SECTION 138
NEGOTIABLE INSTRUMENT ACT

RECENT TRENDS:

Negotiable Instruments have been used in commercial world since long as one of the convenient modes for transferring money. Development in Banking sector and with the opening of new branches, cheque become one of the favourite Negotiable Instruments. When cheques were issued as a Negotiable Instruments, there was always possibility of the same being issued without sufficient amount in the account. With a view to protect drawee of the cheque need was felt that dishonour of cheque he made punishable offence. With that purpose Sec.138 to 142 were inserted by Banking Public Financial Institutions and Negotiable Instruments clause (Amendment) Act, 1988. This was done by making the drawer liable for punishments in case of bouncing of the cheque due to insufficiency of funds with adequate safeguards to prevent harassment of an honest drawer

OBJECT:

The object of this amendment Act is:

1. To regulate the growing business, trade, commerce and Industrial activities.
2. To promote greater vigilance in financial matters.
3. To safeguard the faith of creditors in drawer of cheque.
   (Krishna vs. Dattatraya 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 sec.143 to 147 were newly inserted and provisions of section 148, 141, 142 were amended.

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.

INGREDIENTS:

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

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

Legally recoverable debt:

In Somnath vs. Mukesh Kumar, 2015(4) Law Herald 3629 (P&H) it was held by 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.

2. Cheque must be presented within 3 months or within validity period whichever is earlier.
3. Cheque must be returned unpaid due to insufficient funds or it exceeds the amount arranged.
4. Fact of dishonour be informed to the drawer by notice within 30 days.
5. Drawer of cheque must fail to make payment within 15 days of receipt of the notice.

A mere presentation of delivery of chqeue 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 u/s. 138 of the Act will not be attracted.

KINDS OF CHEQUES:

In Nitin Chadha vs. M/s Swastik Vegetable Products Pvt. Ltd. & Anr., 2015(3) RCR (Civil) 872 (P&H) the Hon'ble High Court explained the kinds of cheques as under:

1. Open cheque:The issuer of the cheque would just fill the name of the person to whom the cheque is issued, writes the amount and attacheshis signature and nothing else. This type of issuing a cheque is also called bearer type cheque also known as open cheque or uncrossed cheque. The cheque is negotiable from the date of issue to three months. The issued cheque turns stale afterteh completion of three months. It has to be revalidated before presenting to the bank.
2. Bearer cheque: Same as Open Cheque
3. Crossed cheque: It is written in the same as that of bearer cheque but issuer specifically specifies it as account payee on the left hand top corner or simply crosses it twice with two paralled lines on the right hand top corner. The bearer of the cheque presenting it to the bank should have an account in the branch to which the written sum is deposited. It is safest type of cheques.
4. Account Payee cheque: Same as Crossed Cheque
5. Self cheque: A self cheque is written by the account holder as pay self to receive the money in the physical form from the brach where he holds his account.
6. Pay yourself cheque: The account holder issues this type of crossed cheque to the bank asking the bank to deduct money from his account into bank's own account for the purpose of buying banking products like drafts, pay orders, fixed deposit receipts or for depositing money into other accounts held by him like recurring deposits and loan accounts.
7. Post dated cheque: A PDC is a form of a crossed or account payee bearer cheque but post dated to meet the said financial obligation at a future date.
8. Local cheque: A local cheque is a type of cheque which is valid in the given

city and a given branch in which the issuer has an account and to which it is connected. The producer of the cheque in whose name it is issued can directly go to the designated bank and receive teh money in the physical form. If a given city's local cheque is presented elsewhere it shall attract some fixed banking charges. Although these type of cheques are still prevalent, especially with nationalised banks. It is slowly stated to be removed with at par cheque type.

9. At par cheque: With the computerisation and networking of bank branches with its head quarters, a variation to the local cheque has become common place in the name of at par cheque. At par cheque is a cheque which is accepted at par at all its branches across the country. Unlike local cheque it can bepresented across teh country without attracting additional banking charges.

