Court had not passed any order under Section 389(3) of the Code suspending the substantive order of sentence passed by the trial Court to enable the accused to prefer an appeal before the appellate Court

(VI) Whether the Sessions Court was justified in insisting for the personal presence of the applicant accused herein for the purpose of the registration of the appeal"

'Be you ever so high, but the law is above you', is the signature theme of rule of law that loudly and silently (as well) echoes in the Indian Constitutional context. Of course, the law makers and law enforcers must

willingly assist the Court in angling the convict avoiding and dodging the law makers, the law enforcers and the law interpreters (Judges and Courts). No illegality as regards the pronouncement of the judgment and order of conviction and sentence in the absence of the applicant accused.

The judgment that the learned Magistrate may pronounce in the absence of the accused by itself will not vitiate the judgment. Sub section (7) of Section 353 of the Cr.P.C. clearly lays down that no judgment delivered by any criminal court shall be deemed to be invalid by reason only of the absence of any party.

The trial Court committed no error in issuing a non-bailable warrant of arrest having noticed that the accused was not present at the time of pronouncement of the judgment and order of conviction and sentence in view of the provisions of Section 418 (2) of the Cr.P.C. Under Sub Section (2) of Section 418 of the Cr.P.C. when the accused sentenced to imprisonment is not present in the Court, the Court has to issue a warrant of his arrest and the sentence shall commence on the date of his arrest.

In the absence of the convict accused, the learned advocate appearing for him cannot prefer an application under Section 389(3) of the Code for suspension of the sentence to enable the convict accused to prefer an appeal before the Sessions Court.

19. COMPOUNDING OF OFFENCE – COSTS

19.1 Damodar S. Prabhu Vs. Sayed Babalal 2010 CRI. L. J. 2860 SUPREME COURT (Full Bench) Criminal Appeal No. 963 (arising out of S.L.P. (Cri.) No. 6369 with 6370 ,6372 of 2007), D/3 ,5 ,2010.

Negotiable Instruments Act S.138, S.147, Tendency of parties togo for compounding at late stage of proceedings.Putting unnecessary strain on judicial system, Absence of guidance in S.147. Supreme Court directed courts to impose graded costs on litigants to encourage them to go for early compounding. The tendency of litigants to adopt compounding as a last resort to compound offence of dishonour of cheque is putting unnecessary strain on judicial system and contributing to increase in number of pending cases. Moreover, the free and easy compounding of offences at any stage, however belated, gives an incentive to the drawer of the cheque to delay the settling of cases for years.

An application for compounding made after several years not only results in the system being burdened but the complainant is also deprived of effective justice. Section 147 which permits compounding does not carry any guidance on how to proceed with the compounding of offences under the Act. The Scheme contemplated under S. 320 of the Cr. P.C. cannot be followed in the strict sense. In view of legislative vacuum Supreme Court directed Courts to follow a graded system of levying costs on parties so as to encourage them to go in for early compounding.

The Supreme Court framed following guidelines

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

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

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

(d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount. (Para 15)

The Court made it clear that even though the imposition of costs by the competent Court is a matter of discretion, the scale of costs has been suggested in the interest of uniformity. The competent Court can of course reduce the costs with regard to the specific facts and circumstances of a case, while recording reasons in writing for such variance. (Paras 15 , 17)

(B) Negotiable Instruments ActChequesissued in one transaction Filing of multiple complaints ,Causes tremendous harassment and prejudice to drawers of cheque ,Supreme Court made it mandatory to complainant to file along with complaint sworn affidavit that no other complaint has been filed in other Court in respect of same transaction High Court directed to levy heavy costs on complainant resorting to practice of filing multiple complaints Directions, however, given prospective effect. (Para 16)

19.2 <u>Madhya Pradesh State Legal Services Authority V/s Prateek Jain And Anr Decided on 10 September, 2014 CIVIL APPEAL NO. 8614 OF 2014</u>

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

<u>Question: Whether These Guidelines Are To Be Given A Go By When A Case Is Decided/ Settled In The Lok Adalat?</u>

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

20. SECURITY CHEQUE &STOP PAYMENT CASES

20.1 Prabhudayal Devandas Khatri vs State Of Gujarat R/CR.A/1650/2017, 11 May, 2018

Para 9.9 It is quite apparent from the evidence that has emerged on record that respondent, accused has succeeded in bringing on record that the cheques were already lying with the complainant-appellant. Those cheques were given to him towards security. The appellant is often lending money to the family members of the accused and others. It is also further revealed that huge amount of interest is being charged by him and that too, in advance towards the security of his sum, he not only takes the writing, but also, the blank cheques, which are taken by way of security. It is also further getting vindicated by the fact that the first cheque issued by the accused was having number 537515, which was prior in point of time, whereas, the subsequent cheque was having number 537509 which had been given on 17.03.2015 for a sum of Rs.3/, lakh. It is quite unlikely that person receives a cheque, at any later point of time, which would be cheque being chronologically prior number. **It would normally not happen, if, a person uses cheque book on a regular basis. The cheque given first is 53715 and later on, the cheque issue was 535709. No explanation comes forth for this. Again, without entering into this** it can be held that the decision of the Apex Court in 'INDUS AIRWAYS PRIVATE LIMITED VS. MAGNUM AVIATION PRIVATE LIMITED' (Supra) would have applicability mutatis mutandis to the facts of the instant case. The appellant appears to have used the cheques, which he had taken in advance from the respondent-accused.

Para 9.12 with the preponderance and probabilities, respondent-accused, in the opinion of this Court, has succeeded in dislodging the proof which had been given. When it is clearly established that these cheuqes were given much before the liability actually arose, even without closing the right of the appellant of taking appropriate actions for his outstanding dues, it can be said that any legally enforceable debt or liability, the appellant has failed to establish. In other words, it can also be said that respondent has succeeded in dislodging the proof, since, the presumption is rebuttable and he could rebut the same under the law.

20.2 Dhirubhai Rananbhai Bhanderi Vs State Of Gujarat Criminal Appeal No. 832 Of 2018 Decided On 03.07.2018

No offence, upon considering transaction, if cheque is given for security purpose

Para 4.9 Whether, the cheque was for discharge of any existing debt or liability would depend on the nature of the transaction. Section 138 of the

NI Act would attracted only if, on the date on which the cheque was issued, the liability or debt existed or the amount had become legally recoverable. **Interpreting the words 'Security', as given in the agreement between the parties**, the Apex Court held that the cheque issued to repay the installment of loan, once the loan was disbursed and the installment was due, the dishonour of cheque would give rise to criminal liability under Section 138 of the NI Act.

Para 4.10 The vital question, therefore, would arise is as to ***whether, on the date on which the cheque was issued in the instant case, the liability or the debt existed or the amount had become legally recoverable.*** Since, admittedly, both the cheques given were post dated cheques, given towards the security, as otherwise, as per the settlement agreement on sale of both the vehicles, respondent No.2 shall be remitted the amount of remaining sale consideration to the appellant.

4.12 In the chronology of the events, the circumstances which have emerged on record, it would be difficult, to hold that the post dated cheques, which were said to have been given on the date on which, they were issued, the liability or the debts existed or the amount had become legally recoverable. Since, while deciding, whether the dishonored cheques issued were for discharging the existing liability would fall under Section 138 of the NI Act or not, the nature of transaction becomes quite relevant. Opponent No.2 when returned the vehicles with a request that they were not in working condition and it was too heavy a burden for them to incur for starting the vehicles and made a request to the appellant to deduct a sum of Rs. 10/, lakh and return the balance. It is understandable that as an owner it cannot be an agreeable proposal for the appellant. However, the best course would be available to the appellant would have been to get the same adjudicated by a competent Court of law or by another mode or method.

Even the lodging of the private complaint before Visavadar Court was a step towards a legal recourse, however, the subsequent developments of executing the settlement agreement on 28.09.2016 at Visavadar Police Station, places this entire transaction into a questionable act. It is also not out of place to make a specific mention that two cheques, which were issued subsequently cannot be said for discharge of the debt or liability, which existed on the date on which they were issued. Even if, one does not consider the consistent stand of threat and coercion, as taken by opponent No.2, when one of the parties had chosen to rescind from a contract, which was not reduced into writing by way of any registered agreement, the same had given rise to various disputed questions of law and facts, both. **Therefore, in such circumstances, it is not possible to hold that dishonored cheques were issued to discharge any existing liability or debt to attract the provisions of Section 138 of the NI Act.**

It also has not been disputed that both the vehicles till the date are in the ownership of the appellant-original complainant, therefore also, with this disputed fact that no change is made in the name of the ownership, no

fault can be found with the findings recorded and the conclusions arrived at **by the trial Court that the sale, itself, of the vehicles has not been established. Therefore, there was no question of paying the remaining amount of consideration.**Either the ownership ought to have been changed or the vehicles' possession ought to have been given to opponent No.2 and towards the remaining part of consideration, there ought to have been issuance of those two cheques. With none of these vital aspects having come on record, the trial Court has committed no error, much less any illegality, warranting interference at the hands of this Court.

20.3 Sampelly Satyanarayana Rao Versus Indian Renewable Energy Development Agency Limited, 2016 (10) SCC 458 : AIR 2016 SC 4363

2 Question for consideration is whether in the facts of the present case, **the dishonour of a post-dated cheque given for repayment of loan installment which is also described as "security" in the loan agreement is covered by Section 138 of the Negotiable Instruments Act, 1881 ("the Act").**

4 The appellant approached the High Court to seek quashing of the complaints arising out of 18 cheques of the value of about Rs. 10.3 crores. Contention of the appellant in support of his case was that the cheques were given by way of security as mentioned in the agreement and that on the date the cheques were issued, no debt or liability was due. Thus, dishonour of post-dated cheques given by way of security did not fall under Section 138 of the Act. Reliance was placed on clause 3.1 (iii) of the agreement to the effect that deposit of post-dated cheques toward repayment of installments was by way of "security". **Even the first installment as per the agreement became due subsequent to the handing over of the post-dated cheque. Thus, contended the appellant, it was not towards discharge of debt or liability in presenti but for the amount payable in future.**

12 Judgment in Indus Airways (supra) is clearly distinguishable. As already noted, it was held therein that liability arising out of claim for breach of contract under Section 138, which arises on account of dishonour of cheque issued was not by itself at par with criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of cheque issued for discharge of later liability is clearly covered by the statute in question. Admittedly, on the date of the cheque there was a debt/liability in presenti in terms of the loan agreement, as against the case of Indus Airways (supra) where the purchase order had been cancelled and cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been issued for discharge of liability but as advance for the purchase order which was cancelled. **Keeping in mind this fine but real distinction, the said judgment cannot be applied to a case of present nature where the cheque was for repayment of loan installment which had fallen due though such deposit of cheques towards repayment of installments was also**

described as "security" in the loan agreement. In applying the judgment in Indus Airways (supra), one cannot lose sight of the difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque.

14 In Balaji Seafoods (supra), the High Court noted that the cheque was not handed over with the intention of discharging the subsisting liability or debt. There is, thus, no similarity in the facts of that case simply because in that case also loan was advanced. It was noticed specifically therein - as **was the admitted case of the parties - that the cheque was issued as "security" for the advance and was not intended to be in discharge of the liability, as in the present case**.

17 As is clear from the above observations of this Court, it is well settled that while dealing with a quashing petition, the Court has ordinarily to proceed on the basis of averments in the complaint. The defence of the accused cannot be considered at this stage. The court considering the prayer for quashing does not adjudicate upon a disputed question of fact.

19 Thus, the question has to be answered in favour of the respondent and against the appellant. Dishonour of cheque in the present case being for discharge of existing liability is covered by Section 138 of the Act, as rightly held by the High Court.

20.4 Hon'ble Supreme Court vide its order dated 29.07.2015 rendered in Apparel Export Promotion Council &Anr v/s M/s Collage Culture &Ors, passed in Criminal Appeal No. 1678/2012 (Coram: V/S Gopala Gowda & A.K. Goel, JJ.). Posthumously, in the case of Credential Leasing & Credits Ltd. v/s Shruti Investments &Anr, the Hon'ble High Court of Delhi observed that, even a security cheque could form the basis of a complaint under. In the case of, M/s Collage Culture &Ors v/s Apparel Export Promotion Council &Anr, the Hon'ble Single Judge Bench of the High Court of Delhi categorically observed as follows:

A post-dated cheque may be issued under two (2) circumstances: (1) It may be issued for a debt in presenti, payable in future; and, (2) It may be issued for a debt which may become payable in future upon the occurrence of a contingent event;

A post-dated cheque issued for a debt in presenti, payable in future is not in the nature of a "security cheque"; however, a post-dated cheque issued for a debt which may become payable in future upon the occurrence of a contingent event is in the nature of a "security cheque"; and, The word "due" means "outstanding at the relevant date". The debt has to be in existence as a crystallized demand analogous to a liquidated demand which may or may not come into existence; coming into existence being contingent upon the happening of an event.

A post-dated cheque for a debt due but payment postponed to future date would attract Section 138 of the N.I. Act; however, a cheque issued not against an existing debt due but rather by way of a 'security' would not attract Section 138 of the N.I. Act, for it has not been issued for a debt which has come into existence.

STOP PAYMENT CASES

20.5 Nirav Bipinbhai Patel Vs. State Of Gujarat.2016,X(Guj),0,422,

Code of Criminal Procedure, 1973 S. 482 Negotiable Instruments Act, 1881 S. 138Constitution of India Art. 226 quashing of complaint applicant lost five cheques and intimated to his banker to make stop payment in respect of lost cheques applicant also intimated to the concern police station about lost cheques subsequently respondent issued notice to the applicant in respect of dishonour of cheque, reply to the statutory notice given by the applicant wherein he denied the facts of any advance taken from complainant, denial of meeting with the complainant by the applicant. Held, cheques in question dishonestly and in collusion with other person came in possession of the complainant. Instruction of stop payment issued by the banker produced on record no legally enforceable debt against the applicant fit case to exercise jurisdiction u/s 482 of Code complaint quashed, application allowed.

20.6 Modi Cements Ltd Vs.Kuchil Kumar Nandi AIR 1998 SUPREME COURT 1057 (1998) 3 SCC 249)

In this case, Hon'ble Full bench of the Hon'ble Apex court held that merely because the drawer issues a notice to the drawee or to the Bank for stoppage of the payment, it will not preclude an action u/s 138 by the drawee or the holder of a cheque in due course. Thus defence under the strict interpretation of "insufficiency of funds" is diluted to this extent.

20.7 M.T.C. Ltd. and Anr. Vs. Medchl Chemicals and Pharma (P) Ltd. and Anr AIR 2002 SUPREME COURT 182.

In this case the Hon'ble Supreme Court held that section 138 gets attracted, even if the drawer has given instruction for "stop payment". It is further held that the court has to presume that the cheque has been issued for a debt or a liability (Sec139) and onus lies on the drawer to rebut this presumption. Complaint cannot be quashed merely on the ground that complaint has not been signed by authorized person on behalf of the company. This technical defect can be cured later with the permission of the court

20.8 Goaplast (P) Ltd Vs. Chico Ursual D'Souza and Anr. AIR 2003 SUPREME COURT 2035

In this case, a postdated cheque has been issued and drawer has issued stop payment instruction to bank before the date mentioned on the

cheque. Lower courts have taken a view that postdated cheque becomes a cheque on the date mentioned on the cheque and therefore Section 138 does not apply to this case.

Hon'ble Supreme Court set aside the judgment of lower court and held that the purpose of postdated cheques is to accommodate a drawer of cheque and he should not be allowed to abuse the accommodation given to him by the creditor. If allowed, it would render Section 138, a dead letter.

20.9 Sunil Todi & Ors V/S State Of Gujarat & Anr, 2021 LawSuit(SC) 793

Negotiable Instruments Act , 1881- 138 - Post dated cheque-If the sum payable depends on a contingent event, then it takes the color of a debt only after the contingency has occurred

[25] ... Aiyar's Judicial Dictionary defines debt as follows: "Debt is a pecuniary liability. A sum payable or recoverable by action in respect of money demand." Lindey L.J in Webb v. Strention,1888 QBD 518 defined debt as "... a sum of money which is now payable or will become payable in the future by reason of a present obligation, debitum in praesenti, solvendum in futuro." The definition was adopted by this Court in Keshoram Industries v. CWT, 1966 AIR(SC) 1370 . Justice Mookerjee writing for a Full Bench of the Calcutta High Court in Banchharam Majumdar v. Adyanath Bhattacharjee, 1909 36 ILR(Cal) 936 adopted the definition provided by the Supreme Court of California in People v. Arguello,1869 37 Calif 524:

"Standing alone, the word 'debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due. In other words, debts are of two kinds: solvendum in praesenti and solvendum in future ... A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt or does not become a debt until the contingency has happened."

Thus, the term debt also includes a sum of money promised to be paid on a future day by reason of a present obligation. A post-dated cheque issued after the debt has been incurred would be covered by the definition of 'debt'. However, if the sum payable depends on a contingent event, then it takes the color of a debt only after the contingency has occurred. Therefore, in the present case, a debt was incurred after the second respondent began supply of power for which payment was not made because of the non-acceptance of the LCs'. The issue to be determined is whether Section 138 only covers a situation where there is an outstanding debt at the time of the drawing of the cheque or includes drawing of a cheque for a debt that is incurred before the cheque is encashed.

Plea of Security Cheque- Matter of defence

[28] At this stage, it would be instructive to note the order of a two judge Bench of this Court in M/s Womb Laboratories Pvt Ltd v. Vijay Ahuja (Criminal Appeal Nos 1382- 1383 of 2019, decided on 11 September 2019). In that case, the High Court had quashed proceedings initiated against the first respondent for offences punishable under Section 138 of the NI Act merely on the basis of the assertion in the complaint that "security cheques were demanded" in response to which the accused had issued three signed blank cheques with the assurance that if the amount was not returned, the cheques could be encashed. The High Court held that the cheques were given only by way of security and therefore not towards the discharge of a debt or liability on the basis of which the complaint was quashed. Allowing the appeal by the drawee, this Court observed: "

5. In our opinion, the High Court has muddled the entire issue. The averment in the complaint does indicate that the signed cheques were handed over by the accused to the complainant. The cheques were given by way of security, is a matter of defence. Further, it was not for the discharge of any debt or any liability is also a matter of defence. The relevant facts to countenance the defence will have to be proved - that such security could not be treated as debt or other liability of the accused. That would be a triable issue. We say so because, handing over of the cheques by way of security per se would not extricate the accused from the discharge of liability arising from such cheques."

[29] The order of this Court in Womb Laboratories holds that the issue as to whether the cheques were given by way of security is a matter of defence. This line of reasoning in Womb Laboratories is on the same plane as the observations in HMT Watches, where it was held that whether a set of cheques has been given towards security or otherwise or whether there was an outstanding liability is a question of fact which has to be determined at the trial on the basis of evidence.

20.10 Sripati Singh V/S State Of Jharkhand & Anr, 2021 LawSuit(SC) 677

WHEN CHEQUE CAN BE TREATED AS SECURITY

[16] A cheque issued as security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance. 'Security' in its true sense is the state of being safe and the security given for a loan is something given as a pledge of payment. It is given, deposited or pledged to make certain the fulfilment of an obligation to which the parties to the transaction are bound. If in a transaction, a loan is advanced and the borrower agrees to repay the amount in a specified timeframe and issues a

cheque as security to secure such repayment; if the loan amount is not repaid in any other form before the due date or if there is no other understanding or agreement between the parties to defer the payment of amount, the cheque which is issued as security would mature for presentation and the drawee of the cheque would be entitled to present the same. On such presentation, if the same is dishonoured, the consequences contemplated under Section 138 and the other provisions of N.I. Act would flow.

[17] When a cheque is issued and is treated as 'security' towards repayment of an amount with a time period being stipulated for repayment, all that it ensures is that such cheque which is issued as 'security' cannot be presented prior to the loan or the instalment maturing for repayment towards which such cheque is issued as security. Further, the borrower would have the option of repaying the loan amount or such financial liability in any other form and in that manner if the amount of loan due and payable has been discharged within the agreed period, the cheque issued as security cannot thereafter be presented. Therefore, the prior discharge of the loan or there being an altered situation due to which there would be understanding between the parties is a sine qua non to not present the cheque which was issued as security. These are only the defences that would be available to the drawer of the cheque in a proceedings initiated under Section 138 of the N.I. Act. Therefore, there cannot be a hard and fast rule that a cheque which is issued as security can never be presented by the drawee of the cheque. If such is the understanding a cheque would also be reduced to an 'on demand promissory note' and in all circumstances, it would only be a civil litigation to recover the amount, which is not the intention of the statute. When a cheque is issued even though as 'security' the consequence flowing therefrom is also known to the drawer of the cheque and in the circumstance stated above if the cheque is presented and dishonoured, the holder of the cheque/drawee would have the option of initiating the civil proceedings for recovery or the criminal proceedings for punishment in the fact situation, but in any event, it is not for the drawer of the cheque to dictate terms with regard to the nature of litigation.

20.11 <u>Indus Airways Pvt.Ltd. Versus Magnum Aviation Private Limited 2014 (12) SCC 539 : 2014 (4) Scale 645</u>

13 The explanation appended to Sec. 138 explains the meaning of the expression debt or other liability for the purpose of Sec. 138. This expression means a legally enforceable debt or other liability. Sec. 138 treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The explanation leaves no manner of doubt that to attract an offence under Sec. 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the

cheque. In other words, drawal of the cheque in discharge of existing or past adjudicated liability is sine qua nonfor bringing an offence under Sec. 138. If a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise, and material or goods for which purchase order was placed is not supplied, in our considered view, the cheque cannot be held to have been drawn for an exiting debt or liability. The payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability.

15 The **Guj. High Court in Shanku Concretes dealing with Sec. 138 of the N.I. Act** held that to attract Sec. 138 of the N.I. Act, there must be subsisting liability or debt on the date when the cheque was delivered. The very fact that the payment was agreed to some future date and there was no debt or liability on the date of delivery of the cheques would take the case out of the purview of Sec. 138 of the N.I. Act.

Para 19 The above reasoning of the Delhi High Court is clearly flawed inasmuch as it failed to keep in mind the fine distinction between civil liability and criminal liability under Sec. 138 of the N.I. Act. If at the time of entering into a contract, it is one of the conditions of the contract that the purchaser has to pay the amount in advance and there is breach of such condition then purchaser may have to make good the loss that might have occasioned to the seller but that does not create a criminal liability under Sec. 138. For a criminal liability to be made out under Sec. 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. We are unable to accept the view of the Delhi High Court that the issuance of cheque towards advance payment at the time of signing such contract has to be considered as subsisting liability and dishonour of such cheque amounts to an offence under Sec. 138 of the N.I. Act. The Delhi High Court has traveled beyond the scope of Sec. 138 of the N.I. Act by holding that the purpose of enacting Section 138 of the N.I. Act would stand defeated if after placing orders and giving advance payments, the instructions for stop payments are issued and orders are cancelled. In what we have discussed above, if a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise and material or goods for which purchase order was placed is not supplied by the supplier, in our considered view, the cheque cannot be said to have been drawn for an existing debt or liability.

Para 20 In our opinion, the view taken by Andhra Pradesh High Court in Swastik Coaters [1997 CrLJ 1942, Madras High Court in Balaji Seafoods [1999 (1) CTC 6], Guj. High Court in Shanku Concretes [2000 CrLJ 1988 (Guj.) 2000 (2) GLR 1705 : 2000 (2) Cri. (1) 1091 : 3000 (3) Cri. No. 5 (HC) 602]. and Kerala High Court in Ullas [2006 CrLJ 4330 (Kerala) : 2006 (3)

Kerl 1921 : 2007 (1) Ker LJ 63 : LR 2006 Ker 695] is the correct view and accords with the scheme of Sec. 138 of the N.I. Act.

21.CLOSURE OF ACCOUNT CASES

21.1 <u>Gopalchand Hotchand vs. Vagwani Gurmukhdas Bhagwandas 2015 JX(Guj) 0 931,</u>

Complainant and accused were neighbours. Transaction of advance between the parties at the time of repayment of debt, accused gave cheque to the complainant towards discharge of his liability signature of the accused on the cheque identified by the Bank Manager bank account of the accused was closed at the time of dishonour of cheque. No substance in the contention of respondent that the S. 138 of NI Act not attracted in case where the bank account of the accused is closed object and purpose of the Section 138 of NI Act is to enhance the credibility of instrument and to induce faith in the efficiency in banking operation ratio laid down in the case of Urban Co-operative Credit Society (Supra) not applied.

SERVICE OF NOTICE RPAD produced on record by the complainant side burden upon the accused who claims that the notice has not been served by leading necessary evidence discharging the burden letter or the notice served by RPAD would lead to the presumption about the service no fetters on the powers of the Appellate Court to scrutinize the evidence acquittal set aside appeal allowed.

<u>Question (i) Can an offence under Section 138 of the NI Act be said to have been committed when the period provided in clause (c) of the proviso has not expired?</u>

<u>The answer to this Question is in the negative for the following reasons given in the above ruling.</u>

Section 2(d) of the Code defines "complaint". According to this definition, complaint means any allegation made orally or in writing to a Magistrate with a view to taking his action against a person who has committed an offence. Commission of an offence is a sine qua non for filing a complaint and for taking cognizance of such offence. Bare reading of the provision contained in clause (c) of the proviso makes it clear that no complaint can be filed for an offence under Section 138 of the NI Act unless the period of 15 days has elapsed. Any complaint filed before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint at all in the eye of the law.

It is not the question of prematurity of the complaint where it is filed before the expiry of 15 days from the date on which notice has been served on him, it is no complaint at all under law.

Merely because at the time of taking cognizance by the court, the period of 15 days has expired from the date on which notice has been served on the drawer/accused, the court is not clothed with the jurisdiction to take cognizance of an offence under Section 138 on a complaint filed before the expiry of 15 days from the date of receipt of notice by the drawer of the cheque.

Complaint filed before the expiry of 15 days from the date on which notice has been served on drawer/accused cannot be said to disclose the cause of action in terms of clause (c) of the proviso to Section 138 and upon such complaint which does not disclose the cause of action the court is not competent to take cognizance. Therefore, a court is barred in law from taking cognizance of such complaint.

We have no doubt that all the five essential features of Section 138 of the NI Act, as noted in the judgment of this Court in **Kusum Ingots & Alloys Ltd. v/s Pennar Peterson Securities Ltd., (2000) 2 SCC 745** and which we have approved, must be satisfied for a complaint to be filed under Section 138. If the period prescribed in clause (c) of the proviso to Section 138 has not expired, there is no commission of an offence nor accrual of cause of action for filing of complaint under Section 138 of the NI Act.

The view taken by the **Court in Narsingh Das Tapadia [Narsingh Das Tapadia v/s Goverdhan Das Partani, (2000) 7 SCC 183 : 2000 SCC (Cri) 1326]** and so also the judgments of various High Courts following **Narsingh Das Tapadia [Narsingh Das Tapadia v/s Goverdhan Das Partani**, that if the complaint under Section 138 is filed before the expiry of 15 days from the date on which notice has been served on the drawer/accused the same is premature and if on the date of taking cognizance a period of 15 days from the date of service of notice on the drawer/accused has expired, such complaint was legally maintainable and, hence, the same is overruled.

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

21.2 NEPC Micon Ltd. Vs. Magma Leasing Ltd. AIR 1999 SC 1952

In this case, the drawer of the cheque closed the account in the Bank before presentation of the cheque by the payee. When the cheque was presented, it was returned by the Bank with the remark “account closed”. Hon'ble Supreme Court observed that the expression “the amount of money standing to the credit of that account is insufficient to honour the cheque” is a genus of which the expression “that account being closed” is specie. It is further held that return of a cheque on account of account being closed would be similar to a situation where the cheque is returned on account of insufficiency of funds in the account of the drawer of the cheque and an offence is committed.

22. MERE DENIAL OF DEBT NOT SUFFICIENT TO ACQUIT ACCUSED IN CHEQUE BOUNCING CASE

22.1 Kishan Rao v/sShankargouda(Criminal Appeal No. 802 of 2018) 2018 SCC Online SC 651

Held that a mere denial of the existence of debt by the accused is not sufficient to acquit the accused and that under Section 139 of the Negotiable Instruments Act, there is a presumption that the accused had issued the cheque for the discharge of some debt or liability and if the accused leads on evidence for his defense rebutting this presumption, then he can be convicted.

In the instant case, the accused had issued a cheque of Rs. 2,00,000/, to the complainant which when the latter presented to the bank was returned dishonored as "insufficient funds". The complainant gave a notice to the accused u/s 138 of the Negotiable Instruments Act to which the accused replied that the cheque in possession of the complainant was stolen by him. The complainant accordingly filed the case and led oral as well as documentary evidence but the accused did not lead any evidence and the Trial Court convicted the accused on the basis of the presumption u/s 139 of the N.I. Act.

The accused went in appeal where the appellate court upheld the judgment of the Magistrate and thereafter when in revision to the High Court. The High Court reversed the conviction of the accused in the revision and acquitted the accused on the ground that the "accused has been successful in creating doubt in the mind of the court with regard to the existence of debt or liability".

The complainant preferred a Special Leave Petition in the Supreme Court challenging the order of the High Court.

The Supreme Court held that

"12. …The High Court in exercise of its revisional jurisdiction shall not interfere with the order of the Magistrate unless it is perverse or wholly unreasonable or there is non,consideration of any relevant material, the order cannot be set aside."

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

view that the judgment of the High Court is liable to be set aside on this ground alone.

