A Quick Guide

To

Action on Bouncing of Cheque

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Anil Chawla Law Associates LLP
Business Lawyers, Strategic Advisors and Insolvency Professionals

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Notes:

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This Guide is an academic exercise. It does not offer any advice or suggestion to any individual or firm or company.

Glossary

Term Used	Meaning
Bailable	In a bailable offence, the accused has a right to get bail and a court cannot deny bail.
Cause of action	The specific act or event which forms the basis for one party to complaint or proceed against the other party.
Company	Company includes private / public limited company, partnership firm and limited liability partnership firm.
Compoundable	In a compoundable offence, the two parties (complainant and accused) can settle the matter by mutual agreement. Most criminal offences are not compoundable. For example, rape is not a compoundable offence.
Director	Director includes partner of a firm.
Drawee or Payee or Holder-in-due-course	This refers to the person who is supposed to receive the payment when the cheque is cleared. If the cheque is in favor of a company, the company is the payee or drawee or holder-in-due-course of the cheque.
Drawer or Issuer	The person who gives a cheque. In case a cheque is issued on behalf of a company, the company is the Drawer or Issuer while the person signing the cheque on behalf of the company is only a signatory.

Mens rea	Criminal intent. For example, if a person is cleaning his gun and inadvertently the gun fires killing someone on the street it will be said that there was no mens rea.
NI Act	The Negotiable Instruments Act, 1881 as amended up to date.
Non-cognizable	In a cognizable offence, a police officer has a right to arrest the accused without orders of a court. In a non-cognizable offence, a court may issue a warrant but a police officer cannot arrest on his own.
Payee Bank / Drawee Bank	The bank where cheque is presented by payee for encashment.
Vicarious Liability	It is a legal concept that assigns liability to an individual who did not actually cause the harm, but who has a specific superior legal relationship to the person who did cause the harm. For example, owner of a monkey is held liable if the monkey escapes and causes damage to people.

Preface

In 1988, the Parliament made cheque bouncing a criminal offence "*to enhance the acceptability of cheques in settlement of liabilities*". In the past three decades, the amended law relating to bounced cheques has been used so extensively that presently in most courts of India bounced-cheque-cases account for the biggest single type of cases in the court. It is estimated that more than 35 lakh (35,00,000-) cases related to cheque dishonour are pending in various courts in India. Honourable Supreme Court recently quoted from a study which indicated that about 15% of all cases in criminal courts in India are related to cheque bouncing.

As lawyers who add value to business, we have been involved in cheque-bounce cases from both sides. On one hand, we have helped businesses use the law to recover money. On the other hand, we have helped entrepreneurs defend against cases filed by banks and financial institutions when their businesses failed to pay in difficult times. This Guide is intended to present the law in a non-partisan way. This Guide will be useful for you if you are holding a bounced cheque. It will also help one understand the legal position if one is in the unfortunate situation of being unable to ensure that the issued cheque is duly cleared.

While judiciary and legal system of the country has become actively involved in enhancing the acceptability of cheques, the world has been moving in an entirely different direction. Cheques are no longer preferred mode of funds transfer for trade settlements. Electronic transfers (NEFT, RTGS etc.) have slowly replaced cheques in large number of business transactions.

It will not be wrong to say that cheques have retained their utility in the Indian context only because of their use as a security or guarantee stemming from the Negotiable Instruments Act (NI Act) as amended in 1988. Most moneylenders (including banks and financial institutions) take undated signed cheques from their borrowers and use the threat of punishment under the NI Act as a recovery method. Surely, this was not the intent of the lawmakers when the law was amended in 1988.

There is a strong demand for decriminalization of cheque bouncing. Department of Financial Services, Ministry of Finance, Government of India issued a Press Note on 8th June 2020 for Decriminalization of Minor Offences for Improving Business Sentiment and Unclogging Court Processes. The introduction paragraph of the Press Note reads as follows:

Decriminalisation of minor offences is one of the thrust areas of the Government. The risk of imprisonment for actions or omissions that aren't necessarily fraudulent or the outcome of malafide intent is a big hurdle in attracting investments. The ensuing uncertainty in legal processes and the time taken for resolution in the courts hurts ease of doing business. Criminal penalties including imprisonment for minor offences act as deterrents, and this is perceived as one of the major reasons impacting business sentiment and hindering investments both from domestic and foreign investors. This becomes even more pertinent in the post COVID19 response strategy to help revive the economic growth and improve the justice system.

Key argument in favour of decriminalization of cheque bouncing is that bouncing of a cheque is almost always without any criminal intent on the part of the drawer of the cheque. In case of a business going bad due to external factors, the businessman is pushed into a situation where cheques issued long ago bounce. If every businessman whose business gets into a rough patch is imprisoned, no one will like to become a businessman / entrepreneur. Failure is essential part of doing business. The NI Act fails to take business failure into account.

We do not know when (and if) cheque bouncing will be decriminalized. But use of cheque for trade settlements will face further challenge by the introduction of "**Positive Pay System**" by Reserve Bank of India with effect from 1 January 2021. Under the Positive Pay System, an issuer a cheque will have to electronically submit certain minimum details of the particular cheque (such as date, name of the beneficiary, payee and amount) to the drawee bank. This can be done through various channels – SMS, mobile app, internet banking and ATM.

Effect of Positive Pay System on cheque bouncing cases is not yet clear. However, it seems that this will act as a further irritant for use of cheques. More and more businesses are likely to shift to electronic funds transfer instead of cheques in times to come.

One may conclude that the law relating to cheque bouncing is likely to lose importance in the years to come. Nevertheless, the NI Act remains an important law as of today. This Guide is intended to help entrepreneurs, business persons and professionals understand the essentials of the law related to bouncing of cheques. We hope that you find this Guide useful.

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1. Offence of Cheque Bouncing – Essential Ingredients

Bouncing of a cheque invites criminal prosecution under section 138 of NI Act. Punishment for the offence under section 138 of NI Act is imprisonment up to two years or fine which may extend to twice the cheque amount or both. The offence is bailable, compoundable and non-cognizable.

