OFFENCES U/S 138 OF NEGOTIABLE INSTRUMENTS ACT

List of Cases

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2	Somnath vs. Mukesh Kumar, 2015(4) Law Herald 3629 (P&H)		
3	Krishna Janardhan Bhat vs. Dattatraya G. Hegde	MANU/SC/0503/2008	2008 INSC 44
4	Vinay Devanna Nayak vs. Ryot Seva Sahakari Bank Ltd	MANU/SC/0061/2008	2007 INSC 1246
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(a) Offence Under Section 138 of N. I Act- Ingredients & Case Law

Introduction

The Negotiable Instruments Act, 1881 (Hereinafter called as N.I Act) was originally drafted in 1866 by the 3rd Indian Law Commission and introduced in December, 1867 in the Council and it was referred to a Selection Committee. The Draft prepared for the fourth time was introduced in the Council and was passed into law in 1881 being the Negotiable Instruments Act, 1881 (Act No.26 of 1881).

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

Following a century of the enactment of the N.I. Act, Sections 138 to 142, Chapter XVII, were inserted in the Act *vide* Section 4 of the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988, (Act 66 of 1988). These sections came into force w.e.f. 29.03.1989. Subsequently, the Negotiable Instrument Act in the year of 2015 (inserting of substitution in Explanation I (a), Explanation III in Section 6, Section 142(2) and 142-A of N.I Act) and in the year of 2018 (insertion of Section 143A, Section 148 of N.I Act).

Now let us see what is Negotiable Instrument

Section 13: Negotiable Instrument:

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

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

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

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

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

Negotiable Instruments are of following kinds :-

1. Promissory notes
2. Bill of Exchange
3. Cheque

Section 138 of Act deals with dishonour of cheques. It has no concern with dishonour of other negotiable instruments.

- **What is a cheque?**

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

Explanation I:- For the purpose of this section the expressions -

(a) a cheque in the electronic form " means a cheque drawn in electronic form by using any computer resource and signed in a secure system with digital signature (with or without biometrics signature) and

asymmetric crypto system or with electronic signature , as the case may be;

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

Explanation II:- For the purposes of this section, the expression clearing house means the clearing house managed by the Reserve Bank of India or a clearing house recognized as such by the Reserve Bank of India.

Explanation III:- For the purposes of this section, the expression "asymmetric crypto system", computer resource", "digital signature", "electronic form" and electronic signature " shall have the same meanings respectively assigned to them in the Information Technology Act,2000'.

- **Ingredients Of the Offence Under Section 138 Of N.I Act:**

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

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

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

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

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

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

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

(g) The debt or liability against which the cheque was issued is legally enforceable. **(Kusum Ingots and Alloys Ltd. Vs Pennar Peterson Securities Ltd (**Manu Citation: MANU/SC/0127/2000 **) (2000)2 SCC 745)**

(h) Failure of the drawer to make the payment within 15 days of receipt of the notice. The cheque must have been drawn for discharge of existing debt or liability. Legally recoverable debt:

In Somnath vs. Mukesh Kumar, 2015(4) Law Herald 3629 (P&H) it was held by the Hon'ble High Court *the complaint under Section 138 is not maintainable when the cheque in question had been issued qua a time barred debt.*

Similarly, *supari money* for commission of crime is not legally recoverable debt and complaint under Section 138 is not maintainable in such a case.

A mere presentation of delivery of cheque by 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 dishonoured offence under section 138 of the Act will not be attracted.

➢ Time Frame In Respect Of The Offence Under Section 138, N.I. Act

- The cheque has to be presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. [section 138 proviso (a)]. The Reserve Bank of India vide Notification No, DBOD.AML BC.No.47/14.01.001/ 2011-12 has made the period of validity of a cheque to be three months now. Hence, as of now, the cheque has to be presented within three months from the date on which it was drawn.
- The payee or holder in due course of the cheque has to make a demand for payment of the amount due by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of information by him from the bank regarding dishonour of the cheque. [Section 138 proviso (b)]

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

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

➢ The object of this amendment Act is:

(a) To regulate the growing business, trade, commerce and Industrial activities.

(b) To promote greater vigilance in financial matters.

(c) To safeguard the faith of creditors in drawer of cheque. **(Krishna vs. Dattatraya (**Manu Citation: MANU/SC/0503/2008) **2008(4) Mh.L.J.354 (Supreme Court)**

However, it was found that punishment provided was inadequate, the procedure prescribed cumbersome and the courts were unable to dispose of the cases expeditiously and in time bound manner. Hence, the Negotiable Instruments (Amendment and Miscellaneous provisions Act 2002) was passed. The provisions of section 143 to 147 were newly inserted and provisions of section 148, 141, 142 were amended.