10. Banker's cheque: It is a kind of cheque issuedby the bank itself connected to its own funds. It is a kind of assurance given by the issuer to the client to alley your fears. The personal account connected cheques may bounce for want of funds in his account. To avoid such hurdles, sometimes, the receiver seeks banker's cheque.

11. Traveller's cheque: They are a kind of an open type bearer cheque issued by the bank which can be used by the user for withdrawal of money while touring. It is equivalent to carrying cash but in a safe form without fear of losing it.

12. Gift cheque: This is another banking instrument introduced for gifting money to the loved ones instead of hard cash.

PRESUMPTIONS:

There is presumptions under Section 118 and 139 of the Negotiable Instruments Act in favour of holder of the cheque. Until contrary is proved, presumption is in favour of holder of cheque that it has been drawn for discharge of debt or liabilities. However, it is rebutable one and accused can rebut it without entering into witness box, through crossexamination of the prosecution witnesses. Complainant is not absolved from liability to show that cheque was issued for legally enforceable debt or liability. Burden on accused in such case would not be as light as it is in the cases under sec.114 of the Evidence Act. In case of " Goa Plast Pvt. Ltd. vs. Shri Chico

Ursula D' Souza 1996 (4) All MR 40" relations between accused and complainant were of employee and employer. No evidence led to show that accused was liable to pay any due or part thereof and thus liability was not proved. Similarly, it was not proved that the cheque was given towards those liabilities. Accused much prior to presentation of cheques to the Bank had appraised the complainant that he was not liable to pay any amount, and therefore, stopped payment. Bombay High Court had observed that complainant failed to prove that cheque was issued for discharge of legal liabilities.

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

Many a times cheques are issued bearing no date or post dated cheques. Holder of cheque enters the date, and thereafter cheques are presented to banks. Hon'ble Bombay High Court in case of Purushottamdas Gandhi vs. Manohar Deshmukh 2007 (1) Mh.L.J. 210 has observed that inserting such date does not amount to tampering or alteration but by delivery of such undated cheque drawer authorizes holder to insert date. Period of 6 months for presentation of such cheque to the Bank would start from the date mentioned on cheque. (Ashok Badwe vs. Surendra Nighojkar A.I.R. 2001, S.C. 1315)

Return of cheque is itself an indication that funds are not forthcoming. The words "refer to drawer" or "account closed" are covered under the term "insufficient funds". Thus, liability of drawer cannot be avoided if he closes account and cheque is dishonoured. A safeguard has been made to prevent hasty action is that the payee or holder in due course of cheque shall make a demand for payment of amount covered by cheque by giving a notice in writing to drawer within 30 days.

Offence u/s. 138 is committed only when payment is not made by drawer on expiry of 15 days after service of notice as prescribed by proviso (c) of

Sec. 138.

In K. Prakashan Vs. P.K. Surenderan, 2007(4) RCR (Criminal) 588 (SC) it was held by the Hon'ble Supreme Court that the presumption under Section 139 of the NI Act can be raised only when the complainant is able to show that he had requisite funds for advancing loan to the accused.

JURISDICTION:

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

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

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

i) 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.

ii) 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.

iii) Cause of action to file a complaint accrues to a complainant /payee/ holder of a cheque in due course if,

(a) the dishonoured cheque is presented to the drawee bank within a period of

three months from the date of its issue.

(b) 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

(c) If the drawer has failed to pay the cheque amount within fifteen days of receipt of such notice.

iv) The facts constituting cause of action do not constitute the ingredients of the offence under Section 138 of the Act.

v) 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.

vi) 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.

Vii) General rule stipulated under Section 177 of Cr.P.C. 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 the Code of Criminal Procedure or is covered by the provisions of Section 182(1) read with Sections 184 and 220 thereof.

Section 142 as amended by the amendment Act of 2015:

1. Where Cheque is delivered for collection through an account- where payee maintains the account.

2. Where cheque is presented for payment by the payee otherwise through an account- where drawer maintains the account.

NOTICE

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

When notice by registered post returned unclaimed there is presumption of service.