Essential ingredients of an offence under the section can be summed up as follows:

1. A person must have drawn a cheque on a bank account maintained by him.

2. The cheque should have been issued in discharge, in whole or in part, of any debt or other liability.

3. The cheque has been presented to the bank within the period of its validity (3 months from the date of the cheque).

4. The cheque is returned by the bank unpaid, either because of funds being insufficient or the cheque exceeds the amount arranged to be paid. (It is not clear whether an offence under the section will be committed if the cheque is returned due to non-confirmation under “Positive Pay System” by the drawer).

5. The payee makes a demand for the payment by giving a notice in writing, within **30 days** of the receipt of information by him from the bank.

6. The drawer fails to make payment of the said amount of money within **15 days** of the receipt of the said notice.

7. Complaint is made within **one month** of the date on which the cause-of-action arises.

The following exception is notable:

When action is not taken against first dishonor and cheque is presented twice and complaint is filed against second dishonor, complaint is maintainable. However, the

prosecution is only for the last time the cheque bounced and there cannot be multiple prosecutions for various times the cheque is returned.

The following special points need to be also considered:

- An offence in terms of section 138 is committed even if the cheque is returned on the ground of "closure of the account".
- Return of cheque unpaid with the advice "account operation jointly, other Director's signature required", amounts to dishonor of the cheque within the meaning of section 138.
- A cheque is issued on an account which is a joint account of two individuals (say A and B). A has signed the cheque which bounces. B has not signed the cheque. Action can be taken under section 138 only against A and not against B.
- In case a cheque is returned with the comments "Refer to drawer" it will be a matter of evidence to prove that the drawer had sufficient funds at the time of return of cheque and that the bank returned the cheque for some reason other than lack of funds.
- If a cheque is returned due to its payment being stopped by the drawer, it will be necessary to prove that the drawer had sufficient funds in his account at the time of return of cheque and the stoppage was for some other justifiable reason (Discussed in more detail below).
- Absence of Mens rea (criminal intent) is not a permissible defense in bouncing of cheque.
- Even though action has been initiated under the NI Act, the holder of bounced cheque can also file an First Information Report (FIR) with a police station or can file a criminal complaint before a magistrate under sections 406, 420 and other relevant sections of Indian Penal Code, 1860 (IPC). Proceedings under the NI Act and under IPC are independent and can proceed simultaneously. This may often be a debatable point and the Honourable Supreme Court has often taken conflicting views on the subject depending on the facts of each

case. The following extract from Sangeetaben Mahendrabhai Patel vs. State of Gujarat and Anr (MANU/SC/0321/2012 dated 23rd April 2012) illustrates the view of the Honourable Supreme Court in the matter.

27. Admittedly, the Appellant had been tried earlier for the offences punishable under the provisions of Section 138 Negotiable Instruments Act and the case is sub judice before the High Court. In the instant case, he is involved under Sections 406/420 read with Section 114 Indian Penal Code. In the prosecution under Section 138 Negotiable Instruments 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 Indian Penal Code involved herein, the issue of mens rea may be relevant. The offence punishable under Section 420 Indian Penal Code is a serious one as the sentence of 7 years can be imposed. In the case under Negotiable Instruments 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 Indian Penal Code. In the case under Negotiable Instruments 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 Indian Penal Code. The case under Negotiable Instruments Act can only be initiated by filing a complaint. However, in a case under the Indian Penal Code such a condition is not necessary.

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 key issue for proceeding under IPC (in contrast with the NI Act) will be mens rea (criminal intent). A person can be guilty of offence under the NI Act without any criminal intentions, while it is necessary to prove criminal intention to convict someone under IPC. Punishment under IPC is much higher than under the NI Act. A criminal cannot be allowed to take the benefit of lower punishment by choosing to push prosecution under one law. Hence, it seems reasonable to allow both proceedings (under the NI Act and IPC) simultaneously. However, it must be stressed that in case there is no mens rea, it will not be possible to prosecute under IPC. Insufficient funds will not be sufficient ground for mens rea.

2. Offence by Companies and Firms

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.

- Company includes partnership firms.

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.

> Therein, it was provided that if the person committing an offence under Section 138 of the Act was a company, every person who at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The scope of Section 141 has been authoritatively discussed in the decision in **S.M.S. Pharmaceuticals Ltd.** (supra) binding on us and there is no scope for redefining it in this case. Suffice it to say, that a prosecution could be launched not only against the company on behalf of which the cheque issued has been dishonoured, but it could also be initiated against every person who at the time the offence was committed, was in charge of and was responsible for the conduct of the business of the company. In fact, Section 141 deems such persons to be guilty of such offence, liable to be proceeded against and punished for the offence, leaving it to the person concerned, to prove that the offence was committed by the company without his knowledge or that he has exercised due diligence to prevent the commission of the offence. Sub-section (2) of Section 141 also roped in Directors, Managers, Secretaries or other officers of the company, if it was proved that the offence was committed with their consent or connivance.

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".

> 14. A person normally having business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its Memorandum or Articles of Association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. Therefore, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are incharge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of it. So, all that a payee of a cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in charge of its affairs. The Directors are prima facie in that position.

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. All directors who are either Managing Director or Executive Director or Wholetime Director must be included in the list of accused. Similarly, if a person is named as Chief Executive Officer or Chief Finance Officer, the person is prima facie incharge of and responsible for the conduct of the business of the company. Hence, such persons should also be included in the list of accused.

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 6th 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.

Relevant extracts from the above judgment of the Honourable Supreme Court are as follows:

> 14. Section 141 states that if the person committing an offence Under Section 138 is a Company, every director of such Company who was in charge of and responsible to that Company for conduct of its business shall also be deemed to be guilty. The reason for creating vicarious liability is plainly that a juristic entity i.e. a Company would be run by living persons who are in charge of its affairs and who guide the actions of that Company and that if such juristic entity is guilty, those who were so responsible for its affairs and who guided actions of such juristic entity must be held responsible and ought to be proceeded against. Section 141 again does not lay down any requirement that in such eventuality the directors must individually be issued separate notices Under Section 138. The persons who are in charge of the affairs of the Company and running its affairs must naturally be aware of the notice of demand Under Section 138 of the Act issued to such Company. It is precisely for this reason that no notice is additionally contemplated to be given to such directors. The opportunity to the 'drawer' Company is considered good enough for those who are in charge of the affairs of such Company. If it is their case that the offence was committed without their knowledge or that they had exercised due diligence to prevent such commission, it would be a matter of defence to be considered at the appropriate stage in the trial and certainly not at the stage of notice Under Section 138.