Further the Supreme Court observed that,

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

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

23. SECOND OR SUCCESSIVE DEFAULT IN PAYMENT OF THE CHEQUE

23.1 MSR Leathers v/s S. Palaniappan And Anr (2013) 1 Supreme Court Cases 177

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

We have no hesitation in holding that a prosecution based on a second or successive default in payment of the cheque amount should not be impermissible simply because no prosecution based on the first default which was followed by a statutory notice and a failure to pay had not been launched. If the entire purpose underlying Section 138 of the Negotiable Instruments Act is to compel the drawers to honour their commitments made in the course of their business or other affairs, there is no reason why a person who has issued a cheque which is dishonoured and who fails to make payment despite statutory notice served upon him should be immune to prosecution simply because the holder of the cheque has not rushed to the court with a complaint based on such default or simply because the drawer has made the holder defer prosecution promising to make arrangements for funds or for any other similar reason. There is in our opinion no real or qualitative difference between a case where default is committed and prosecution immediately launched and another where the prosecution is deferred till the cheque presented again gets dishonoured for the second or successive time.

Para 32. The controversy, in our opinion, can be seen from another angle also. If the decision in SadanandanBhadrans case (supra) is correct, there is no option for the holder to defer institution of judicial proceedings even when he may like to do so for so simple and innocuous a reason as to extend certain accommodation to the drawer to arrange the payment of the amount. Apart from the fact that an interpretation which curtails the right of the parties to negotiate a possible settlement without prejudice to the right of holder to institute proceedings within the outer period of limitation stipulated by law should be avoided we see no reason why parties should, by a process of interpretation, be forced to launch complaints where they can or may like to defer such action for good and valid reasons. After all, neither the courts nor the parties stand to gain by institution of proceedings which may become unnecessary if cheque amount is paid by the drawer. The magistracy in this country is over-burdened by an avalanche of cases under Section 138 of Negotiable Instruments Act. If the first default itself must in terms of the decision in SadanandanBhadrans case (supra) result in filing of prosecution, avoidable litigation would become an inevitable bane of the

legislation that was intended only to bring solemnity to cheques without forcing parties to resort to proceedings in the courts of law.

While there is no empirical data to suggest that the problems of overburdened magistracy and judicial system at the district level is entirely because of the compulsions arising out of the decisions in SadanandanBhadrans case (supra), it is difficult to say that the law declared in that decision has not added to court congestion.

Para 33. In the result, we overrule the decision in SadanandanBhadrans case (supra) and hold that prosecution based upon second or successive dishonour of the cheque is also permissible so long as the same satisfies the requirements stipulated in the proviso to Section 138 of the Negotiable Instruments Act. The reference is answered accordingly. The appeals shall now be listed before the regular Bench for hearing and disposal in light of the observations made above.

23.2 Econ Antri Limited Appellant V/s Rom Industries Limited &Anr Respondents (2014) 11 Supreme Court Cases 769 AIR 2013 SC 3283
PERIOD OF LIMITATION FOR FILING COMPLAINT UNDER S. 142(A)

Debt, Financial and Monetary Laws Negotiable Instruments Act, 1881 Ss. 142 and 138 Dishonour of cheque Period of limitation for filing complaint under S. 142(a) Reckoning of Held, period of limitation is to be calculated by excluding date on which cause of action arose.

Para 24while considering the question of computation of three months limitation period and further 30 days within which the challenge to the award is to be filed, as provided in Section 34(3) and proviso thereto of the Arbitration Act, this Court held that having regard to Section 12(1) of the Limitation Act, 1963 and Section 9 of the General Clauses Act, 1897, day from which such period is to be reckoned is to be excluded for calculating limitation. It was pointed out by counsel for the respondents that Section 43 of the Arbitration Act makes the Limitation Act, 1963 applicable to the Arbitration Act whereas it is held to be not applicable to the N.I. Act and, therefore, this judgment would not be applicable to the present case. We have noted that in this case reliance is not merely placed on Section 12(1) of the Limitation Act. Reliance is also placed on Section 9 of the General Clauses Act. However, since, in the instant case we have reached a conclusion on the basis of Section 9 of the General Clauses Act, 1897 and on the basis of a long line of English decisions that where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded, it is not necessary to discuss whether State of Himachal Pradesh is applicable to this case or not because Section 12(1) of the Limitation Act is relied upon therein.

Para 25 we are of the opinion that Saketh lays down the correct proposition of law. We hold that for the purpose of calculating the period of one month, which is prescribed under Section 142(b) of the N.I. Act, the

period has to be reckoned by excluding the date on which the cause of action arose. We hold that SIL Import USA does not lay down the correct law. Needless to say that any decision of this Court which takes a view contrary to the view taken in Saketh by this Court, which is confirmed by us, do not lay down the correct law on the question involved in this reference. The reference is answered accordingly.

24. TWO CONSECUTIVE NOTICES

24.1 N. Para MeswaranUnni V/s G. Kannan and Another (2017) 5 Supreme Court Cases 737 : 2017 SCC OnLine SC 293 Decided on 1 March, 2017

If within limitation, Two consecutive notices sent by payee by registered post to correct address of drawer of cheque: first one sent within limitation period of 15 days but same was returned with postal endorsement "intimation served, addressee absent", whereas second one sent after expiry of stipulated period of limitation. First notice would be deemed to have been duly effected by virtue of S.27 of General Clauses Act and S. 114 of Evidence Act Though drawer entitled to rebut that presumption, but in absence of rebuttal, requirement of S. 138 proviso (b) would stand complied with Subsequent notice should be treated only as remainder and would not affect validity of first notice. Provisions should be so interpreted in consonance with object which legislation sought to achieve that right of honest lender is not defeated.

24.2 VaniAgro Enterprises v/s State of Gujarat Criminal appeal no 5687,590/2010 order date 5/9/2019

Whether in a case where more than one cheques are dishonoured and one common notice under Section 138 of the Negotiable Instruments Act, 1881 is issued, can it be said that it will constitute only one offence and/or there would be only one cause of action?

(7) IN the present case, four different cheques came to be dishonoured, however, one common notice 20/04/1999 was issued for dishonour of cheques and thereafter under different criminal cases, complaints have been filed by the original complaint under Section 138 of the Negotiable Instruments Act, 1881. In view of the fact that only one common notice was issued for dishonour of different cheques it is sought to be contented on behalf of the respective common petitioners-original accused that it can be said that there is only one cause of action and, therefore, all the complaints are required to be consolidated.

(10) NOW so far as the decision of the Bombay High Court in the case of RAJENDRA B. CHOUDHARI (Supra) relied upon by the learned advocate appearing on behalf of the respective petitioners-original accused is concerned, apart from the fact that in view of binding decision of the Division Bench of this Court referred to hereinabove, the said decision would not be of any assistance to the respective petitioners-original accused, even otherwise, considering the controversy/dispute raised in the said decision, the said decision would not be of any assistance to the petitioners-original accused. Before the Bombay High Court, in the said decision, the accused came to be convicted for the offences under Section 138 of the Negotiable Instruments Act, 1881 for four criminal cases tried separately

and the learned Magistrate imposed separate sentence of imprisonment and fine in each of the cases and being aggrieved and dissatisfied with the same, the accused approached the Bombay High Court for a direction that all the sentences shall run concurrently and submitted that considering Section 219 of the Code of Criminal Procedure, the learned trial Court committed an error in not combining and/or in holding single trial and, therefore, on the facts the said decision would not be of any assistance to the petitioners. Considering the facts of the cases on hand and the decision of the Division Bench of this Court in the case of **KERSHI PIROZSHA BHAGVAGAR (Supra),** more particularly paragraph 22, the prayer of the respective petitioners for consolidation of all the four cases and for joint one trial and to record only one common evidence cannot be accepted on the ground that there will be only one cause of action. Dishonour of cheques constitutes different offences and different cause of action. Merely because common notice was issued, it cannot be said that there is only one cause of action. Each dishonour of cheque has different cause of action for different individual offences. Under the circumstances, it cannot be said that both the Courts below have committed any error in rejecting the prayer of the respective petitioners-original accused to consolidate all the criminal cases and to try it by one trial and recording common evidence.

25. OFFENCE BY COMPANY/PARTNERSHIP FIRM/HUF

25.1 Swarn Mukeshbhai Gupta V/s Parth Mukeshbhai Patel,2017 JX(Guj) 264

Joining Of Company Is A Must :,Negotiable Instruments Act, 1881 , S. 138, 141 , quashing of complaint , dishonour of cheque , complaint u/s 138 of NI Act , vicarious liability , non joining of company as an accused , complainant filed an application u/s 319 of Code for joining a company as an accused in the complaint , case of Oanali Ismailji Sadikot relied on, cheque was issued on behalf of company where applicant arraigned as an accused in her capacity as the authorized and responsible officer of the company , complainant not maintainable in absence of joining of company as an accused , object of insertion of S. 319 of the Code was to provide for a more comprehensive provision, with considerable improvement in the old S. 351, for proceeding against other persons appearing to be guilty, although he is not an accused, when the complaint has the initial defect in its sustainability, the defect cannot be cured by amending the proceedings, criminal proceedings in both cases quashed , applications allowed.

25.2 Kirshna Texport & Capital Markets Limited V/sIla A. Agrawal &Ors (2015) 8 Supreme Court Cases 28

Offence By Company Issuance Of Individual Notices Under S. 138 To Them, Held, Not Required As

Ss. 138, 141 and 142 – Dishonour of cheque – Offence by companyIssuance of individual notices under S. 138 to them, held, not required as for dishonour of cheque drawn by Company, appellant issued notice under S. 138 accused to Company, but no individual notices were given to its Directors. Held, S. 138 does not admit of any necessity or scope for reading into it, requirement that Directors of company in question must also be issued individual notices under S. 138.Such Directors who are in charge of and responsible for affairs of company, would be aware of receipt of notice by company under S. 138.

25.3 Gulf Asphalt Pvt.Ltd V/S Dipesh Sinh Kishanchandra Rao. 2015 CrLJ 3954

If a Complainant has been converted from Sole proprietor to Company whether prosecution can be continued ?

Negotiable Instruments Act, 1881 , S. 138 , Constitution of India , Art. 227 , dishonour of cheque, substitution of complainant – proprietary concern through its proprietor filed complaint , application before Trial Court to substitute itself as a complainant in the place of the original proprietary concern , Trial Court permitted the private limited company to be

substituted as the original complainant for the purpose of proceeding further with the complaint, whether permitting a private limited company to be substituted as the complainant in place of proprietary concern amounts to an amendment in complaint , held, there is no provision in the Criminal Procedure Code, which empowers a Court to permit an amendment of the complaint at a later stage , however, the substitution of the complainant at a later stage in certain contingencies would not amount to seeking an amendment in the complaint , when the complaint was lodged in the year 2010 by the proprietary concern, the same was maintainable as the proprietary concern was the "payee" of the cheque , at a later stage for the purpose of business convenience, if the entire business of the proprietary concern with all its rights and liabilities were taken over by a private limited company, then such private limited company can seek substitution as a complainant in the complaint so that the private limited company can pursue the complaint further in accordance with law , present case is not one in which the amendment was prayed for in the pleadings of the complaint , if it had been so, then Revisional Court would have been justified in saying that there cannot be any amendment in the pleadings of the complaint after the complaint isfiled and cognizance is taken by Court , the Endeavour must be to do justice and not to take advantage of technicalities , Trial Court passed a correct order allowing the application and permitting the applicant to be substituted as a complainant in place of the original proprietary concern, impugned order quashed and set aside , application allowed.

Whether complaint only against the partner without joining the partnership firm is maintainable ?

25.4 Ankit Pradipbhai Kapadia V/s State Of Gujarat2016 (1) Crimes(HC) 812

Negotiable Instruments Act, 1881 , S. 138, 141 , Code of Criminal Procedure, 1973 , S. 482 , dishonour of cheque , quashing of complaint , whether the complaint is maintainable in the absence of the partnership firm being a legal entity , held, relying on the case of U.P. Pollution Control Board v/s M/s. Modi Distillery, for maintaining the prosecution u/S. 141 of the Act, arraigning of a company as accused is imperative , 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 , further relying on case of Raghubhai Lakshminarayan v/s M/s Fine Tube, accused No. 1 was not Company within meaning of S. 141 of Negotiable Instruments Act, question of anemployee being preceded against in terms thereof would not arise , respondent was aware of difference between a 'partnership firm' and a 'business concern' , thus in the absence of the partnership firm being a juristic person or a legal entity, applicant, in his

capacity as one of the partners, cannot be proceeded for the offence alleged, by virtue of S. 141 of the Negotiable Instruments Act , impugned proceedings quashed , application allowed.

25.5 Shah Rajendrabhai Jayantilal VS D. Pranjivandas & Sons Prop. Dhirajlal Pranjivandas Popat, 31 Jan 2017 2017 2 GLH 328; 2017 0 Supreme (Guj) 301 Gujarat High Court

Negotiable Instruments Act, 1881 – Section 138, 141 – Present application is filed for quashing of Criminal case pending before Chief Judicial Magistrate and also for stay of further proceedings in the case – The case of complainant is that the cheque drawn by accused in favour of complainant came to be dishonoured and present case is filed – Accused submitted that a H.U.F. is a legal entity and without impleading it as a legal entity or a juridical person as one of the accused in the complaint, the member/'Karta' of the H.U.F. alone cannot be prosecuted – Complainant contends a H.U.F. is not a firm nor an association of persons – Observed that **H.U.F. is not like a corporation or a limited concern and it cannot be said that it has a legal entity quite distinct and separate from its members –** Section 141, Explanation (1) indicates that the expression "Company" shall mean a body corporate and includes a firm or other association of individuals – "other association of individuals" cannot be understood to refer even to informal understandings between individuals – **H.U.F. will not constitute an "association of individuals" and karta or any other member can be roped/prosecuted under Section 141, NI Act.**

25.6 Ravindrabhai Manibhai Patel V/s Priyasha Money Lending Co.Thru,uday Shivprasad Dave, 2 016 JX(Guj) 383

Director no proof form 32 shows no iota of evidence as accused being director, accused only shareholder complaint quashed

Code of Criminal Procedure, 1973 , S. 482 , Negotiable Instruments Act, 1881 , S. 138 , quashing of complaint , dishonour of cheque , petitioner/accused is a one of the Directors of the company – vicarious liability , form No. 32 issued by the Registrar of the companies indicated that applicant was not a Director of the company at any point of time , no evidence as to say that the applicant was a Director of the accused company , applicant was merely a share holder of the accused company , complaint qua applicant quashed , application allowed.

25.7 Murjibhai Vishram Varsani V/s Adam Alimamad Kumbhar,2 017 (1) BankCas 716

PARTNERSHIP FIRM – FIRM MUST BE PARTY held, in the absence of the legal entity not being arraigned as an accused, a partner or the authorised

signatory cannot be prosecuted for the offence u/s. 138 of the Negotiable Instruments Act , for maintaining the prosecution against the director u/s. 141 of theNegotiable Instruments Act, arraigning of a company as an accused is imperative , it is applicable in case of a partnership firm also – partners are liable and sued in their vicarious liability , complaint itself is not maintainable as the partnership firm as a legal entity has not been arraigned as an accused , criminal proceedings quashed – application allowed.

25.8 <u>Joginder Singh Juneja V/s State Of Gujarat, 2 017 JX(Guj) 268</u>

Nature of averments for inflicting liability of directors u/s 141

Code of Criminal Procedure, 1973 , S. 482 , Negotiable Instruments Act, 1881 , S. 138, 141 , complaint of dishonour of cheque , cheque in question was signed by the accused No. 4 and 12 , accused No. 4 in the complaint is the Managing Director and CEO of the Company and accused No. 12 is authorized signatory , applicant is one of the independent directors of the accused No. 1 company – whether responsible for the dishonour of the cheque issued by the original accused No. 4 and 12 on behalf of the company , vicarious liability of directors , held, for making Directors liable for the offences committed by the company u/s. 141 of the Act, there must be specific averments against Directors, showing as to how and in what manner the Directors were responsible for the conduct of the business of the company – a person may be a director and belongs to the group of persons making the policy followed by the company, but yet may not be in charge of the business of the company; that a person may be a Manager who is in charge of the business but may not be in overall charge of the business; and that a person may be an officer who may be in charge of only some part of the business , so far as the companies are concerned if any offence is committed by it then every person who is a Director or employee of the company is not liable , only such person would be held liable if at the time when offence is committed he was in charge and was responsible to the company for the conduct of the business of the company as well as the company , merely being a Director of the company will not make him liable , criminal proceedings so far as the two independent directors are concerned quashed – application allowed.

Code of Criminal Procedure, 1973 , S. 482 , Negotiable Instruments Act, 1881 , S. 138, 141 , complaint of dishonour of cheque – quashing of criminal proceedings , applicants were serving as Directors of accused no. 1 company , vicarious liability – audit committee report , responsibility of Directors , specific averments in the complaint that applicants were responsible for the conduct of the business of the company , role and functions of the members of the audit committee noted , remuneration was

also being paid to the applicants – every person who at the time of offence was committed is in charge of and responsible to the company shall be deemed to be guilty of the offence u/s 138 of NI Act , if basic averments in the complaint supported by evidence then the burden shift upon the accused to establish that he had nothing to do with the day to day affairs of the company – liberty given to the applicants to raise their defence during trial as to they were not responsible for the day today affairs of the company – no interference , applications dismissed.

25.9 Satish Menon Vs. State Of Gujarat And Other. 2017 Gri L. J. 2076. High Court Of Gujarat.

Negotiable Instruments Act (26 of 1881), Ss. 138, 141 Criminal P. C. (2 of 1974), Ss. 482, 227, Dishonour of Cheque ,Offence by Company , Quashing of proceedings, Issuance of cheque towards discharging liability by company ,Accused one of Directors ,Plea that he had already resigned from Company Tendering of resignation, question of fact To be decided by trial court by leading evidence , Accused cannot be discharged at preliminary stage.

25.10 Nikhil P.Gandhi Versus State Of Gujarat, 2016 (4) GLR 2838 : 2016 (2) GLH 762

41 Section 13 of the N.I. Act defines a negotiable instrument as under:

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

Explanation to Section 13 also would make it clear that it must be an instrument containing all the particulars referred to earlier.

42 If only it is a negotiable instrument within the meaning of Section 13 of N.I. Act, Section 87 would have any application. If it was only a signed blank cheque leaf, it cannot be termed as a 'negotiable instrument', and if so the question of effecting material alteration of that paper (signed cheque leaf) does not arise.

43 If it is only a signed blank cheque leaf that was handed over it cannot be said to be a paper stamped in accordance with law relating to the negotiable instruments. As such the contention that, whether it is wholly blank or filled up partly making it an incomplete document and that handing over of the same would give authority to the holder thereof to make or complete the instrument as the case may be for any amount specified therein and not exceeding the amount covered by the stamp, cannot be sustained. So far as a cheque is concerned, if it is a signed blank cheque leaf it may be filled up showing any amount without any restriction what so ever and if that be so, how Section 20 of the N.I. Act can be applied to a case of cheque. But if it is

a paper stamped, it can be filled up showing the amount not exceeding the amount covered by the stamp. That is the rationale behind why Section 20 is specifically made applicable to the stamped documents/instruments.

50 In view of the aforesaid discussion, I am of the view that Section 20 of the N.I. Act would not save the situation as such for the accused applicants. The collective reading of the various provisions of the N.I. Act shows that even under the scheme of the N.I. Act, it is possible for the drawer of a cheque to give a blank cheque signed by him to the payee and consent either impliedly or expressly to the said cheque being filled up at a subsequent point in time and present the same for payment by the drawee.

60 Thus, a cheque may be issued under two circumstances. First, it may be issued for a debt in present, but payable in future. Secondly, it may be issued for a debt which may become payable in future upon the occurrence of a contingent event. The difference in the two kinds of cheques would be that the cheque issued under the first circumstance would be for a debt due, only payment being postponed. The latter cheque would be by way of a security.

61 The word 'due' means 'outstanding at the relevant date'. The debt has to be in existence as a crystallized demand akin to a liquidated damages and not a demand which may or may not come into existence; coming into existence being contingent upon the happening of an event.

91 In view of the above, there is no cogent material on record to fasten any vicarious liability so far as the other accused are concerned who are Non-Executive Directors including the Office Bearers concerned with the Accounts Department of the company.

92 The plain reading of Section 138 of the N.I. Act would clearly go to show that by reason thereof, a legal fiction had been created. A legal fiction, as is well known, although is required to be given full effect, yet has its own limitations. It cannot be taken recourse to for any purpose other than the one mentioned in the statute itself. Section 138 of the Act moreover provides for a penal provision. A penal provision created by reason of a legal fiction must receive strict construction. Such a penal provision, enacted in terms of the legal fiction drawn, would be attracted when a cheque is returned by the bank unpaid. Before a proceeding thereunder is initiated, all the legal requirements therefore must be complied with. The Court must be satisfied that all the ingredients of commission of an offence under the said provision have been complied with. [See: Raj Kumar Khurana v. State of (NCT of Delhi) and another, (2009) 6 SCC 72]

93 Before concluding, I may only say that, whenever a blank cheque or postdated cheque is issued, a trust is reposed that the cheque will be filled

in or used according to the understanding or agreement between the parties. If there is a prima facie reason to believe that the said trust is not honoured, then the continuation of prosecution under Section 138 of the N.I. Act would be the abuse of the process of law. It is in the interest of justice that the parties in such cases are left to the civil remedy.

94 In my view, having regard to the peculiar facts and circumstances of the case, as narrated above, all the petitions succeed and are allowed. The order of the issuance of the process under Section 138 of the N.I. Act is hereby quashed. Rule is made absolute accordingly.

25.11 Ritesh Garodia Vs. State Of Gujarat &Ors. (2016 (4) Glr 2994)

Negotiable Instruments Act, 1881—Sections 138 and 141 Criminal Procedure Code, 1973—Section 482—Dishonour of cheque, Issuance of summons—Offence by company—Every person at the time of commission of offence was In charge and was responsible to company for conduct of business shall be deemed to be guilty of offence and liable to be proceeded—Issuance of summons is a serious step against person concerned and it requires proper application of mind before issuance of it—Applicant is merely a brother of Director of accused–company—He is not a signatory to cheques in question, Complaint qua present applicant quashed.

25.12 Vijay Himatlal Modi Vs. State Of Gujarat (2019) Acd 593Criminal Miscellaneous Application No. 8999 of 2014Decided on : 24,01,2019

Para 9. The precedent relied upon by the learned advocate Shri. Dewal, learned advocate for respondent No. 2, if looked from closed angle, it is not deciding the issue, which Shri. Dewal proposes to argue. In fact it permits, more particularly, in paragraph 11 to furnish some concrete or uncontrovertable material, which could be accepted to conclude that the averments made as regards their involvement as the Director in day-to-day business or they being responsible for conduct of the business of the Company without which they cannot be prosecuted, and therefore, based on an order passed by Securities and Exchange Board of India the statutory authority under the statute in respect of the very same Company holding in respect of the very same Director that he is not responsible for the day-to-day affairs of the Company, the applicant could not have been prosecuted under Section 138 of the Act for an offence committed by the Company.

25.13 PremjibhaiLakhabhai Chauhan Vs. State Of Gujarat (2019) 3 DCR 206Gujarat High Court

OFFENCE BY SOCIETY

Para 7. Explanation to the section clearly defines "company" means anybody corporate and includes a firm or other association of individuals; and further also explains that the “director", in relation to a firm, means a

partner in the firm. The aforesaid explanation clearly indicates that the definition of company is not exhaustively defines by the statue but definition of inclusive which includes any association of individuals which result into the artificial person. Indisputably Shri Jalpari Co-operative Housing Society Limited is flowing from Gujarat Co-operative Society Act, 1961 which is essentially the artificial person and came to be found and constituted by association of persons. In view of the aforesaid legal and factual position, learned trial Court has rightly dismissed the complaint. In view of the settled law laid down by the Hon'ble Apex Court and consequently therefore no case is made out for granting any leave to appeal against the aforesaid judgment and order of acquittal.

25.14 Kiritbhai Patel Vs. State Of Gujarat. 2016,JX(Guj),0,61.

Code of Criminal Procedure, 1973, S. 482, Negotiable Instruments Act, 1881 S. 138, 141, dishonour of cheque, complaint against partners of the partnership firm-quashing of complaint. it is clear that the complainant himself has stated in the complaint that both the accused are partners of partnership firm, however, partnership firm is not joined as an accused by the complainant in the impugned complaint held, when respondent no. 2 original complainant has not joined the partnership firm as an accused in the impugned complaint, this Court can exercise the powers u/s. 482 of the Cr.P.C. for quashing and setting aside the impugned complaint , complaint quashed and set aside qua the present applicant only , application allowed.

25.15 Ratishbhai D. Ramani Vs. State Of Gujarat And Anr.
2015 (1) GLR 848

Held, complaint not maintainable without joining partnership firm as accused. Complaint quashed under Sec. 482 of Cr.P.C. Complaint for dishonour of cheque filled by an Unregistered Partnership Firm is maintainable.

25.16 RuturajAyurvedic GruhUdhyog (Through Res.No.2) Vs. Navnitlal And Company Through Devang Manojbhai Gandhi.
2017 (2) GLH 312

Negotiable Instruments Act, 1881 S. 138 Indian Partnership Act, 1932 S. 69 (2) Dishonour of cheque, complaint by an unregistered partnership firm ,maintainability , A careful reading of Section 69 (2) of the Partnership Act shows that an unregistered partnership firm is barred from filing a civil suit and there is no bar as such to file a complaint for enforcing criminal liability on the part of the person who has issued the cheque Even, when the cheque is issued by a partner of an unregistered firm for legally recoverable debt or otherwise or if such a cheque is dishonoured when it was presented for encashment, it attracts criminal liability Complaint for dishonour of cheque filled by an unregistered partnership firm is maintainable.

25.17 Nijanand Pipes, Fittings Pvt. Ltd. VS State Of Gujarat.[2019] 2 GLR 1523 / [2019] 0 Supreme(Guj) 212

Held, Cheque in question is issued under the signature of the accused no.7 on behalf of the Company – Complaint reveals except accused no.1 & 7, it is not alleged against rest of the accused that applicants-accused were responsible for the day to day affairs of the business of the accused no.1 company – Essential requirement of Section 141 of Act and has to be made in complaint – Criminal proceedings against applicants except accused No. 1 & 7 quashed – Petition allowed Complaint reveals except accused no.1 & 7, it is not alleged against rest of the accused that applicants-accused were responsible for the day to day affairs of the business of the accused no.1 company – Essential requirement of Section 141 of Act and has to be made in complaint – Criminal proceedings against applicants except accused No. 1 & 7 quashed.

25.18 Urmilaben Pareshbhai Kothiya V/s Hdfc Bank Ltd, 2 018 JX(Guj) 272

Retirement from firm disputed question of fact complaint cannot be quashed in absence of evidence being lead by parties :,complaint filed u/s 138 and 141 of NI Act – liability of the partner of partnership firm , applicant accused was one of the partners of the partnership firm , loan borrowed on behalf of the firm , contention of applicant that he was not the partner at the time of issuance of cheque and he had retired as partner much before the commission of offence , no publication of retirement from the firm , held, whether on the date of the commission of the alleged offence, applicant was a partner of the firm or not, being a disputed question of fact, the same cannot be gone into by this Court in the present proceedings in quashing petition , that has to be established in trial , case of Rallis India Ltd (Supra) relied on , once the vicarious liability of a partner of the firm is specifically made out by appropriate averments in the complaint, then High Court should not discharge the accused of their vicarious liability for the offences u/s. 138 and 141 of N.I. Act at the threshold on the ground that they had retired from the partnership firm , not a fit case to exercise jurisdiction u/s 482 of the Code , application dismissed.

25.19 Chimanbhai Bachubha Kabariya VS HDFC Bank Ltd.[2018] 4 GLR 2807 / [2018] 0 Supreme(Guj) 1043

3. A bare perusal of sub-section (3) of Section 32 makes it clear that notwithstanding **the retirement of a partner from a firm, he/she and the partners continue to be liable as partners to third parties for any act done by them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement**. In the

present case, admittedly, there is no publication of the retirement in the Official Gazette and no public notice in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business has been given in the manner as prescribed in Section 72 of The Indian Partnership Act, 1932 (reproduced above) relating to retirement of the petitioners as partners of M/s Radheshyam Cottex and as such the petitioners cannot be said to have legally retired from the partnership firm M/s Radheshyam Cottex as per the provisions of The Indian Partnership Act, 1932. In other words, since admittedly, there is no publication of retirement in the Official Gazette and further since no public notice in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business has been published, as contemplated under Suction 32 read with Section 72 of The Indian Partnership Act, 1932 either by the applicant or by any partner of the reconstituted firm, the petitioners still continues to be partners of M/s Radheshyam Cottex and are liable to be prosecuted under Section 138 read with Section 141 of The Negotiable Instruments Act, 1881. As such, the petitioners' submission that they have retired from M/s Radheshyam Cottex is thoroughly mis-conceived and not tenable at law. It would be pertinent to mention here that it is an undisputed position that at the time of availing loan from the respondent No.1 Bank and issuance of the subject cheques (3 Nos.) to it, the petitioners were partners of M/s Radheshyam Cottex and in fact the petitioners had also signed the subject loan agreement as partners of M/s Radheshyam Cottex as well as in their individual capacity as a borrower/guarantor. In view of the above, the petitioners are liable to discharge the liabilities of M/s Radheshyam Cottex to the respondent No.1 Bank and as such the impugned cheques (3 Nos.) issued in discharge of the said liability would be covered under the definition of "legally enforceable debt" and the applicant would be liable for dishonour of the said cheques in question.

8. Thus, the case of the complainant is that the issue whether on the date of the commission of the alleged offence, the applicant was a partner of the firm or not, being a disputed question of fact, the same cannot be gone into by this Court in the present proceedings. The principal argument of the learned counsel appearing for the complainant is that assuming for the moment that the applicant-accused had retired as a partner from the partnership firm, whether such retirement could be said to be in accordance with law, and if such retirement could not be said to be in accordance with law, then even if the applicant has ceased to be the partner, the applicant would not get absolved from her liability under section 138 read with section 141 of the Act. In such circumstances, referred to above, the learned counsel prays that there being no merit in this application, the same be rejected.