1. Rahul vs. Arihant Fertilizers 2008(4) Mh.L.J. 365 (SC)

2. K. Bhaskaran vs. Shankaran Vidhyabalan 1999 AIR SCW, 3809.

Initially, it was held by various High Courts and Apex court that cheque may be presented severally within period of its validity or within 6 months. However, once notice is served and amount is not paid within stipulated period, the cause of action to prosecute starts. Thereafter complaint is to be filed within period of 30 days. However, in case of MSR Leathers vs. Palaniappan and others 2013, Cr.L.J. S.C. 1112. Apex court held that failure to prosecute on basis of first default in payment does not result in forfeiture of right of holder/ payee to prosecute. Nothing in N.I. Act that prohibits holder / payee of cheque from issuing fresh demand notice and then launching prosecution. Limitation of one month from accrual of cause of action for taking cognizance u/s. 142 does not militate against accrual of successive cause of action.

Payee is not prevented from combing the causes of action by covering multiple instances of dishonour of cheques in single notice, in such a case all the transactions covered by notice would be regarded as a single transaction permitting a single trial. However, in a case where cheques were issued on different dates, presented on different dates and separate notices were issued in respect of each default. The transactions cannot be held to be a single transaction. Section 219 of Cr.P.C. will not be attracted to such cases. Rajendra Vs. State of Mah. 2007, (1) Mh L.J. 370.

Apex court in case of K. Bhaskaran vs. Shankaran 2000 (1) Mh.L.J. 193

observed that giving notice is not the same as receipt of notice. Giving is a process of which receipt is accomplishment. It is for the payee to perform formal process by sending notice to the drawer at correct address..... the payee can send notice for doing his part of giving the notice. Once it is dispatched, his part is over and next depends on what sendee does. It is well settled that notice refused to be accepted by addressee can be presumed to have been served on him. Where notice is returned as unclaimed and not as a refused, it can be deemed to have been served on sendee unless he proves that it was not really served and that he was not really responsible for such non service.

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

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

Section 27 of General Clauses Act- meaning of service by post- where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression serve or either of the expression give or sent or any other expression is used then unless a different intention appears, the services shall be deemed to be effected by properly addressing, pre-paying and posting by registered post a letter containing the document and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the **ordinary course of post**.

Order V Rule 9(5) C.P.C.: 30 days time ordinarily must be held to be sufficient for service of notice through registered post Suboodh S. Salaskar Vs. Jayprakash M. Shah, 2008(3) RCR (Criminal) 875 (SC);- presumption can also be raised under

section 114 of Indian Evidence Act

Speed post ordinarily the service takes place within **a few days**. Vinay Patni Versus State of U.P. 2013(1) CCC 682;

One week's time considered as ordinary time to receive letter in ICICI Bank Ltd. Versus Praful Chandra 2007(4) RCR(Civil) Delhi 203;

Presumption of due service - Som Nath Versus State of Punjab and another 2008(1) RCR(Criminal) 273 (P&H).- when notice is sent through registered post presumption of due service can be raised in following cases -

(a) unclaimed

(b) Refused

(c) Not available in house

(d) House locked

(e) Shop closed

(f) Addressee not in station

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

WHO CAN FILE COMPLAINT

Payee or holder in due course is a competent person to file complaint. Complaint must be by corporal person capable of making physical appearance in court. In case of company and firm natural person should represent it. Complaint can be filed by Power of Attorney Holder. It is not requirement that the person whose statement was taken on oath at the first instance should alone represent the company till the proceeding have ended. Even if the person sent earlier had no authority, the

company can at subsequent stage send a person competent to represent the company. (Associated Cement Company Ltd. vs. Keshavanand (1998) 91 company cases 3619 SC.)

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

In M/s Capital Leasing and Finance Co. Vs. Navrattan Jain, 2005(4) RCR (Criminal) 331 (P&H) it was held by Hon'ble High Court that even an unregistered partnership firm can file a complaint under Section 138 of the Act.