➢ The Object Of Section 138 Of N.I Act:

In the world of business, the cheque, as a negotiable instrument, was losing its credibility because of lack of responsibility on the part of the drawer. To bring back that credibility, to inculcate faith in the efficacy of banking operations in transacting business on negotiable instrument in general to bring the erring drawer to book , so that such irresponsibility is not perpetuated, to protect the honest drawer, to safe guard the payee who is almost a loser, this section was brought on statute. This aspect has been stated in the decision reported in **2008(2) SCC 305= AIR 2008 SC 716- Vinaya Devanna Nayak Vs Ryot Sewa Sahakari Bank Ltd. (**Manu Citation: MANU/SC/0061/2008) Also refer the decision in the case of **Bir Singh Vs Mukesh Kumar (**Manu Citation: MANU/SC/0154/2019) reported in **(2019) 4 SCC 197.**

The Parliament in its wisdom had chosen to bring section 138 on the Statute book in order to introduce financial discipline in business dealings. Prior to insertion of section 138 of the Negotiable Instruments Act, a dishonoured cheque left the person aggrieved with the only remedy of filing a claim. The object and purpose of bringing new provisions in the Act was to make the persons dealing in commercial transactions work with a sense of responsibility and for that reason, under the amended provisions of law, lapse on their part to honour their commitment renders the person liable for criminal prosecution. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. The Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment, enacted the aforesaid provisions. The remedy available in Civil Court is a long drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee. ***Goa Plast (P) Ltd. v. Chico Urrsula D'souza,*** **(**Manu Citation: MANU/SC/0940/2003) ***(2004) 2 SCC 235.***

Component Of Offence:

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

(a) drawing of the cheque for some amount;

(b) presentation of the cheque to the banker;

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

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

(e) failure of drawer to make payment within 15 days of receipt of such notice. **Harman Electronics Pvt. Ltd. Vs. National Panasonic India Ltd. (**Manu Citation: MANU/SC/8405/2008 **) (2009)1 SCC 720**

Indra Kumar Patodia Vs. Reliance Industries Ltd. (Manu Citation: **MANU/SC/1012/2012) (2012) 13 SCC 1** – Complaint without the signature of complainant is maintainable when it is verified by the complainant and the process is issued by the Magistrate after due verification. (AIR 2013 SC 426)

- **Drawing of a Cheque:**

The drawer in payment of a legal liability to discharge the existing debt should have drawn cheque. Therefore any cheque given say by way of gift would not come within the purview of the section. It should be a legally enforceable debt; therefore time barred debt and money-lending activities are beyond its scope. The words any debt or any other liability appearing in section 138 make it very clear that it is not in respect of any particular debt or liability The presumption which the Court will have to make in all such cases is that there was some debt or liability once a cheque is issued. It will be for the accused to prove the contrary. i.e., there is no debt or any other liability. The Court shall statutorily make a presumption that the cheques were issued for the liability indicated by the prosecution unless contrary is to be proved Sivakumar Vs. Natrajan (Manu Citation: MANU/SC/1013/2009) (2009) 13 SCC 623.

- **Cheque not issued from the account of the accused:** Where the Complaint lacks necessary ingredients of the offence under Section 138: Hon'ble Supreme Court in **Jugesh Sehgal v. Shamsher Singh Gogi, (**Manu Citation: **MANU/SC/1198/2009) (2009) 14 SCC 683** has observed

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

The Court also noted that one of the essential ingredients of the offence punishable under Section 138 of Negotiable Instruments Act is that the

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

The matter was referred to a larger bench in the case of **Aneeta Hada Vs God father Tour and Travels Ltd** MANU/SC/0335/2012 **(2008)13 SCC 703** to be ultimately decided by the Hon'ble Supreme Court of India in the following terms "Arraigning of the Company as accused imperative **(2012) 5 SCC 661**.

It was further held in the case of **Aparna A. Shah Vs Sheth Developers Pvt Ltd and Anr MANU/SC/0598/2013 (2013)8 SCC 71** that in case of joint account only the drawer is liable. The same view has been retreated by the Apex Court in the recent ruling of **N Harihara Krishna Vs J. Thomas reported in** MANU/SC/1062/2017 **2017 SCC Online SC 1017**.