25.20 ChimanbhaiBachubhaKabariya VS HDFC Bank Ltd.[2018] 4 GLR 2807 / [2018] 0 Supreme(Guj) 1043

Basic averment that vis-à-vis a Director who has not signed the cheque, that such a Director is in charge of and responsible for the day to day conduct of the management has to be made. As per facts of the case offence of dishonor of cheque was committed by partnership firm but applicant contending that he has been retired before issuance of this cheque – court while declining to quash proceedings held that retirement of applicant is a question of fact which has to be established.

25.21 Gunmala sales Pvt. Ltd. Vs. Navkar Promoters Pvt. Ltd., (2015) 1 SCC 103

Para 30. When a petition is filed for quashing the process, in a given case, on an overall reading of the complaint, the High Court may find that the basic averment is sufficient, that it makes out a case against the Director, that there is nothing to suggest that the substratum of the allegation against the Director is destroyed rendering the basic averment insufficient and that since offence is made out against him, his further role can be brought out in the trial. In another case, the High Court may quash the complaint despite the basic averment. It may come across some unimpeachable evidence or acceptable circumstances which may in its opinion lead to a conclusion that the Director could never have been in charge of and responsible for the conduct of the business of the company at the relevant time and therefore making him stand the trial would be an abuse of process of court as no offence is made out against him.

Para 31. When in view of the basic averment process is issued the complaint must proceed against the Directors. But, if any Director wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he is really not concerned with the issuance of the cheque, he must in order to persuade the High Court to quash the process either furnish some sterling incontrovertible material or acceptable circumstances to substantiate his contention. He must make out a case that making him stand the trial would be an abuse of process of court. He cannot get the complaint quashed merely on the ground that apart from the basic averment no particulars are given in the complaint about his role, because ordinarily the basic averment would be sufficient to send him to trial and it could be argued that his further role could be brought out in the trial. Quashing of a complaint is a serious matter. Complaint cannot be quashed for the asking. For quashing of a complaint it must be shown that no offence is made out at all against the Director." (Emphasis supplied)

The Supreme Court observed that since a specific averment was made in the complaint that the Directors were in charge of the day to day management, the complaint could not have been quashed.

25.22 SMS Pharmaceuticals vs. Neeta Bhalla, 2005 (53) ACC 503 (SC)

Sec. 138, 141It is necessary to specifically aver in complaint u/s. 141 that at the time of offence, accused was in-charge of and responsible for the conduct of business of the company. Mere being a director of the companycannot be deemed to be in-charge of and responsible for the company for conduct of it's business. Even a non, Director can be liable u/s. 141.

Section 141 of the Act can be summarized thus:

(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix "Managing" to the word "Director" makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii) In the case of a Director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141.

(iii) In the case of a Director, Secretary or Manager [as defined in section 2(24) of the Companies Act] or a person referred to in clause (e) and (f) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 14(1) of the Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.

(iv) Other officers of a company cannot be made liable under Sub-section (1) of Section 141. Other Officers of a company can be made liable only under Sub-section (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence**.**

25.23 Pre-conditions for fastening liability on Director for offence u/s 138 :

1. **Tamil Nadu News Print & Papers Ltd. Vs. D. Karunakar, (2016) 6 SCC 78.**
2. **Sabitha Ramamurthy vs. RBSC, AIR 2006 SC 3086 , 2007 Cr.L.J. 2442 (SC)**

3. **Paresh P. Rajda vs. State of Maharashtra, 2008 (61) ACC 996 (SC).8**

It is necessary for complainant to aver in the complaint and also in the sworn statements u/s. 200 Cr.P.C. that the director was in-charge of the affairs of the company and responsible for the day to day business of the company, otherwise director cannot be held liable. It is so because in case such an averment of the complainant is ultimately found false or malafide, court may direct registration of case against the complainant for malicious prosecution.

25.24 (i) Mainuddin Abdul Sattar Shaikh Vs. Vijay D. Salvi, (2015) 9 SCC 622.
(ii) National Small Industries Corporation Limited Vs. Harmeet Singh Paintal, (2010) 3 SCC 330 (para 39).
To hold Director liable, not necessary to make specific averment in the complaint that he was in-charge of the affairs of the company :
If the accused was Managing Director or a Joint Managing Director of the company then it is not necessary to make specific averment in the complaint to that effect as by virtue of his position he is liable to be proceeded for the offence u/s 138 of the N I Act.

Section 141 of NI Act outlines conditions in cases of offences by companies. The following points are important: Every person at the time the offence was committed, was in charge of, and was responsible for the conduct of the business of the company is liable to be prosecuted. In other words, directors, secretary and officers of the company may be liable.

The company is also liable to be prosecuted. If a person proves that the offence was committed without his knowledge or he exercised all due diligence to prevent the commission of such offence, he will escape prosecution. A person nominated as a Director of a company by virtue of his holding any office or employment in the Central or State Government or a financial corporation owned or controlled by the Central Government or the State Government enjoys exemption from prosecution.

The following paragraph from the judgment of Supreme Court in the matter of **N. Rangachari vs. Bharat Sanchar Nigam Ltd. (MANU/SC/7316/2007 dated 19.04.2007)** explains the law relating to persons who are deemed to be liable under section 138. Section 141 of the Act creates liability on every person who was in charge of and responsible for the affairs of the company at the time of issue of the cheque. It is the responsibility of the accused (and not of the complainant) to prove that:
(a) The offence of cheque bouncing was committed by the company without his / her knowledge, or
(b) He / she exercised due diligence to prevent the bouncing of the cheque.

Section 141 of the Act creates a vicarious liability. In criminal law, the general rule is against vicarious liability. Hence, section 141 of the Act is exceptional. It makes a person criminally liable for someone else's actions. Often directors of an accused company take defense that the cheque related to a division/project of the company where they had no involvement or the cheque was issued by a Director without due authorization from the Board of Directors of the company. The Supreme Court has ruled (N. Rangachary, supra) that a holder of cheque cannot be expected to be aware of such matters which relate to "arrangements within the company in regard to its management, daily routine, etc."

As per the judgment of the Supreme Court, Directors of a company are prima facie in the position of being "in charge of affairs".

Hence, if you are holder of a bounced cheque issued by a company, it will be reasonable to name all directors (excluding independent directors) of the company as accused (in addition to the company) in the complaint under section 138. If you do not know the names of the directors of the company, please ask a Company Secretary to conduct a search on the website of Ministry of Company Affairs.

It is important to clarify that as per the decision of the Honourable Supreme Court in **Kirshna Texport and Capital Markets Ltd. vs. Ila A. Agrawal and Ors. (MANU/SC/0562/2015 decided on 6 th May 2015)** it is no longer required to issue notices to directors of a company. The notice needs to be issued only to the company whose cheque has bounced. Subsequently, after determining the names of the persons who are in charge of, and are responsible for the conduct of the business of the company, all such persons can be included as accused in the complaint. In other words, a director will be made an accused even though he/she has not received any notice.

25.25 Standard Chartered Bank Vs. State of Maharashtra and Others Etc. AIR 2016 SUPREME COURT 175

(a) Negotiable Instruments Act, 1881 Section 138 and 141 In case of a Company, a constructive liability is created on the persons responsible for the conduct of the business of the company However, vicarious liability of other persons will not only arise if the Company is not prosecuted. (Para 12)

(b) Negotiable Instruments Act, 1881 Section 138 and 141 r/w sections 203 and 204, Code of Criminal Procedure, 1973 Complaint must contain material to enable the Magistrate to make up mind for issuing process. Only direct involvement of an officer of a Company would make such officer liable under section 141(2) Liabilities arises on account of conduct, act or omission by an officer and not merely on account of his holding office or position in a company. The accused being in charge of, and responsible for the conduct of business of the company must be specifically averred in the complaint u/s 141The specific averment may be direct or indirect. (Para 15, 17, 18)

(c) Code of Criminal procedure, 1973 Section 482 r/w section 141, Negotiable Instruments Act, 1881 Complaint prosecuting the Company – Specifically attributing liability of Chairman, Managing Director and while time Directors asserting that they were responsible for day to day business of the Company – Complaint making out case against respondent Nos. 2 and 3, wholetime Director and Executive Director– Meeting the test laid down in **(2015) 1 SCC 103. (Para 33, 34)**

25.26 <u>Pooja Ravinder Devidasani Vs. State of Maharashtra 2015 CRI. L. J. 1165</u>

Vicarious liability Appellant was neither Director of accused company Nor in charge of or involved in day to day affairs of company at time of commission of alleged offence, No evidence on record to show that there is any act committed by appellantNo reasonable inference can be drawn that appellant could be vicariously held liable for offence she was charged ,Appellant resigned from Board of Directors much before issuance of cheques ,Continuation of proceedings against appellant under S. 138 and S. 141 being abuse of process of law, liable to be quashed.

25.27 <u>National Small Industries Corporation Limited Vs. Harmeet Singh Paintal and another (2010) 3 SCC 330 Section – 141 – Offences by Company – Vicarious liability.</u>

"Para 39. From the above discussion, the following principles emerge:

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make accused therein vicariously liable for offence committed by company along with averments in the petition containing that accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If accused is Managing Director or Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

(vi) If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint.
(vii) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases."

25.28 <u>Everest Advertising Pvt.Ltd. Vs State, Govt. of NCT of Delhi &Ors.) 2007(2) Apex Court Judgments 191 (S.C.) : 2007(2) Civil Court Cases 708 (S.C.) : 2007(2) Criminal Court Cases 791 (S.C.)</u>

Dishonour of cheque,Company , Chairman or Director , Pleading , There must be an averment that the person who is vicariously liable for commission of the offence of the Company both was in charge of and was responsible for the conduct of the business of the Company , Such requirement must be read conjointly and not disjunctively.

Dishonour of cheque, Company, Directors, Pleading, As a result of fall out of nonpayment negotiations were held between parties wherein Respondent Nos.2 and 3 took part, Held, there is no doubt that ingredients of S.141 of the Act stand satisfied.

25.29 <u>K.Srikanth Singh Vs M/s North East Securities Ltd. &Ors.) 2007(3) Apex Court Judgments 024 (S.C.) : 2007(3) Civil Court Cases 525 (S.C.) : 2007(3) Criminal Court Cases 850 (S.C.)</u>

Dishonour of cheque, Company, Director, Vicarious liability, Director who negotiated for obtaining financial assistance on behalf of the Company cannot be held vicariously liable. It does not give rise to an inference that he was responsible for day-to-day affairs of the company,vicarious liability on the part of a person must be pleaded and proved,It cannot be a subject matter of mere inference.

It must be pleaded that accused was responsible to the Company for the conduct of the business of the Company.

25.30 <u>Ramrajsingh v/s State of M.P. and Anr AIR 2009 SC (Supp) 1726 SUPREME COURT (From : 2003 (1) Jab LJ 227 (M.P.)) Criminal Appeal No. 1103 of 2003, D/, 15 , 4 , 2009</u>

Negotiable Instruments Act (26 of 1881), S.138, S.141 , Dishonour of cheque, Liability of directors of company , No evidence that appellant director of company was in charge and responsible for conduct of business of company,**<u>No notice given to him , No specific role attributed to him in complaint petition</u>**, Conviction of appellant cannot be maintained

25.31 <u>A. R. Radha Krishna v/s Dasari Deepthi and Ors. AIR 2019 SUPREME COURT 2518 (From: 2018 ACD 433 (Hyd))(Three Bench Judgment)</u>

Criminal P.C. (2 of 1974), S.482 , Negotiable Instruments Act (26 of 1881), S.138, S.141 , Quashing of criminal proceedings , Dishonour of cheque , Complaint containing specific averments that, respondents, Directors of accused company were running company together by actively participating in day-to-day affairs, being from same family ,**Complaint also stating that all accused in active connivance issued cheques in favour of complainant and later instructed for stop payment , No material on record to show that allowing proceedings to continue would be an abuse of process of Court**, Quashing of proceedings by High Court, illegal.

25.32 Himanshu Vs. B. Shivamurthy And Another Criminal Appeal No. 1465 of 2009 Decided on : 17,01,2019 (2019) 9 SCJ 27 : (2019) 153 SCL 71 SUPREME COURT OF INDIA
A Defective Complaint Cannot Be Allowed To Stand.

In absence of company being arraigned as an accused, complaint against appellant was not maintainable , Appellant had signed cheque as a Director of company and for and on its behalf – In absence of notice of demand being served on company and without compliance with proviso to Section 138, High Court was in error in holding that company could now be arraigned as accused , High Court was in error in rejecting petition under Section 482 of Cr.P.C. , Judgment of High Court set aside and complaint quashed.

25.33 Apex Court in AneetaHada Vs. Godfather Travels and Tours Private Limited (2012) 5 SCC 661.
"58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.
59. 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 State of Madras v/s C.V/S Parekh (1970) 3 SCC 491, which is a three,Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal v/s State of M.P. does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil

Hada v/s Indian Acrylic Ltd, (2000) 1 SCC 1 is overruled with the qualifier as stated in paragraph 51. The decision in U.P. Pollution Control Board v/s Modi Distillery, (1987) 3 SCC 684 has to be treated to be restricted to its own facts as has been explained by us hereinabove." (Emphasis supplied)

25.34 Devendra Kumar Garg VS State of U. P. , 19 Feb 2020
2020 0 Supreme(All) 281;

Para 8. From perusal of the contents of the notice and complaint, **it is evident that the notice as well as the complaint was filed against the applicant in his individual capacity. Company was not arrayed as a party neither in the notice nor in the complaint**. Hon'ble Apex Court in the case of AneetaHada (supra) has held that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative.

25.35 Harshendra Kumar D. .... Appellant V/s RebatilataKoley Etc. ....Respondents SC. Criminal Appeal No. 360,377 OF 2011 (Arising out of SLP (Criminal) Nos. 3008,3025 of 2008)

Director Not Responsible For Cheques Issued After His Resignation

21. In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents – which are beyond suspicion or doubt – placed by accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

22. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In our opinion, the High Court fell into grave error in not taking into consideration the uncontroverted documents relating to appellant's resignation from the post of Director of the Company. Had these documents been considered by the High Court, it would have been apparent that the appellant has resigned much before the cheques

were issued by the Company. As noticed above, the appellant resigned from the post of Director on March 2, 2004. The dishonoured cheques were issued by the Company on April 30, 2004, i.e., much after the appellant had resigned from the post of Director of the Company. The acceptance of appellant's resignation is duly reflected in the resolution dated March 2, 2004. Then in the prescribed form (Form No. 32), the Company informed to the Registrar of Companies on March 4, 2004 about appellant's resignation. It is not even the case of the complainants that the dishonored cheques were issued by the appellant. These facts leave no manner of doubt that on the date the offence was committed by the Company, the appellant was not the Director; he had nothing to do with the affairs of the Company. In this view of the matter, if the criminal complaints are allowed to proceed against the appellant, it would result in gross injustice to the appellant and tantamount to an abuse of process of the court.

25.36 Milind Shripad Chandurkar VS Kalim M. Khan [2011] 2 SCC(Cri) 208

Locus standi of complainant to maintain appeal against order of acquittal-A person can maintain a complaint provided he is either a "payee" or "holder in due course" of chequeAppellant/complainant could not produce any document to show that he was **proprietor of firm-**Mere statement in affidavit in this regard, is not sufficient to meet requirement of/aw.

25.37 Shankar Finance and Investments v/s State of Andhra Pradesh and Ors. (2008) 8 SCC 536,

Held that where the **"payee" is a proprietary concern the complaint can be filed** (i) by the proprietor of the proprietary concern describing himself as the sole proprietor of the "payee"; (ii) the proprietary concern describing itself as the sole proprietary concern represented by its proprietor; and

(iii) the proprietor or the proprietary concern represented by the Attorney Holder under the power of attorney executed by the sole proprietor.

However, it shall not be permissible for an Attorney Holder to file the complaint in his own name as if he was the complainant. He can initiate criminal proceedings on behalf of the principal. In a case of this nature, where the "payee" is a company or a sole proprietary concern, such issue cannot be adjudicated upon taking any guidance from Section 142 of the Act 1881 but the case shall be governed by the general law i.e. the Companies Act 1956 or by civil law where an individual carries on business in the name or style other than his own name. In such a situation, he can sue in his own name and not in trading name, though others can sue him in the trading name. So far as Section 142 is concerned, a complaint shall be maintainable in the name of the "payee", proprietary concern itself or in the name of the proprietor of the said concern.

25.38 Janki Vashdeo Bhojwani v/s Indusind Bank Ltd. (2005) 2 SCC 217,

Held that the general principles of company law or civil law would apply for maintaining the complaint under Section 138 of the Act 1881

25.39 Beacon Industries, Bangalore V/s Anupam Ghosh Decided On : 09,08,03 2004 1 DCR 457; Karnataka High Court

Therefore, in view of the above decisions of the Supreme Court as well as of the other High Courts, the contention of the respondent that filing of a criminal complaint by a partner of an unregistered *firm is hit by section 69 (2) of the Partnership Act cannot be accepted.* The said section has no application to the criminal cases. Under these circumstances it could be said that Section 69 (2) of the Partnership Act is applicable only where the civil rights are invoked and not in criminal cases. Non-registration of the firm has no legal bearing on the criminal case. Hence, the finding recorded by the Trial Court is totally incorrect and illegal and the same is liable to be set aside.

25.40 Bhupesh Rathod V/S Dayashankar Prasad Chaurasia & Anr 2021 LawSuit(SC) 708

Negotiable Instruments Act , 1881- 138 -Describing the name of managing director first instead of companies name is not a fundamental defect to reject complainant case of dishonour of cheque under section 138 of NI Act

[19] In the conspectus of the aforesaid principles we have to deal with the plea of the respondent that the complaint was not filed by the competent complainant as it is the case that the loan was advanced by the Company. As to what would be the governing principles in respect of a corporate entity which seeks to file the complaint, an elucidation can be found in the judgment of this Court in Associated Cement Co. Ltd. v. Keshavanand, 1998 1 SCC 687. If a complaint was made in the name of the Company, it is necessary that a natural person represents such juristic person in the court and the court looks upon the natural person for all practical purposes. It is in this context that observations were made that the body corporate is a de jure complainant while the human being is a de facto complainant to represent the former in the court proceedings

Thus, no Magistrate could insist that the particular person whose statement was taken on oath alone can continue to represent the Company till the end of the proceedings. Not only that, even if there was initially no authority the Company can at any stage rectify that defect by sending a competent person.

[22] If we look at the format of the complaint which we have extracted aforesaid, it is quite apparent that the Managing Director has filed the complaint on behalf of the Company. There could be a format where the

Company's name is described first, suing through the Managing Director but there cannot be a fundamental defect merely because the name of the Managing Director is stated first followed by the post held in the Company.
[24] While we turn to the authorisation in the present case, it was a copy and, thus, does not have to be signed by the Board Members, as that would form a part of the minutes of the Board meeting and not a true copy of the authorisation. We also feel that it has been wrongly concluded that the Managing Director was not authorised. If we peruse the authorisation in the form of a certified copy of the Resolution, it states that legal action has to be taken against the respondent for dishonour of cheques issued by him to discharge his liabilities to the Company. To this effect, Mr. Bhupesh Rathod/Sashikant Ganekar were authorised to appoint advocates, issues notices through advocate, file complaint, verifications on oath, appoint Constituent attorney to file complaint in the court and attend all such affairs which may be needed in the process of legal actions. What more could be said?
[26] The description of the complainant with its full registered office address is given at the inception itself except that the Managing Director's name appears first as acting on behalf of the Company. The affidavit and the cross-examination in respect of the same during trial supports the finding that the complaint had been filed by the Managing Director on behalf of the Company. Thus, the format itself cannot be said to be defective though it may not be perfect. The body of the complaint need not be required to contain anything more in view of what has been set out at the inception coupled with the copy of the Board Resolution. There is no reason to otherwise annex a copy of the Board Resolution if the complaint was not being filed by the appellant on behalf of the Company.

25.41 <u>Ashutosh Ashok Parasrampuriya & Anr V/S M/S Gharrkul Industries Pvt Ltd & Ors, 2021 LawSuit(SC) 639</u>
<u>Negotiable Instruments Act , 1881- 141 and 138 - Role of Directors must be aver clearly</u>
[24] The issue for determination before us is whether the role of the appellants in the capacity of the Director of the defaulter company makes them vicariously liable for the activities of the defaulter Company as defined under Section 141 of the NI Act? In that perception, whether the appellant had committed the offence chargeable under Section 138 of the NI Act?

[25] We are concerned in this case with Directors who are not signatories to the cheques. So far as Directors who are not the signatories to the cheques or who are not Managing Directors or Joint Managing Directors are concerned, it is clear from the conclusions drawn in the afore-stated judgment that it is necessary to aver in the complaint filed under Section 138 read with Section 141 of the NI Act that at the relevant time when the

offence was committed, the Directors were in charge of and were responsible for the conduct of the business of the company.

[26] This averment assumes importance because it is the basic and essential averment which persuades the Magistrate to issue process against the Director. That is why this Court in S.M.S. Pharmaceuticals Ltd.(supra) observed that the question of requirement of averments in a complaint has to be considered on the basis of provisions contained in Sections 138 and 141 of the NI Act read in the light of the powers of a Magistrate referred to in Sections 200 to 204 CrPC which recognise the Magistrate's discretion to take action in accordance with law. Thus, it is imperative that if this basic averment is missing, the Magistrate is legally justified in not issuing process.

26. PRACTICE AND PROCEDURE - MEDIATION IN NEGOTIABLE INSTRUMENT ACT CASES

26.1 Dayawati vs Yogesh Kumar Gosain 2017 SCC Online Del 11032 CRL.REF.No.1/2016 Decided on 17 October, 2017

The legal permissibility of referring a complaint cases under Section 138 of the NI Act for amicable settlement through mediation; procedure to be followed upon settlement and the legal implications of breach of the mediation settlement is the subject matter of this judgment. Shri Bharat Chugh, as the concerned Metropolitan Magistrate (NI Act), Central – 01/THC/ Delhi, when seized of Complaint Case Nos.519662/2016 and 519664/2016 (Old Complaint Case Nos.2429/2015 and 2430/2015) under Section 138 of the Negotiable Instruments Act ("NI Act" hereafter) passed an order dated 13th January, 2016, the following **questions under Section 395 of the Code of Criminal Procedure** ("Cr.P.C" hereafter) to this court for consideration:

QUESTIONS UNDER SECTION 395 OF THE CODE OF CRIMINAL PROCEDURE

"1. What is the legality of referral of a criminal compoundable case (such as one u/s 138 of the NI Act) to mediation?

Answer: It is legal to refer a criminal compoundable case as one under Section 138 of the NI Act to mediation.

2. Can the Mediation and Conciliation Rules, 2004 formulated in exercise of powers under the CPC, be imported and applied in criminal cases? If not, how to fill the legal vacuum? Is there a need for separate rules framed in this regard (possibly u/s 477 of the CrPC)?

Answer: The Delhi Mediation and Conciliation Rules, 2004 issued in exercise of the rule making power under Part,10 and Clause (d) of sub-section (ii) of Section 89 as well as all other powers enabling the High Court of Delhi to make such rules, applies to mediation arising out of civil as well as criminal cases.

3. In cases where the dispute has already been referred to mediation , What is the procedure to be followed thereafter? Is the matter to be disposed of taking the very mediated settlement agreement to be evidence of compounding of the case and dispose of the case, or the same is to be kept pending, awaiting compliance thereof (for example, when the payments are spread over a long period of time, as is usually the case in such settlement agreements)?

In the context of reference of the parties, in a case arising under Section 138 of the NI Act, to mediation is concerned, the following procedure is required to be followed:

III (i)When the respondent first enters appearance in a complaint under Section 138 of the NI Act, before proceeding further with the case, the Magistrate may proceed to record admission and denial of documents in

accordance with Section 294 of the Cr.P.C., and if satisfied, at any stage before the complaint is taken up for hearing, there exist elements of settlement, the magistrate shall inquire from the parties if they are open to exploring possibility of an amicable resolution of the disputes.

III (ii) If the parties are so inclined, they should be informed by the court of the various mechanisms available to them by which they can arrive at such settlement including out of court settlement; referral to Lok Adalat under the Legal Services Authorities Act, 1987; referral to the court annexed mediation center; as well as conciliation under the Arbitration and Conciliation Act, 1996.

III (iii) Once the parties have chosen the appropriate mechanism which they would be willing to use to resolve their disputes, the court should refer the parties to such forum while stipulating the prescribed time period, within which the matter should be negotiated (ideally a period of six weeks) and the next date of hearing when the case should be again placed before the concerned court to enable it to monitor the progress and outcome of such negotiations.

III (IV) in the event that the parties seek reference to mediation, the court should list the matter before the concerned mediation center/mediator on a fixed date directing the presence of the parties/authorized representatives before the mediator on the said date.

III (v) If referred to mediation, the courts, as well as the mediators, should encourage parties to resolve their overall disputes, not confined to the case in which the reference is made or the subject matter of the criminal complaint which relates only to dishonoring of a particular cheque.

III (vi) The parties should endeavor to interact/discuss their individual resolutions/proposals with each other as well and facilitate as many interactions necessary for efficient resolution within the period granted by the court. The parties shall be directed to appear before the mediator in a time bound manner keeping in view the time period fixed by the magistrate.

III (vii) In the event that all parties seek extension of time beyond the initial six week period, the magistrate may, after considering the progress of the mediation proceedings, in the interest of justice, grant extension of time to the parties for facilitating the settlement.

For the purposes of such extension, the magistrate may call for an interim report from the mediator, however keeping in mind the confidentiality attached to the mediation process. Upon being satisfied that bona fide and sincere efforts for settlement were being made by the parties, the magistrate may fix a reasonable time period for the parties to appear before the mediator appointing a next date of hearing for a report on the progress in the mediation. Such time period would depend on the facts and circumstances and is best left to the discretion of the magistrate who would appoint the same keeping in view the best interest of both parties.

CONTENTS OF THE SETTLEMENT III

(viii) If a settlement is reached during the mediation, the settlement agreement which is drawn-up must incorporate:

(a) A clear stipulation as to the amount which is agreed to be paid by the party;

(b) A clear and simple mechanism/method of payment and the manner and mode of payment;

(c) Undertakings of all parties to abide and be bound by the terms of the settlement must be contained in the agreement to ensure that the parties comply with the terms agreed upon;

(d) A clear stipulation, if agreed upon, of the penalty which would ensure to the party if a default of the agreed terms is committed in addition to the consequences of the breach of the terms of the settlement;

(e) An unequivocal declaration that both parties have executed the agreement after understanding the terms of the settlement agreement as well as of the consequences of its breach;

(f)a stipulation regarding the voluntariness of the settlement and declaration that the executors of the settlement agreement were executing and signing the same without any kind of force, pressure and undue influence.

III (ix) the mediator should forward a carefully executed settlement agreement duly signed by both parties along with his report to the court on the date fixed, when the parties or their authorized representatives would appear before the court.

PROCEEDINGS BEFORE THE COURT.

III (x) The magistrate would adopt a procedure akin to that followed by the civil court under Order XXIII of the C.P.C. III

(xi) The magistrate should record a statement on oath of the parties affirming the terms of the settlement; that it was entered into voluntarily, of the free will of the parties, after fully understanding the contents and implications thereof, affirming the contents of the agreement placed before the court; confirming their signatures thereon. A clear undertaking to abide by the terms of the settlement should also be recorded as a matter of abundant caution.

III (xii) a statement to the above effect may be obtained on affidavit. However, the magistrate must record a statement of the parties proving the affidavit and the settlement agreement on court record.

III (xiii) the magistrate should independently apply his judicial mind and satisfy himself that the settlement agreement is genuine, equitable, lawful, not opposed to public policy, voluntary and that there is no legal impediment in accepting the same.

III (xiv) Pursuant to recording of the statement of the parties, the magistrate should specifically accept the statement of the parties as well as their undertakings and hold them bound by the terms of the settlement terms entered into by and between them. This order should clearly stipulate that

in the event of default by either party, the amount agreed to be paid in the settlement agreement will be recoverable in terms of Section 431 read with Section 421 of the Cr.P.C.

III (xv) upon receiving a request from the complainant, that on account of the compromise vide the settlement agreement, it is withdrawing himself from prosecution, and the matter has to be compounded. Such prayer of the complainant has to be accepted in keeping with the scheme of Section 147 of the NI Act.

At this point, the trial court should discharge/acquit the accused person, depending on the stage of the case. This procedure should be followed even where the settlement terms require implementation of the terms and payment over a period of time.

III (xvi) In the event that after various rounds of mediation, the parties conclude that the matter cannot be amicably resolved or settled, information to this effect should be placed before the magistrate who should proceed in that complaint on merits, as per the procedure prescribed by law.

III (xvii) The magistrate should ensure strict compliance with the guidelines and principles laid down by the Supreme Court in the pronouncement reported at (2010) 5 SCC 663, Damodar S. Prabhu v/s Sayed Babalal H and so far as the settlement at the later stage is concerned in (2014) 10 SCC 690 Madhya Pradesh State Legal Services Authority v/s Prateek Jain.

III (xviii) we may also refer to a criminal case wherein there is an underlying civil dispute. While the parties may not be either permitted in law to compound the criminal case or may not be willing to compound the criminal case, they may be willing to explore the possibility of a negotiated settlement of their civil disputes. There is no legal prohibition to the parties seeking mediation so far as the underlying civil dispute is concerned. In case a settlement is reached, the principles laid down by us would apply to settlement of such underlying civil disputes as well.

In case reference in a criminal case is restricted to only an underlying civil dispute and a settlement is reached in mediation, the referring court could require the mediator to place such settlement in the civil litigation between the parties which would proceed in the matter in accordance with prescribed procedure.