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

LIABILITY OF DIRECTORS / PARTNERS

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

It is primary duty of the Magistrate to find out whether the complainant has shown that accused persons falls into one of the categories of persons envisaged in sec. 141. What is required is the specific accusation against each Director of role

played by him. Onus is on complainant to make out prima facie case i.e. to show that accused, at the time of commission of offence, was in charge of and responsible to company. Such person need not be a Director, Manager, Secretary or other officer of the company. In case of A.K. Singhania vs. Gujrat State Fertilizers Company Ltd. 2014, Cr.L.J. 340 (SC), Apex court observed that it was not necessary that complaint should contain averments as to who were in charge and responsible for conduct of the business of company. Court held that it was sufficient if reading of complaint show substance of accusation disclosing necessary averments.

In case of K. Shrikant Singh vs. North East Security Ltd. and others, J.T. 2007 (9) SC 449, Hon'ble Apex court observed that vicarious liability on the part of a person must be pleaded and proved and not inferred.

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

In case of " Shushatna J. Sarkar & other vs State of Mah. 2014(1) MhLJ 214 " complaint was not showing as to what role played by petitioner Directors in the alleged offence. Allegations were vague and were not specifying role of each of petitioners. It was observed that averments in complaint were not sufficient enough to make them vicariously liable for offence u/s 138. It has been further observed that ' It is necessary for the complainant to make specific averments disclosing role of Directors in the alleged offence. Criminal offence, Criminal liability can be fastened only on those who at the time of commission of offence were in charge of and were responsible for conduct of business of company..... It is obligatory on the part of complainant to state in brief as to how and in what manner the directors, who are sought to be made accused were responsible for the conduct of business of company at relevant time."

Earlier it was observed that prosecution of company was not sine qua non for the prosecution of either persons who are in charge of and responsible for the business of company or any Director, Manager, Secretary or other officers of company. However, finding that offence was committed by company is sine qua non for convicting those other persons (Anil Hada vs. Indian Acrylic Ltd. (2002) of 1999 Comp. Cases 36 (SC). However, recently in case of Anil Gupta vs. Star India Pvt. Ltd. Co. & another 2014 Cr.L.J.3884 Hon'ble Supreme Court has laid down that only drawer of cheque falls within ambit of sec.138 of the Act whether human being or a body corporate or even a firm ..... Hon'ble Apex court further observed that "we arrived at the irresistable conclusion that to maintain prosecution u/s 141 of the Act, arraigning of the company as a accused is to imperative". Hon'ble Apex court overruled the decision in Anil Hada's case referred above. However, *In Standard Chartered Bank vs. State of Maharashtra and others etc., 2016(2) RCR (Criminal) 778 (SC) it was held by the Hon'ble Supreme Court that the complaint under Section 138 is not maintainable without making company a party.*

In Mainuddin Abdul Sattar Shaikh Vs. Vijay D. Salvi, 2015(3) RCR (Criminal) 593 (SC) it was held by Hon'ble Supreme Court that when an employee of a company issues a cheque on his personal account for discharging the liability of the company, the company/its directors are not liable under Section 138 of the Act. Personal liability of employee was upheld.

CAUSE OF ACTION:

Cause of action arises when notice is served on the drawer and drawer fails to make payment of the amount of cheque within 15 days. Limitation to file complaint is one month from the date of cause of action. However, by Amendment Act of 2002 court is empowered to take cognizance of the offence even if complaint is filed beyond one month by condoning the delay if sufficient cause is shown. It has been held in various other cases that offence is not made out

1. When cheque returned as defective one (Babulal vs. Khilji 1998 (3) Mh L.J.

762)

2. When no notice is given to company and cheque is drawn by company (P. Raja Rathinalm vs. State of Maharashtra 1999 (1) Mh.L.J. 815)

3. Cheque is given as a gift.

4. Complainant was not a payee.

5. Signature of drawer on the cheque is incomplete. (Vinod vs. Jahir 2003 (1) Mh L.J. 456.)

PUNISHMENT:

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

The sentence should be such that it gives proper effect to the object of the legislation. No drawer can be allowed to take advantage of cheque issued by him lightly. Apex court has cautioned against imposing flee bite sentences. In case of Sujanti Suresh Kumar vs. Jagdeeshan 2002 Cr.L.J. 1003 Prior to the amendment of 2002 a sentence of fine in excess of Rs.5,000/by Judicial Magistrate, First Class or Metropolitan Magistrate was held to be illegal. However, after the amendment the Magistrate are empowered to impose fine exceeding Rs.5,000/. In case of Dilip vs. Kotak Mahindra Company Ltd. 2008 (1) Mh L.J. 22 it was enunciated that the amount of compensation sought to be imposed must be reasonable and not arbitrary. Before issuing a direction to pay compensation the capacity of accused to pay the same must be judged. An inquiry in this behalf even in summary way may be necessary. Sub section 3 of Sec. 357 does not impose any limitation but the powers thereunder should be exercised only in appropriate cases. Ordinarily it should be lesser than the amount which can be granted by Civil Court upon appreciation of evidence. A criminal case is not a substitution for civil suit.

PROCEDURE:

Section 142 of the N. I. Act creates bar against taking cognizance of the offence u/s. 138 of the N. I. Act except upon complaint in writing by payee or holder in due course. Complaint may be instituted by Power of Attorney Holder. However, if the holder of Power of Attorney has merely lodged complaint without being aware of the facts, then recording the statement of payee becomes imperative.

Once Magistrate is satisfied that there is proper compliance of the proviso to Sec.138 N. I. Act and jurisdictional conditions are fulfilled, Magistrate shall issue the process. Service of summons by speed post or approved courier is recognized by Sec. 144 of N. I. Act. If accused does not appear in response to summons or remains absent subsequent, a coercive process needs to be taken by the court. In case of Bhaskar Industries Ltd. vs. M/s Bhiwani – Denim and Apparens Ltd. 2001 All M.R. (Criminal) 1961). Advocate who appeared in absence of accused was allowed to plea on behalf of accused.

Section 145 (1) of the Act permits the recording of evidence of complainant on affidavit. Even evidence of accused and witnesses can be recorded on affidavit. This was for expedite disposal of the cases. Bank slips are held as a primary evidence and admissible directly.

Accused are given effective opportunity to defend the case. Considering presumptions under sec.118 and 139 of the N.I. Act effective opportunity is to be given to accused to crossexamine the witnesses.

It is common experience that in cases u/s 138 of N.I. Act evidence is recorded by one Judicial Officer and before delivery of Judgment he is transferred, in such situation the successor has to proceed with denovo trial.

In Nitinbhai Saevatilal Shah and another vs. Manubhai Manjibhai Panchal and another, 2011(4) RCR (Criminal) 149 (SC) it was held by the Hon'ble Supreme Court in summary trial of complaint under Section 138 of the Act, if the Magistrate who recorded the evidence is transferred, the successor Judge can not pronounce judgments on basis of evidence recorded by his predecessor. He has to try

case de novo.

However, in case of Mehsana Nagarik Sahakari Bank Ltd. vs. Shreeji CAB company ltd. and others 2014 Cr.L.J. 1953. The apex court held that if evidence is recorded in full and not in summary manner, then evidence recorded by predecessor can be acted upon.

Though the provision contained in Sec.143 of the N. I. Act provides that cases u/s.138 are to be tried in summary way, they should be tried as a regular summons cases. If it appears to the Magistrate that nature of case is such that sentence of imprisonment for a term exceeding one year may have to be passed, or that it is for any other reasons undesirable to try the case summarily, Magistrate shall after hearing the parties record and order to that effect and try the case as a regular summons case.

Recently in case of Indian Bank Association and others vs. Union of India & others reported in AIR 2014 Supreme Court 2528, general directions have been given by the Apex court. The directions are worth quoting and they are as under :

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

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

3. Court may indicate in the summons that if the accused makes an application for compounding of offences at the first hearing of the case and, if such an

application is made, Court may pass appropriate orders at the earliest.

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

5. Court concerned must ensure that examination in chief, cross examination and re examination of the complainant must be conducted within tree months of assigning the case. The court has option of accepting affidavits of the witnesses, instead of examining them in Court. Witnesses to the complainant and accused must be available for crossexamination as and when there is direction to this effect by the Court.