15. If the requirement that such individual notices to the directors must additionally be given is read into the concerned provisions, it will not only be against the plain meaning and construction of the provision but will make the remedy Under Section 138 wholly cumbersome. In a given case the ordinary lapse or negligence on part of the Company could easily be rectified and amends could be made upon receipt of a notice Under Section 138 by the Company. It would be unnecessary at that point to issue notices to all the directors, whose names the payee may not even be aware of at that stage. Under Second proviso to Section 138, the notice of demand has to be made within 30 days of the dishonour of cheque and the third proviso gives 15 days time to the drawer to make the payment of the amount and escape the penal consequences. Under Clause (a) of Section 142, the complaint must be filed within one month of the date on which the cause of action arises under the third proviso to Section

138. Thus a complaint can be filed within the aggregate period of seventy five days from the dishonour, by which time a complainant can gather requisite information as regards names and other details as to who were in charge of and how they were responsible for the affairs of the Company. But if we accept the logic that has weighed with the High Court in the present case, such period gets reduced to 30 days only. Furthermore, unlike proviso to Clause (b) of Section 142 of the Act, such period is non-extendable. The summary remedy created for the benefit of a drawee of a dishonoured cheque will thus be rendered completely cumbersome and capable of getting frustrated.

3. Prosecution of Directors

As mentioned earlier, the NI Act affixes liability on Directors of a company even when they are not directly involved with bouncing of cheque. However, the following points need to be noted before directors of a company can be prosecuted:

a) Specific statements alleging role of the Directors are necessary in the complaint.

b) It must be stated that the Director concerned was in charge of AND responsible to the company for conduct of the business of the company.

Key Principles with regard to Directors

The following key principles laid down by the Honourable Supreme Court in National Small Industries Corporation Ltd. vs. Harmeet Singh Paintal and Anr. (MANU/SC/0112/2010, Decided on 15th February 2010) with regard to affixing liability on directors are important:

(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.

From the above it can be concluded that the following persons are always liable and cannot escape prosecution:

- Managing Director
- Joint Managing Director
- Director or officer who signed the cheque

Notably, no specific averment or statements are needed against the above persons. The above persons shall be presumed to be liable.

Independent Directors

The NI Act does not specifically say anything about independent directors. Section 141(1) of the NI Act states that "*every person who, at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company* …" shall be liable to be proceeded against and punished accordingly. Independent Directors are generally never in charge of conduct of the business of the company. An independent director cannot also be said to be responsible to the company for the conduct of the business of the company. Hence, it may be said that unless there are strong facts which run contrary to the usual nature of independent directors, an independent director cannot be prosecuted for bouncing of a cheque issued by the company.

Support to our above view comes also from section 149(12) of the Companies Act, 2013 which states as follows:

> (*12*) Notwithstanding anything contained in this Act,—
>
> (*i*) an independent director;
>
> (*ii*) a non-executive director not being promoter or key managerial personnel,
>
> shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

In general, a complainant who wishes to name an Independent Director as an accused must make specific averments against the person and not make general comments that cannot be backed up with evidence. High Courts have often quashed proceedings where independent non-executive directors are implicated without clear allegations.

The following extract from Har Sarup Bhasin vs. Origo Commodities India Private Limited (MANU/DE/0529/2020; Delhi High Court, Decided on 7th January 2020) makes the position clear:

> as laid down by this Court in Bhardwaj Thuiruvenkata Venkatavraghavan (supra) and Kanarath Payattiyath Balraj (supra), the petitioner being an Independent and a Non-Executive Director, in the absence of any specific role attributed against the petitioner for his active participation in the day to day affairs of the company and of taking all decisions of the company, where the petitioner was not a signatory to the cheques in question, vicarious liability cannot be fastened on the petitioner in the absence of any specific role attributed to him, in as much as, the contentions that have been sought to be raised during the course of the arguments and in the affidavit in reply to the petition on behalf of the respondent in relation to the petitioner being in a Key Managerial Person and the petitioner having participated in 100% all the meetings of the accused company, are not spelt out in the complaint that had been filed by the respondent. Furthermore, taking into account also the factum that even if the petitioner was a Key Managerial Person of the accused No. 1 company as per the reply affidavit of the respondent as filed on 8.7.2007, he was so for the period from 1.4.2015 to 31.3.2016 and the date of the drawing of the cheques in question are 1.6.2016 and 7.6.2016.

The above position was further confirmed in Sunita Palta and Ors. vs. Kit Marketing Pvt. Ltd. (MANU/DE/0715/2020; Delhi High Court, Decided on 3rd March 2020):

> **17.** Admittedly, the petitioners are neither the Managing Directors nor the Authorized Signatories of the accused company. The accused company and the Managing Director are arrayed as accused No. 1 and 2 along with others in the complaint pending before the concerned Metropolitan Magistrate. A perusal of the complaint filed under Section 138 r/w Sections 141/142 of NI Act filed by the complainant shows that except for the general allegation stating that the petitioners were responsible for control and management and day to day affairs of the accused company, no specific role has been attributed to the petitioners. To fasten the criminal liability under The Negotiable Instruments Act, 1881, the above generalised averment without any specific details as to how and in what manner, the petitioners were responsible for the control and management of affairs of the company, is not enough.

Company not accused – can Directors be accused

In case of a cheque issued by a company, it is necessary to serve notice to the company and file proceedings against the company. In case the holder of a bounced cheque omits to accuse the company, he / she cannot proceed against the directors of the company.

Following extract from Aneeta Hada vs. Godfather Travels and Tours Pvt. Ltd. (MANU/SC/0335/2012, Supreme Court, Decided on 27th April 2012) is relevant:

> 43. 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

The above view was further confirmed by the Honourable Supreme Court in the matter of Himanshu vs. B. Shivamurthy and Ors. (MANU/SC/0072/2019, Decided on 17th January 2019). Relevant extract reads as follows:

13. In the present case, the record before the Court indicates that the cheque was drawn by the Appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the Appellant. The complaint was lodged only against the Appellant without arraigning the company as an Accused.

14. The provisions of Section 141 postulate that if the person committing an offence Under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.

15. In the absence of the company being arraigned as an Accused, a complaint against the Appellant was therefore not maintainable. The Appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an Accused.