4. If the settlement in Mediation is not complied with , is the court required to proceed with the case for a trial on merits, or hold such a settlement agreement to be executable as a decree?

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

IV (i) In the event of default or non-compliance or breach of the settlement agreement by the accused person, the magistrate would pass an order under Section 431 read with Section 421 of the Cr.P.C. to recover the amount agreed to be paid by the accused in the same manner as a fine would be recovered.

IV (ii) Additionally, for breach of the undertaking given to the magistrate/court, the court would take appropriate action permissible in law to enforce compliance with the undertaking as well as the orders of the court based thereon, including proceeding under Section 2(b) of the Contempt of Courts Act, 1971 for violation thereof.

5. If the Mediated Settlement Agreement, by itself, is taken to be tantamount to a decree, then, how the same is to be executed? Is the complainant to be relegated to file an application for execution in a civil court? If yes, what should be the appropriate orders with respect to the criminal complaint case at hand? What would be the effect of such a mediated settlement vis-a-vis the complaint case?" (Emphasis by us)

Answer: The settlement reached in mediation arising out of a criminal case does not tantamount to a decree by a civil court and cannot be executed in a civil court.

However, a settlement in mediation arising out of referral in a civil case by a civil court, can result in a decree upon compliance with the procedure under Order XXIII of the C.P.C. This can never be so in a mediation settlement arising out of a criminal case.

27. WITHDRAWAL OF COMPLAINT & NON-EXECUTION OF NBW

27.1 Birju Thomas vs. State of Kerala, 2001 Cr.L.J. 790 (Kerala)

Sec. 256 Cr.P.C. applies in respect of withdrawal of complaint involving an offence u/s. 138 of the N.I. Act. If NBW was already issued against the accused and thereafter withdrawal of the complaint is prayed by the complainant, the Magistrate should not insist appearance of accused and NBW should not be executed. Complaint in such cases should be ordered to be withdrawn.

28. BURDEN ON DRAWER/ADDRESSEE TO PROVE NON,SERVICE OF NOTICE

Sec. 138, proviso (b), (c) r/w Sec. 142—Notice through regd. post. presumption of service in case of report on envelope to the effect, refusal, unclaimed, not available, premises locked, party not at station, arrival not known, court may presume receipt of notice by the drawee Drawer may prove at trial by evidence that the endorsement was not correct.

1.V/S Raja Kumari vs. P. Subbarama Naidu, (2004) 8 SCC 774
2. Prem Chand Vijai Kumar vs. Yashpal Singh, (2005) 4 SCC 417
3. Sadanandan Bhadran vs. Madhavan Sunil Kumar, (1998) 6 SCC 514
4. K. Bhaskaran vs. Sankaran Vaidhyan Balan, (1999) 7 SCC 510
5. Dalmia Cement (Bharat) Ltd. vs. Galaxy Traders, (2001) 6 SCC 463.

29. DEATH OF COMPLAINANT UNDER NI ACT, 1881

29.1 Jimmy Jahangir Madan vs. Bolly Cariyappa Hindley (Dead), 2005 (51) ACC 23 (SC)

Complainant died during complaint's pendency under N.I. Act, application to continue prosecution can be made by a person who has a right to continue the prosecution including L.Rs. by themselves or through pleader But Holder of Power of Attorney cannot be permitted to continue prosecution.

29.2 (i) Vinita S. Rao Vs. M/s Essen Corporate Services Pvt. Ltd., AIR 2015 SC 882 (ii) A.C. Narayanan Vs. State of Maharashtra, 2013 (83) ACC 583 (SC)(Three,Judge Bench).

Power of Attorney holder or LR can file complaint u/s 138 :

29.3 A.C. Narayanan Vs State of Maharashtra, 2013 (83) ACC 583 (SC)(Three,Judge Bench).

General power of Attorney holder cannot delegate his functions to another person unless so specified in the power of attorney: General power of Attorney holder cannot delegate his functions to another person unless so specified in the power of attorney.

30. CONDONATION OF DELAY,
HEARING OF ACCUSED BEFORE CONDONING DELAY

30.1 Sunil KanubhaiGoswami Vs. State Of Gujarat And Anr. 2017 (1) GLR 370

(A) Negotiable Instruments Act, 1881 (26 of 1881) Sec. 138 & 142 Limitation, Condonation of delay. Complaint filed seven days beyond limitation period/30 days from arising of cause of action. Held, in absence of explanation for delay the Court cannot condone delay. Complaint time barred Orders by the Courts below confirmed. Therefore, there is delay of 7 days in filing such complaint. Though proviso to Sec. 142 empowers the Court to condone such delay, it is clear that the cognizance of the complaint may be taken by the Court after the prescribed period as aforesaid only if the complainant satisfies the Court that he had sufficient cause for not filing the complaint within such period. Therefore, it is mandatory for the complainant to plead and prove that there was sufficient cause for not filing the complaint within prescribed period. (Para 6).

30.2 Sunil Kanubhai Goswami Vs State Of Gujarat [2017] 1 GLR 370. Powers To Condone Delay In Filing A Complaint Cannot Be Exercised In Absence Of Any Pleading And/Or Request To Condone Delay.

Para 6. Therefore, if we recollect the factual details which are described herein above, now it becomes clear that the cause-of-action to file the complaint arose to the present complainant on 13th July, 2015 i.e. after 15th day from the date of service of statutory notice upon the accused which is 27th June, 2015 and therefore, complaint is to be filed within 30 days from 13th July, 2015 i.e. on or before 12th August, 2015. It is undisputed fact that the complaint is filed after 12th August, 2015 i.e. on 19th August, 2015 and therefore there is delay of 7 days in filing such complaint. Though proviso to Section 142 empowers the Court to condone such delay, it is clear that the cognizance of the complaint may be taken by the Court after the prescribed period as aforesaid only if the complainant satisfies the Court that he had sufficient cause for not filing the complaint within such period. Therefore, it is mandatory for the complainant to plead and prove that there was sufficient cause for not filing the complaint within prescribed period.

Para 7. Unfortunately, in the present case, if we peruse the complaint which is produced at Annexure-B there is neither disclosure that there is some delay in filing such complaint and therefore there is no explanation or reason to consider that there is sufficient cause for not filing the complaint within the prescribed period so as to enable the Court to take cognizance. **Therefore, in absence of pleading and proof regarding sufficient cause, the Court cannot be convinced that there was sufficient cause.**

30.3 Umiya Pipe Private Limited vs. State of Gujarat, reported in 2008 (3) GLH 628

Hon'ble high court Held, that powers to condone delay in filing a complaint cannot be exercised in absence of any pleading and/or request to condone delay and thereby complaint was quashed being time barred.

30.4K.S. Joseph Vs. Philips Carbon Black Ltd. & Anr.2016 0 AIR(SC) 2149SUPREME COURT OF INDIA

Held, Taking cognizance without condoning the delay of 62 days in filing the complaint was not proper.

Delay of 62 days in filingcomplaint – Taking cognizance without issuing notice to condone the delay – Appellantreplying to notice of complainant on 20.02.2006 – Complaint filed on 24.05.2006–**Delay not condoned before issuance of summons**– Further, accused shown to be residing at a placebeyond The Magistrate's jurisdiction requiring an enquiry or investigation u/s 202, Cr PC –Question of law whether such requirement of enquiry or investigation is attracted even foroffences under the Act left open. (Para 6, 10)

30.5P.K. Choudhury v/s Commander, 48 BRTF (GREF) [(2008) 13 SCC 229]

Condoning delay in filing complaint beyond the period of limitation, natural justice warrants notice to the accused so as to grant him an opportunity to show that the delay should not be condoned.

31. DE-NOVO TRIAL

31.1 J. V/S Baharuni and Anr. etc. V/s State of Gujarat and Anr etc. (2014) 10 SCC 494

The Hon'ble Supreme Court Held in Para 43 the procedure prescribed for cases under Section 138 of the Act was flexible and applicability of Section 326 (3) of the Cr. P. C. in not acting on the evidence already recorded in a summary trial did not strictly apply to the scheme of Section 143 of the Act.

31.2UshmabenDineshbhaiGohel Vs. State Of Gujarat. 2015 GLR 3 2572,

Code of Criminal Procedure, 1973 S. 326(3), 482 Negotiable Instruments Act, 1881 S. 138 private complaint , whether evidence recorded in summary case by a predecessor Court, can be used for contradiction before the successor Court learned Judge held that whenever the successor Court orders a de-novo trial, statements of the complainant recorded by the predecessor Court cannot be used for contradicting the complainant or his witnesses, if any challenged held, whenever successor Court orders a de-novo trial, statements of witnesses recorded by predecessor can be used for contradicting those witnesses their previous statements do not become inadmissible or non-existent on account of the de-novo trial permitting the defence tocontradictthe witnesses with their previous statements in the deposition recorded by the predecessor Judge would not amount to relying on the evidence by the successor Judge recorded by the predecessor Judge impugned order quashed and set aside application allowed.

31.3 YOGESHWAR OIL INDUSTRIES Vs. POL WORLD PVT. LTD. 2014 (1) GLR 623

(A) Negotiable Instruments Act, 1881 (26 of 1881) Secs. 138 & 143 Held, where trial of case proceeded as summons case mere non recording of reasons for conducting trial as summons case and not as summary case would not entitle accused to seek 'de-novo' trial Order by trial Court set aside.

31.4 Nitin Sevantilal Shah v/s Manubhai Manjibhai Panchal and others, AIR 2011 SC 3076

1. In summary proceedings, the successor Judge or Magistrate has no authority to proceed with trial from the stage at which his predecessor has left the same because in summary trial only the substance of the evidence of the witnesses has to be recorded. The Court does not record the entire statements of the witnesses and, therefore, the Judge or Magistrate, who recorded such substance of evidence is

alone in a position to appreciate such evidence led before him and not the successor Judge or Magistrate.

2. Section 326 of the Cr.P.C. is an exception to the Rule where successor Magistrate can act on the evidence recorded by his predecessor either in whole or in part.
3. Sub-section (3) of section 326 of the Cr.P.C. does not apply to summary trials.
4. These are not the cases of irregularity, but of want of competence in wake of section 326 of the Cr.P.C.

31.5 RamjibhaiHaribhai Chaudhari v/s State of Gujarat and another, [2013 (1) GLH 300]

Successor has no Authority

1. In the summary trial, the successor Judge or Magistrate has no authority to adjudicate upon the trial proceedings from where his predecessor has left.
2. Such proceedings are to be tried ***de-novo***.
3. ***[RamjibhaiHaribhai Chaudhari v/s State of Gujarat and another, 2013 (1) GLH 300, wherein the decision in the case of NitinbhaiSevantilal Shah (supra) is followed.]***
4. The Court discussed the procedure of deviating from the proceedings of summary trial considering the proviso to section 143 of the NI Act.

32. SUBSTITUTION OF COMPLAINANT

32.1 Gulf Asphalt Pvt. Ltd. Vs. D. S. K. Rao 2015 CRI. L. J. 3954 Special Criminal Application (Quashing) No. 5562 of 2014, D/8/ 5 /2015.

Negotiable Instruments Act (26 of 1881) , S.138 , S.142(a) Criminal P.C. (2 of 1974), S.200, DISHONOUR OF CHEQUE – Substitutionofcomplainant – Permissibility – Substitutionof complainant at a later stage in certain contingencies would not amount to seeking an amendment in complaint. Complaint under S. 138 of Act of 1881 was lodged by proprietary concern throughits proprietor. During pendency oftrial, business of proprietary concern was taken over by private limited company Order permitting said company to be substituted as a complainant in place of original proprietary concern, is proper. **(Paras 21, 31, 41)**

33. FILLING THE PARTICULARS OF BLANK CHEQUE

33.1 Hitenbhai Parekh, Proprietor, Parekh Enterprises Vs. State Of Gujarat And Anr. 2010 (5) Glr 4136 Criminal Appeal No. 1189 Of 2009. Decided On : 6/10/2009

(B) Negotiable Instruments Act, 1881 (26 of 1881) Sec. 20, 87 & 139 Blank cheque bearing signature of drawer delivered to payee. In such cases, "there is an implied authority of the person receiving such cheque to complete it by filing the blanks". Amount so filled in would be the amount intended to be paid by the drawer. Held further, onus of proving legally enforceable debts has to be discharged by the complainant.

33.2 NilkumarAmarchand Vs. Ashish B. Zode and Ors. 2016 0 Supreme (Guj) 1194 Decided On : 08,07,2016

The trial Court shall carry out proper verification before issuing summons in a criminal case under Section 138 of Negotiable Instruments Act – In terms of Section 200 of the Cr.P.C., the Court should take care to see that the complainant makes a statement on oath as to how the offence has been committed and as to how the accused persons are responsible therefore.

For fastening the criminal liability, there is no presumption that every Director knows about the transaction. Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business. It is necessary to specifically aver in the complaint under section 141 that at the time the offence was committed, the person accused was in charge of and responsible for the conduct of the business of the company. Such an averment is an essential requirement of section 141 and has to be made in the complaint.

33.3 Modern Denim Limited Through Arun Triloknath Bhargava And Ors. Vs. State Of Gujarat And Anr. 2015 (2) GLR 1584

(A) Criminal Procedure Code, 1973 (2 of 1974) Sec. 482 - Negotiable Instruments Act, 1881 (26 of 1881) Sec. 138 & 141 Complaint against non-signatory Directors of company Held, when there are averments in complaint that said Directors were in-charge of day to day business of company and were responsible for conduct of business of company, issue of process against them proper Further, when there are specific averments as aforesaid it is for Directors to furnish concrete material to show that said averments not acceptable.

33.4 Dr. Rajan Sanatkumar Joshi Vs Rajnikant Govindlal Shah &Anr.) 2007(3) Criminal Court Cases 577 (Gujarat)

Dishonour of cheque, Court to carry out proper verification before issuing process, Verifications required are :
(1) Verification of a complaint on oath which should be in a proper manner i.e. all the facts necessary to constitute the offence must be borne out from the verification;
(2) If Company then person representing the Company should be duly authorized
(3) Complete postal addresses of complainant and accused;
(4) Statement of the complainant that all the accused persons named in the complaint are Directors/Partners and that they are liable under the Act and to verify the status of accused and the extent of involvement in the commission of offence;
(5) That the accused is the signatory to the instrument in question;
(6) Fact of issuance of statutory notice and Court should insist for some formal proof in the form of acknowledgement receipt etc.;
(7) Whether the concerned Firm/Company, Society/Institution, Partner/Director or Proprietor are joined as parties or not;
(8) Whether the complaint has been filed within the period of limitation as prescribed under S.138 of the Act;
(9) Whether there are any specific allegations against each accused or not.

Dishonour of cheque, Director, Resigned before issuance of cheque in question, No averment in complaint as to how and in what manner petitioner was responsible for conduct of business of company or otherwise responsible to it in regard to its functioning , Complaint against petitioner quashed.

33.5<u>Anil Gupta Vs. Star India Pvt. Ltd. 2014 CRI. L. J. 3884 SUPREME COURT</u>

(a) Negotiable instruments act (26 of 1881), S.138, dishonour of cheque, dishonour of cheque,drawer of cheque alone falls within ambit of s. 138, whether human being or a body corporate or even a firm. (Para 10)
(b) negotiable instruments act (26 of 1881) , s.141 , s.138 dishonour of cheque, offences by company dishonour of cheque, proceeding initiated against company and its managing director managing director of company cannot be prosecuted alone complaint against company already quashed order of high court that proceeding against appellant , managing director can be continued even in absence of company liable to be set aside.

33.6 <u>Mainuddin Abdul Sattar Shaikh Vs. Vijay D. Salvi Air 2015 Supreme Court 2579 Criminal Appeal No. 1472 Of 2009, D/ 6 ,7,2015.</u>

(a) Negotiable instruments act (26 of 1881), S.138 dishonour of cheque, dishonour of cheque liability cheque drawn by respondent in his personal capacity and not by company of which he is managing director company is not liable even if it is for discharging dues of company respondent being drawer of cheque is alone liable for offence under s. 138.

33.7 Sanjay Chaturvedi Vs State) 2007(2) Civil Court Cases 392 (Delhi) : 2007(2) Criminal Court Cases 044 (Delhi)

Dishonour of cheque, Summoning order , Accused appeared through counsel and moved an application for exemption from his personal appearance, Application dismissed and non bailable warrants issued and also issued process u/s 82/83 Cr.P.C. , Order set aside , Issue of non bailable warrants and issue of process u/ss 82/83 Cr.P.C. is not required when accused is represented through his counsel and it is not a case where he is absconding and evading the court process.

34.NOTICE

34.1 Chandulal Keshavlal Modi v/s Vijaysinh Ratansinh Chavda, 2019 ACD 105 : 2019(1) GLR 811 : 2019(198) AIC 880

No evidence to that after return of notice complainant ever tried to ascertain address of accused , In absence of effective service of statutory notice, complaint not maintainable.

Para 9. This Court has minutely gone through ratio came to be propounded by the Apex Court in the above referred two decisions as well as this Court and other High Courts. Indisputably, the facts in the present case and the facts before the Apex Court as well as other High Courts are quite different. In the present case, the first endorsement "not known" is not equivalent to "refuse" or "unclaimed". Similarly, the second attempt clearly indicates that the person has vacated and left the house and was not residing by itself is clearly indicating that the notice is not served upon the respondent accused. The aforesaid factual scenario is clearly pleaded in the complaint itself by the complainant and that has been stated on oath. Even, in the cross examination also, the complainant had admitted the said fact. In this view of the matter, for want of effective service of statutory notice, the complaint is not maintainable.

34.2C.C.Alavi Haji Vs Palapetty Muhammed &Anr.) 2007(5) Laws (SC) 100

Notice, Claim as to non receipt of , Drawer can still make the payment of cheque amount within 15 days of the receipt of summons and can absolve himself of prosecution u/s 138 of the Act , If drawer does not make payment of cheque amount within 15 days of the receipt of summons then plea of proper service of notice is not available to him.

Notice, Absence of pleading that notice was sent at the correct address of the drawer by registered post acknowledgement due, However, returned envelope annexed to complaint and thus it formed part of the complaint, Returned enveloped showed that it was sent by registered post acknowledgement due to the correct address with endorsement that 'the addressee was abroad', Held, requirement of S.138 of the Act is sufficiently complied with.

34.3M/s. Sarav Investment & Financial Consultants Pvt. Ltd. &Anr. Vs Llyods Register of Shipping Indian Office Staff Provident Fund &Anr.) 2007(4) Criminal Court Cases 527 (S.C.)

Dishonour of cheque, Service of notice by hand delivery , Refusal , Presumption of service cannot be raised as the same is not effected in terms of the statute.

34.4 M/s.Rahul Builders Vs M/s.Arihant Fertilizers & Chemical &Anr. 2007(3) Apex Court Judgments 554 (S.C.) : 2007(4) Criminal Court Cases 990 (S.C.)

Whether the complaint is tenable if the demand in the notice is vague or omnibus ?

Dishonour of cheque, Notice, Cheque issued for part payment of outstanding bills , Cheque dishonoured , By issuing notice demand made of payment of pending bills and not cheque amount,Held, notice is not valid.

34.5 N. Paraeswaran Unni Vs. G. Kannan Criminal Appeal No. 455 of 2006 Decided on : 01,03,201, (2017) 5 SCC 737 : (2017) 2 SCC(Cri) 668 : (2017) 141 SCL 1 SUPREME COURT OF INDIA

Presumption of service of statutory notice—When a notice is sent by registered post and is returned with postal endorsement "refused" or "not available in house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed—Generally, there is no bar under N.I. Act to send a reminder notice to drawer of cheque and usually such notice cannot be construed as an admission of non-service of rest notice by appellant—Impugned judgment of High Court set aside.

34.6 ICICI Bank Ltd. Vs Prafull Chandra 2007(3) Civil Court Cases 532 (Delhi) : 2007(3) Criminal Court Cases 731 (Delhi)

Dishonour of cheque,Notice , Undelivered letter or A.D. not received back, Allowance of period of service of notice which at least should be a week is admissible in this regard , Period to file complaint is thus extended to a further period of a week.

34.7 M Nagappa, S/O Karibasappa, V/S Mohamad Aslam Savanur, Criminal Appeal No.838 Of 2011 , Date 1-03- 2021 High Court Of Karnataka

When a sender has dispatched the notice through registered post with correct address written on it, Section 27 of General Clauses Act could be profitably imported and in such a situation service of notice deemed to have been effected on the sender unless he proves that it was really not serve. Section 138 NI Act - No Requirement To Serve Notice Under Certificate Of Posting; Service Through Registered Post Proper.

35. WHETHER THE ACCUSED ON PUTTING UP APPEARANCE CAN SEEK DISCHARGE FROM THE CASE ?

The summoning order passed by the court on appraisal of the preliminary evidence adduced by the complainant is an interlocutory one. As observed by the **Hon'ble Supreme Court in Adalat Prasad v/s Rooplal Jindal 2004(4) RCR (Criminal) 01.** , the only remedy available to an aggrieved accused to challenge an interlocutory order is under section 482 of CrPC and not by way of an application to seek discharge. Furthermore, the offence under section 138 of the Negotiable Instruments Act is punishable with imprisonment upto two years and therefore is to be tried as a summons case. The procedure for trial of summons cases is covered by Chapter XX of the Code which does not contemplate a stage of discharge like section 239 and 245 dealing with warrant cases. So as held by the Allahabad High Court in **Sanjeev Rai v/s State of U.P .2005(2) RCR (Criminal) 361.** After referring, the decision of the Hon'ble Apex Court in **Subramaniam Sethuram v/s State of Maharashtra 2004(4) RCR (Criminal) 349,** it is not open to the accused to seek discharge in a summons case and as such the summoning order cannot be recalled or revised in any manner.

36. WHETHER BOUNCING OF A CHEQUE ISSUED TOWARDS TIME BARRED DEBT ATTRACTS PENAL LIABILITY UNDER SECTION 138?

36.1 Sureshbhai Narsinhbhai Parsana VS State of Gujarat [2017] 0 Supreme(Guj) 794

17.2 Thus, the above discussion would answer even the argument in relation to section 25(3) of the Indian Contract Act apart from the argument in relation to enforceability of the debt and maintainability of the complaint under section 138 of the N.I. Act.

I am of the view that the issue as regards the cheque being time barred should be gone into by the Trial Court and the same should be decided on the basis of the evidence that may be led by the parties. The law is very clear that if the cheque is found to be time barred, the complaint under section 138 of the N.I. Act shall fail. This aspect shall be borne in mind by the Trial Court while appreciating the evidence on record.

36.2 Keshavlal Prabhudas Patel (Since Deceased) VS Ashokbhai Bachubhai Maganbhai Patel, 2019] 3 GLH 728 / [2020] 2 GLR 1573 / [2019] 0 Supreme(Guj) 1043

9. In view of aforesaid **nature of evidence emerging out from the mouth of the complainant himself, he has not come with definite case and**

consequently, the complainant could not prove that the aforesaid cheque was for legally enforceable debt as envisaged under Section 138 of the Negotiable Instruments Act. If the case of the complainant may be believed to be true that he had lent the amount to the accused in the year 1995, then the cheque issued in the year 2003 is barred by period of limitation and no longer remained for legally enforceable debt.

36.3 J.Chitranjan And Company Proprietor- C D Shah Versus State Of Gujarat, 2017 (1) GCD 390 : 2016 (3) CrLR(Guj) 952

Held, for a time barred debt proceedings u/S. 138 of the N.I. Act are not maintainable - in present case, loan was made in the year 1983/1986 as deposed by complainant and in view of limitation period prescribed in Article 19 of Limitation Act for money payable for money lent being 3 years from date loan was made, debt or other liability as indicated in explanation to S. 138 of the N.I. Act was not legally enforceable beyond 1986/1989 and proceedings u/S. 138 of the N.I. Act initiated in year 1994 were not competent - no evidence was adduced to show that within prescribed period of limitation debt was acknowledged by accused in writing.

17 xxx

17.1 The next question which falls for consideration of this court is with regard to the meaning to be assigned to the expression `legally enforceable debt or other liability' as contained in explanation to section 138 of the N.I. Act and whether the time barred debt is a legally enforceable debt. This issue may not detain this court for long in view of the decision in Sasseriyil Joseph v. Devassia (supra). The said legal position was reiterated by this court in Criminal Appeal No. 35 of 2008 decided on 14.12.2013 whereby the case under section 138 of the N.I. Act was dismissed on noticing the time barred debt. It must be held that for a time barred debt proceedings under section 138 of the N.I. Act are not maintainable. In the instant case, admittedly, loan was made in the year 1983/1986 as deposed by the complainant and in view of the limitation period prescribed in Article 19 of the Limitation Act for money payable for money lent being 3 years from the date the loan was made, the debt or other liability as indicated in explanation to section 138 of the N.I. Act was not legally enforceable beyond 1986/1989 and the proceedings under section 138 of the N.I. Act initiated in the year 1994 were not competent. No evidence was adduced to show that within the prescribed period of limitation debt was acknowledged by the accused in writing. The decision in A.V. Murthy (supra) is of no assistance to the complainant inasmuch as therein it was held that in view of presumption under section 118 and 138 of the N.I. Act; as also section 25 of the Indian Contract Act, the complaint could not have been thrown overboard at the threshold on the ground of limitation. Such a fact situation

is not available in the instant case. The proposition of law indicated in Hindustan Apparel Industries v. Fair Deal Corporation (supra) which dealt with acknowledgement within the period of limitation also cannot be applied to the facts of the case inasmuch as according to the complainant, the cheque was issued in the year 1994 i.e. after expiry of the period of limitation and therefore, there was no question of acknowledgement of the debt within the meaning of section 18 of the Limitation Act. As noticed at paragraph No. 5.3 above, the Supreme Court in Sasseriyil Joseph v. Devassia (supra) had, in no uncertain terms, after perusing the decision of the Kerala High Court in Criminal Appeal No. 161 of 1994 and after finding that the language in section 138 of the N.I. Act was clear and unambiguous, confirmed the judgement of the Kerala High Court. In the said judgement of the Kerala High Court in paragraph No. 6 and 7, it is held as under:

"6. The only question that arises for consideration in this appeal is whether the respondent who issued the cheque in question in discharge of a time barred debt is liable under Section 138 of the Negotiable Instruments Act. In this case, the complainant had admitted that the loan was advanced to the accused in January, 1988 and the cheque was issued in February, 1991. Thus, by the time the cheque was issued, the debt was barred by limitation since there was no valid acknowledgement of the liability within the period of limitation. According to the learned counsel for the appellant, the promise made by the accused to repay the time barred debt would come within the purview of Section 25(3) of the Indian Contract Act. **No doubt, the promise to pay a time barred cheque (debt) is valid and enforceable, if it is made in writing and signed by the person to be charged therewith. But, it is clear from Section 138 of the Negotiable Instruments Act that in order to attract the penal provisions in the bouncing of a cheque in Chapter XVII, it is essential that the dishonoured cheque should have been issued in discharge, wholly or in part, or any debt or other liability of the drawer to the payee.** The explanation to Section 138 defines the expression debt or other liability as a legally enforceable debt or other liability. The explanation to Section 138 reads as under :-

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

7. **Thus, Section 138 is attracted only if the cheque is issued for the discharge of a legally enforceable debt or other liability. In this case, admittedly, the cheque in question was issued in discharge of a time barred debt. It cannot be said that a time barred debt is a legally enforceable debt**. In this connection, it is also relevant to note the decision of the Andhra Pradesh High Court reported in Girdhari Lal Rathi v. P.T.V. Ramanujachari 1997 (2) Crimes 658. It has been held in that case that if a cheque is issued for a time barred debt and it is dishonoured, the accused cannot be convicted under Section 138 of the Negotiable Instruments Act

simply on the ground that the debt was not legally recoverable. I am fully in agreement with the view expressed by the learned Judge in the decision referred to above. "

17.2 Thus, the above discussion would answer even the argument in relation to **section 25(3) of the Indian Contract Act apart from the argument in relation to enforceability of the debt and maintainability of the complaint under section 138 of the N.I. Act.**

17.3 It also appears from the record that accused C.D. Shah was not confronted with the statement of account in his statement under section 313 of the Cr. P.C. and thus in absence of confrontation of accused with; and opportunity of offering an explanation to the said statement of account to the accused on such crucial incriminating material, no reliance could have been placed on the statement of accounts.

36.4 Apex Court in National Insurance Company Limited v/s Seema Malhotra andothers, 2001 (2) ALD 68 (SC) : (2001) 3 SCC 151,

Held that the drawer of the cheque promises to the person in whose favour the cheque is drawn or to whom a cheque is endorsed, that the cheque on presentation would yield the amount in cash. When a cheque is drawn to pay wholly or in part, a debt which is not enforceable only by reason of bar of limitation, the cheque amounts to a promise governed by the sub-section(3) of Section 25 of the Contract Act. Such promise which is an agreement becomes exception to the general rule that an agreement without consideration is void. It further held that though on the date of making such promise by issuing a cheque, the debt which is promised to be paid may be already time barred, in view of sub-section (3)of Section 25 of the Contract Act, the promise/ agreement is valid and, therefore, the same is enforceable.

36.5 S. Natarajan Vs. Sama Dharman (2014) 9 Scale 3 Supreme Court Of IndiaDivision Bench

Whetherissuance of cheque itself is a promise to pay time barred debt and referred to Sections 4 and 6 of the NIAct, For the purpose of invoking Section 138 read with Section 142 of the NI Act, the cheque inquestion must be issued in respect of legally enforceable debt or other liability, Court observed that thepresumption mandated by Section 139 of the NI Act includes a presumption that there exists a legallyenforceable debt or liability. It is of course in the nature of rebuttable presumption and it is open to theaccused to raise a defence wherein the existence of a legally enforceable debt or liability can becontested. **The Court further observed that Section 139 of the NI Act is an example of a reverse onusclause that has been included in furtherance of the legislative objective of improving the credibility ofnegotiable instruments. This Court clarified that the reverse onus clauses usually impose an evidentiaryburden and not a persuasive burden.**The Court, then, explained the manner in which

this statutorypresumption can be rebutted. **Thus, in cheque bouncing cases, the initial presumption incorporated inSection 139 of the NI Act favours the complainant and the accused can rebut the said presumption anddischarge the reverse onus by adducing evidence,** The High Court could not have quashed theproceedings on the ground that at the time of issuance of cheque, the debt had become time barred andthe complaint was not maintainable.