- **Sections 138, 141 & 142 of N.I Act** – Dishonour of cheque – offence by company – Issuance of individual notices under section 138 to them, held, not required as For dishonor of cheque drawn by company, appellant issued notice under section 138 to accused company, but no individual notices were given to its Directors- Held, Section 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 section

  138 – Such Directors who are in charge of and responsible for affairs of company, would be aware of receipt of notice by company under section

  138 **(2015) 8 SC Cases 28 AIR 2015 SC 2091 Kirshna Texport and Capital markets limited Vs.Ila A.Agarwal and others** MANU/SC/0562/2015

- **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 MANU/SC/0644/1999 (1999)8 SCC 221**.

The Hon'ble 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 Section. 27 of General Clauses Act and Section. 114 of Evidence Act- Though drawer entitled to rebut that presumption, but in absence of rebuttal, requirement of section 138 proviso (b) would stand complied with- subsequent notice should be treated only as reminder and would not affect validity of first to achieve that right of honest lender is not defeated. **(2017) 5 SC cases 737: 2017 SCC Online SC 293 AIR 2017 SC 1681 : (2017) 2 Crimes 62 (SC) N. Parameswaran Unni Vs. G. Kannan and Another MANU/SC/0327/2017**

The Hon'ble Supreme Court in **Sadanandan Bhadran vs. Madhavan Sunil Kaur MANU/SC/0552/1998 [(1998) 6 SCC 514],** held that while the payee was free to present the cheque repeatedly within its validity period, once notice had been issued and payments not received within 15 days of the receipt of the notice, the payee has to avail the very cause of action arising thereupon and file the complaint **[Prem Chand Vijay Kumar vs. Yashpal Singh & Anr. MANU/SC/0343/2005 [(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 MANU/SC/0797/2012** 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 of NI Act. 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 beyond limitation period of 30 days – Information as to second dishonor was received from Bank on the same day itself.

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 Section 138 NI Act as explained in **MSR Leather, MANU/SC/0797/2012 (2013) 1 SCC 177 (2014) 2 SC cases 424 AIR 2014 SC 660 Kamlesh Kumar Vs. State of Bihar and another MANU/SC/1275/2013**.

This Court has noted that the object of the statute was to facilitate smooth functioning of business transactions. The provision is necessary as in many transactions cheques were issued merely as a device to defraud the creditors. Dishonour of cheque causes incalculable loss, injury and inconvenience to the payee and credibility of business transactions suffers a setback. **[Goa Plast (P) Ltd. v. Chico Ursula D'Souza, MANU/SC/0940/2003 (2004) 2 SCC 235,**

p. 248, para 26: 2004 SCC (Cri) 499] At the same time, it was also noted that nature of offence under Section 138 primarily related to a civil wrong and the 2002 Amendment specifically made it compoundable. **[Vinay Devanna Nayak v. Ryot Sewa Sahakari Bank Ltd., MANU/SC/0061/2008 (2008) 2 SCC 305: (2008) 1 SCC (Civ) 542 : (2008) 1 SCC (Cri) 351]** The offence was also described as "regulatory offence". The burden of proof was on the accused in view of presumption under Section 139 and the standard of proof was of "preponderance of probabilities". **[Rangappa v. Sri Mohan, MANU/SC/0376/2010 (2010) 11 SCC 441, p. 454, para 28: (2010) 4 SCC (Civ) 477: (2011) 1 SCC (Cri) 184]**

The object of the provision was described as both punitive as well as compensatory. The intention of the provision was to ensure that the complainant received the amount of cheque by way of compensation. Though proceedings under Section 138 could not be treated as civil suits for recovery, the scheme of the provision, providing for punishment with imprisonment or with fine which could extend to twice the amount of the cheque or to both, made the intention of law clear. The complainant could be given not only the cheque amount but double the amount so as to cover interest and costs. Section 357(1)(b) of Cr.P.C ,now section 395 of Bharathiya Nagarik Suraksha Sanhitha, 2023 (Herein after called as BNSS) provides for payment of compensation for the loss caused by the offence out of the fine. **[R. Vijayan**

v. Baby, MANU/SC/1245/2011 (2012) 1 SCC 260, p. 264, para 9: (2012) 1 SCC (Civ) 79:

(2012) 1 SCC (Cri) 520] Where fine is not imposed, compensation can be awarded under Section 357(3) Cr.P.C, now section 395 of BNSS to the person who suffered loss. Sentence in default can also be imposed. The object of the provision is not merely penal but to make the accused honour the negotiable instruments. **[Lafarge Aggregates & Concrete India (P) Ltd. v. Sukarsh Azad, MANU/SC/1183/2013 (2014) 13 SCC 779, p. 781, para 7: (2014) 5 SCC (Cri) 818]**