4. Summary of Procedure

1) A legal notice on behalf of payee is issued to the defaulter, within 30 days of dishonor of cheque, by registered post (or Speed Post) acknowledgement due. All facts including the nature of transaction, amount of loan and or any other legally enforceable debt against which the said cheque was issued and the date of deposit in bank and date of dishonor of cheque should be mentioned in the notice.

   Please refer to Annexure A / B for format of the notice. An advocate is not needed at the stage of sending a notice. A notice sent by the holder of the cheque is as good as a notice sent by an advocate on behalf of the holder.

2) The person who has issued cheque is directed, through the notice as mentioned under 1, to make the payment of amount of dishonored cheque within 15 days. In case, the said payment is made within 15 days of service of notice, the matter ends.

3) In case, the said payment is not made within 15 days, the holder of cheque should file a criminal case in a court within 30 days from the expiry of notice period of 15 days. It is advisable to have an advocate handle the matter in the court.

4) The complaint will have to be filed at a court in the city of location of the bank where the cheque was presented. So, if a cheque is drawn on a bank branch in Guwahati and presented in Mumbai, the complaint can be filed only at Mumbai.

5) Complaint to be accompanied with affidavit and relevant documents in original.

6) The court will hear complainant / advocate of complainant and issue summons under section 138 of NI Act.

7) Summons are sent and served through police station where accused is residing. The summons can also be served by speed post or by authorized courier service and even if not accepted will be treated as duly served.

8) Police action is generally limited to only service of summons. In case accused remains absent on court date after service of summons, then warrant is sent to police station to produce accused in court.

9) The accused and surety are required to appear in court and submit documents (ownership documents of house or land owned by surety, or fixed deposit receipts in the name of surety, his address proof including ration card, election identity card, aadhar card, PAN card, photo and address proof of surety and accused). The court will accept the surety and on signing bonds by accused and surety, the bail will be granted and accused will be released by court.

10) Accused / his advocate will cross examine the complainant & its witness / witnesses.

11) Statement of accused is recorded under section 313 of Cr.P.C. Accused will be asked to give reply to the questions and allegations against him.

12) Witnesses of accused to prove his innocence will be produced and the evidence will be recorded by the court.

13) Last stage is of arguments of advocates of the complainant and of the accused.

14) After hearing final arguments, court will pass the judgment.

15) In case the accused is acquitted, the matter ends.

16) In case accused is convicted, the accused should immediately thereafter submit bail application and give surety and pray for time to appeal to Sessions Court. Court will direct him to immediately deposit fine as per judgment and he will be released thereafter on acceptance of bail application.

17) The convict may appeal to Sessions Court within one month from the date of judgment of lower court.

18) Criminal appeal with application for suspension of sentence and for bail will be given hearing by the district and sessions court.

19) The dispute may go on from District and Sessions court to High Court and then to Supreme Court.

20) The matter can be settled at any time between the parties. In case of any such settlement, an application should be moved before the court to compound and close the case. In many states, it may be possible to get a full or partial refund of court fees if the case is closed before charges are framed.

List of Documents to be submitted in Court with Complaint (Original)

- ✓ Any agreement / contract between complainant & accused including order(s) placed (if any)
- ✓ Invoice / Bill against which dishonored cheque was issued
- ✓ Delivery challan and acknowledgement, if any, of goods received by the accused (In case of contracts involving supply of goods)
- ✓ Any other document that is evidence of creation of debt or liability
- ✓ Dishonored Cheque
- ✓ Bank Memo stating reason for dishonor of cheque
- ✓ Copy of the legal notice sent to the accused
- ✓ Proof of dispatch of the above legal notice
- ✓ Postal Acknowledgment received from the accused
- ✓ Authority of competent person (Certified True Copy of Board resolution in case of filing of complaint by legal representative of a company)
- ✓ Vakalatnama in favour of the advocate

5. Complaint with Magistrate and Court Fees

For filing of a complaint, the following points should be kept in mind:

- Complaint in writing should be filed by payee or holder in due course.
- Complaint must be filed only before a court having jurisdiction over the place where the bank in which cheque is presented for encashment by payee is located.
- Complaint can be filed by an advocate / power of attorney holder or by a duly authorized agent of the complainant.
- In case of a company, a person duly authorized in a meeting of Board of Directors of the Company should file the complaint. It is advised that a copy of the Board Resolution should be filed with the court along with the complaint.
- Complaint to be filed before Judicial Magistrate of the first class or before a Metropolitan Magistrate. In most district courts, there are designated magistrates to deal with NI Act cases. Please check the applicable magistrate based on the location of the drawee bank or such other detail that may be followed by the district court.
- Complaint should be made within 30 days of the date of cause of action, which is when the drawer fails to make payment of the demanded amount of money within 15 days of the receipt of the notice issued by payee / holder of cheque.
- If there is delay in filing of the complaint, the Magistrate can condone the delay.

In Madhya Pradesh, the following court fee is payable from 2011 onwards:

When the amount of dishonored cheque involved in the complaint is up to One Lakh	Five percent of the amount of dishonored cheque subject to the minimum of Rupees Two Hundred
When the amount of dishonored cheque involved in the complaint is more than Rupees One Lakh but up to Five Lakhs	Minimum Rupees Five Thousand, plus four percent on the amount in excess of Rupees One Lakh
When the amount of dishonored cheque involved in the complaint is more than Rupees Five Lakhs	Minimum Rupees Twenty One Thousand, plus three percent on the amount in excess of Rupees Five Lakhs subject to maximum Rupees One Lakh Fifty Thousand

Please check fee applicable for the state where you intend to file the complaint.

6. Cheque Bouncing – Case where Cheque is Presented

Law related to cheque bouncing went through a major change on 1st August 2014 (Dashrath Rupsingh Rathod vs. State of Maharashtra; MANU/SC/0655/2014) when a three-judge bench of the Honourable Supreme Court overturned many of the Court's previous decisions.

Before this judgment the legal position was as follows – Let us say a party X based in Mumbai issued a cheque to a party Y of Kolkata. The cheque was drawn on a bank of Mumbai. The cheque was presented by Y to his bank in Kolkata. The cheque bounced. Y would file a complaint with the Magistrate at Kolkata.

After the judgment dated 1st August 2014, Y had to necessarily come to Mumbai to file the complaint.