Some important principles laid down by the Hon'ble High Courts and Apex Court are as under :

1. Cheque to pay time barred debt is enforceable by virtue of section 25 (3) of Contract Act, (Kadir vs. Dattatraya 2005 (3) Mh L.J. 1076). However,*In Somnath vs. Mukesh Kumar, 2015(4) Law Herald 3629 (P&H) it was held by our 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.*

2. Legal heirs of complainant can continue the complaint (Revi Selval vs. Navin 2000 (2) Bombay Cri. Cases, 23.)

3. However, legal representatives of accused cannot be made to face trial. (Smt. Dropadi @ Maya Shippi vs. State of Rajasthan 2000(3) Crimes 6045.)

4. Part payment made does not absolve to the drawer from liability (Ramnarayan Madanlal Khandelwar vs. Proprietor Daulat Enterprise, 2005 (4) Mh L.J. 796)

5. Cheque issued as a security are in discharge of liability as a guarantor attracts Sec. 138 (ICBS Ltd. vs. Beena Shabeer 2002 AIR SCW 3358)

6. “Any liability does not include any other's liability unless there is agreement between drawer and original debtor (Hinten Sagar and another vs. IMC Ltd. And another 2001 (3) Mh L.J. 659)”

7. Demanding cheque amount interest, damages, separately in the notice would not invalidate the notice (Suman Shetty vs. Ajay A. Chudiwal AIR 2000 (SC) 828.)

8. A single complaint in respect of dishonoured cheques is maintenable though consolidated single notice is sent and single complaint is maintenable. (Charashni Kumar Talwani vs. M/s. Malhotra Poultries 2014 Cr.L.J. 2908)

Summary trials:

Section 143 NI Act:

For offence punishable under section 138 of Act, the judicial Magistrate Ist Class shall try the offence summarily and the provisions of section 262 to 265 of Cr.P.C. shall apply.

Section 262 Cr.P.C. provides the procedure provided for trial of summons case shall be followed.

Procedure in trial of summons case :

1. On appearance of accused notice of accusation to be served.

2. Evidence of prosecution

3. 313 Cr.P.C.

4. Evidence of defence

5. Judgment of acquittal or conviction- which shall include

(a) Substance of evidence

(b) Brief statement of reasons for the findings

However in case of conviction in a summary trial, the Magistrate can pass a sentence of imprisonment for a term not exceeding one year and an amount of fine not exceeding 5000/-

But, keeping in view nature of case, if it appears to the Magistrate that a sentence of imprisonment exceeding one year is to be passed or it is undesirable to try the case summarily, he may shall after hearing the parties, record an order to that effect and proceeds to hear or rehear the case in the manner provided in Cr.P.C.

The trial shall be conducted as expeditiously as possible and endeavour be made to conclude the trial within a period of six month from the date of filing of complaint.

If a Magistrate holds a summary trial, records substance of evidence given by complainant and his witnesses and is thereafter transferred- successor magistrate cannot proceed with the matter on the basis of evidence already recorded- **denovo trial** 2011(4) RCR(Criminal) 148 (SC);

APPLICATION OF 138 BY JUDICIAL PRONOUNCEMENTS:-

1. Insufficient funds

2. Exceeds arrangements- funds are sufficient but, the amount mentioned in the cheque exceeds the arrangement made with the bank.

3. **Payment stopped** by drawer- Som Nath Versus State of Punjab and another 2008(1) RCR(Criminal) 273 (P&H).

4. **Account already closed**. Jitender Poddar Versus Prem Nath Sharma 1994(3) RCR(Criminal) 353(P&H), Jaspal Singh Bedi Versus State of Punjab 2005(1) RCR(Criminal) 78m (P&H).

5. **No such account**. Sandeep Mehra alias Babi Versus Chander Parkash Madan 2015 ACD 166 (P&H).

6. **Stop payment**. M/s Gupta Rice and General Mills Versus M/s. Meerut Agro Mills Ltd. And another 2011(3) Law Herald 2690.

7. **Signature differ**. Charanjit Singh Chawla Versus State of Punjab 2009(2) RCR (Criminal) 690 (P&H).