In view of the above scheme, this Court held that the accused could make an application for compounding at the first or second hearing in which case the court ought to allow the same. If such application is made later, the accused was required to pay higher amount towards cost, etc. **[Damodar S. Prabhu v. Sayed Babalal H., MANU/SC/0319/2010 (2010) 5 SCC 663: (2010) 2 SCC (Civ) 520**

: (2010) 2 SCC (Cri) 1328] This Court has also laid down that even if the payment of the cheque amount, in terms of proviso (b) to Section 138 of the Act was not made, the court could permit such payment being made immediately after receiving notice/summons of the court. **[D. Vinod Shivappa v. Nanda Belliappa, MANU/SC/8187/2006 (2006) 6 SCC 456 : (2006) 3 SCC (Cri)**

114; C.C. Alavi Haji v. Palapetty Muhammed, MANU/SC/2263/2007 (2007) 6 SCC 555: (2007) 3 SCC (Cri) 236] The guidelines in Damodar **[Damodar S. Prabhu**

v. Sayed Babalal H., MANU/SC/0319/2010 (2010) 5 SCC 663 : (2010) 2 SCC (Civ) 520 :

(2010) 2 SCC (Cri) 1328] have been held to be flexible as may be necessary in a given situation. **[M.P. State Legal Services Authority v. Prateek Jain, MANU/SC/0796/2014 (2014) 10 SCC 690, p. 701, para 23: (2015) 1 SCC (Civ)**

74: (2015) 1 SCC (Cri) 211] Since the concept of compounding involves consent of the complainant, this Court held that compounding could not be permitted merely by unilateral payment, without the consent of both the parties. **[Rajneesh Aggarwal v. Amit J. Bhalla, MANU/SC/1462/2001 (2001) 1 SCC 631: 2001**

SCC (Cri) 229]

In view of the above, 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. (now section 281 of B.N.S.S) 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, now section 395 of B.N.S.S 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.

(b) Cognizance, Limitation, Jurisdiction – A Study

COGNIZANCE

Section 142: Cognizance of offences:- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), -

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

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

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

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

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

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

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

Explanation- For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course,

then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.]

When should the Magistrate take Cognizance?

Even without recording sworn statements of the complainants and his witnesses, the magistrate should take cognizance of offence. Refer **ILR 1998 Kar 666 – Mahadeva Vs. Papireddy,** MANU/KA/0145/1987 **1997 (4) KLJ 23-Vishwa Cement Products Vs. KSFC, AIR 2000 SC 2946 – Narsingdas Tapadia Vs. Goverdhan Das Partani.** MANU/SC/0555/2000

Can the Court take cognizance if notice is not served on the drawer?

No cognizance can be taken if notice is not served on the drawer.

Refer (1999) 8 SCC 221 – Central Bank of India Vs. Saxons Farms, MANU/SC/0644/1999 **AIR 2002 SC 182 – MMTC Ltd., Vs. Medchi Chemicals & Pharma Pvt. Ltd. MANU/SC/0728/2001**

Whether sworn statement can be recorded by way of affidavit?

In the decision reported in **ILR 2005 Kar 2890** in the case of **K.Srinivasa Vs Kashinath,** it is held that the Court may accept affidavit in lieu of oral sworn statement before the Court. However, in a subsequent decision reported in **ILR 2008 Kar 424** in the case of **K. Venkatramaiah and others vs Sri Katterao**, a passing observation is made that affidavit cannot be accepted in lieu of oral sworn statement before the Court. But, Bombay High Court has taken a similar view and ordered to circulate the copy of the order to the Magistrates to follow uniform procedure. The relevant decision is reported in **2007-BCR-2-630-Maharaja Developers Vs. Udaysing S/o. Pratapsinghrao Bhonsle MANU/MH/0363/2007 (Division bench).** However, this aspect of procedure has been set at rest by the decision reported in **ILR 2009 Kar 3477 - Smt.B.R.Premakumari vs Supraja Credit Co-operative Society Ltd MANU/KA/0462/2009**

(para 7) that even in an offence under Section 138 of the Act, the Sworn statement has to be recorded by the Magistrate and affidavit cannot be accepted in the place of sworn statement. However, on a reference to the divisional bench, the Divisional bench has answered the reference made

by single judge stating that sworn statement can be recorded by way of Affidavit. **(Cr. R.P 2604/2012).**

Is it possible to take cognizance once again, when it is contended by the accused that the issue of process on the basis of sworn statement by way of affidavit is improper?