Supreme Court's judgment was overturned by the Parliament by passing of The Negotiable Instruments (Amendment) Act, 2015, No. 26 of 2015. The Act has introduced a new sub-section to section 142 of The Negotiable Instruments Act. The sub-section reads as follows:

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

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

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

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.".

The above sub-section reverses the Supreme Court decision. In the example discussed earlier, the cheque drawn on a Bank at Mumbai was presented for collection at Kolkata. **As per the new law introduced by the Amendment Act, the case can be filed only at Kolkata**, the place where it was presented. It may be mentioned here that before the Amendment Act, an Ordinance to the same effect was promulgated by the President in June 2015.

The Amendment Act also introduced section 142A which reads as follows:

"142A. Validation for transfer of pending cases.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or any judgment, decree, order or direction of any court, all cases 2 of 1974. transferred to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, shall be deemed to have been transferred under this Act, 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) and such complaint is pending in that court, 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 delivered for collection or 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 payee or holder in due course, as the case may be, 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, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, before which the first case was filed and is pending, as if that sub-section had been in force at all material times.

Clearly, the Government reversed the decision of the Supreme Court not only in respect of all cases arising in future but also in relation to the cases that were transferred due to the decision of the Supreme Court.

7. Some Special Cases

Some Special Cases that deserve attention are as follows:

7.1 Cheque Issued in Compromise

Cheque issued in terms of a compromise agreement, not to satisfy any debt or payment due, is not covered by section 138 of NI Act. (Lalit Kumar Sharma & Anr vs State of Uttar Pradesh & Anr dated 06.05.08 MANU/SC/2079/2008). Two cheques were issued by the directors of a company and they were prosecuted. Meanwhile, there was a settlement under which Rs 5 lakh was to be paid to the creditor. However, this cheque also bounced, leading to another prosecution. The Allahabad High Court rejected their plea to quash the proceedings. But on appeal, the Supreme Court stated that the latter cheque was issued in terms of a compromise agreement and not to satisfy any debt or payment due. Therefore, the second instance would not invite prosecution under Section 138. The High Court judgment was set aside.

In contrast with the above case there is the case - A cheque was issued after a compromise was made in Lok Adalat. The cheque bounced. Drawer of cheque pleaded that the cheque was issued in settlement and hence, sec. 138 NI Act would not apply. Honourable Supreme Court rejected the plea taken by the drawer of cheque and ruled that decree of Lok Adalat created a liability. Relevant extracts are as follows:

16. In K.N. Govindan Kutty Menon v. C.D. Shaji reported in MANU/SC/1412/2011 : (2012) 2 SCC 51 : (AIR 2012 SC 719, Para 8) 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.

17. Every award of the Lok Adalat is, as held in K.N. Govindan Kutty Menon v. C.D. Shaji (MANU/SC/1412/2011 : AIR 2012 SC 719) (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.

[Arun Kumar vs Anita Mishra and Ors.; MANU/SC/1817/2019, Decided on 18th October 2019]

7.2 Post-dated Cheque Issued as Security

It is customary for a lender to take post-dated cheques from a borrower when extending a loan. Later when the cheques bounce, can the lender take recourse to section 138 of NI Act. The question came up before the Honourable Supreme Court in the matter of Sampelly Satyanarayana Rao vs. Indian Renewable Energy Development Agency Limited (MANU/SC/1021/2016, Decided on 19th September 2016). Honourable Supreme Court ruled that the post-dated cheques were issued against a liability and hence provisions of section 138 will apply. Relevant portion of head notes for the case are reproduced below:

also the co-accused. Vide the loan agreement, the Respondent agreed to advance loan for setting up of Power Project in the State. The agreement recorded that post-dated cheques towards payment of installment of loan (principal and interest) were given by way of security. The cheques carried different dates depending on the dates when the installments were due and upon dishonour thereof, complaints including the one were filed by the Respondent in the Court. The Appellant approached the High Court to seek quashing of the complaints. 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. The High Court held that when the post-dated cheques were issued, the loan had been sanctioned and hence the same fall in the first category that was they were cheque issued for a debt in present

but payable in future and declined to quash the complaints. Held, while dismissing the appeal: (i) The question whether a post-dated cheque is for "discharge of debt or liability" depends on the nature of the transaction. If on the date of the cheque liability or debt exists or the amount has become legally recoverable, the Section is attracted and not otherwise. [10] (ii) Though the word "security" is used in Clause 3.1(iii) of the agreement, the said expression refers to the cheques being towards repayment of installments. The repayment becomes due under the agreement, the moment the loan is advanced and the installment falls due.Once the loan was disbursed and installments had fallen due on the date of the cheque as per the agreement, dishonour of such cheques would fall under Section 138 of the Act. The cheques undoubtedly represent the outstanding liability. [11] (iii) As per the case of the

The above position was further reiterated by Honourable Supreme Court in Womb Laboratories Pvt. Ltd. vs. Vijay Ahuja and Ors; MANU/SC/1499/2019, Decided on 11th September 2019. In the said matter, Honourable High Court had treated the cheque as a security cheque and had dismissed the complaint. Honourable Supreme Court overturned the judgment of High Court. Relevant extracts are as follows:

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.

6. Suffice it to observe, the impugned judgment of the High Court cannot stand the test of judicial scrutiny. The same is, therefore, set aside.

7.3 Blank Cheque / Post-dated Cheque

Often accused take the defence that the cheque in question was handed over either blank or post-dated. The issue before the court is whether a blank / post-dated cheque can be basis for action under section 138 of NI Act. The issue came up before Honourable Supreme Court in the matter of Bir Singh vs. Mukesh Kumar (MANU/SC/0154/2019, Decided on 6th February 2019). Relevant extracts from the judgment are as follows:

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.

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.

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.

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.

Clearly, the accused cannot take the defense that the cheque was either blank or post-dated at the time of issue.

7.4 Signature Not Matching

Signature on cheque not matching with the signature in the record of the bank is treated as no different from “insufficient funds”. The following extract from Laxmi Dyechem vs. State of Gujarat (MANU/SC/1030/2012) makes the position clear:

> We find ourselves in respectful agreement with the decision in NEPC Micon Ltd. (supra) that the expression "amount of money .... is insufficient" appearing in Section 138 of the Act is a genus and dishonour for reasons such "as account closed", "payment stopped", "referred to the drawer" are only species of that genus. Just as dishonour of a cheque on the ground that the account has been closed is a dishonour falling in the first contingency referred to in Section 138, so also dishonour on the ground that the "signatures do not match" or that the "image is not found", which too implies that the specimen signatures do not match the signatures on the cheque would constitute a dishonour within the meaning of Section 138 of the Act.