36.6A. V/S Murthy Vs. B. S. Nagabasavanna, (2002) 2 SCC 642)

where the accused had alleged that the cheque issued by him in favour of the complainant in respect of sumadvanced to the accused by the complainant four years ago was dishonoured by the bank for the reasons"account closed". The Magistrate had issued summons to the accused. The Sessions Court quashed theproceedings on the ground that the alleged debt was barred by limitation at the time of issuance of cheque and,therefore, there was no legally enforceable debt or liability against the accused under the Explanation to Section138 of the NI Act and, therefore, the complaint was not maintainable. While dealing with the challenge to thisorder, this Court observed that u/s 118 of the NI Act, there is a presumption that until the contrary is proved, everynegotiable instrument was drawn for consideration. This Court further observed that Section 139 of the NI Actspecifically notes that it shall be presumed unless the contrary is proved, that the holder of a cheque received thecheque of the nature referred to in Section 138 of the NI Act for discharge, in whole or in part, of any debt or otherliability. This Court further observed that under Sub-section (3) of Section 25 of the Contract Act, a promise, madein writing and signed by the person to be charged therewith, or by his agent generally or specially authorized inthat behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits, is a valid contract. Referring to the facts before it, this Court observed that the complainanttherein had submitted his balance sheet, prepared for every year subsequent to the loan advanced by thecomplainant and had shown the amount as deposits from friends. This Court noticed that the relevant balancesheet is also produced in the Court. This Court observed that if the amount borrowed by the accused therein isshown in the balance sheet, it may amount to acknowledgement and the creditor might have a fresh period oflimitation from the date on which the acknowledgement was made. After highlighting further facts of the case,this Court held that at this stage of proceedings, to say that the cheque drawn by the accused was in respect of adebt or liability, which was not legally enforceable, was clearly illegal and erroneous. In the circumstances, thisCourt set aside the order passed by the High Court upholding the Sessions Court's order quashing the entireproceedings on the ground that the debt or liability is barred by limitation and, hence, the complaint was notmaintainable. It is, therefore, clear that the contention urged by the

Appellant herein can be examined only duringtrial since it involves examination of facts.

36.7Sri Kapaleeswar Temple Mysore vs. T. Tirunavukarase, (1975)AIR Madras 167

when a debtor entered into fresh obligation with thecreditor in a time barred debt, to pay the liability it satisfies the condition of Section 25 (3) of Contract Actand will amount a fresh contract and it is an enforceable by the law. That though a debt might havebegan time barred on the debt, a debtor entered into fresh obligation with the creditor to pay the liability,the said obligation, if it satisfies the conditions laid down in Section 25 (3) of the Indian Contract act, willamount to fresh contract in the eye of law and can certainly be made the basis of an action forrecovering the amount promised and acknowledged there in by the debtor. While the Section 18 ofLimitation Act deals with an acknowledgment meant by an debtor within the period of limitation thecontractual obligation which a debtor enters into under the terms of Section 25 (3) has no referencewhatsoever to the acknowledged debt within the time or not. In that sense the provision of Section 25 (3)is far wider in scope than the acknowledgment contemplated in Section 18 of Limitation Act. Thecontract entered into under Section 25 (3) is an independent and enforceable contract and has noreference to be debt under the contract being a live one in the sense that it had not became barredunder the law of limitation.

36.8AmulyaPatowari Vs. Amarendra Choudhury, (2013) 5 GauLT 201 Para 23 And 24it has been categorically held that law permit aperson to make a promise in writing and signed by him to pay wholly or in part a debt which his creditormight have enforced payment and when such promise is made it becomes an agreement, which beingvalid in law turns to an enforceable contract. It was held that when a debtor, whose debt or liabilitybecame time barred, promises in writing and signs the same, an enforceable contract is created and insuch case the promisor can be forced to make good his promise.

36.9Ottis Infrastructure – Appellant Vs. State Of Assam And Another – Respondents 2019 0 Supreme(Gau) 380; High Court Of Gauhati

Para 24. As a corollary of the discussion and the legal proposition laid in the aforesaid decisions it indicatesthat panel provisions under Section 138 of N.I. Act would not be attracted if the cheque in question isissued against the debt which is not legally enforceable. A sharp distinction lies between the Section 18of the Limitation Act and Section 25(3) of the Contract Act. Under Section 18 of the Limitation Act unlessvalid acknowledgement within the period of time the liability ceased to exist whereas under Section 25(3)of the Contract Act such liability can be acknowledged and extended by the debtor

by his own wisdom ifhe promises to pay such debt in writing after the limitation period and it partakes the character ofenforceable debt. Now in the instant case admittedly the accused/petitioner entered into threeagreements in writing with a promise to pay the debt even after the period of limitation which has madehim liable to pay the debt that has been issued by way of cheque. As has been held in A. V/S Murthy inthis case also it can be held that in view of Section 118 and 139 of N.I. Act and Section 25(3) of theContract Act and in presence of documentary evidence which might amount to acknowledgment revivingthe period of limitation, the present case is not the one where the cheque was drawn in respect of a debtor liability which is completely barred from being enforced under the law. The liability incurred to theaccused/petitioner subsists and cannot be denied, after acknowledging the debt as has been indicatedabove.

36.8Manjit Kaur vs. Vanita, 2010(3) RCR (Criminal) 574.
In the said case, a cheque issued in the year 2003 in respect of the loan advanced in 1999, was held not be legally enforceable.
It was held as under:,
"9. Adverting to the facts of the instant case, the cheque was issued on 28.6.2003. On reckoning, it worksout that the loan was advanced somewhere in June, 1999. A meticulous perusal of the evidence on recordwould reveal that the appellant has not produced any document or other evidence revealing that theaccused-respondent had acknowledged the debt within three years from the date of loan. Thus, by the time,the cheque was issued, the debt became barred by limitation because no acknowledgment was obtainedbefore the expiry of three years from the date of loan. Section 18 of the Limitation Act, 1963 deals with thetheory underlying the doctrineof acknowledgment. The true principle underlying an acknowledgment isthat it merely renews the liability and gives the creditor or claimant a fresh period of limitation according tothe nature of the liability which exists at the time of the acknowledgment. An acknowledgment cannot beregarded as evidentiary of the debt but an acknowledgment that a person owes money to another, aspecified person is good evidence of his owing money to another. The dishonoured cheque Ex.PI cannot be
treated as acknowledgment under Section 18 of the Limitation Act, since the acknowledgment should bebefore the period of limitation is over and that it should be in writing. Thus, it cannot be said that the appellant has been able to prove that Ex. PI was in relation to a legally enforceable debt or liability in law asthe same was admittedly issued after more than three years of the advancement of the alleged amount asloan. So, if the matter is viewed in the background of the observations rendered in re: Ashwani Satish Bhat(Mrs.) (supra), it turns out that the accused-respondent had issued the cheque in 2003 when the debt hadalready become time barred. The acknowledgment of the alleged amount in 2003 was not

validacknowledgment under Section 18 of the Limitation Act and consequently, it was not a legally enforceabledebt."

36.9Rajesh Devi Vs. Satbir (2020) 1 Lawherald 585 Punjab And Haryana High Court

6. Even if it is taken that the respondent had, vide agreement dated 24.05.2006, agreed to make the payment ofthe installments of the loan, then also the cheque issued by the respondent on 30.06.2013 would not make thesame as legally recoverable debt, particularly when such debt becomes time barred. There is noacknowledgement on behalf of the respondent from the period 2006 till 2013 regarding the payment of thealleged debt.

36.10Sumesh Chadha Vs. Yogesh Jain (2020) 1 Lawherald 530 Punjab And Haryana High Court

Para 9. On the same analogy, it is held **that the cheque issued in 2018 in respect of the loan advanced in the year 2011,cannot be said to be a valid acknowledgment and thus, the complaint filed in respect of the dishonour of the saidcheque is not maintainable**. As a consequence, the summoning order passed in the said complaint cannot besustained.

36.11A.Yesubabu v/s D.Appala Swamy and another, 2003 2 ALD(Cri) 707 (AP)

The Courtalso held that "**Even assuming for a moment that the accused gave the cheque in the year 1990 ie., on 02.04.1990acknowledging the previous debt, even that acknowledgment of debt is also time barred on the facts of the case**in as much as the cheque in question was issued three years later ie., on 25.08.1994. Therefore, the complainantcannot legally enforce the liability under Ex.P1 and Ex.P2 receipts.

36.12Vellanki Venkata Krishna Rao Vs. State Of Telangana Criminal Petition No. 12344 Of 2017 Decided On : 09,12,2019

11. In the instant case, a perusal of the material on record would show that on 08.06.2012 the 2nd respondenthad transferred the loan amount of Rs. 10,00,000/, through RTGS from his bank account to the bank account ofthe petitioner/accused. On 05.11.2013, the petitioner/ accused had acknowledged the receipt of the said amountby executing hand loan agreement and also promissory notes. The cheques were issued on 08.04.2017. **By thetime the cheques were issued, the debt appears to have been barred by limitation because no acknowledgementis alleged to have been obtained by the 2nd respondent from the petitioner/accused before expiry of three yearsfrom the date of**

execution of the hand loan agreement. Thus, it is crystal clear that the debt was not legallyenforceable at the time of issuance of the cheque as per the explanation of Section 138 of the NegotiableInstruments Act, 1881.

36.13 Pragati Credit Co,operative Society Ltd. Vs. Suresh Shamrao Gode 2017 ALL MR (Cri) 3081.

HC: Dishonour of Cheque issued for a time barred debt, is offence under law. Cheque issued towards time barred debt, Acquittal of accused on ground that claim of complainant was barred by limitation, Improper, Cheque issued for discharge of time barred debt constitutes a fresh promise by virtue of S.25(3) of Contract Act, And in case of dishonour of such cheque, complaint u/S.138 N.I. Act would be maintainable, Matter remanded back to trial court.

36.14 (Zaheeda Kazi Vs Mrs. Sharina Ashraff Khan) 2007(3) Civil Court Cases 163 (Bombay) : 2007(3) Criminal Court Cases 069 (Bombay) : 2007(4) Criminal Court Cases 733 (Bombay)

Negotiable Instruments Act, 1881, S.138 , Dishonour of cheque , Cheque issued towards time barred debt , Accused cannot be convicted u/s 138 of the Act.

36.15 Hon'ble Delhi High Court in Prajan Kumar Jain vs. Ravi Malhotra 2010 (2) DCR 104

wherein it has been observed that the cheque issued in lieu of time barred debt does not come within the perview of section 138 NI Act.

37. WHETHER THE QUESTION OF HOLDING A MONEY LENDER'S LICENSE IS RELEVANT IN A COMPLAINT FILED UNDER SECTION 138?

In cases where cheque has been issued in discharge of loan liability, a defence often resorted to by the accused is that the complainant does not hold a valid money lenders license. This line of defence is not tenable in as much as it does not negate the liability of the drawer under section 138.

37.1S. Parameshwarappa v/s S.Choodappa 2007(2) CCC 763 (Karnataka).

It has been held that prosecution under section 138 of the Act is not affected by the provisions of the Money Lenders Act and the question as to whether the complainant is having a money lenders license is not relevant in a complaint filed under this section. Even otherwise also, as per settled law a man does not become a money lender within the meaning of section 2(a) of the aforesaid Act, by reason of occasional loans to relations, friends or acquaintances, nor does a man become a money lender merely because he may upon one or several isolated occasions lend money to a stranger. There must be a business of money lending, and the word 'business' imports the notion of repetition and continuity.

38.WHETHER SECTION 138 IS ATTRACTED WHEN A CHEQUE IS ISSUED IN DISCHARGE OF LEGAL LIABILITY OF ANOTHER?

I.C.S.D. Ltd. v/s Beena Shabeer 2002(4) RCR (Criminal) 74.,

by saying that a cheque can be drawn by one person towards a legally enforceable debt or liability of another person and it is not necessary under Section 138 of the Act that the cheque must have been drawn by the person for his own debt or liability. The Court reasoned that the language, has been rather specific as regards the intent of the legislature. The commencement of the Section stands with the words "Where any cheque". The above note d three words are of extreme significance, in particular, by reason of the use of the word "any" , the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well. The language of the

Statute depicts the intent of the law,makers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act. 'Any cheque' and 'other liability' are the two key expressions which stands as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the Statute. Any contra interpretation would defeat the intent of the legislature.

39. WHETHER NON-PRODUCTION OF ACCOUNT BOOKS BY THE COMPLAINANT IS FATAL FOR HIS CASE?

The law on this point was laid down in **M.S. Narayana Menon @ Mani v/s State of Kerala 2006(3) RCR (Criminal) 504**. Where there are business dealings between accused and complainant and it is contended that accused issued cheque to make payment of outstanding dues but the account books are not produced by complainant, there an adverse inference is required to be drawn as complainant did not produce account books which he was required to maintenance under statutory rules Contention of accused that he had issued cheque by way security was believed in this case. Further while discussing section 118 (a), it was reiterated that Court shall presume a negotiable instrument to before consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non ,existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon. It is not necessary for the accused to disprove the existence of consideration by way of direct evidence. Standard of proof evidently is per-preponderance of probabilities. For rebuttal of presumption arising under Section 139 of Negotiable Instruments Act the onus on an accused is not as heavy as that of the prosecution. It may be compared with a defendant in a civil proceeding. Presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. Acc used can discharge the onus placed on him even from the materials brought on records by the complainant himself. Evidently in law he is entitled to do so.

40. NOTICE BY WHATAPP / FAX OR EMAIL OR SMS OR BY COURIER PERMISSIBLE?

40.1 SUO MOTO WRIT PETITION (C) NO. 3/2020 IN RE COGNIZANCE FOR EXTENSION OF LIMITATION 10,07,2020

Service of notices, summons and exchange of pleadings/documents, is a requirement of virtually every legal proceeding. Service of notices, summons and pleadings etc. have not been possible during the period of lockdown because this involves visits to post offices, courier companies or physical delivery of notices, summons and pleadings. We, therefore, consider it appropriate to direct that such services of all the above may be effected by e-mail, FAX, commonly used instant messaging services, such as WhatsApp, Telegram, Signal etc. However, if a party intends to effect service by means of said instant messaging services, we direct that in addition thereto, the party must also effect service of the same document/documents by e-mail, simultaneously on the same date.

41.FSL

41.1 Rakeshbhai Ambalal Patel V/s State of Gujarat &Anr. 2017 3 GLR 2466; 2016 0 Supreme(Guj) 2173; HIGH COURT OF GUJARAT

A) Right of the accused in getting opinion of the hand writing expert, when he denies his hand writing in the cheque is a valuable right and in a normal case it cannot be denied by the Court, except the Court finds it fit and opines that just to delay the proceedings the accused is trying hard.

b)"Fair trial" includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and the courts should be jealous in seeing that there is no breach of them.

c)As to inquiry under Section 243 of Cr.P.C., refer to para 12

41.2 Madhubhai Gandabhai Patel Vs. Joitaram Jividas Patel And Another (2005) 3 Gujlh 535.

Para 9. In view of the above, the order passed by the Ld. Magistrate and its confirmation thereof by the Ld. Sessions Judge shall stand modified to the effect that after proper evidence is led by the accused that the cheques handed over to the complainant were signed as blank cheques without there being date, name and the amount, the accused may pray to the trial court for examination of hand writing expert as the case may be and if such an application is made at that stage the matter may be considered in accordance with law by the Ld. Magistrate and at that stage the contentions

of both sides shall remain open. **It is clarified that if there is no evidence led as observed earlier on behalf of the accused that the cheques were handed over blank, the option for referring the cheques to handwriting expert may not be available to the accused.**

Para 10. The present order passed by the Ld. Magistrate as well as the Ld. Sessions Judge shall not be treated as foreclosing the right of the accused for all times to come to refer the cheque to the handwriting expert and/or for examination of the handwriting expert.

41.3 Kalyani Baskar Vs. M.S.Sampornam 2006(9) Supreme 823 [2007] 2 SCC 258

Where accused in a cheque bouncing case prayed to Magistrate to send cheque in question for examination by handwriting expert to ascertain genuineness of signatures, as a fair trial request should have been allowed in exercise of power u/s 243(2) Cr.P.C.

Held : Section 243 (2) is clear that a Magistrate holding an inquiry under the Cr.P.C. in respect of an offence triable by him does not exceed his powers under Section 243(2) if, in the interest of justice, he directs to send the document for enabling the same to be compared by a handwriting expert because even in adopting this course, the purpose is to enable the Magistrate to compare the disputed signature or writing with the admitted writing or signature of the accused and to reach his own conclusion with the assistance of the expert. The appellant is entitled to rebut the case of the respondent and if the document viz. the cheque on which the respondent has relied upon for initiating criminal proceedings against the appellant would furnish good material for rebutting that case, the Magistrate having declined to send the document for the examination and opinion of the handwriting expert has deprived the appellant of an opportunity of rebutting it. The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. Fair trial includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and courts should be jealous in seeing that there is no breach of them. We have not been able to appreciate the view of the learned Judge of the High Court that the petitioner has filed application under Section 243 Cr.P.C. without naming any person as witness or anything to be summoned, which are to be sent for handwriting expert for examination. As noticed above, Section 243(2) Cr.P.C. refers to a stage when the prosecution closes its evidence after examining the witnesses and the accused has entered upon his defence. The appellant in this case requests for sending the cheque, in question, for the opinion of the handwriting expert after the respondent has closed her evidence, the Magistrate should have granted such a request

unless he thinks that the object of the appellant is vexation or delaying the criminal proceedings. In the circumstances, the order of the High Court impugned in this appeal upholding the order of the Magistrate is erroneous and not sustainable. (Para 12)

41.4 C.T. Kuriakose Vs.Joseph (2018) Acd 250 : (2018) 1 Klt 356 Kerala High Court

As of now there are no scientific and technical facilities available in India to scientifically determine age of handwritings and signatures in a cheque, Determination of such an issue may certainly be relevant for determining controversies in trials, But since such scientific facilities are lacking, no useful purpose would be sub served by directing Trial Court to subject the cheque for expert analysis as prayed for by petitioner, Petition dismissed.

41.5 Niranjan Vs. Swapnil Nitin Pagare 2019(5) MHLJ 789 Bom

Whether Magistrate can allow application for seeking opinion of handwriting expert in cheque dishonour case at belated stage?

A perusal of the impugned order shows that the learned Magistrate has rejected the application on the following grounds:

a) During the entire cross-examination of the respondent on behalf of the petitioner there was not a single suggestion put, regarding handwriting in the contents of the cheques;

b) There was no cross-examination even in the form of suggestion to show that the ink in which the contents are filled and that of the signatures on those cheques was different;

c) The petitioner during his cross-examination admitted to have received the statutory notice (Exhibit,16) but had not replied it when he could have raised such a dispute by sending a reply;

d) The defence was tried to be built at a belated stage and was an afterthought.

As can be seen the grounds put,forth by the learned Magistrate are duly corroborated by the fact situation and there is no dispute about correctness of availability of these grounds. In my considered opinion, these are indeed unassailable grounds which cumulatively demonstrate as to how filing of the application (Exhibit,75) at that stage was clearly an afterthought and the petitioner had not raised such defence at an appropriate stage.

8. Coupled with the above grounds, it is equally important to note that there is one more reason which justifies the observations and the conclusions of the learned Magistrate. As is pointed out by the learned advocate for the respondent, even in his examination under Section 313 of the Cr.P.C. the petitioner had not come out with any such concrete defence which would have justified his request which he had made by the application (Exhibit,75). He has given evasive replies and have denied all the facts simplicitor except by saying that he had given blank cheques to the respondent and that the case was false. He could have but has not at all stated that he had issued blank signed cheques which the respondent has misused.

9. In the cases of Nandkumar and Bandeppa (Supra) the accused therein had taken the defence at earlier point of time, unlike the petitioner who has applied at a belated stage which demonstrates same obvious motive to protract the trial. His case is rather covered by the instances in Prakash Sevantilal Vora and Simratmal Hiralal Gandhi (supra).

10. Taking into account all these aspects, I find no apparent illegality committed by the learned Magistrate while passing the impugned order. The grounds referred to herein-above clearly justify the conclusion reached by him.

Shri. Prakash Sevantilal Vora Vs. State Of Maharashtra & Anr. Criminal Application No.2987 of 2010, 2011 ALL MR (Cri) 713.

No dispute as to signature on cheques , Material alterations in the form of eraser, overwriting or corrections absent.

Complaint of accused that complainant had filled in details of the cheques, No reply given to statutory notice alleging that contents were not filled up by complainant ,**Held, application was made only to protract the trial and was liable to be dismissed**. If an application is made for sending the document to the Handwriting Expert particularly in a complaint which is filed under section 138, the Magistrate has to consider the said application and taking into consideration the facts of each case decide as to whether it is a fit case for sending the said document to the Handwriting Expert. Proceedings under section 138 are of a summary nature and the Act itself contemplates that the said trial should be over within a period of six months. There is a tendency on the part of the accused to protract the trial as much as possible. On the one hand, it is true that accused has a right to rebut the presumption which is raised under sections 118 and 139 of the Negotiable Instruments Act and, for that purpose, a fair opportunity has to be given to him. On the other hand, it is the duty of the Magistrate to ensure that by filing frivolous application, accused does not protract the trial. So far as the State of Maharashtra is concerned and particularly in the City of Mumbai there are about 6 lakhs cases pending in the Courts of Magistrates

for the offences punishable under section 138 of the Negotiable Instruments Act and the Handwriting Experts which are available in the City of Mumbai are very few. It is a common knowledge therefore that, at times, it takes couple of years for Handwriting Expert to give his opinion. Under these circumstances, therefore, the learned Magistrate has to consider **whether the application filed by the accused needs to be granted or not, taking into consideration the genuineness of the application and also after taking into consideration individual facts of the case. Merely because the accused has a right of being given fair opportunity, it cannot be said that in each and every case, whenever applications are filed for sending the document to Handwriting Expert, the same should be allowed.**Ref. to. [Para 16]

In the present case, however, the learned Magistrate was justified in rejecting the application filed by the accused. There is no dispute regarding the signature on the said cheques. The complainant has denied the suggestion that he had filled in the details of the cheques. Under these circumstances, therefore, the learned Magistrate was justified in coming to the conclusion that it was not necessary to send the cheques to the Handwriting Expert since there were no material alterations in the form of eraser or over writings or corrections. If it is a defence of the accused that blank cheque was given as a security, whether any authority was given to the complainant to fill in the contents will have to be decided after evidence is led by both parties and, for that purpose, it is not necessary to send it to the Handwriting Expert. Secondly, this application has been filed at a belated stage. No reply was given to the statutory notice alleging that contents were not filled up by the accused. The contention of the learned Counsel for the applicant that only after suggestions made by the accused were denied by the complainant, it became necessary to file an application for sending the cheques to Handwriting Expert, cannot be accepted. It is clear from the facts and circumstances of the case that the application is only made to protract the trial [Para 17].

42. CR.P.C.Sec. 256

42.1 Ankur Gopalbhai Patel V/s Chisti Vasimudin Khurshidbhai 2018 (4) GLR 3049

Dismiss For Default Of Complaint Under Section 256 Of CRPC

Code of Criminal Procedure, 1973 , S. 256,Held, plain reading of S. 256 of Cr.P.C. indicates that Magistrate is empowered to pass an order of acquittal on non-appearance or death of the complainant, ingredients of S. 256(1) are:

(i) that summons must have been issued on a complaint.

(ii) Magistrate should be of the opinion that for some reasons, it is not proper to adjourn the hearing of the case to some other date.

(iii) the date on which the order u/S. 256(1) can be passed is the day appointed for appearance of the accused or any day subsequent thereto to which the hearing of the case has been adjourned , word "acquit" in S. 256(1) is of immense significance, thus, from the perusal of S. 256 Cr.P.C. it is clear that if the summons has been issued to the accused on a complaint or on any subsequent date fixed for appearance of the accused or on any subsequent day, if the complainant does not appear, Magistrate has to acquit the accused unless he thinks it proper to adjourn the hearing of the case to some other day. Code of Criminal Procedure, 1973 , S. 256, 378 , acquittal of accused, remedy available for the complainant , provisions of S. 256(1) mandate the Magistrate to acquit the accused unless for some reasons he thinks it proper to adjourn the hearing of the case , once there is an acquittal of the accused, although not on merits, but on a technical ground like dismissal of the complaint for non appearance of the complainant, yet the only remedy available for the complainant would be to seek leave to appeal u/S. 378 of Cr.P.C. , therefore, a distinction has to be drawn in regard to the complaints dismissed prior to the summoning of an accused and those dismissed subsequent to the summoning of the accused, if complaint is dismissed prior to the summoning of an accused the order may be challenged by way of filing a revision, but once S. 256 comes into play the dismissal of a complaint has the effect of acquittal of accused and only an appeal can be filed u/S. 378 of the Code to challenge his acquittal.

Code of Criminal Procedure, 1973, S. 378, 401,**whether such an appeal could have been filed before Sessions Court u/s. 372 of Cr.P.C. or before High Court with the leave u/s. 378(3) of Cr.P.C. , held, appeal could have been filed before this Court after seeking leave, as provided u/S. 378(3) of Cr.P.C**. Held, power under Art. 227 of the Constitution is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate Courts or Tribunals within the bounds of their authority and not for correcting mere errors – power under Article 227 of the

Constitution is wider than the one conferred on the High Court by Art. 226 in the sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in the certiorari jurisdiction, exercise of jurisdiction under Art. 227 is limited and restrictive in nature, it can be exercised in the circumstances where the orders passed were for want of jurisdiction, error of law, perverse findings and gross violation of natural justice , although the impugned order could be termed as without jurisdiction, yet the High Court may refuse to disturb the same, as substantive justice is done by the Court, Revisional Court has assigned cogent reasons arrived for conclusion that the complaint could not have been dismissed for want of non,prosecution , application dismissed.

42.2 <u>ManojbhaiJasmatbhaiRamoliya VS State of Gujarat, 30 Jan 2020, 2020 0 Supreme(Guj) 253;</u>

Apex Court reported in AIR 1998 SC 596 dealing in case of Associated Cement Co. Ltd. Vs. Keshavanand wherein scope and purpose of insertion of Section 256 in the Code is discussed, which reads as under:

"17. What was the purpose of including a provision like S. 247 in the Code (or S.256 in the new Code). It affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. An accused who is per force to attend the Court on all posting days can be put much harassment by a complainant if he does not turn up to the Court on occasions when his presence is necessary. The Section, therefore, affords a protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, Court has a duty to acquit the accused in invitum.

18. Reading the Section in its entirety would reveal that two constraints are imposed on the Court for exercising the power under the Section. First is, if the Court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the Court notices that the complainant is absent on a particular day the Court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the Court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the steps of axing down the complainant may not be a proper exercise of the power envisaged in the section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice."

42.3 BAL KRISHAN RAWAT — Appellant Vs. PYARE LAL NEPTA — Respondent Cr. Appeal No. 5 of 2009 Decided on : 11,01,2018 (2018) ACD 397 (2018) 4 RCR(Criminal) 296

Complaint dismissed in default for non,presence and non prosecution when case was listed for recording of defence evidence—When Magistrate, in a summons case, dismisses complaint and acquits accused due to absence of complainant on the date of hearing, it becomes final and it cannot be restored—Keeping in view effect of dismissal in default, Magistrate is supposed to exercise his discretion with care and caution clearly mentioning in the order that there was no reason for him to think it proper to adjourn hearing of case to some other day.

42.4 Associated Cement Co. Ltd. v/s Keshvanand, (1998) 1 Supreme Court Cases 687,

The object and scope of Section 256 Cr.P.C, 1973 has held that, though, the Section affords protectionto an accused against dilatory tactics on the part of the complainant, but, at the same time, it does not mean thatif the complainant is absent, the Court has duty to acquit the accused in indium. It has further been held in thesaid judgment that the discretion under Section 256 Cr.P.C, 1973must be exercised judicially and fairly withoutimpairing the cause of administration of criminal justice.

42.5 Mohd. Azeem v/s A. Venkatesh and another, (2002) 7Supreme Court Cases 726,

Held that has considered dismissal of the complaint on account of one singular default inappearance on the part of the complainant as a very strict and unjust attitude resulting in failure of justice.

42.6 S. Anand v/s Vasumathi Chandrasekar, (2008) 4 Supreme Court Cases 67,

wherein the complaint under section 138 of the NI Act was dismissed by the trial Court exercising the powerunder Section 256 Cr.P.C , 1973on failure of the complainant or her power of attorney or the lawyer appointed byher to appear in Court on the date of hearing fixed for examination of witnesses on behalf of the defence, the Apex Court has considered as to whether provisions of Section 256 Cr.P.C, 1973 providing for disposal of acomplaint in default, could have been resorted to in the facts of the case as the witnesses on behalf of the

Complainant have already been examined and it has been held that in such a situation, particularly, when theaccused had been examined under Section 313 Cr.P.C, 1973 the Court was required to pass a judgment on meritin the matter.

42.7 Bal Krishan Rawat Vs. Pyare Lal Nepta (2018) LatestHlj(Hp) 516 : (2018) 1 Nij 128 : (2018) 4 Rcr(Criminal) 296 Himachal Pradesh High Court

20. In view of the ratio of law laid down by the apex Court and other judgments of the High Courts, including thisCourt, I am of the opinion that the learned Magistrate was not justified in dismissing the complaint in default forsingle absence of the complainant coupled with failure of his counsel to attend the date. From the stage ofcomplaint, it is evident that presence of complainant, on that day, was unnecessary as the case was at finalstage. The Magistrate instead of dismissing the complaint in default should have adjudicated upon the complaint on merit and for that purpose, he might have adjourned the case for a future date.