No, because once cognizance is taken rightly or wrongly, the remedy that is available is only by challenging the same either before the Sessions Court or High Court. Magistrate cannot take cognizance twice. Refer the decisions reported in **AIR 1976 SC 1672 Devarapalli Lakshminarayana Reddy vs V. Narayana Reddy (Manu Citation: MANU/SC/0108/1976; Neutral Citation: 1976 INSC 136)** and **AIR 2004 SC 4674 Adalat Prasad vs. Rooplal Jindal (Manu Citation: MANU/SC/0688/2004).**

Whether cognizance can be taken immediately after filing of the complaint, when it is noticed that there is delay in filing complaint?

Cognizance cannot be taken immediately after filing of the complaint, when it is noticed that there is delay in filing complaint, because, if there is delay in filing complaint, it would be proper to issue notice to the accused, of delay condonation application and after deciding delay condonation application, to take cognizance, as per the decision reported in **AIR 2008 SC 1937 P. K. Choudhury v. Commander, 48 BRTF (GREF) (Neutral Citation: 2008 INSC 361; Manu Citation: MANU/SC/7321/2008).**

LIMITATION

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

- Cheque should be presented to the bank for encashment within its validity

period (03 months).

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

What is the time limit within which the demand notice be issued?

30 days. The period of limitation has to be counted from the date of receipt by the payee of the information from the Bank. Refer **AIR 2001 SC 2752 in the case of M/S. Munoth Investments Ltd., Vs. M/S. Puttukota Properties Ltd., & Another(Manu Citation: MANU/SC/0455/2001) and 2009(8) SCALE 431-Shivakumar Vs Nataarajan (para 12).**

How to calculate period of limitation for filing the complaint?

The cause of action arises on the 16th day of receipt of demand notice by the drawer and complaint should be filed within one month from that day. Relevant decision reported in **AIR 1999 SC 1090 – Saketh India Ltd., Vs. India Securities Ltd.(Manu citation: MANU/SC/1734/1999),** The Hon'ble Supreme Court has held that without excluding any day the period has to be counted. This has been reiterated in a latest decision of Apex Court reported in **2013 (8) LAWS (SC) 58** in the case of **Econ Antri Ltd Vs. Rom Industries Ltd.(Manu Citation: MANU/SC/0865/2013; Nautral Citation: 2013 INSC 561)** Also refer **2014 (3) JT 128- Rameshchandra Ambalal Joshi Vs. State Of Gujarat (Neutral Citation:2014 INSC 108; Manu Citation: MANU/SC/0108/2014)**

How to calculate the notice period as prescribed under section 138 (B) of N.I Act?

While calculating the limitation of 15 days to issue demand notice, the day on which the information of dishonour is received from the bank should be excluded. Relevant decisions are reported in **2001(5)-Kantlj- 449 = ILR 2001 Kar 4987 – Raju Indani Vs. Veerendra Hegade (para 5), 2008(1) KCCR 112 – P. S.Aithala Vs. Ganapathy N. Hegde (Manu Citation:**

MANU/KA/7363/2007)(para 8).

Is it necessary to issue notice of delay condonation application to accused before issuing process?

Yes. Relevant decision is reported in **ILR 2006 Kar 3771-Sajjan Kumar Jhunjhunwala VS. Eastern Roadways Pvt. Ltd. (Manu Citation: MANU/KA/8351/2006)**

Whether period spent in conducting the case before wrong Court can be condoned?

Yes. If it is shown and made out sufficient grounds, then such delay can be condoned. Refer the decision in the case of **Charanjit Pal Jindal Vs L.N. Metalics- 2015-5 SCALE 16=2015(2) JCC—137. (MANU/SC/0540/2015)**

JURISDICTION/TERRITORIAL JURISDICTION

Which Court has jurisdiction to try the offences u/s 138?