So, even if the cheque is returned with comments “Signature not matching”, action can be initiated under section 138.

7.5 Stop Payment

Supreme Court in the matter of M.M.T.C. Ltd. and Anr. v. Medchl Chemical and Pharma (P) Ltd. and Anr. (MANU/SC/0728/2001) made the following observations:

> The accused can thus show that the "stop-payment" instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there were sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop-payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out. The important thing is that the burden of so proving would be on the accused. Thus a court cannot quash a complaint on this ground.

The above position was reconfirmed by Supreme Court in 2012 in the matter of Laxmi Dyechem vs. State of Gujarat (MANU/SC/1030/2012). The following extracts are relevant and interesting.

> As already noted, the Legislature intends to punish only those who are well aware that they have no amount in the bank and yet issue a cheque in discharge of debt or liability which amounts to cheating and not to punish those who bona fide issues the cheque and in return gets cheated giving rise to disputes emerging from breach of agreement and hence contractual violation. To illustrate this, there may be a situation where the cheque is issued in favour of a supplier who delivers the goods which is found defective by the consignee before the cheque is encashed or a postdated cheque towards full and final payment to a builder after which the apartment owner might notice breach of agreement for several reasons. It is not uncommon that in that event the payment might be stopped bona fide by the drawer of the cheque which becomes the contentious issue relating to breach of contract and hence the question whether that would constitute an offence under the NI Act. There may be yet another example where a cheque is issued in favour of a hospital which undertakes to treat the patient by operating the patient or any other method of treatment and the doctor fails to turn up and operate and in the process the patient expires even before the treatment is administered. Thereafter, if the payment is stopped by the drawer of the cheque, the obvious question would arise as to whether that would amount to an offence under Section 138 of the NI Act by stopping the payment ignoring

> Section 139 which makes it mandatory by incorporating that the offence under Section 138 of the NI Act is rebuttable. Similarly, there may be innumerable situations where the drawer of the cheque for bonafide reasons might issue instruction of 'stop payment' to the bank in spite of sufficiency of funds in his account.

To sum up, it can be said that a person has a right to stop payment of a cheque and escape punishment if both the following conditions are satisfied:

a) On the day of the dishonor of the cheque there were sufficient funds in the bank account of the drawer

b) There was a bonafide reason for the drawer to stop payment

7.6 Cheque Presented Twice

A few years ago a cheque could only be presented once and the underlying principle was that a single instrument cannot lead to multiple causes of action. This was based on the Supreme Court's decision in the matter of Sadanandan Bhadran v. Madhavan Sunil Kumar (MANU/SC/0552/1998). Based on this the courts took the view that failure to initiate action based on first presentation led to immunity from prosecution in case of second presentation.

In year 2012, the Supreme Court reversed (vide MSR Leathers vs. S. Palaniappan and Anr. MANU/SC/0797/2012) the legal principle that it had laid down in Sadanandan Bhadran v. Madhavan Sunil Kumar. Relevant extracts are as follows:

> We have, therefore, no manner of doubt that so long as the cheque remains unpaid it is the continuing obligation of the drawer to make good the same by either arranging the funds in the account on which the cheque is drawn or liquidating the liability otherwise. It is true that a dishonour of the cheque can be made a basis for prosecution of the offender but once, but that is far from saying that the holder of the cheque does not have the discretion to choose out of several such defaults, one default, on which to launch such a prosecution. The omission or the failure of the holder to institute prosecution does not, therefore, give any immunity to the drawer so long as the cheque is dishonoured within its validity period and the conditions precedent for prosecution in terms of the proviso to Section 138 are satisfied.

> 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.
>
> In the result, we overrule the decision in Sadanandan Bhadran's case (supra) and hold that prosecution based upon second or successive dishonour of the cheque is also permissible so long as the same satisfies the requirements stipulated in the proviso to Section 138 of the Negotiable Instruments Act.

So, as of date, a bounced cheque can be represented and if it bounces again, steps mentioned above can be initiated under section 138 of the NI Act. The same has been reconfirmed by the Honourable Supreme Court in the matter of Sicagen India Ltd. vs. Mahindra Vadineni and Ors. (MANU/SC/0041/2019; decided on 8 January 2019).

7.7 Cheque Reported Lost by Drawer

A person say A had kept two signed blank cheques in his office drawer. A owed some money to B who used to visit the office of A and used the opportunity to steal one of the blank signed cheques. A came to know that a signed cheque had been stolen. A filed an FIR and also gave a copy of the FIR to his bank. When B presented the cheque for encashment, the Bank returned it with the comments “Cheque reported lost by the drawer”. Is it possible for B to proceed against A under section 138 of the NI Act?

The above question was examined in Raj Kumar Khurana vs. State of (NCT of Delhi) and Anr. (MANU/SC/0727/2009, Decided on 5th May 2009). Honourable Supreme Court decided that provisions of NI Act cannot be applied in the case.

7.8 Holder of cheque gets intimation very late

In one instance a holder of a cheque deposited the cheque and left India for one year. On coming back after one year, he went to the bank where he was informed by the bank about the bouncing of the cheque deposited by him one year back. In this sort of case the following points may be noted:

a) The onus will be on the holder to show that he did not receive any information from the bank about the bouncing of the cheque. If the bank has, for example, sent him an SMS or email informing about the bouncing of cheque, the information would have been conveyed on the date of SMS or email. If the holder was receiving account statement by email, he would have received the information of the bouncing as and when he received the account statement by email.

b) It does not matter when the holder visited the bank to pick up the bounced cheque and official intimation note regarding cheque bouncing.

c) In case the holder can prove that he did not have any prior information of bouncing of the cheque, he may proceed to issue notice to the drawer demanding payment of money as required section 138 of the NI Act.

d) In case the holder had received information either by SMS or email or by account statement sent by email, it was open to him to issue a notice under section 138 and also initiate the necessary further steps under NI Act through an advocate. Having failed to initiate such steps within the prescribed statutory time limits after receipt of information, the holder loses all rights to initiate action under the NI Act.