8. **Refer to drawer.** M/s Lily hire purchase pvt. Ltd vs Darshan Lal 1997(1)RCR Cr 580

9. **Not arranged for**. VK Bansal vs State of Haryana 2011(1) Law Herald 396

10. **Account not in the name of accused- Section 138 not made out-** A person must have drawn cheque **on account maintained by him-** Jugesh Sehgal Versus Shamsher Singh Gogi 2009(3) RCR(Criminal) 712 (SC).

IMPORTANT CASE LAWS ON SECTION 138 OF THE ACT:

1. In *Krishan Lal More and another vs. M/s Bibby Financial Services India Pvt. Ltd. And another, 2016(2) RCR (Criminal) 603 (P&H) it was held by the Hon'ble High Court that the provision of Section 202 Criminal Procedure Code are not applicable to the complaints filed under Section 138 of the Negotiable Instrument Act.*

2. In Ashok Kumar vs. Jagdish Ram alias Jagdish Rai, 2016(2) RCR (Criminal) 281 (P&H) it was held by the Hon'ble High Court that in case of acquittal of accused in cheque dishonour case by trial Magistrate, appeal against acquittal is not maintainable before Sessions Court. Complainant can approach High Court seeking leave to appeal.

3. In Rajan Singhal vs. State of U.T. Chandigarh and Ors., 2015(4) RCR (Criminal) 809 (P&H) it was held by the Hon'ble High Court that when accused issues a cheque drawn on an account which is already closed, mala fide intention was clear in the case. Both offences of cheating under Section 420 IPC and Section 138 of NIT Act are made out and accused can prosecuted for both the offences.

4. In Vishal Sharma vs. Balkaran Singh, 2015(4) RCR (Criminal) 916 (P&H) and Yogender Pratap Singh vs. Savitri Devi, 2014 (4) CCC 305 (SC) it was held by the Hon'ble Court that the Complaint filed before expiry of 15 days from the date of receipt of notice by the accused is not maintainable.

5. In Damodar S. Prabhu Vs. SayedBabalal H., 2010(2) RCR (Criminal) 851 (SC) it was held by Hon'ble Supreme Court that if parties compound the offence in trial court accused will have to pay 10% of cheque amount as cost of compounding. Cost of compounding will be 15% in High Court and 20% in Supreme Court. However, in Madhya Pradesh State Legal Services Authority vs. Prateek Jain and another, 2014(4) RCR (Criminal) 178 (SC) it was held by the Hon'ble Supreme Court that where settlement is made in Lok Adalat, the Lok Adalat can waive the same for reasons to be recorded.

6. In V.K. Bhat vs. G. Ravi Kishore and another, 2016(2) RCR (Criminal) 793 (SC) it was held by the Hon'ble Supreme Court that when complaint under section 138 of the Act is dismissed in default, it amounts to acquittal of accused under Section 256 of Cr.P.C.

7. In C.C. Alavi Heji Vs. Pala Petty Muhammed, 2007(3) SCC (Criminal) 236 it was held by the Hon'ble Supreme Court that defence that no notice under Section 138 proviso (b) has been served can not be taken without depositing cheque amount within 15 days of receipt of summons of court along with copy a complaint.

8. In K.S. Joseph vs. Philips Carbon Black Ltd. and another, 2016(2) RCR (Criminal) 788 (SC) it was held by the Hon'ble Supreme Court that the delay in filing of complaint under Section 138 of the Act can not be condoned without notice to the accused.

9. In K.A. Abbas H.S.A. Vs. Sabu Joseph, 2010 (3) RCR (Civil) 187 (SC), the Hon'ble Supreme Court upheld the sentence of default to suffer imprisonment in default of payment of compensation awarded against the accused. In this case, the accused was convicted and was sentenced till rising of the court and was ordered to pay compensation of Rs.5 lacs and in case of default to suffer three months simple imprisonment.

52-A. Disposal of seized narcotic drugs and psychotropic substances (1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of orgin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application to any Magistrate for the purpose of

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of [such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every Court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.