21. In the impugned order, there is no finding of the Magistrate that the complainant was not pursuing thecomplaint honestly and diligently. There is no reference of previous history, if any, with regard to conduct of thecomplainant causing unnecessary delay on account of adjournments sought by him or for want of his presence.

There is only reference of his absence on the date since morning till post lunch session. Therefore, acquittal ofthe accused without adjudicating the case on merits, due to non,appearance of the complainant on the date ofdefence evidence, who was siPIncerely pursuing his remedy, is improper. In normal circumstance, no complainantwill be disinterested in pursuing his complaint without any reason, particularly, when it is at final stage of trialinvolving stake of Rs. 20 lakhs. It was a fit case for the Magistrate to exercise his discretion to adjourn the casefor a subsequent date.

43. TWO COMPLAINTS

43.1 <u>Shri Pareshbhai Amrutlal Patel Vs State Of Gujarat, 28 Feb 2020, 2020 0 Supreme(SC) 199;</u>

When two complaints are filed, subject matter of which is the same, it is desirable that the same court hears both complaints to avoid contradictory judgments.

43.2 <u>Sangeetaben Mahendrabhai Patel v. State of Gujarat & Anr. (2012) 7 SCC 621</u>

- Wherein, for a dishonour of cheque, the prosecution for an offence under Section 420 IPC was found to be maintainable even after the prosecution under Section 138 of the Negotiable Instruments Act, 18819 is lodged. It was held that the mens rea i.e. fraudulent or dishonest intention at the time of issuance of cheque is not required to be proved in proceeding of an offence under Section 138 of the NI Act, whereas in the case under IPC, the issue of mens rea is relevant. It was held that the offences under Section 420 of IPC and Section 138 of NI Act are different, may on same facts.
- A subsequent First Information Report under Sections 406, 420 read with 114 of IPC was challenged on the ground that the accused has been tried earlier for an offence under Section 138 of the NI Act and that accused cannot be charged for the offence of criminal breach of trust, cheating and abetment pertaining to the cheque for which proceedings were initiated under Section 138 of the NI Act. In the said case, the Court held that there may be overlapping of facts in both the cases but the ingredients of the offences are entirely different.
- **Para 27** Admittedly, the appellant had been tried earlier for the offences punishable under the provisions of Sec. 138 N.I. Act and the case is sub judice before the High Court. In the instant case, he is involved under Secs. 406/420 read with Sec. 114 IPC. In the prosecution under Sec. 138 N.I. Act, the mens rea i.e. fraudulent or dishonest intention at the time of issuance of cheque is not required to be proved. However, in the case under IPC involved herein, the issue of mens rea may be relevant. The offence punishable under Sec. 420 IPC is a serious one as the sentence of 7 years can be imposed. In the case under N.I. Act, there is a legal presumption that the cheque had been issued for discharging the antecedent liability and that presumption can be rebutted only by the person who draws the cheque. Such a requirement is not there in the offences under IPC. In the case under N.I. Act, if a fine is imposed, it is to be adjusted to meet the legally enforceable liability. There cannot be such a requirement in the offences under IPC. The case under N.I. Act can

only be initiated by filing a complaint. However, in a case under the IPC such a condition is not necessary.

- **Para 28** ***There may be some overlapping of facts in both the cases but ingredients of offences are entirely different. Thus, the subsequent case is not barred by any of the aforesaid statutory provisions.*** The appeal is devoid of any merit and accordingly dismissed.

43.3 Yogesh Premjibhai Suvariya Versus State Of Gujarat, 2021 (4) GLR 3434

- It is submitted that respondent complainant having filed complaint u/S. 138 of NI Act, present complaint for offences under IPC was not maintainable - held, in view of decision of Supreme Court in case of Sangeetaben Mahendrabhai Patel vs State Of Gujarat, even if accused was tried earlier for offences punishable u/S. 138 of NI Act, complaint for the offences punishable u/S. 406 and 420 of IPC would be maintainable.

44. CONDITIONAL SUSPENSION OF SENTENCE

44.1 Surinder Singh Deswal@ Col. S. S. Deswal VS Virender Gandhi, 08 Jan 2020, 2020 0 AIR(SC) 415; 2020 1 Crimes(SC) 118;

In case of conditional suspension of sentence non compliance of the condition has adverse effect on the continuance of suspension of sentence.

44.2 Rahul Sudhakar Anantwar Versus Shivkumar Kanhiyalal Shrivastav, AIR 2019 SC 5520

Para 5 Challenging the order of acquittal of the Trial Court, the respondent-complainant has filed an appeal before the High Court. **The High Court has pointed that the appellant has not disputed his signature on the said cheque presented for clearance and that there is nothing on record to show that the said Firm by name Synergy and Solution Incorporation was a firm or a company and that the account was maintained by one Vipin Dhopte. The High Court has also held that it is not the case of the appellant-accused that other entries in said cheque is not in his own handwriting.** The High Court has held that the Trial Court has not appreciated the evidence in the right perspective and in the light of the provisions of Section 139 of the N.I. Act which create statutory presumption in favour of the holder of cheque and the burden is on the accused to rebut the statutory presumption. Observing that there is sufficient evidence on record to show that the said cheque was issued to discharge legally enforceable debt , the High Court has reversed the acquittal of the appellant-accused and convicted him under Section 138 of the N.I. Act and

imposed fine amount of Rs.5,00,000/- (Rupees Five Lakhs) and also imposed costs of Rs.20,000/- (Rupees Twenty Thousand) on the appellant.

44.3 Satyendra Kumar Mehra @ Satendera v. The State of Jharkhand (2019) 1 SCC (Cri.) 831, the Apex Court observed thus :

Para 34. The appellate Court while exercising power under Section 389 Cr.P.C. can suspend the sentence of imprisonment as well as of fine without any condition or with conditions. There are no fetters on the power of the Appellate Court while exercising jurisdiction under 389 Cr.P.C. The Appellate Court could have suspended the sentence and fine both or could have directed for deposit of fine or part of fine.

45. ADVOCATE FEES IN PERCENTAGE CHQUE BOUNCE

45.1 B. Sunitha Vs. State Of Telengana (2018) 1 SCC 638

Held, Claim Based On Percentage Of Subject Matter In Litigation Cannot Be Basis Of A Complaint Under Section 138 Of Act.

Para 18. Thus, mere issuance of cheque by the client may not debar him from contesting the liability. If liability is disputed, the advocate has to independently prove the contract. Claim based on percentage of subject matter in litigation cannot be the basis of a complaint under Section 138 of the Act.

Para 19. In view of the above, the claim of the respondent advocate being against public policy and being an act of professional misconduct, proceedings in the complaint filed by him have to be held to be abuse of the process of law and have to be quashed.

46. RECOVERY OF FINE AND COMPENSATION

46.1 R. Vijayan v/sBaby Supreme Court (2012) 1 SCC 260

Held, wherein the court was determining an issue in respect of compensation when fine is imposed as the sentence or it forms part of the sentence. In this pronouncement, the Supreme Court noted that cases arising under Section 138 of the NI Act are really "civil cases masquerading as criminal cases". The statutory object in effect appears to be both punitive as also compensatory and restitutive in regard to cheque dishonouring cases. The judgment notes that Chapter XVII of the enactment is a unique exercise which bears the dividing line between civil and criminal jurisdictions and that it provides a single forum to enforce a civil and criminal remedy

46.2 Kumaran Vs. State Of Kerala (2017) 7 SCC 471 Supreme Court Of India

Dishonour of cheque—When compensation is ordered as payable for uncommitted under Section 138 of Negotiable Instruments Act and in default thereof, jail sentence is prescribed and undergone, compensation is still recoverable—Court may, when passing judgment, ordered accused to pay by way of compensation such amount as may be specified in the order to person who has suffered loss or injury by reason of act for which accused person has been sentenced— Undergoing of imprisonment awarded in default of payment of fine does not operate as a discharge or satisfaction of fine

Para 31. The provisions of Sections 357(3) and 431 CrPC, when read with Section 64 IPC, empower the court, while making an order for payment of compensation, to also include a default sentence in case of non-payment of the same."

26. This statement of the law was reiterated in **R. Mohan v/s A.K. Vijaya Kumar, (2012) 8 SCC 721 (see paras 26 to 29).** 27. These two judgments make it clear that the deeming fiction of Section 431 Cr.P.C. extends not only to Section 421, but also to Section 64 of the Indian Penal Code. This being the case, Section 70 IPC, which is the last in the group of Sections dealing with sentence of imprisonment for non-payment of fine must also be included as applying directly to compensation under Section 357(3) as well. The position in law now becomes clear. The deeming provision in Section 431 will apply to Section 421(1) as well, despite the fact that the last part of the proviso to Section 421(1) makes a reference only to an order for payment of expenses or compensation out of a fine, which would necessarily refer only to Section 357(1) and not 357(3). Despite this being so, so long ascompensation has been directed to be paid, albeit under Section 357(3), Section 431, Section 70 IPC and Section 421(1) proviso would make it clear that by a legal fiction, even though a default sentence has been suffered, yet,

compensation would be recoverable in the manner provided under Section 421(1). This would, however, be without the necessity for recording any special reasons. This is because Section 421(1) proviso contains the disjunctive "or" following the recommendation of the Law Commission, that the proviso to old Section 386(1) should not be a bar to the issue of a warrant for levy of fine, even when a sentence of imprisonment for default has been fully undergone. The last part inserted into the proviso to Section 421(1) as a result of this recommendation of the Law Commission is a category by itself which applies to compensation payable out of a fine under Section 357(1) and, by applying the fiction contained in Section 431, to compensation payable under Section 357(3).

46.3 Ashok Leyland Limited v/s State of Tamil Nadu, (2004) 3 SCC 1 at para 32,76.

Thus it is clear that the object of the legal fiction created by Section 431 is to extend for the purpose of recovery of compensation until such recovery is completed, and this would necessarily take us not only to Section 421 of the Cr.P.C. but also to Section 70 of the Penal Code, a companion criminal statute, as has been held above.

46.4 K.C. AUGUSTINE Vs. P.N. RAJASEKHARAN Criminal Rev/s Pet. No. 680 Of 2013, Decided On : 09,06,2017 (2017) ACD 828 (2018) 1 DCR 127 KERALA HIGH COURT

Criminal Procedure Code, 1973 (CrPC) , Section 4(2) Negotiable Instruments Act, 1881 (NI) , Section 138 Negotiable Instruments Act, 1881 Section 138 — Dishonour of cheque — The offence of dishonour of cheques under Section 138 of the N.I.Act is essentially a civil wrong, which has been given criminal overtones by the Parliamentary intervention through the amendment of the N.I. Act and that the gravity of such a complaint cannot be equated with an offence under IPC and, instead of jail sentence, imposition of fine payable as compensation was found sufficient to meet the ends of justice. Negotiable Instruments Act, 1881 Section 138 Dishonour of cheque Compensatory aspect of the remedy which should be given utmost priority over the punitive aspects. Negotiable Instruments Act, 1881 Section 138 Dishonour of cheque Trial of offenceIt is settled position that in view of the provisions contained in Section 4(2) of the Cr.P.C. 1973, the provisions of that Code would apply even for regulating the inquiries and trials of offences under special statutes like the N.I. Act, so long as there are no specific provisions in the special enactment covering the situation at hand.

46.5 Suganthi Suresh KumarVsJagdeeshan [2002 (2) SCC 420]

The Hon'ble Apex Court held that Court can impose a sentenceof imprisonmenton the accused in default of payment of compensation ordered u/s 357 (3) of the Code.

46.6 R. Mohan Vs A.K. Vijaya Kumar [2012 Cri.L.J. 3953]

18. The idea behind directing the accused to pay compensation to the complainant is to give him immediate relief so as to alleviate his grievance. In terms of Section 357(3) compensation is awarded for the loss or injury suffered by the person due to the act of the accused for which he is sentenced. If merely an order, directing compensation, is passed, it would be totally ineffective. It could be an order without any deterrence or apprehension of immediate adverse consequences in case of its non, observance. The whole purpose of giving relief to the complainant under Section 357(3) of the Code would be frustrated if he is driven to take recourse to Section 421 of the Code. Order under Section 357 (3) must have potentiality to secure its observance. Deterrence can only be infused into the order by providing for a default sentence. If Section 421 of the Code puts compensation ordered to be paid by the court on par with fine so far as mode of recovery is concerned, then there is no reason why the court cannot impose a sentence in default of payment of compensation as it can be done in case of default in payment of fine under Section 64 of the IPC. It is obvious that in view of this, in Vijayan, this court stated that the above mentioned provisions enabled the court to impose a sentence in default of payment of compensation and rejected the submission that the recourse can only be had to Section 421 of the Code for enforcing the order of compensation. Pertinently, it was made clear that observations made by this Court in Hari Singh are as important today as they were when they were made. The conclusion, therefore, is that the order to pay compensation may be enforced by awarding sentence in default.

19. In view of the above, we find no illegality in the order passed by the learned Magistrate and confirmed by the Sessions Court in awarding sentence in default of payment of compensation. The High Court was in error in setting aside the sentence imposed in default of payment of compensation.

46.7 Triyambak S Hegde V/S Sripad, 2021 LawSuit(SC) 551
Negotiable Instruments Act , 1881- Sec 138- Conviction - Sentencing Policy- Gravity of Offence under N. I. Act not equated to other criminal offences- enhanced fine would meet justice

[21] Having arrived at the above conclusion, it would be natural to restore the judgment of the Learned JMFC. Though in that regard, we confirm the order of conviction, we have given our thoughtful consideration relating to the appropriate sentence that is required to be imposed at this stage, inasmuch as; whether it is necessary to imprison the respondent at this point in time or limit the sentence to imposition of fine. As noted, the transaction in question is not an out and out commercial transaction. The

very case of the appellant before the Trial Court was that the respondent was in financial distress and it is in such event, he had offered to sell his house for which the advance payment was made by the appellant. The subject cheque has been issued towards repayment of a portion of the advance amount since the sale transaction could not be taken forward. In that background, what cannot also be lost sight of is that more than two and half decades have passed from the date on which the transaction had taken place. During this period there would be a lot of social and economic change in the status of the parties. Further, as observed by this Court in Kaushalya Devi Massand vs. Roopkishore Khore, 2011 4 SCC 593, the gravity of complaint under N.I. Act cannot be equated with an offence under the provisions of the Indian Penal Code, 1860 or other criminal offences. In that view, in our opinion, in the facts and circumstances of the instant case, if an enhanced fine is imposed it would meet the ends of justice.

47.CR.P.C. Sec. 427

47.1 <u>Shyam Pal Vs. Dayawati Besoya (2017) 1 Scc(Cri) 264 Supreme Court Of India Decided on : 28,10,2016</u>

Criminal Procedure Code, 1973 (CrPC) , Section 427 Negotiable Instruments Act, 1881 (NI) , Section 138 Negotiable Instruments Act, 1881—Section 138—Criminal Procedure Code, 1973—Section 427— Dishonour of cheques—Running of substantive sentences—There is overwhelming identicalness in features of both cases permitting two transactions though undertaken at different points of time, to be deemed as a singular transaction or two segments of one transaction—Direction for concurrent running of sentence would be limited to substantive sentence alone—Such concession cannot be extended to transactions which are distinctly different, separate and independent of each other and amongst others where parties are not the same—Appellant is entitled to benefit of discretion contained in Section 427 of Cr.P.C

47.2 <u>Rajpal v/s Om Prakash and Anr. AIR 2018 SC (Supp) 1377 Supreme Court</u>

Criminal P.C. (2 of 1974), S.427, Negotiable Instruments Act (26 of 1881), S.138, Concurrent running of sentences, Offence of dishonour of cheque, Accused convicted for dishonour of 2 different cheques – As conviction is not arising out of single transaction, Relief of concurrent running of sentences cannot be granted.

47.3 <u>Sudesh Devendrakumar Jain Versus State Of Gujarat, 2021 (2) GLR 1558</u>

- In present case four complaints u/s 138 of NI Act filed by complainant, Trial court convicted in all criminal cases u/s. 138 by two different Courts, order of running of sentence in all four cases consequently, prayer for direction u/s 427 of CrPC for the sentences to run concurrently in all four cases, while u/s. 427(1), discretion to make the sentences to run consecutively or concurrently would have to be exercised by the Court, if Trial Court is silent and has not given any direction for the sentence to run concurrently, it will run only consecutively as the normal rule u/s. 427(1), if no direction given by Trial Court to run sentence concurrently, then sentences will run only consequently, powers u/s. 427 of Code to be exercised, where prosecution is based on single transaction, powers u/s 427 of Code is to be exercised based on nature of offence and attending facts and circumstances.

- In case of **<u>Mohd. Akhtar Hussain Vs. Assistant Collector Of Customs, reported in AIR 1988 SC 2143</u>**, the Apex Court held that the Basic rule of thumb over the years has been the so called single

transaction rule for concurrent sentences, but this rule has no application if the transaction relating to offence is not the same or the facts constituting the offence are quite different, where there are different transactions, different crime numbers and different judgments, no concurrent sentences can be awarded u/s 427 of Code. each tender of a cheque and its dishonour gives rise to separate cause of action subject to a condition that separate notices are issued in respect of each of these cheque, petitioner by giving four different cheques of different amount of different dates by its dishonour, has ruled out the consideration of single transaction, efficacious alternative remedy by way of an appeal or revision available to petitioner, no direction can be issued for running the sentence concurrently.

- In case where Cheques issued on different dates, presented on different dates and separate notices are issued in respect of each default, the transaction cannot be held to be a single transaction, which has occurred in the present case on hand.

- **Para 14** Though the learned Advocate Mr. Jay Thakkar had initially sought to submit that the respondentcomplainant having filed the complaint under Section 138 of the Negotiable Instruments Act, the present complaint for the offences under the IPC was not maintainable, during the course of his oral submissions, he had fairly conceded that in view of the decision in case of Sangeetaben Mahendrabhai Pate vs State Of Gujarat & Anr reported in (2012) 7 SCC 621, even if the accused was tried earlier for the offences punishable under Section 138 of the Negotiable Instruments Act, the complaint for the offences punishable under Sections 406 and 420 of IPC would be maintainable. The Supreme Court in the said case had held as under:

- **Para 37**. Admittedly, the appellant had been tried earlier for the offences punishable under the provisions of Section 138 N.I. Act and the case is sub judice before the High Court. In the instant case, he is involved under Section 406/420 read with Section 114 IPC. In the prosecution under Section 138 N.I. Act, the mens rea i.e. fraudulent or dishonest intention at the time of issuance of cheque is not required to be proved. However, in the case under IPC involved herein, the issue of mens rea may be relevant. The offence punishable under Section 420 IPC is a serious one as the sentence of 7 years can be imposed.

- **Para 38**. In the case under N.I. Act, there is a legal presumption that the cheque had been issued for discharging the antecedent liability and that presumption can be rebutted only by the person who draws the cheque. Such a requirement is not there in the offences under IPC. In the case under N.I. Act, if a fine is imposed, it is to be adjusted to meet the legally enforceable liability. There cannot be such a requirement in the offences under IPC. The case under N.I. Act can only be initiated by filing a complaint. However, in a case under the IPC such a condition is not necessary.

- **Para 39**. There may be some overlapping of facts in both the cases but ingredients of offences are entirely different. Thus, the subsequent case is not barred by any of the aforesaid statutory provisions.

48. CHEQUE ISSUED PURSUANT TO THE ORDER OF THE LOK ADALAT

48.1 Arun Kumar VS Anita Mishra, 18 Oct 2019, 2019 0 AIR(SC) 5745; 2019 0 Supreme(SC) 1418;

Para 12. The cheque issued pursuant to the order of the Lok Adalat, was also dishonoured. This clearly gave rise to afresh cause of action under Section 138 of the Negotiable Instruments Act.

13. In**K.N. Govindan Kutty Menon vs. CD. Shaji reported in, (2012) 2 SCC 51** cited by the appellant complainant, this Court held:

"11. In the case on hand, the question posed for consideration before the High Court was that "when a criminal case referred to by the Magistrate to a Lok Adalat is settled by the parties and an award is passed recording the settlement, can it be considered as a decree of a civil court and thus executable by that court?" After highlighting the relevant provisions, namely, Section 21 of the Act, it was contended before the High Court that every award passed by the Lok Adalat has to be deemed to be a decree of a civil court and as such, executable by that court.23. In the case on hand, the courts below erred in holding that only if the matter was one which was referred by a civil court it could be a decree and if the matter was referred by a criminal court it will only be an order of the criminal court and not a decree under Section 21 of the Act. The Act does not make out any such distinction between the reference made by a civil court and a criminal court. There is no restriction on the power of Lok Adalat to pass an award based on the compromise arrived at between the parties".

14. Every award of the Lok Adalat is, as held in K.N. Govindan Kutty Menon vs. CD. Shaji (supra), deemed to be decree of a civil court and executable as a legally enforceable debt. The dishonour of the cheque gave rise to a cause of action under Section 138 of the Negotiable Instruments Act. The impugned judgment and order is misconceived.

48.2 Gimpex Private Limited VS Manoj Goel 2021 LawSuit(SC) 637

Negotiable Instruments Act , 1881- 147 Can complainant pursue original complaint under Sec 138 N. I. Act after entering into compromise and the cheque given during compromise proceedings gets dishonoured?

[38] When a complainant party enters into a compromise agreement with the accused, it may be for a multitude of reasons - higher compensation, faster recovery of money, uncertainty of trial and strength of the complaint, among others. A complainant enters into a settlement with open eyes and undertakes the risk of the accused failing to honour the cheques issued pursuant to the settlement, based on certain benefits that the settlement agreement postulates. Once parties have voluntarily entered into such an agreement and agree to abide by the consequences of non-compliance of the

settlement agreement, they cannot be allowed to reverse the effects of the agreement by pursuing both the original complaint and the subsequent complaint arising from such noncompliance. The settlement agreement subsumes the original complaint. Noncompliance of the terms of the settlement agreement or dishonour of cheques issued subsequent to it, would then give rise to a fresh cause of action attracting liability under Section 138 of the NI Act and other remedies under civil law and criminal law.

[39] A contrary interpretation, which allows for the complainant to pursue both the original complaint and the consequences arising out of the settlement agreement, would lead to contradictory results. First, it would allow for the accused to be prosecuted and undergo trial for two different complaints, which in its essence arise out of one underlying legal liability. Second, the accused would then face criminal liability for not just the violation of the original agreement of the transaction which had resulted in issuance of the first set of cheques, but also the cheques issued pursuant to the compromise deed. Third, instead of reducing litigation and ensuring faster recovery of money, it would increase the burden of the criminal justice system where judicial time is being spent on adjudicating an offence which is essentially in the nature of a civil wrong affecting private parties - a problem noted in multiple judgments of this Court cited above. Most importantly, allowing the complainant to pursue parallel proceedings, one resulting from the original complaint and the second emanating from the terms of the settlement would make the settlement and issuance of fresh cheques or any other partial payment made towards the original liability meaningless. Such an interpretation would discourage settlement of matters since they do not have any effect on the status quo, and in fact increase the protracted litigation before the court.

[40] Thus, in our view, a complainant cannot pursue two parallel prosecutions for the same underlying transaction. Once a settlement agreement has been entered into by the parties, the proceedings in the original complaint cannot be sustained and a fresh cause of action accrues to the complainant under the terms of the settlement deed. It has been urged by Mr V Giri, learned Senior Counsel, and Ms Liz Mathew, learned counsel, that parallel prosecutions would not lead to a multiplicity of proceedings, as in the present case, both complaints are being tried by the same court.

49. AMENDMENT IN COMPLAINT

49.1 M/s. Kumar Rubber Industries Kapurthala v/sSohan Lal 2003 2 DCR 71; Criminal Misc. No. 11506,M of 1998 Decided on 14.9.2001 Punjab and Haryana High court

Para 50. Therefore, we find that not only the complaint is defective, but also there is total non application of mind by the learned Magistrate also. This is not a mere technical defect or a mere mis,description of the parties which could be allowed to be amended. The cheques are the very basis of foundation of the complaint. So, when the very foundation has not been properly laid by giving the correct numbers of the cheques, the complaint itself becomes not maintainable. Such a defect which goes to the root of the matter, cannot be allowed to be amended and the complainant cannot be allowed to supplement the complaint by giving the numbers of fresh cheques as the basis of the complaint. The complaint cannot thus be made to suit the evidence introduced. Therefore, in my view, the complaint has to fail and to be quashed on that account.

49.2 Vinayagam v/s Subhash Chandran, 2000 (3) R.C.R. (Criminal) 4 Madras High Court

Held in considered the question whether the Magistrate has the power to return a complaint to the complaint for removing certain defects and for representing the same. The Division Bench held that the Magistrate and no power to do so and that the complaint has to suffer for the defects in the complaint.

49.3 K. Subramanian v/s Kamakshi Extractions, 1999 (3) R.C.R. (Criminal) 253

It will be of no help to the complainant, because it was held therein that if the factual foundation for the offence has been laid in the complaint, the Court should not hasten to quash the criminal proceedings merely on the premise that one or two ingredients have not been stated with details. Because, in the present case, the very factual foundation of the case of the complainant is defective, and this defect goes to the root of the matter affecting the very maintainability of the complaint, the complaint cannot be sustained, and the complainant or supplement the complaint to rectify such a defect.

50.THE RIGHT OF THE ACCUSED TO PRODUCE EVIDENCE OF HIS CHOICE IS A PART OF FAIR TRIAL

50.1 Abdul Rauf Abdul Rashid Shaikh Vs Shaikh Nuruddin Sarfuddin, 12 Dec 2017 2018 1 GLH 617; 2017 0 Supreme(Guj) 1811;

12. The right of the accused to adduce evidence of his choice is a part of fair trial. Whether it be sessions trial, trial of a summons case, warrant case or

summary trial, that right is there when it comes to the stage of adducing defence evidence. It is a right of the accused, at the appropriate time, to be called upon to enter his defence. So far as the sessions trials are concerned, there is Section 233 of the Cr.P.C. and in trial of warrant cases, there is Section 243 of the Code of Criminal Procedure. In a case triable as summons case, if the Magistrate does not convict the accused under Sections 252 or 253 of the Cr.P.C., he has to hear the prosecution and take all such evidence as may be produced in support of the prosecution. He has also to hear the accused and take all such evidence as he produces in his defence. Section 254(2) of the Cr.P.C. provides that the Magistrate may, on the application of the prosecution or the accused, issue a summons to any witness directing him to attend or to produce any document or other thing. The discretion is certainly vested with the Magistrate to consider whether the witnesses cited by the accused should all be examined. In a case where the Magistrate finds that the witness schedule has been filed with the sole purpose of delaying the proceeding or that no meaningful purpose would be served by the examination of the witnesses, it is open to him to decline the request for summoning the witnesses.

13. Section 254 of the Cr.P.C. reads as under:

"254. Procedure when not convicted. , (1) If the Magistrate does not convict the accused under section 252 or section 253, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.

(2) The Magistrate may, if he thinks fit, on the application of the prosecution or the accused, issue a summons to any witness directing him to attend or to produce any document or other thing.

(3) A Magistrate may, before summoning any witness on such application require that the reasonable expenses of the witness incurred in attending for the purposes of the trial be deposited in Court."

14. The power under Section 254(2) conferred on the Magistrate is of wider amplitude than that of the Sessions Judge or Magistrate in a similar situation while tying a sessions case or a warrant case. Section 233(3) relates to a situation where the Accused in a sessions case wants to adduce defence evidence or to produce any document or thing. Subsection (3) enables the Judge to issue process. Of course, it is with a rider. The Sessions Judge can refuse to issue process if he finds that the witness list is filed for the purpose of vexation or delay or defeating the ends of justice. Section 243(2) provides that in a case tried as a warrant case the Magistrate can reject the application filed by the Accused for issuing process for compelling the attendance of any witness or the production of any document

or thing, if he finds that the application is made for the purpose of vexation or delay or for defeating the ends of justice. Under Sections 233(2) and 243(2) the power of the Sessions Judge and Magistrate to refuse issuance of process is circumscribed by the three factors mentioned specifically viz. vexation, delay or defeating the ends of justice. Thus, in cases not coming under any of the above categories the Sessions Judge or the Magistrate in a trial of warrant cases will have to issue process to the defence witnesses. So far as Section 254(2) is concerned there is no such limitation. Thus, it can be seen from a reading of Sections 233(2), 243(2) and 254(2) that the Magistrate's discretion as to allowing or refusing an application either by the prosecution or by the accused for issuing the summons to any witness directing him to attend or to produce any document before the Court is wider so far as the trial of summary cases is concerned. But that does not mean that the Magistrate can act arbitrarily, whimsically or capriciously. It has to be considered on the facts and circumstances of each case. It may not be possible to enumerate in what circumstances the Magistrate can issue process for examining the defence witnesses and in what circumstances he should not do it. The Magistrate will have to assess the overall situation in any case particularly bearing in mind the onus of proof. In other words, the Court should not scuttle the defence evidence on flimsy grounds. If the Magistrate finds that the witnesses cited have nothing relevant to testify before the Court or if he finds that the witnesses are merely cited with the ulterior motive to dodge the proceedings, he can refuse to act.

15. The right of the accused to have his witnesses examined or to have documents produced on his side cannot be denied. The general rule is that an opportunity should be afforded to the accused to adduce his evidence. But he cannot have unfettered liberty to prolong the proceedings by adopting delaying tactics. It is always open to the Magistrate to put a stop to it. But in a case where the burden is on the accused, as in this case, the attempt of the accused to establish his innocence by defence evidence should not be thwarted. The applicant is facing prosecution for the offence punishable under Section 138 of the Negotiable Instruments Act. Section 139 of the N.I. Act provides for presumption in favour of the holder. Section 139 of the N.I. Act reads as under:,

"139.XXX...