The offences u/s 138 is the net result of series of acts, may be omissions and commissions. Considering ingredients of section 138 referred above Hon'ble Apex Court in case of **K. Bhaskaran vs. Shankaran (MANU/SC/0625/1999)AIR 1999, SC 3762,** had given jurisdiction to initiate the prosecution at any of the following places:

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

However, recently in case of **Dashrath Rupsingh Rathod vs. State of Maharashtra (MANU/SC/0625/1999),** reported in MANU /SC/ 0655/ 2014 interpreted various provisions of section 138 of Negotiable Instruments Act and held,

1. An offence under Section 138 of the Negotiable Instruments Act, 1881 is committed no sooner a cheque drawn by accused on an account being maintained by him in a bank for discharge of debt/liability is returned unpaid for insufficiency of funds or for the reason that the amount exceeds the arrangement made with the bank.
2. Cognizance of any such offence is however forbidden under Section 142 of

the Act except upon a complaint in writing made by payee or holder of cheque in due course within a period of one month from the date of cause

of action accrues to such payee or holder under clause (c) of proviso to Section 138.

3. Cause of action to file a complaint accrues to a complainant /payee/ holder of a cheque in due course if,
   - The dishonoured cheque is presented to the drawee bank within a period of three months from the date of its issue.
   - If complainant has demanded payment of cheque amount within thirty days of receipt of information by him from the bank regarding the dishonour of cheque and
   - If the drawer has failed to pay the cheque amount within fifteen days of receipt of such notice
4. The facts constituting cause of action do not constitute the ingredients of the offence under Section 138 of the Act.
5. Proviso to Section 138 simply postpones/ defers institution of criminal proceedings and taking of cognizance by Court till such time cause of action in terms of clause (c) of proviso accrues to the complainant.
6. Once the cause of action accrues to complainant, jurisdiction of Court to try the case will be determined by reference to the place where cheque is dishonoured.
7. General rule stipulated under Section 177 of Cr.P.C (now section 197 of B.N.S.S.) applies to cases under Section 138 of the Negotiable Instruments Act. Prosecution in such cases can, therefore, be launched against the drawer of the cheque only before the Court within whose jurisdiction the dishonour takes place except in situations where the offence of dishonour of cheque punishable under Section 138 is committed along with other offences in a single transaction within the meaning of Section 220(1) read with section 184 of Cr.P.C. (now section 204 of B.N.S.S.) are is covered by the provisions of Section 182(1) read with section 184 and section 220 thereof.

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

cases under section 138, N.I. Act. Following the amendment was made in Section 142 (2), N.I Act reads as follows:

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

1. if the cheque is delivered for collection through an account, the branch of the bank where the **payee or holder** in due course, as the case may be, **maintains the account,** is situated; or
2. if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

What is the Course open to the Court if it has no jurisdiction to try the case?

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

(c) Interim Compensation and its recovery

As per section 143A of the Act , Court has power to grant interim compensation during pendency of the proceedings. Power to Grant Interim Compensation in Cheque Bounce Cases under section 143A of N.I Act is Discretionary. The Hon'ble Supreme Court Issued Guidelines in **Rakesh Ranjan Shrivastava vs. The State Of Jharkhand & Anr** (Neutral Citation 2024 INSC 205).

The Hon'ble Supreme Court held that the exercise of power to grant interim compensation in cheque bounce cases under sub-section (1) of Section 143A of the Negotiable Instruments Act, 1881 (N.I. Act) is discretionary and not mandatory. The complainant filed a complaint under Section 138 of the N.I. Act against the appellant, alleging dishonour of a cheque made towards payment of agreed amounts in various business ventures. Subsequently, the complainant sought interim compensation under Section 143A of the NI Act, which was granted by the trial court and upheld by the Jharkhand High Court. The Supreme Court had to decide on the factors

to be considered while exercising powers under sub-section (1) of Section 143A of the N.I. Act. Justice Abhay S. Oka and Justice Ujjal Bhuyan observed, “Section 143A can be invoked before the conviction of the accused, and therefore, the word “may” used therein can never be construed as “shall”. The tests applicable for the exercise of jurisdiction under sub-section (1) of Section 148 can never apply to the exercise of jurisdiction under subsection

(1) of Section 143A of the N.I. Act.”

The appellant had challenged the said order before the Supreme Court arguing that Section 143A of the N.I Act uses the word ‘may,’ which made the provision discretionary. “While deciding the prayer made under Section 143A, the Court must record brief reasons indicating consideration of all relevant factors,” the Court remarked .The Court provided the following parameters for exercising the discretion under Section 143A of the N.I. Act:

The Court must evaluate the merits of a case made out by the complainant and the defence pleaded by the accused in the reply to the application. “The financial distress of the accused can also be a consideration.”

If a complainant made out a prima facie case, only then a direction to pay interim compensation could be issued by the Court.

The Court may exercise discretion in refusing to grant interim compensation if the defence of the accused was found to be prima facie plausible.