8. Out-of-court Settlement – Compounding

Compounding refers to a compromise between the victim and the accused whereby the two agree to close the judicial process. Proceedings relating to cheque bouncing are compoundable. In other words, at any stage the drawer of the cheque and the holder of cheque can arrive at a compromise and apply to a court to close the proceedings.

In a case under Section 138 (R. Raju vs. K. Sivaswamy, MANU/SC/1449/2011), the Magistrate convicted the accused and sentenced him to undergo one year simple imprisonment and to pay a fine of Rs. 5000/-, in default, to undergo simple imprisonment for three months. The Sessions Court confirmed the sentence. The accused filed an appeal in High Court. During the pendency of the appeal, the parties entered into an agreement. The complainant applied to the High Court stating that he had received full money and wanted the offence to be compounded. The High Court did not grant the application for compounding. However, the Supreme Court overruled the order of the High Court and allowed compounding. However, the Supreme Court felt that the time of the judicial process had been wasted and therefore awarded exemplary costs. The following extract from the judgment sums it up.

> **6. In our opinion, since the Appellant has wasted the public time, while setting aside the aforesaid orders, the Appellant should be burdened with exemplary costs, which we quantify at Rs. 50,000/- which shall be deposited by the Appellant before the National Legal Services Authority within three weeks from today. In case, the appellant defaults in depositing the amount, as ordered by us, the National Legal Services Authority is at liberty to move this Court for appropriate orders.**

In conclusion, it can be said that if one is caught in a case involving bouncing of cheque the option of a compromise is always open – even when the Magistrate has convicted and the Sessions Court has confirmed the sentence.

8.1. Costs of delayed Compounding

Although an application for compounding shall be allowed at any stage, it is encouraged at the earliest instance. The Supreme court made note of the fact that free and easy compounding of offences at any stage, however belated, gives an incentive to the drawer of the cheque to delay settling the cases for years. Therefore, in order to prevent unduly delay in compounding of the offence, the Supreme Court

has laid down guidelines, vide Damodar S. Prabhu vs. Sayed Babalal H. MANU/SC/0319/2010, to impose costs for the delay.

The guidelines impose costs on the drawer according to the amount of delay in composition. If the application for the compounding of the offences is made within the first or second hearing no costs shall be imposed. But further delay will lead to imposition at 10% before the Judicial Magistrate First Class, 15% at the Session Court and High Court Level and 20% at the Supreme Court level.

8.2. If the Complainant disagrees to compound

The Supreme Court, in Meters and Instruments Private Limited and Ors. vs. Kanchan Mehta MANU/SC/1256/2017, adjudged upon whether how proceedings for an offence Under Section 138 should be regulated where the Complainant refused to agree to compound the matter, and whether the consent of both parties was necessary. The Court was of the opinion that the object of Sec 138 is primarily compensatory and not punitive and thus the Court may exercise its powers and close the proceedings where it is satisfied with the amount paid irrespective of the consent of the parties.

Honourable Supreme Court in the said case found it desirable that the summons sent by the Magistrate mention the cheque amount and interest / cost to be paid to the specified bank account by a certain date. If the accused pays the specified amount by the date given in the summons, the Magistrate will not insist on the appearance of the accused and will try to close the case without a detailed trial. In such a case, right of the complainant to raise objection to closing of the case will be severely limited. Only in cases where the complainant has some special reasons to justify continuing of the trial, the Magistrate will proceed with the trial after receipt of information about payment of specified amount in the specified bank account by the date mentioned in the summons.

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

16. It is, thus, clear that the trials under Chapter XVII of the Act are expected normally to be summary trial. Once the complaint is filed which is accompanied by the dishonored cheque and the bank's slip and the affidavit, the Court ought to issue summons. The service of summons can be by post/e-mail/courier and ought to be properly monitored. The summons ought to indicate that the Accused could make specified payment by deposit in a particular account before the specified date and inform the court and the complainant by e-mail. In such a situation, he may not be required to appear if the court is satisfied that the payment has not been duly made and if the complainant has no valid objection. If the Accused is required to appear,

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 Code of Criminal Procedure 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) Code of Criminal Procedure 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.

It may be pointed out that the complainant must agree specifically to the compounding of the offence under the NI Act. Consent to receive part of the payment as part of a compromise or settlement under some other law cannot be construed as consent to compounding under NI Act. The issue was examined by the Honourable Supreme court in the matter of JIK Industries Limited and Ors. vs. Amarlal V. Jumani and Ors. (MANU/SC/0075/2012, Decided on 1st February 2012). It was ruled that sanction of a scheme of compromise under Companies Act cannot be construed as consent to compounding. Relevant extracts are as follows:

74. For the reasons aforesaid, this Court is unable to accept the contentions of the Learned Counsel for the Appellant(s) that as a result of sanction of a scheme under Section 391 of the Companies Act there is an automatic compounding of offences under Section 138 of the Negotiable Instruments Act even without the consent of the complainant.

9. Interim Relief

While cases related to bouncing of cheques were expected to conclude quickly in a matter of months, in reality the cases often drag on for years. Given the delay in disposing of the cases it was felt that the complainant ought to get some interim relief while the matter is pending before the Magistrate. The Negotiable Instruments (Amendment) Act, 2018 (Act No. 20 of 2018) dated 2 August 2018 was enacted. The amendment introduced two new sections in the Negotiable Instruments Act.

The sec. 143 A inserted in 2018 relates to payment of interim compensation to the complainant by the drawer of the bounced cheque. The section reads as follows:

"143A. Power to direct interim compensation

(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.".

It is to be noted that power of the Magistrate to grant interim relief to the complainant under this section is discretionary. The Court may or may not direct the drawer of the cheque to pay interim compensation. However, generally speaking, the courts do not exercise the discretion in favour of the accused and order the appealing accused to deposit the interim relief.

In case the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of compensation with interest at the bank rate as published by Reserve Bank of India.

The final compensation after final judgment, if awarded shall be reduced by the interim compensation.

The section 148 inserted in 2018 relates to filing of appeal against conviction. In any such appeal, the 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. Again the power granted to the appellate court is discretionary and not mandatory. The sum deposited under section 148 is in addition to any sums that might have been paid under section 143A. Relevant portion of the said section reads as follows:

"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.