Defence of misuse of cheque by complainant. Rejection of application to call for expert opinion, in light of presumption raised u/Ss. 20 and 139 of Act of 1881 is improper. Opportunity must be granted to accused for adducing evidence."

16. The plain reading of Section 139 of the N.I. Act referred to above would indicate that there is a legal presumption that the cheque was issued for

discharging the antecedent liability and that presumption can be rebutted only by the person, who draws the cheque.

17. The aforesaid presumption is in favour of the holder of cheque. After all, a presumption is only for casting the burden of proof as to who should adduce evidence in a case. The presumption available under Section 139 can be rebutted by the accused by adducing evidence. So, the burden of proof is on the accused and the evidence available on record will have to be appreciated by bearing in mind the fact regarding the burden of proof.

18. In such circumstances, the Court should permit the accused to lead appropriate evidence for the purpose of deciding that burden. This one important aspect should be kept in mind by the Trial Court while conducting a criminal case for the offence of dishonour of cheque punishable under Section 138 of the N.I. Act.

51.MORE THAN ONEEXAMINATION U/S. 313, CR.P.C.

51.1 RajanDwivedi Vs. CBI; 2008 Cri.L.J.; 1440 (1447) DEL

If examination of the accused under section 313 has taken place, the court can call the accused to answer incriminating circumstances again. There is no implied prohibition on calling upon the accused to again answer questions. However, power to call the accused to answer questions more than once, after conclusion of the prosecution evidence should not be used in a routine or mechanical manner.

22. Section 313 consists of two parts. The first confers a discretion ("may") to the Court to question the accused at "any stage" of an inquiry or trial without previously warning him. Under Section 313(1)(b) the Court is required to question him generally on the case after the witnesses for the prosecution have been examined and before he is called for his defense. The second part is mandatory and imposes upon the Court a duty to examine the accused at the close of the prosecution case, to give him an opportunity to explain any incriminating circumstances appearing against him in the evidence and to state, whatever he wishes to, in his defense. He is not bound to answer the questions. Under Sub-section (4) the answers given by the accused may be taken into consideration in the inquiry or trial. His statement is material upon which the Court may act, and which may prove his innocence. Under Sub-section (2) no oath is administered to him. The reason is that when he is examined under the provision, he is not a witness.

51.2 Keya Mukherjee VS Magma Leasing Limited, [2008] 8 SCC 447

IMPORTANT POINT :The word "shall" in clause (b) to Section 313(1) of the Code is to be interpreted as obligatory on the court and it should be complied with when it is for the benefit of the accused.

25. We think that a pragmatic and humanistic approach is warranted in regard to such special exigencies. The word "shall" in clause (b) to Section 313(1) of the Code is 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, e.g., if the accused satisfies the court that he is unable to reach the venue of the court, except by bearing huge expenditure or that he is unable to travel the long journey due to physical incapacity or some such other hardship, relieve him of such hardship and at the same time adopt a measure to comply with the requirements in Section 313 of the Code in a substantial manner. How could this be achieved?

26. 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. (c) An undertaking that he would not raise any grievance on that score at any stage of the case.

27. 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.

28. In our opinion, if the above course is adopted in exceptional exigency it would not violate the legislative intent envisaged in Section 313 of the Code.

52. CALCULATING THE PERIOD OF ONE MONTH& LIMITATION

52.1 Econ Antri Ltd. V/s Rom Industries Ltd. & Another Supreme Court of India 2014 11 SCC 769; 2013 0 Supreme(SC) 783; (Three Bench Judgment).

Law Laid Down : For the purpose of calculating the period of one months under Section 142(b) of NI Act the period of limitation has to be reckoned by excluding the date on which cause of action arose.

Negotiable Instruments Act, 1881 (Central Act 26 of 1881) — Sections 138(c) and 142(b) Limitation Act, 1963 (Central Act 36 of 1963) — Section 12(1) and (2) General Clause Act, 1897 (Central Act No. 10 of 1897) Section 9 Cognizance of offence under NI Act — Period of limitation Reckoning of Whether while calculating the period of one month which is prescribed has to be reckoned by excluding the date on which the cause of actionarose — Finding of — Court having considered the question of Law involved in the case and in the light of relevant Judgments held that for the purpose of calculating the period of one month which is prescribed under Section 142(b) of NI Act the period of limitation has to be reckoned by excluding the date on which the cause of action arose.

Held : Having considered the question of law involved in this case in proper perspective, in light of relevant judgments, we are of the opinion that Saketh lays down the correct proposition of law. We hold that for the purpose of calculating the period of one month, which is prescribed under Section 142(b) of the N.I. Act, the period has to be reckoned by excluding the date on which the cause of action arose. Court hold that SIL Import USA does not lay down the correct law. Needless to say that any decision of this Court which takes a view contrary to the view taken in Saketh by this Court, which is confirmed by us, do not lay down the correct law on the question involved in this reference[Para 25].

52.2 RE: Cognizance For Extension Of Limitation Suo Motu Writ Petition (Civil) No.3 of 2020 2021-JX-(SC)-0-159, LL 2021 SC 144 Decided on : 08-03-2021.

In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 14.03.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2020, if any, shall become available with effect from 15.03.2021. 2. In cases where the limitation would have expired during the period between 15.03.2020 till 14.03.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days

from 15.03.2021. In the event the actual balance period of limitation remaining, with effect from 15.03.2021, is greater than 90 days, that longer period shall apply. 3. The period from 15.03.2020 till 14.03.2021 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

53. LOST OF CHEQUE

53.1 Raj Kumar Khurana VS State of (NCT of Delhi)[2009] 0 Supreme(SC) 926 / [2009] 6 UJ 2588 / [2009] 3 WLN 77 SC

"5. That the above said cheque in question was presented by the complainant for encashment through its bearers, namely State Bank of India, Azadpur Branch, Delhi 33, but the same was returned as dishonoured with the remarks "SAID CHEQUE REPORTED LOST BY THE DRAWER". This intimation was received by the complainant from the bankers on 27.7.2001 and accordingly a notice dt. 3.8.2001 was sent to the accused requesting the accused to make payment of the above said cheque amount and on 17.8.2001 the accused sent reply through his Advocate denying his liability falsely taking the plea that the cheque in question was lost as stolen by the complainant.

6. That the accused has taken the above said false pleas knowing it fully well that he does not intend to make payment of the said cheque amount, and the complainant is thus compelled to file this complaint.Before a proceeding thereunder is initiated, all the legal requirements therefore must be complied with. The court must be satisfied that all the ingredients of commission of an offence under the said provision have been complied with. The parameters for invoking the provisions of Section 138 of the Act, thus, being limited, we are of the opinion that refusal on the part of the bank to honour the cheque would not bring the matter within the mischief of the provisions of Section 138 of the Act.

Legal fiction created in a statute is required to be given full effect, but it cannot be taken recourse to for any other purpose than the one mentioned in the statute itself. A penal provision created by legal fiction must be construed strictly. Section 138 of the NI Act, 1881 would apply if either the amount of money standing to the credit of that account being insufficient to honour the cheque, or, the amount of cheque it exceeds the amount arranged to be paid from that account by an agreement made with that bank. Court taking cognizance u/s 138 is entitled to consider the allegations in the complaint and the evidence of the complainant and his witnesses only, nothing else.

53.2 Patel Jayantibhai Mafatlal Versus State Of Gujarat, 2018 (4) RCR(Cri) 661 : 2018 (3) GLH(NOC) 3

Held, absence of any complaint to the police for stolen cheques - accused denied to the request of examining handwriting expert to prove signature on the cheque - accused failed to discharge his burden of liability.

27 In wake of settled position of law as to how to appreciate the duly signed cheque in the hands of holder in due course or a drawee, on adverting to the

facts of the instant case, the question needs to be addressed as to whether proof of existence of legally enforceable debt, could be established by the Appellant?

28 In the examination-in-chief, the complainant has given all the details which have been specified in the complaint itself, which may not be required to be reiterated. The case of the prosecution, in sum and substance, as emerged in oral evidence is that an amount of Rs. 36 lakh had been advanced to the respondent which he needed for his business, which was to be set up and for which the complainant appellant was also offered partnership. When the respondent No.2 did not fulfill his promise, he firstly attempted to give back the amount by transferring a parcel of his land. A promissory note also was written by the respondent No.2 accused. However, on account of his not clearing the land from the bank where it was mortgaged, he issued the cheque which eventually got dishonored. The cheque issued by him was of State Bank of India, Girdharnagar Branch, Ahmedabad. However, due to 'insufficient opening balance', the same was returned as per the memo sent by the Bank.

29 The factum of issuance of notice under section 138 of the N.I. Act, as is mandatory, prior to the lodgment of complaint has also come on record which is dated 12.11.2002. Respondent No.2 has chosen not to reply to the said notice nor has he paid back the amount pursuant to such notice and that paved a way for lodgment of complaint.

46 The respondent No.2 was required to discharge the burden under section 118 and 139 of the N.I. Act that the cheque he issued of Rs. 36 lakh was not issued towards discharge of legal debt but was issued in view of security or was obtained unlawfully or was issued otherwise, since the appellant succeeded in proving the initial burden reasonably existence of legal debt as was required under the law.

46.1 With no reply to the notice of demand initially and in absence of any complaint to the police or otherwise in connection with his version that the impugned cheque having been stolen from his brother, the respondent No.2 cannot be said to have discharged his burden as required of him by the law.

46.2 His attempt to bring on record theory of stolen cheque in his further statement after many years is nothing but a calculative chance or an afterthought, however, neither that attempt nor his detailed cross examination comes nowhere nearer even to discharge his burden, even with a comparatively lighter scale of proof i.e. preponderance of probabilities.

46.3 His line of cross-examination also reveals clearly that the business of S.B. Fabrics (process house) was purchased from father of Mr. Gautam Adani and his sons were looking after this business. He attempted to say

that he was not involved personally in running the business and there were certain litigations in respect of the said process house, however, that version, on the contrary, as held by the trial Court, favours the complainant's story. His aspirations for his family and his purchase of a huge business is the cause of his facing various litigations under section 138 of the N.I. Act. Respondent No.2, in fact, as can be held unhesitantly, failed to dislodge the positive proof.

46.4 section 139 of the N.I. Act stipulates that the Court shall presume unless the contrary is proved, that the holder of the cheque received the cheque of the nature referred to in Section 138 for discharge of debt or liability.

46.5 Section 3 when read with Section 4 of the Evidence Act, it can be said that Whenever it is directed by the Court that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. Section 3 defines the expression 'disproved' that a fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its nonexistence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. Word 'proved' under the very section stipulates the converse that 'A fact is said to be proved when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

48 None of the matters brought on record either by way of cross-examination or by further statement or otherwise, are such which can make the existence of those facts so probable that their existence would be believed by a prudent man so as to displace and dislodge the positive proof available on record.

50 Further, as the transaction between the parties is of the year 2002 and the complaint was also filed in the year 2002, when the amendment in the law having come about of enhancement of punishment for two years with effect from 06.02.2003, where, the maximum punishment prescribed is of one year. Hence, the respondent-accused is sentenced to undergo simple imprisonment for one year and he shall also pay RS.72 Lakh(Seventy Two Lakh). Out of the same, the complainant shall be paid towards compensation an amount of RS.71 Lakh(Seventy One Lakh), whereas, the remaining RS.1 Lakh(One Lakh) shall go to the State exchequer. In case of default, the same shall be recovered in accordance with law. The judgment and order passed by the learned Chief Metropolitan Magistrate, Court No.28, Dated 13.02.2015, in Criminal Case No.521 of 2011 stands MODIFIED to the aforesaid extent.

51 Considering the huge amount, the respondent-accused is given four weeks time to deposit the same. On completion of four weeks, the respondent-accused shall surrender before the concerned jail authority immediate to serve the sentence and in case of failure on his part, non-bailable warrant shall be issued against him for execution and implementation of order of this Court.

54.ORDER OF MORATORIUM IS PASSED U/S INSOLVENCEY AND BANKRUPTCY CODE 2016 AND N.I. ACT 138

54.1 P. Mohanraj and Others Vs. M/S. Shah Brothers Ispat Private Limited Civil Appeal No. 10355 of 2018 2021-JX-(SC)-0-128 Decided on : 01-03-2021

ISSUE:

Whether the order of moratorium will cover a criminal proceeding under Section 138 of the Act?

BRIEF FACTS:

Shah Brothers Ispat Pvt. Ltd. ("the Appellant") herein has filed Company Petition No. 507/IB/2017 before the Hon'ble National Company Law Tribunal, Chennai Bench ("NCLT") against M/s. Diamond Engineering Chennai Pvt. Ltd. ("Corporate Debtor") for a debt of Rs. 24, 80, 33, 430 (Rupees twenty four crore eighty lakh thirty three thousand four hundred thirty). In view of the nonpayment of debt by P. Mohanraj ("the Respondents"), the Hon'ble NCLT *vide* its order dated June 6, 2017 admitted the Company Petition and appointed the Interim Resolution Professional. Moratorium was also declared and Corporate Insolvency Resolution Process ("CIRP") was initiated against the Corporate Debtor. Before the commencement of the CIRP, the Appellant had filed CC No. 552/SS/2017 before the Learned Metropolitan Magistrate, 59th Court, Kurla, Mumbai. After the commencement of the CIRP, the Appellant filed CC No. 690/ SS/ 2017.

In MA/102/IB/2018 in CP/507/IB/2017 filed by the Respondents, the Hon'ble NCLT by its order dated May 24, 2018 has held that the Appellant had filed proceedings against Corporate Debtor inspite of the order of moratorium dated June 6, 2017. Further, the Appellant was directed to withdraw the aforesaid complaints forthwith, failing which appropriate order would be passed for violation of the moratorium.

The order dated May 24, 2018 was assailed by the Appellant before the Hon'ble NCLAT. The Hon'ble NCLAT after referring to the aforesaid facts and Section 14 of the IBC has held in para 6 *"... Section 138 is a penal provision, which empowers the Court of competent jurisdiction to pass order of imprisonment or fine, which cannot be held to be proceeding or any judgment or decree of money claim. Imposition of fine cannot held to be a money claim or recovery against the Corporate Debtor nor order of imprisonment, if passed by the court of competent jurisdiction on the Directors, they cannot come*

within the purview of Section 14. Infact no criminal proceeding is covered under Section 14 of I&B Code…".

In conclusion, disagreeing with the Bombay High Court and the Calcutta High Court judgments in Tayal Cotton Pvt. Ltd. v. State of Maharashtra, 2018 SCC OnLine Bom 2069 : (2019) 1 Mah LJ 312 and M/s MBL Infrastructure Ltd. v. Manik Chand Somani, CRR 3456/2018 (Calcutta High Court; decided on 16.04.2019), respectively, we hold that a Section 138/141 proceeding against a corporate debtor is covered by Section 14(1)(a) of the IBC. Para 79)

CONCLUSION

1. A Section 138/141 proceeding against a corporate debtor is covered by Section 14(1) (a) of the IBC.
2. Negotiable Instruments Act, 1881 - Section 138 - Dishonour of Cheque - Civil proceeding is not necessarily a proceeding which begins with the filing of a suit and culminates in execution of a decree.
3. It would include a revenue proceeding as well as a writ petition filed under Article 226 of the Constitution, if the reliefs therein are to enforce rights of a civil nature.
4. Criminal proceedings are stated to be proceedings in which the larger interest of the State is concerned. Given these tests, it is clear that a Section 138 proceeding can be said to be a "civil sheep" in a "criminal wolf's" clothing, as it is the interest of the victim that is sought to be protected, the larger interest of the State being subsumed in the victim alone moving a court in cheque bouncing cases.

54.2 Central Bank of India Vs. Elmot Engineering Co. Pvt. Ltd. &Ors., 1993 MH.L.J. 671,

The issue raised for consideration was, 'whether the leave of the Company Court under Section 446(1) of the Companies Act was essential to continue to prosecute the suit filed to realize mortgaged debt and other securities created by the Company?' In the light of the same, it was held that, as the object of Section 446(1) is to see that the assets of the Company are brought under the control of the winding,up court to avoid, wherever possible, expensive litigation and to see that all matters in dispute, which are capable of being expeditiously disposed of by the winding,up court, are taken up by that court. Accordingly, it was held that Section 446 of the Companies Act, which is wide enough and is not restricted to any category of suits or any class of plaintiffs, to cover all suits and other legal proceedings, whoever may be the plaintiff. Thus, it is clear that in the said decision, the proceedings were of a civil nature and against the assets of the Company

and, therefore, it was held that the provisions of Section 446 of the Act will be applicable. This decision, thus, can be distinguishable, where the issue is in respect of the specific criminal proceedings filed under Section 138 of N.I. Act imposing criminal and penal liability on the Directors of the Company for dishonour of the cheque and not dealing with the assets of the Company.

54.3 M/S Indorama Synthetics (I) Ltd vs State Of Maharashtra And Anr2016 (4) Mh.L.J 249 , 6 May, 2016

33. Accordingly, it was held that the proceedings under Section 138 of N.I. Act cannot be stayed for want of leave of the Company Court under Section 446(1) of the Companies Act.

Note : New introduced in Section 32A (1) of the IBC

The Central Government introduced the Insolvency and Bankruptcy Code (Amendment) Act, 2020 with effect from 28thDecember 2019 to absolve the Corporate Debtor of the Liability with respect to an offence committed prior to initiation of Corporate Insolvency Resolution process. The Act also states that, the Prosecution in respect of such offences will not be carried forward, once a resolution plan has been approved by the NCLT provided, such resolution plan proposes change in control of the corporate debtor to a person who was already not a promoter or a director or a person against whom a investigation report has already been filed.

1. Power Grid Corporation Of India vs Jyoti Structures Ltd. 2017 SCC Online Delhi 12189 11 December, 2017 Overruled

2. Mr. Ajay Kumar Bishnoi Former Managing Director M/S Tecpro Systems Ltd Vs M/S Tap Engineering 2020 Ibclaw.In 14 Hc Madras High Court Overruled

55.SICK Co. U/S 22 OF SICA & U/S 138 OF N.I. ACT

55.1 Servalakshmi Paper Limited And Others Vs. State Of Gujarat And Others (2020) 1 GLR 493Gujarat High Court

Para 12. In the present case, there are various notices issued to the petitioners by the respondents on 22.09.2015 for the cheques, which were returned on 09.09.2015, on 27.11.2015 for the cheques, which were returned on19.11.2015, on 28.10.2015 for the cheques, which were returned on 07.10.2015, on 14.03.2016 for the cheques, which were returned on 25.02.2016 and on 10.05.2016 for the cheques, which were returned on 16.04.2016. The petitioners have placed reliance on the order dated 13.08.2015 passed under Section 22 of the SICA. The ApexCourt in the case of Kusum Ignots (supra) has held that "section 22 of SICA does not create any legal impedimentfor instituting and proceeding with a criminal case on the allegations of an offence under section 138 of the N.I.Act against a company or its Directors. The section as we read it only creates an embargo against disposal ofassets of the company for recovery of its debts.".**Thus, the provisions of Section 138 of the NI Act are penal in nature and hence, the proceedings under Section 22 of the SICA cannot be stretched to such proceedings**. The question of law and fact that whether the order dated 13.08.2015 will rescue the petitioner from the rigours of section 138 of NI Act can only be examined during the trial proceedings.

55.2 Rajesh MenaV/s State of Haryana and ors. 2019 ACD 940 : 2020(1) DCR 705 : 2020(3) R.C.R.(Criminal) 888 Punjab And Haryana High Court

"**Account Blocked" as a result of the order passed by NCLT , Offence under Section 138 not made out , Proceedings quashed.**

A. Negotiable Instruments Act, 1881 Sections 141 and 138 Criminal Procedure Code, 1973, Section 482 , Dishonour of cheques,"Account Blocked" ,Accused a corporate debtor facing proceedings before Company Tribunal , Control and management of corporate debtor vested with Interim Resolution Professional by order of Tribunal , Prior to the effective dates the said account was blocked, which cannot at all be attributed to the account holder, as it was a result of the order passed by NCLT, New Delhi , Therefore, by virtue of the said order, the authority and control of the account holder over the account ceased to exist , Offence under Section 138 not made out , Proceedings quashed. [Paras 7 and 22]

B. **Account maintained by account holder**, Necessary ingredient would be complete , Expression "account maintained by him" must necessarily include that the said account is not only alive and operative, but the

account holder is capable of executing command to govern the financial transactions which include the clearance of cheques etc.

55.3 <u>Ceasefire Industries Ltd. , Petitioner V/s State &Ors. – Respondents 2017(2) MadWN (Cri) 71 Delhi High Court Crl.L.P. 51 & 52 of 2017. D/d. 1.5.2017.</u>

4. It appears a number of defences were raised by the respondents in resisting the prosecution for offences under Section 138 N.I. Act in the above mentioned criminal complaint cases, but what has clinched the issue in their favour is essentially the fact that cheques were returned unpaid on account of the account in question having been frozen. 5. It is noted that in the demand notice after the cheques had been returned, the complainant itself described the reasons for such return as "account freezed". This is what was reiterated by complainant's witness V/SN. Raju in his affidavit submitted with the complaint. When he was examined on fresh affidavit at the trial he reiterated the reason now referring to the remarks in the return memos the same being "account blocked". The learned Metropolitan Magistrate accepted the said fact as good reason to dismiss the complaints. 6. In the opinion of this court, the view taken by the Metropolitan Magistrate in the two complaint cases cannot be faulted. The provision contained in Section 138 of the N.I. Act makes it clear that it is not every return of a cheque unpaid which leads to prosecution of an offence under the said provision of law. For such purposes, the cheque must have been returned "unpaid" either because the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank. 7. The bank which returned the cheques unpaid had made it clear that the accounts had been blocked. It is clear that the complainant itself was aware that the accounts had been frozen in terms of directions by some statutory authority. In these circumstances, the reasons for return of the cheques unpaid being not what is envisaged in Section 138 of the N.I. Act, these petitions are devoid of merit and, therefore, dismissed.

56.MATERIAL ALTERATION IN CHEQUE

56.1 M/s. Goyal Enterprises v/s State and Anr Acquittal Appeal No. 31 of 2008 Decided on 16.12.2011 2012 3 Crimes(HC) 567;Jharkhand High Court

Section 87 of the N.I. Act is a mandatory provision and in this view of the matter, the chequeswhich were materially altered before production in the Court and without any evidence to the effectthat how the said alterations in the cheques were made, were absolutely void and the accusedcould not have been found guilty of the offence under Section 138 of the N.I. Act on the basis ofthe said void cheques.

57. UNACCOUNTED MONEY

57.1 Asst. Director of Inspection Investigation v/s Kum. A.B.Shanth [(2002) 6 SCC 259 : AIR 2002 SC 2188]

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

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

57.2 Krishna P. Morajkar v/s Joe Ferrao&Anr Criminal Appeal No.6 of 2012 Decided on 19.7.2013 2014 1 Bankmann 228; Bombay High Court

Para 31. Before I conclude, with all humility at my command, it has to be noted that even after noticing the object of enacting Section 138 of Negotiable Instruments Act, namely to enhance the acceptability of cheques, Courts have been accepting virtually any argument advanced to nullify me liability created, like ignoring or misreading presumption under Section 139 of the Act, misreading provisions of Sections 269 SS and 27 ID of the Income Tax Act, unmindful of the consequence that unscrupulous

individuals go on signing cheques irresponsibly. When a person signs a cheque and delivers it, even if it is a blank cheque or a post dated cheque, presumptions under Section 118(b) and 139 of the Negotiable Instruments Act would have to be raised and would have to be rebutted by the aced, albeit by raising a probability. Unless the Courts start discouraging flimsy defences, acceptability of cheques would not increase. The problem of unaccounted money would be reduced if transactions take place by cheques. Even a cash advanceWhenrepaid by cheque gels accounted. Making it unrecoverable,would only push the persons toextrajudicial methods of recovery. The Courts would thus not only be defeating the object of theprovisionbut also indirectly be party to increase lawlessness. This, in my humble view, cannot beallowedby Courts.

57.3 <u>ShrimatiRagini Gupta V/s Piyush Dutt Sharma 2019(3) DCR 358</u>

A. Negotiable Instruments Act, 1881 Sections 138 and 139 Dishonour of cheque , Loan of Rs. 10,00,000/,, Source of income, Non,filing of income tax return , Mere non,filing of Income Tax Return would not automatically dislodge the source of income of the complainant ,Non-payment of Income Tax is a matter between the revenue and theassessee , However, non filing of Income Tax Return by itself does not mean that complainant had no source of income, No adverse inference can be drawn in that regard only because of absence of Income Tax Return.[Para 13]

B. Negotiable Instruments Act, 1881 Sections 138 and 139 Dishonour of cheque , Whether there was any legally recoverable debt\liability , Where accused failed to satisfactorily explain circumstances under which cheque was issued by accused or misused by complainant, then it can be safely inferred/presumed that cheque was issued in discharge of legally recoverable debt/liability.[Para 13]

58. PRODUCTION OF THE ACCOUNT BOOKS/CASH BOOK

58.1 <u>D. K. Chandel V/s M/S Wockhardt Ltd. &Anr Criminal Appeal No(S). 132 Of 2020 (Arising Out Of Slp (Crl.)No.1621 Of 2018) 20,1,2020 Supreme Court Of India</u>

<u>Para (8)</u>as held by the Trial Court as well as by the High Court that the cheque was issued towards the amount due and payable by the appellant for purchase of pesticides. As rightlyobserved by the High Court production of the account books/cashbook may be relevant in the civil court; but may not be so in the criminal case filed under Section 138 of the N.I.Act. Thisis because of the presumption raised in favour of the holder of the cheque. In view of the concurrent findings recorded by the Trial Court as well as by the High Court we do not see any ground warranting interference with the conviction of the appellant under Section 138 of the N.I.Act.

58.2 D.K.Chandel Versus Wockhardt Ltd., 2020 (13) SCC 471 : 2020 (4) SCC(Cri) 572

Held, Production of the account books/cash book may be relevant in the civil court; but may not be so in the criminal case filed under Section 138 of the N.I.Act

- **Para 8** As held by the Trial Court as well as by the High Court that the cheque was issued towards the amount due and payable by the appellant for purchase of pesticides. As rightly observed by the High Court production of the account books/cash book may be relevant in the civil court; but may not be so in the criminal case filed under Section 138 of the N.I.Act. This is because of the presumption raised in favour of the holder of the cheque. In view of the concurrent findings recorded by the Trial Court as well as by the High Court we do not see any ground warranting interference with the conviction of the appellant under Section 138 of the N.I.Act.
- **Para 9** So far as the question of sentence is concerned, the cheque was issued by the appellant, for discharge of the debt, way back in the year 1999. Considering the fact that the cheque was issued in the year 1999 and having regard to the other facts and circumstances of the case and in the interest of justice we deem it appropriate to modify the sentence of imprisonment imposed upon the appellant and also the fine amount of Rs.4,17,148/-

  Para 10 In the result, the impugned judgment is modified and the appeal is partly allowed to the extent indicated below. For the conviction under Section 138 of the N.I.Act, the appellant is imposed upon only fine amount of Rs.4,17,148/- and the sentence of imprisonment imposed upon the appellant is set aside. The appellant has already deposited the said amount with the Registry of this Court and the same be disbursed to the respondent forthwith. No costs.

59. EVIDENCE ON AFFIDAVIT

59.1 RakeshbhaiMaganbhaiBarot Vs State Of Gujarat On 29 January, 2019,GLR (4) 2719

It is clear that having regard to the Scheme of the Cr.P.C., the legislature in its wisdom has left it open to the accused to exercise the option of examining himself as a witness for an offence punishable under Section 138 of the NI Act, in deliberately omitting any reference to the evidence of the accused by way of affidavit. For it would run against a first principle in criminal law namely, that an accused shall not be called as a witness except on his own request in writing. The evidence on behalf of the accused would include that of the accused, subject to Section 315 Cr.P.C. If the evidence of the witnesses could be by way of affidavit in terms of Section 145 NI Act, the evidence of the accused could also be way of affidavit.

A closer scrutiny of Section 145 would indicate that the same is intended to ensure that the trial is concluded as expeditiously as possible. The said provision does not in any manner affect the right of the accused to cross examine the complainant and his witnesses. The said provision enables even the defence evidence to be led by affidavits. Thus, the said provision is purely procedural in nature. In this behalf, the Apex court has in Shreenath v/s Rajesh, AIR 1998 SC 1827, has held that in interpreting any procedural law, where more than one interpretation is possible, the one which curtails the procedure without eluding the justice, is to be adopted. The procedural law is always subservient to and is in aid to justice. (See: KSL Industries v/s Khandelwal, 2006(1) Mh.LJ (Cri) 86).

Note :The Apex Court in Mandvi Cooperative Bank Limited, (supra), has not examined the matter in the above perspective.

59.2 M/S. Mandvi Co,Op Bank Ltd vs Nimesh B. Thakore on 11 January, 2010 , 2010(1)SCALE188; (2010)3SCC83

Para 32. On a bare reading of section 143 it is clear that the legislature provided for the complainant to give his evidence on affidavit and did not provide for the accused to similarly do so. But the High Court thought that not mentioning the accused along with the complainant in sub-section (1) of section 145 was merely an omission by the legislature that it could fill up without difficulty. Even though the legislature in their wisdom did not deem it proper to incorporate the word `accused' with the word `complainant' in section 145(1), it did not mean that the Magistrate could not allow the accused to give his evidence on affidavit by applying the same analogy unless there was a just and reasonable ground to refuse such permission. There are two errors apparent in the reasoning of the High Court. First, if the legislature in their wisdom did not think "it proper to incorporate a word `accused' with the word `complainant' in section 145(1)", it was not open to the High Court to fill up the self perceived blank. Secondly, the High Court was in error in drawing an analogy between the evidences of the complainant and the accused in a case of dishonoured cheque. The case of the complainant in a complaint under section 138 of the Act would be based largely on documentary evidence. The accused, on the other hand, in a large number of cases, may not lead any evidence at all and let the prosecution stand or fall on its own evidence. In case the defence does lead any evidence, the nature of its evidence may not be necessarily documentary; in all likelihood the defence would lead other kinds of evidences to rebut the presumption that the issuance of the cheque was not in the discharge of any debt or liability. This is the basic difference between the nature of the complainant's evidence and the evidence of the accused in a case of dishonoured cheque. It is, therefore, wrong to equate the defence evidence with the complainant's evidence and to extend the same option to the accused as well.