If the Court concludes that a case warrants interim compensation, it will also "have to apply its mind to the quantum of interim compensation to be granted." While doing so, the Court should also consider several factors such as the nature of the transaction, the relationship if any, between the accused and the complainant, etc.

The Court stated the parameters given by the Court were not exhaustive and that “there could be several other relevant factors in the peculiar facts of a given case.”

Section 143A of the Act is prospective. Court has power to grant interim compensation during pendency of the proceedings, as held in the case of **G. J Raja Vs Tejraj Surana, reported in (2019) 19 SCC 469 (Neutral Citation: 2019 INSC 838; Manu Citation: MANU/SC/1002/2019)**

Interim compensation is not mandatory but discretionary directory as held by Delhi High Court in the case of **M/S JSB Cargo and freight forwarder Pvt Ltd Vs State and another(Manu CItation: MANU/DE/3613/2021; Neutral Citation: 2021:DHC:4269)**. Similar view has been expressed by Madras High Court in the case **LGR enterprises Vs P Anbazhvgan.**

Karnataka High Court in the case of **V Krishnamurthy Vs Diary Classic ICE Creams Pvt Ltd, reported in 2022 SCC Online Kar 1047,** has held that the conduct of the accused is relevant consideration while deciding the application for interim compensation. The discretion to be exercised by the magistrate is twofold, how accused cooperates with the Court for early disposal of the case, Etc,. It is not mandatory to award interim compensation in every case.

Power of Appellate Court to order payment of fine or compensation:

The Appellate Court can order for payment pending appeal against conviction under section 148 of the N.I ACT. Above provision is analogous to Section 143A of the N.I Act.

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

Recovery of Fine and Compensation

Further, in order to recover the fine and compensation which has been discussed in the decision reported in **Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd., (Manu Citation:** MANU/SC/1803/2007)**(2007) 6 SCC 528, at page 538, wherein,** it is held that fine for an offence under Section 138 of the Act can be imposed only in terms of the provisions of the Act, when fine is not imposed, compensation can be directed to be paid for loss or injury caused to the complainant by reason of commission of such offence. The fine can be recovered under Section 421 of Cr.P.C (now 461 of B.N.S.S.) Section 431 provides for a legal fiction in terms whereof any money other than a fine shall be recoverable as if it was a fine. Section 357 (2) Cr.P.C would be attracted in such a situation. There does not appear to be any reason as to why the amount of compensation should be held to be automatically payable, although, the same is only to be

recovered, as if, a fine has been imposed.

In the case of ***Surinder Singh Deswal @ Col. S.S. Deswal and Ors. v. Virender Gandhi, (2020) 2 SCC 514, MANU/SC/0019/2020, 2020 INSC 21*** the Hon'ble Supreme Court of India addressed the issue of non-payment of interim compensation under Section 143A of the Negotiable Instruments Act, 1881.

The court held that if the accused fails to pay the interim compensation as directed under Section 143A, the court can resort to the provisions of Section 421 of the Code of Criminal Procedure (now 461 of Bharatiya Nagarik Suraksha Sanhita, 2023) for recovery. Additionally, the court clarified that non-payment of interim compensation can also lead to the cancellation of bail granted to the accused. So, apart from the remedy under Section 421 Cr.P.C. (now 461 of B.N.S.S.) the court may consider the cancellation of bail as a consequence of non-payment of interim compensation. This serves as an additional measure to ensure compliance with the order of interim compensation.

What is the effect of accused depositing the cheque amount when the appeal against his conviction is pending?

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

(d) Compounding Of Offences – Execution Of Lok Adalat Award Section 147:- Offences to be compoundable - Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable.

Is the offence under Section 138 of N.I Act compoundable?

After amendment and insertion of Section 147 it is compoundable. The purpose of compounding the offence has been stated in the decisions reported

in **AIR 2000 SC 3543- P.Mohanbabu Vs. D. Ramaswamy, MANU/SC/0939/2000 , AIR 2004 SC 3978 Anil Kumar Haritwal v. Alka Gupta, MANU/SC/1200/2004 , AIR 2008 SC 716 Vinay Devanna Nayak v. Ryot Seva Sahakari Bank Ltd., MANU/SC/0061/2008, 2007 INSC 1246 AIR 2010 SC 276 K.**

M. Ibrahim v. K. P. Mohammed. In the latest decision reported in **AIR 2010 SC 1907 = 2010 AIR (SCW) 2929 = 2010-ADJ-4-464 – Damodar**

S. Prabhu vs. Sayed Babalal H, MANU/SC/0319/2010, 2010 INSC 260 the Apex **Court has issued the following guidelines. They are:**

In the circumstances, it is proposed as follows:

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

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

Similarly, if 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 20% of the cheque amount by way of costs.

Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount. Let it also be clarified that any costs imposed in accordance with these guidelines should be deposited with the Legal services Authority operating at the level of the Court before which compounding takes place. For instance, in case of compounding during the pendency of proceedings before a magistrate's Court or a Court of Sessions, such costs should be deposited with the District Legal Services Authority. Likewise, costs imposed in connection with composition before the High Court should be deposited with the State Legal services Authority and those imposed in connection with composition before the Supreme Court should be deposited with the National Legal Services Authority.)

Some more guidelines have been issued by the Apex Court in the case of **Madhya Pradesh State Legal Services Authority Vs. Prateek Jain, MANU/SC/0796/2014, 2014 INSC 621** reported in **(2014) 10 SCC 690**, as follows;

In the opinion of the Court, since Section 147 of the Act did not carry any guidance on how to proceed with compounding of the offences under the Act and Section 320 of the Code of Criminal Procedure, 1973 (now section 359 of Bharatiya Nagarik Suraksha Sanhita, 2023) could not be followed in strict sense in respect of offences pertaining to Section 138 of the Act, there is a legislative vacuum which prompted the Court to frame those guidelines to achieve the following objectives:

- to discourage litigants from unduly delaying the composition of offences in cases involving Section 138 of the Act;
- it would result in encouraging compounding at an early stage of litigation saving valuable time of the Court which is spent on the trial of such cases; and
- even though imposition of costs by the competent Court is a matter of discretion, the scale of cost had been suggested to attain uniformity.
- At the same time, the Court also made it abundantly clear that the concerned Court would be at liberty to reduce the costs with regard to specific facts and circumstances of a case, while recording reasons in writing for such variance.

Whether Award passed by the Lok Adalath in a case referred to it can be executed in Civil Court?

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

However, in the decision, in the case of **Sri Somashekhar Reddy Vs Smt. G S Geetha, in WP No.23519 of 2018(GM- RES),** held that 'depending upon the terms of a compromise arrived at before lok-adalath it can be enforced as a

Civil Decree or in terms the applicable provisions of

B.N.S.S including that under Section 431 of Cr.P.C. (now 471 of B.N.S.S.) if so provided in the compromise. In the event of default of a compromise arrived at before the Lok-Adalath, this court or trial Court can on an application made by the Complainant set-aside the compromise arrived at before the Lok- Adalath, restore the complaint on its file and proceed with the complaint or enforce the compromise as per the terms of the compromise by invoking the procedure under section 431 of Cr.P.C. (now section 471 of B.N.S.S.).

What is the course available to the Court when the accused wants to pay the cheque amount and compound the offence, but, complainant is not willing to compound?

Offences under section 138 of the Act are primarily a civil wrong. Burden of proof is on the accused in view of 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
B.N.S.S 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. (now 281 of B.N.S.S.) will apply and the court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect. The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the court. Though compounding requires consent of both parties, even in absence of such consent, the court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused. (Paras 18.1, 18.2 and 18.3) **Meters and Instruments Private Ltd., and another vs. Kanchan Mehta – (2018) 1 SCC 560.** Above decision has been followed in subsequent decision in the case of **Gulshan Dhall And Another Vs Sasrbit Singh and another – (2019)11 SCC 671, MANU/SC/1651/2018.** As far as closing of case under section 258 is concerned, the view taken in **Meters and instruments** case has been overruled in the case of **Expeditious Trial of cases under section**

138 NI Act, Suo Moto writ petition (Crl) 2 of 202 reported in **-2021 SCC online SC 325.**

What is the effect of compounding or Compromising the case?

Once the matter is compromised, then, it must end in acquittal of the accused. There is no question of granting installments and acquitting the accused. Refer the decision reported in **K. J. B. L. Rama Reddy v. Annapurna Seeds 2005 (10) SCC 632**, and **(2005)12 SCC 234- Cochin Hotels Co. Pvt Ltd Vs Kairali Granites & Ors., MANU/SC/2631/2005**

Criminal proceedings are not barred due to pendency of parallel civil case. Relevant decision is **AIR 2000 SC 1869- Medchi Chemicals & Pharma (P) Ltd. Vs. Biological E. Ltd. MANU/SC/0128/2000, 2000 INSC 103** Even if the suit is decreed, continuation of criminal proceedings is not an abuse of process of Court.

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