10. Insolvency and Bankruptcy Code

The Insolvency And Bankruptcy Code, 2016 (31 of 2016) (**the IB Code**) came into force for corporate debtors with effect from 1 December 2016. Two relevant sections of the IB Code relate to (a) moratorium on all suits against the corporate debtor (s. 14) and (b) the IB Code to override all other laws (s. 238).

Relevant portion of section 14 reads as follows:

14. Moratorium. -

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: -

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Section 238 reads as follows:

238. Provisions of this Code to override other laws. -

The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

Section 14 of the IB Code declares moratorium on "*continuation of pending suits or proceedings against the corporate debtor*". The key question is whether the term "proceedings" includes proceedings under the NI Act. In other words, whether any ongoing proceedings against a company for cheque bouncing will continue after the company is placed under an Interim Resolution Professional / Resolution Professional subject to provisions of the IB Code.

National Company Law Appellate Tribunal (NCLAT) had opined that section 14 of the IB Code covers only civil proceedings and not criminal proceedings. NCLAT had

in the matter of Shah Brothers Ispat Pvt. Ltd. vs. P. Mohanraj and Ors.(MANU/NL/0181/2018; decided on 31 July 2018) decided that moratorium under the IB Code is not applicable to cases under section 138 of the NI Act.

However, NCLAT's view was rejected by the Honourable Supreme Court. In the judgment dated 1st March 2021 (MANU/SC/0132/2021; P. Mohanraj and Ors. Vs. M/s Shah Brothers Ispat Pvt. Ltd.) Honourable Supreme Court held that the moratorium under section 14 of the IB Code will also apply to proceedings under sec. 138 of NI Act. Relevant extract from the judgment reads as follows:

78. In conclusion, disagreeing with the Bombay High Court and the Calcutta High Court judgments in Tayal Cotton Pvt. Ltd. v. State of Maharashtra, MANU/MH/2352/2018 : (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.

While the judgment of Honourable Supreme Court will provide relief to companies under insolvency resolution process under IB Code, the judgment does not provide any relief to the directors of such companies.

debtor. Thus, for the period of moratorium, since no Section 138/141 proceeding can continue or be initiated against the corporate debtor because of a statutory bar, such proceedings can be initiated or continued against the persons mentioned in Section 141(1) and (2) of the Negotiable Instruments Act. This being the case, it is clear that the moratorium provision contained in Section 14 of the IBC would apply only to the corporate debtor, the natural persons mentioned in Section 141 continuing to be statutorily liable under Chapter XVII of the Negotiable Instruments Act.

The judgment has created an anomalous situation. The company (undergoing insolvency resolution process) which is usually the Accused No. 1 will enjoy the moratorium while directors of the company will face prosecution and may have to face imprisonment.

11. Key Points to Note

i. Cheque should be issued for full or part payment of a legally enforceable debt or liability.

ii. A notice must be served within **30 days** of information of bouncing of the cheque. The notice must give the drawer **fifteen (15) days** to pay the amount of the cheque.

iii. If the drawer does not pay as demanded, case must be filed within **thirty (30) days** of expiry of notice period.

iv. A case can only be filed in the court of a Metropolitan Magistrate or a Judicial Magistrate First Class at the place where the cheque is presented.

v. A director of the drawer company can be held liable for a bounced cheque issued by the company.

vi. It is initially presumed that the director can be prosecuted. It is for the director to prove that he / she was not in charge of the affairs of the company when the cheque was issued.

vii. The punishment for the offence shall include imprisonment of up to 2 years, fine up to twice the amount of the cheque, or both.

viii. In case the drawer pays the cheque amount, the court may allow the matter to be compounded or, in other words, closed without punishment.

ix. The matter may be compounded at any stage. The court is obliged to impose additional costs according to the stage at which the application for compounding is presented.

Annexure A – Format for Notice by Company / Firm for Bounced Cheque

By Registered Post / Speed Post – Acknowledgment Due

…….. (Date)

To,
…….. …….. (Name of the Company / Firm / Individual who issued the cheque)
…….. ……..
…….. …….. (Address)

Subject : Notice under Section 138 of the Negotiable Instruments Act, 1881

Dear Sir / Madam,

We hereby serve the following notice upon you:

1. You had issued cheque no. …….. dated…… for Rs……. (Rupees …… …….. …….. only) drawn on …… (Bank Name and Branch Name) against your debt or liability to pay us.

2. We presented the above mentioned cheque. However, the said cheque was returned unpaid to us by your bank.

3. Our Bank vide its memo dated …….. (received by us on ……) has informed us that the cheque is returned unpaid due to …….. …… (reason cited in the memo).

4. We hereby serve notice on you to pay the aforesaid amount within fifteen (15) days from the date of receipt of this notice.

5. In case we do not receive the money as demanded above, we shall be constrained to take legal action against you under section 138 of the Negotiable Instruments Act, 1881 (Act no. 26 of 1881) as amended up to date and other relevant laws as applicable.

Regards,

For …….. ……. (Name of the Company / Firm issuing the notice)

……
(Designation and Signature)

(Please fill in the blanks, remove all fine print matter and print on company / firm letterhead)

Annexure B – Format for Notice by Individual for Bounced Cheque

By Registered Post / Speed Post – Acknowledgment Due

…….. (Date)

From,
……. ……. (Name of the Individual who is holder of the bounced cheque)
……. …….
……. ……. (Address)

To,
……. ……. (Name of the Company / Individual / Firm who issued the cheque)
……. …….
……. ……. (Address)

Subject : Notice under Section 138 of the Negotiable Instruments Act, 1881

Dear Sir / Madam,

I hereby serve the following notice upon you:

1. You had issued cheque no. ……. dated……. for Rs……. (Rupees…… ……. ……. only) drawn on …… (Bank Name and Branch Name) against your debt or liability to pay me.

2. I presented the above mentioned cheque. However, the said cheque was returned unpaid to me by your bank.

3. My Bank vide its memo dated …….. (received by me on ……) has informed me that the cheque is returned unpaid due to …….. …… (reason cited in the memo).

4. I hereby serve notice on you to pay the aforesaid amount within fifteen (15) days from the date of receipt of this notice.

5. In case I do not receive the money as demanded above, I shall be constrained to take legal action against you under section 138 of the Negotiable Instruments Act, 1881 (Act no. 26 of 1881) as amended up to date and other relevant laws as applicable.

Regards,

…….
(Name and Signature)

(Please fill in the blanks, remove all fine print matter and print on plain paper)

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