59.3 <u>Afzal Pasha v/s Mohamed Ameerjan (Criminal Petition No.1684 of 2016, decided on 9th August 2016). Karnataka High Court :</u>

"Para 2. The petition is filed by the accused, against whom a complaint is filed before the court below alleging an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (Hereinafter referred to as the NI Act, for brevity). The petitioner is contesting the case. At the stage when the case was set down for the evidence of the accused, he is said to have filed an application under Section 145(2) of the NI Act, seeking permission of the court to filed an affidavit in lieu of oral evidence. The trial court having rejected the application on the ground that the same is not permissible, the present petition is filed.

Para 3. The learned counsel for the petitioner places reliance on the language of Section 145 of the NI Act to contend that the trial courthas not taken into consideration the intent of the provision, which has been interpreted by the Apex Court in the case of Indian Bank Association v/s Union of India, (2014) 5 SCC 590.

60.ADDITION OF PARTY AND CR P C 319

60.1 OANALI ISMAILJI SADIKOT Vs. STATE OF GUJARAT AND ANR. 2016 (3) GLR 1991

Held, in absence of partnership firm being arraigned as accused prosecution against partners not maintainable. As commission of offence by partnership firm is an express condition precedent to attract vicarious liability of partners.

(B) Negotiable Instruments Act, 1881 (26 of 1881) Sec. 138, 141 & 142 Criminal Procedure Code, 1973 (2 of 1974) Sec. 319,Infirmity in complaint of partnership firm not being arraigned as accused. Held, same cannot be cured by subsequent seeking of impleadment of partnership firm. Further, Sec. 319 of Cr.P.C. has no application in such case. Order by Chief Judicial Magistrate confirmed.

60.2 Khizer Impex Pvt. Ltd.Vs.State of Gujarat MANU/GJ/0572/2020 HIGH COURT OF GUJARAT AT R/Special Criminal Application Nos. 764 and 769 of 2020 Decided On: 17.02.2020

7. (vi) Lastly, learned Senior Counsel relied on the decision of Sarabjit Singh (supra)wherein Hon'ble Apex Court maintained the order of Metropolitan Magistrate summoning of the company accused additionally under Section 319 of CriminalProcedure Code. In the said case the company was accused but it was not summoned and therefore pending proceeding and with reference to liberty earlier granted by the Metropolitan Magistrate there to filed fresh application touch effect to be filed at the appropriate stage, the complainant made application under Section 319 of Criminal Procedure Code seeking summoning of the company as the accused additionally which was allowed. In nutshell in the said case the company was already co,accused in the original complaint but it was not summoned and on such factual premisesHon'ble Apex Court maintained the orderof Metropolitan Magistrate. It is not suchcase here.

Para 8. Looking to the overall facts andcircumstances of each case cited at bar learned Senior Counsel Mr. S.V/S Raju invarious cases of Hon'ble Apex Court orother High Courts, theamendment of thenature sought for in present petitions,cannot be permitted and therefore thisCourt is not inclined to entertain presentpetitions, as no infirmity or illegality isnoticed in the impugned orders.

61. PROOF OF BANKING DOCUMENT

61.1 Surendrapal Singh Chawla VS State of Gujarat, 14 Jul 2009 2009 2 GLH 654

There exists a system of core banking and on,line banking system by which it is very easy to verify on the day of presentation of cheque issued from any corner of the country as to whether there was any sufficient fund in the account of the drawer of a cheque or not. Said version is proved through the deposition of the Bank Officer wherein he has specifically stated that as per on,line banking system, the cheque in original is not required to be sent to the concerned branch from where it was issued because of the core banking and development of computer network system.

In view of the above, non,examination of the Officer who dealt with the cheque or non,production of counterfoil of pay,in,slip showing deposit of cheque does not mean that cheque was not presented with the bank nor does it create any doubt in the mind of the Court about the version given by the complainant. [Para 9]

61.2 Dilipkumar Nalinkant Gandhi VS State of Gujarat, 2015 3 GCD 2384

22.3 In the facts of the present case, the documents at Exhibits 95, 96 and 97 have been produced by Shri Rakeshbhai Babulal Choksi, Assistant Accountant, who has been examined as witness pursuant to the summons issued by the court to the bank calling upon the person concerned to appear and testify before the court. Though the said witness did not have any personal knowledge about the cheque return memo etc., he had been working in the bank for a period of twenty years and has identified the signatures of the concerned officers on the documents. **Under section 4 of the Banker's Books Evidence Act, a certified copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.** Thus, in view of the said provision, the certified copy of the entries made in the banker's books shall be received as evidence of existence of such entry. Under section 67 of the Evidence Act, if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. Section 45 of the Evidence Act inter alia lays down that when the court has to form an opinion as to the identity of handwriting, the opinion upon that point of persons specially skilled in questions as to identity of handwritings are relevant facts. Section 47 of the Evidence Act, bears the heading "Opinion as to handwriting, when relevant"

and lays down that when the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact. The Explanation to section 47 says that a person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him. Therefore, in view of section 67 of the Evidence Act, the signature or handwriting of a person must be proved and sections 45 and 47 provide for the mode of such proof. In view of section 47 of the Evidence Act, a person to whom documents purporting to be written by that person are submitted in the ordinary course of business, can be said to be acquainted with his handwriting or signature and can prove the same. Adverting to the facts of the present case, witness Shri Rakeshbhai Babulal Choksi, is an Assistant Accountant with the bank and has been working for twenty years with the bank. The persons whose signatures he has identified are also stated to be working in the bank for a period of fifteen to twenty years. The said witness is, therefore, in the ordinary course of his business required to deal with documents bearing their signatures and is acquainted with their handwriting and signatures. He is, therefore, competent to prove their handwriting and signature in view of section 47 of the Evidence Act. The said documents have come from proper custody, namely, from the officer of the bank. Under the circumstances, there is no reason to disbelieve the testimony of the said witness or the documentary evidence which has been brought on record for the purpose of establishing that the cheque upon presentation had been returned.

61.3 R. Subramanian VS ICICI Bank Ltd, 2019 2 BC 442; 2019 2 CTC 1

Para 8. On a careful consideration of the materials available on record, the submissions made by the petitioner appearing in person and the learned Senior Counsel appearing for the respondent No.1, it could be seen that though the petitioner contended that the respondent No.1 did not produce the certificate along with Ex.A58 statement of accounts, contrary to his contention, he himself has produced the certificate at Page 179 of the typed set of papers. The said certificate has been issued under section 4 of the Bankers' Books Evidence Act, 1891. The petitioner contended that though the certificate was produced by the respondent No.1, which is at page 179 of the typed set of papers filed by him, the respondent No.1 has not enclosed such certificate for all the statement of accounts. On a reading of the certificate, it is clear that the certificate has been issued in respect of Ex.A-58 statement of accounts produced by the respondent No.1/Bank. The

statement of accounts as well as the certificate bears the signature of the authorized signatory of the respondent No.1/Bank. Therefore, **when the respondent No.1 has marked the statement of accounts along with the certificate under section 4 of the Bankers' Books Evidence Act, there is no necessity for producing the certificate for each and every page of the statement of accounts.**

Para 16. In the case on hand, as already stated, the Bank has produced the statement of accounts in support of their claim along with a certificate as per Section 4 of the Bankers' Books Evidence Act, 1891, which was not objected or disputed by the petitioner at the time of marking the said document as Ex.A-58. In such circumstances, we are of the considered view that in the interest of justice, even the production of certificate by the respondent No.1 can be relaxed. Thus, in our opinion, the ratio laid down by the Apex Court in the judgment reported in 2018 (2) SCC 801 [cited supra], applies to the present case.

61.4 Vijay Singh Rana VS ICICI Bank Ltd. 2018 0 Supreme (Del) 2070;

Para 11. The Appellate Tribunal rightly observed that the Tribunal had erred in not appreciating the proviso to Section 4 of the Bankers' Books Evidence Act, 1891 ('Act' for short), which stipulates that a certified copy of any entry in a banker's books shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise. **Under this Section, the copy of accounts certified in accordance with Section 2(8) of the Act is prima facie evidence and does not require proof by production of cheques and vouchers etc. relating to each entry. Such a copy must be received as prima facie evidence not only of existence of such entries but also for the matters, transactions and accounts therein recorded.**

62. MODEL NOTICE/ORDER/FS

MODEL/ DRAFT ORDER FOR GIVING EXHIBIT TO DOCUMENTS

Criminal Case No._____

Order below Exh.____

1. By way of this application, the complainant prayed to give exhibit to the documents produced vide mark __ to mark ___ and referred into the affidavit filed in lieu of chief-examination under Section 145 of the NI Act.

2. Learned advocate appearing for complainant mainly argued to the substance that the documents which are sought to exhibited are the documents produced at the time of filing the complaint and are referred in the chief-examination. He further argued that the cheque dishonoured is original, the notice and acknowledgement duly received thereof are also office copy and original and are referred in the chief-examination and therefore, these documents are duly proved. As far as bank slip memo and other related documents are concerned, he argued that as per Section 146 of the NI Act fact of this documents are not required to be doubted.

3. Learned advocate appearing for the complainant, having argued about submitted to allow this application and to grant exhibits to the documents.

4. Per contra, learned advocate for accused vehemently objected the present application by arguing that the document cannot simply be proved by referring them in affidavit. He further argued that Evidence Act lay down certain procedure to be followed for proving the document. He further argued that in present case complainant has failed to adhere this procedural requirement and therefore, it cannot be said that the documents asked for giving exhibits are proved documents.

5. Learned advocate for the accused also argued to the extent that the some of the documents are photo copy and they are in nature of secondary evidence cannot be admitted into the evidence unless the legal procedure for proving the secondary evidence is followed which lack in the present case. Ultimately learned advocate for the accused argued to dismiss this application.

6. Heard learned advocate for both the sides. I pay anxious consideration to argument advanced by learned advocate for both sides.

7. On going through documents which are sought to be exhibited, it perused that, from amongst, first is original leaf of the cheque dishonoured

by the Bank. Second in line is office copy of the notice served to the accused coupled with acknowledgement and/ or window receipt issued by Post Department. These documents being original and primary nature needs no further proof for being admitted into the evidence. Important is that the accused has not denied existence of these documents. Even, for acknowledgement and window receipt issued by the Post Department, for as much, office copy of the notice presumption under Section 27 of the General Clause Act applies. Qua bank slip/ memo, Section 146 of the NI Act speak that facts stated in the memo is believe to be in existence. This privilege available to bank slip memo does not required any further proof.

8. In view of the above, the documents which are prayed for giving exhibits in this application deserve consideration. The ratio laid down in case of ***Bipin Shantilal Panchal vs State Of Gujarat And Anr***, ***AIR 2001 SC 1158*** as well as in case of ***Dayamathi Bai vs. K.M. Shafi, AIR 2004 SC 4082,*** also helps present complainant. In that circumstance document stated supra are required to be exhibited. Thus I pass following order.

ORDER

- Present application is allowed.
- Document produced vide mark ___ to Mark __ is hereby ordered to give exhibit in seriatim.
- Needless to say that exhibiting afore stated document does not absolve complainant for proving it in accordance with provision of law.

Order signed and pronounced in open court today.

Date:
Place:

(JUDGE NAME)
DESIGNATION
JUDGE CODE GJ0000

MODEL/ DRAFT ORDER BELOW AN APPLICATION UNDER SECTION 143A OF THE NI ACT

Criminal Case No._____

Order Below Exh.____

1. Heard learned advocate to either side.

2. This court has recorded plea of the accused vide exhibit ___ after order to try present trial as summons trial. In plea the accused pleaded not guilty and claimed to be tried. Accused has denied the case and the allegations levelled by complainant against him.

3. If we briefly observe the facts of the case, it seems that a cheque said to have been issued by the accused in favour of the complainant got dishonoured after 1st September, 2018. The complainant, in sequel of dishonoured of the cheque issued notice and completed other formalities being requirement of filing the complaint. The accused replied the notice/ did not replied the notice.

3.1 This court has taken cognizance of the offence under Section 138 of the NI Act as the complaint filed by the complainant found in order. The process issued to the accused for said offence, has been served and accused appeared in person as well as through his learned advocate. Accused was asked that whether he wants to enter into the settlement with complainant qua the dispute. (Following mandate in a case of ***M/s. Meters and Instruments Private Limited & Anr.Versus Kanchan Mehta***, ***(2018) 1 SCC 560***). Accused denied thus the case was kept for recording plea. As mentioned earlier in this order the plea of the accused was recorded vide Exh.____.

4. Learned advocate appearing for accused has vehemently argued against the present application. He would argue that in a present case accused has very sound defence. He further submitted that in absence of cogent evidence, complainant cannot seek for compensation under Section 143A of the NI Act he also argued that every criminal trial has to be decided on touchstone of principle of beyond reasonable doubt whereas in the present case trial is yet to begin. In that circumstances he argued that no order for compensation can be passed merely on the basis of certain documents which are to be proved by the complainant.

5. Learned advocate for the accused also argued that law makers have used word “may” in Section 143A of the NI Act which rest discretion upon the court whether to pass order or not. He further argued that in other words nature of Section 143A of the NI Act is directory and therefore the

complainant cannot press for granting the interim compensation without proving his case. In line of this argument he submitted to reject this application.

6. The argument advance by learned advocate for the accused left this court to decide two important questions, viz. 1, whether the provision under Section 143A of the NI Act is directory or mandatory? 2. Whether accused has any *locus standi* to object application under Section 143A of the NI act, in other word, whether the say of the accused can be considered while deciding the application under Section 143A of the NI Act?

7. Having heard learned advocates for both sides. Perusing section 143A of the NI Act in background of statement and object of brining the statute to law book, whereby law makers thought it fit to empower the court trying the cases under NI Act, to grant interim compensation even without holding accused guilty. This idea behind the bringing the legislation clearly denotes it as mandatory. Alongside Section 143A, legislatures have also brought to statute book section 148 under very same statement and object. The Hon'ble Supreme Court in case of ***Surinder Singh Deswal @ Col. S.S. Deswal and Others Vs. Virender Gandhi, (2020) 2 SCC 514***, had occasion to interpret nature of section 148. Hon'ble Apex Court in paragraph 8.1 hold that:

> *"8.1. Having observed and found that because of the delay tactics of unscrupulous drawers of dishonoured cheques due to easy filing of appeals and obtaining stay on proceedings, the object and purpose of the enactment of Section 138 of the N.I. Act was being frustrated, the Parliament has thought it fit to amend Section 148 of the N.I. Act, by which the first appellate Court, in an appeal challenging the order of conviction Under Section 138 of the N.I. Act, is conferred with the power to direct the convicted Accused - Appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial Court. By the amendment in Section 148 of the N.I. Act, it cannot be said that any vested right of appeal of the Accused - Appellant has been taken away and/or affected. Therefore, submission on behalf of the Appellants that amendment in Section 148 of the N.I. Act shall not be made applicable retrospectively and more particularly with respect to cases/complaints filed prior to 1.9.2018 shall not be applicable has no substance and cannot be accepted, as by amendment in Section 148 of the N.I. Act, no substantive right of appeal has been taken away and/or affected. Therefore the decisions of this Court in the cases of Garikapatti Veeraya (supra) and Videocon International Limited (supra), relied upon by the learned senior Counsel appearing on behalf of the Appellants shall not be applicable to the facts of the case on hand. Therefore,*

considering the Statement of Objects and Reasons of the amendment in Section 148 of the N.I. Act stated hereinabove, on purposive interpretation of Section 148 of the N.I. Act as amended, we are of the opinion that Section 148 of the N.I. Act as amended, shall be applicable in respect of the appeals against the order of conviction and sentence for the offence Under Section 138 of the N.I. Act, even in a case where the criminal complaints for the offence Under Section 138 of the N.I. Act were filed prior to amendment Act No. 20/2018 i.e., prior to 01.09.2018. If such a purposive interpretation is not adopted, in that case, the object and purpose of amendment in Section 148 of the N.I. Act would be frustrated. Therefore, as such, no error has been committed by the learned first appellate court directing the Appellants to deposit 25% of the amount of fine/compensation as imposed by the learned trial Court considering Section 148 of the N.I. Act, as amended."

8. The answer of the first question is clear from the aforenoted ratio. The nature of Section 143A is mandatory.

9. Next question is above that whether the accused has any say in the application for interim compensation. Normally when some monetary liability is to be fasten upon the accused he must be given opportunity of hearing which in present case is given also. But looking to mandatory section 143A, and since accused has already denied case of the prosecution by pleading not guilty, he would not say any other except saying that the false case is filed, he has not executed cheque or cheque was blank but filled by complainant etc. As noted earlier, this provision amplifies that interim compensation can be granted without holding accused guilty and as in built mechanism under sub section 4 of Section 143A is provided for recovery of amount of interim compensation in case of acquittal, would clearly depict that while passing order under Section 143A accused need not to be heard but for limited purpose. Section 143A empowers the court to impose interim compensation upto 20% of the cheque amount. So their discretion lies with the court and for that limited purpose accused can be given opportunity of hearing.

10. Switch back to present case, it seems that the prior to lodging of the complaint accused remain mute, he did not encashed opportunity to reply statutory demand notice. Accused first time raise his voice and questions legality of the case after he pleaded not guilty. One must not forget section 139 of the NI Act. According to Section 139 presumption runs in favour of the holder or complainant as the case may be even before commencement of trial. This presumption includes that the cheque in question is issued for the discharge for any debt or other liability either whole or in part. This presumption is itself sufficient to notify and quantify that the accused owes

liability to deposit the compensation to the tune of 20% of the cheque in dispute.

11. Resultantly I pass the following order.

ORDER

- I allow this application and passed order against the accused Mr._____ to deposit 20% of the cheque amount as interim compensation within 60 days from today.

  Order signed and pronounced in open court today.

Date: (JUDGE NAME)
Place: DESIGNATION
JUDGE CODE GJ0000

MODEL/DRAFT ORDER FOR SUO MOTO PASSING ORDER FOR INTERIM COMPENSATION

Criminal Case No._____

Order Below Exh. 1

1. Indeed, complainant has not filed any application and moved the Court for passing order of interim compensation under Section 143A of the NI Act but in view of the judgment deliver by Hon'ble Punjab and Haryana High Court in case of ***Anita Devi vs. Poonam Singh*** delivered in CRR No.2343 OF 2019 dated 16.10.2019, which speaks that accused has no say and cannot stand at the time of deciding the application for interim compensation under Section 143A of the NI Act, as well as in case of ***Jisha W/o Praveen vs. State of Kerala***, 2019 4 KLT 558, Hon'ble Kerala High Court, held in para 7 that "***it is indicative on the reading of Section 143A which has newly introduce into the NI Act, the Court trying an offence under Section 138 shall Suo Moto exercise the power. There is no need for an application to be filed by complainant in this regards. Likewise the section does not provide for an opportunity for the accused to be heard***". This Court decides to pass Suo Moto order.

2. Admittedly cause of action in the present case arise after 01.09.2018, precisely same after insertion of section 143A. Plea of the accused is recorded vide Exh._____ whereby accused pleaded not guilty and claimed to be tried.

3. Considering the legislative mandate stated in Section 143A of the NI Act and interpreted by the Hon'ble Supreme Court for Section 148 which is brought to statue book together and having *paramateria* of both the section the ratio laid down in case of ***Surinder Singh Deswal @ Col. S.S. Deswal and Others Vs. Virender Gandhi, (2020) 2 SCC 514***, had occasion to interpret nature of section 148. Hon'ble Apex Court in paragraph 8.1 hold that:

> "8.1. Having observed and found that because of the delay tactics of unscrupulous drawers of dishonoured cheques due to easy filing of appeals and obtaining stay on proceedings, the object and purpose of the enactment of Section 138 of the N.I. Act was being frustrated, the Parliament has thought it fit to amend Section 148 of the N.I. Act, by which the first appellate Court, in an appeal challenging the order of conviction Under Section 138 of the N.I. Act, is conferred with the power to direct the convicted Accused - Appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial Court. By the amendment in Section 148 of the N.I. Act, it cannot be said that any vested right of appeal of the Accused - Appellant

has been taken away and/or affected. Therefore, submission on behalf of the Appellants that amendment in Section 148 of the N.I. Act shall not be made applicable retrospectively and more particularly with respect to cases/complaints filed prior to 1.9.2018 shall not be applicable has no substance and cannot be accepted, as by amendment in Section 148 of the N.I. Act, no substantive right of appeal has been taken away and/or affected. Therefore the decisions of this Court in the cases of Garikapatti Veeraya (supra) and Videocon International Limited (supra), relied upon by the learned senior Counsel appearing on behalf of the Appellants shall not be applicable to the facts of the case on hand. Therefore, considering the Statement of Objects and Reasons of the amendment in Section 148 of the N.I. Act stated hereinabove, on purposive interpretation of Section 148 of the N.I. Act as amended, we are of the opinion that Section 148 of the N.I. Act as amended, shall be applicable in respect of the appeals against the order of conviction and sentence for the offence Under Section 138 of the N.I. Act, even in a case where the criminal complaints for the offence Under Section 138 of the N.I. Act were filed prior to amendment Act No. 20/2018 i.e., prior to 01.09.2018. If such a purposive interpretation is not adopted, in that case, the object and purpose of amendment in Section 148 of the N.I. Act would be frustrated. Therefore, as such, no error has been committed by the learned first appellate court directing the Appellants to deposit 25% of the amount of fine/compensation as imposed by the learned trial Court considering Section 148 of the N.I. Act, as amended."

4. Considering the mandatory nature of Section 143A and in absence of any other material on record to deny the case of prosecution ***viz-a-viz***, availability of presumption under section 139 prompt this Court to pass following order.

ORDER

- Accused Mr. XYZ is hereby directed to deposit 20% of the cheque amount within 60 days from today.

Order signed and pronounced in open court today.

Date:
Place:

(JUDGE NAME)
DESIGNATION
JUDGE CODE GJ0000

MODEL/ DRAFT ORDER FOR TAKING BAIL AND BOND DURING TRIAL

Criminal Case No._____

Order below Exh.1

1. In ***Modern Denim Limited Thro Arun Triloknath Bhargava vs. State of Gujarat***, 2015 (3)GLH 668, the Hon'ble Gujarat High Court issued slew of directions for immediate disposal of case under Section 138 of the NI Act. Also permit the court trying the case under NI ACT to obtain bail bond of the accused for his appearance. Relevant para is below:

> *"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 251 Cr.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."*

2. Following the fiat and considering the aspect of smooth and early trial and to ensure the presence of the accused throughout the trial I deem it fit to take bail and bond of the accused and thus I pass the following order.

ORDER

- Accused Mr. _____ hereby ordered to execute personal bond of Rs._____ with local surety of like amount before the next date of trial.

- Accused is directed submits his permanent residential and commercial/professional/occupational address, landline and mobile number if any for as much email address.

Order signed and pronounced in open court today.

Date: (JUDGE NAME)
Place: DESIGNATION
JUDGE CODE GJ0000

MODEL DRAFT ORDER FOR CONDUCTING TRIAL SUMMONS TRIAL

Criminal Case No._____

Order below Exh.1

1. Perusing the fact that the cheque amount in the present case is large and huge and complainant has already filed affidavit in support of his complainant which is no less than an affidavit in chief as per section 145 of the NI Act and taking note of intricacies and the disputed question involved in the present case, i deem it fit to conduct trial of the case as a summons trial. One may not forget that section 139 of the NI Act caste heavy burden of the accused to disprove existence of debt and/or cheque etc., therefore accused may required to enter into details cross examination of the complainant and his witness if any. Must it be noted that the complaint has already filed full-fledged affidavit in lieu of chief examination. In these circumstances, I order to conduct the trial of the present case as summons trial.

Order signed and pronounced in open court today.

Date: (JUDGE NAME)
Place: DESIGNATION
JUDGE CODE GJ0000

MODEL DRAFT FOR FURTHER STATEMENT OF ACCUSED U/S 313

નોંધ: નીચે જણાવેલા સવાલો માત્ર એક ઉદાહરણ રૂપે રજુ કરવામાં આવેલ છે. તમોએ સવાલો તમારી સમક્ષ સોગંદનામાં પર સરતપાસ રૂપે રજુ કરવામાં આવેલ પુરાવા ઉપરથી તૈયાર કરવાના રહેશે.

ફોજદારી કાર્યરીતી સંહિતાની કલમ 313 (1) (ક) અન્વયે આરોપીનું આંક – નીચે નિવેદન...

ફોજદારી કેસ નંબર/ /

સવાલ: આ કામેના ફરિયાદી _____ એ આંક , ____ થી આ કાયદાની કલમ 145 (1) અન્વયે સોગંદનામાં પર સરતપાસ રૂપે પુરાવો રજુ કરેલ છે તેમાં તેઓએ જણાવેલ છે કે તમો આરોપી ફરીયાદીના ઘરે મિત્રતાના નાતે આવતા જતાં હોવાથી તમોને સારી રીતે ઓળખે છે આ અંગે તમોએ શું કહેવું છે?

જવાબ:

સવાલ: વિશેષમાં ફરીયાદીએ તેઓના પુરાવામાં જણાવેલ છે કે તમો આરોપી ફરીયાદીના ઘરે આવેલા અને જણાવેલ કે, તાત્કાલીક હાથ ઉછીના રૂ. _____/,ની જરૂર છે. તો ઉછીના આપો અને તે લેણી રકમ પેટે તમોએ ચેક લખી આપેલ. આ અંગે તમો એ શું કહેવું છે?

જવાબ:

સવાલ: વિશેષમાં ફરીયાદીએ તેઓના પુરાવામાં જણાવેલ છે કે તમો આરોપીએ એવો વિશ્વાસ આપેલ કે તમો ચેક બેન્ક માં ભરશો તો નાણાં મળી જશે તેમ કહી _____ બેન્કનો ચેક ફરીયાદી રૂબરૂ વિગતો ભરી, સહી કરી તા._____ ના રોજનો ચેક નં. _____ આપેલ, આ અંગે તમોએ શું કહેવું છે?

જવાબ:

સવાલ:વિશેષમાં ફરીયાદીએ તેઓના પુરાવામાં જણાવેલ છે કે તમો આરોપીના કથન મુજબ ફરીયાદીએ સદર ચેક ક્લીયરન્સ માટે _____ બેન્કમાં જમા કરાવેલ અને સદર ચેક તા. _____ ના રોજ ખાતામાં _____ શેરા સાથે પરત આવેલ. આ અંગે તમોએ શું કહેવું છે?

જવાબ:

સવાલ: વિશેષમાં ફરીયાદી એ તેઓના પુરાવામાં જણાવેલ છે કે તમો આરોપી પાસે લેણી રકમની ફરીયાદી ઉઘરાણી કરતાં , તમો આરોપીએ રકમ વસૂલ નહી આપતા , ફરીયાદીએ તેઓના વિદ્વાન વકીલશ્રી મારફતે તા. _____ ના રોજ કાનૂની નોટીસ રજીસ્ટર પો.એ.ડી. તથા યુ.પી.સી. થી આપેલી જે નોટીસ તમોને તા._____ ના રોજ મળી ગયેલ છે. આ અંગે તમોએ શું કહેવું છે?

જવાબ:

સવાલ: વિશેષમાં ફરીયાદી એ તેઓના પુરાવામાં જણાવેલ છે કે તમો આરોપીને સદર કાનૂની નોટીસ મળી ગયા પછી પણ ફરીયાદીની લેણી રકમ વસૂલ આપેલી નહી જેથી હાલની ફરીયાદ કરેલી છે. આ અંગે તમોએ શું કહેવું છે?

જવાબ:

સવાલ: આ કામે ફરીયાદીએ દસ્તાવેજી પુરાવારૂપે તમો આરોપીએ આપેલ અસલ ચેક જે આંક _____ થી રજૂ કરેલ છે તેમાં તમો આરોપીની સહી છે આ અંગે તમો આરોપી એ શું કહેવું છે?

જવાબ:

સવાલ: આ કામે ફરીયાદીએ દસ્તાવેજી પુરાવારૂપે આંક _____ ના અસલ રિટર્ન મેમો બાબતે તમોએ શું કહેવું છે?

જવાબ:

સવાલ: આ કામે ફરીયાદીએ દસ્તાવેજી પુરાવારૂપે આંક _____ થી રજી.પો.એ.ડી. તથા આંક _____ થી યુ.પી.સી.થી કાનૂની ડિમાન્ડ નોટીસ તમો આરોપીને મોકલાવેલ છે. આ અંગે તમો એ શું કહેવું છે?

જવાબ:

સવાલ: આ કામે ફરીયાદીએ દસ્તાવેજી પુરાવારૂપે આંક _____ ની એકનોલેજમેંટ સ્લીપ રજૂ કરેલ છે. આ અંગે તમોએ શું કહેવું છે?

જવાબ:

સવાલ: તમોએ સોગંદ ઉપર પુરાવો આપવો છે?

જવાબ:

સવાલ: તમો તમારા બચાવમાં સાહેદો તપાસવા માંગો છો?

જવાબ:

સવાલ: તમો વિશેષમાં કાઇ કહેવા માંગો છો?

જવાબ:

,,,

તારીખ: / /

સ્થળ : મારી રૂબરૂ

(Judge Name)
Designation
Judge Code GJ0000