Respected Session Judge Madam, Respected Additional District and Session Judges, Respected CJM Madam and Sir and Fellow colleagues:
First of all i would like to thank Madam Session Judge for giving me oppurtunity to present me on the subject of NDPS. I would also like to thank Madam Aradhana Sawhney for the untiring support and guidance in the preparation of topic.
I will discuss:
1. as to how sampling of contraband is to be done,
2. the preparation and certification of inventory, and
3. disposal of contaband,

under the provisions of the Act as directed by the Hon'ble Apex Court in **UNION OF INDIA VS MOHAN LAL 2016(1) R.C.R.(Criminal) 858.** The Hon'ble Apex has precisely and beautifully categorized the procedure for the same.
As soon as Contraband is seized, it shall be produced before the officer-in-charge of police station, who shall affix his seal thereon and the seizing officer shall also put his seal.
The inventory shall be prepared by the IO.
The preparation of inventory shall contain certain details as to the contraband seized because once the inventory has been certified it becomes primary evidence for the trial court.
Hence, the inventory should specify **description of contraband, its quality, quantity, mode of packing, marks, numbers and such other identifying particulars.**
Thereupon the seized contraband shall be produced before **Magistrate** for Sampling and Certification of inventory.
There is no provision under the Act which requires sampling to be done at the time of seizure.
It must be done in the presence of Magistrate.
The Seizing officer/IO shall move an application before Magistrate, without undue delay, for Sampling and certification of inventory and the Magistrate shall attend to the application and do the needful, within a reasonable period and without any undue

delay or procrastination.

The Magistrate shall break open the seals of the contraband produced before him/her and shall weigh the contraband and shall allow the IO to draw the samples. Upon being satisfied as to the particulars given in the inventory, the Magistrate shall certify the inventory.

The photographs of the contraband produced and the samples drawn shall also be taken and be certified by the Magistrate.

Once the report of chemical examiner as to the result to the sample sent for analysis is received by the officer In-charge of Police Station he shall,within 30 days of the receipt of report (as per notification dated 16.01.2015), again move an application before the Magistrate for the disposal of the contraband seized and thereupon the Magistrate shall allow the disposal of the seized contraband by drug disposal committee.

This is all about sampling, certification of inventory and disposal order to be made by the Magistrate.

Thanks all of you for your patient listening.

BAIL UNDER SECTION 167(2) Cr.P.C

SECTION 167(2) of the Criminal Procedure Code, 1973 empowers judicial magistrates to authorize custody of an accused person in cases wherein investigation cannot be completed in twenty-four hours. It provides for the maximum period of custody that can be authorized. It further contains a mandate that if the investigation is not completed within the stipulated maximum period, the accused is to be released on bail whatever may be the nature of accusation against him,[1] In *Natbar Parinda*[2] the Supreme Court noted that the accused has a right to be released on bail under this provision "even in serious and ghastly types of crimes". The court observed:

> *Such a law may be 'paradise for the criminals', but surely it would not be so, as sometimes it is supposed to be, because of the Courts, it would be so under the command of the Legislature.*

The proviso to section 167(2) does not lay down any time limit for completion of investigation. In substance it deals with the "detention of the accused person in custody" during investigation. The mandate of the proviso is that the accused is not to be detained in custody beyond the period of 90/60 days as may be applicable to the offence for which the accused is being detained. If the investigation is not completed within that period, on the expiry of such period, the accused is to be "released on bail if he is prepared to and does furnish bail". The role of the accused under the proviso is that he should show willingness to furnish bail and to actually furnish bail when magistrate passes an order for release on bail. Under the legislative scheme of section 167(2), the magistrate has no authority to detain the accused in custody beyond the statutory period of 90/60 days. Once the stipulated period expires and investigation is not completed, the magistrate cannot further authorize detention of accused in custody. In such a situation the magistrate has to forthwith pass an order releasing the accused on bail. After passing such an order the magistrate has to call upon the accused to furnish bail. Once such an order is passed, the accused can be "detained in custody so long as he does not furnish bail". Explanation I to section 167(2) of the Code makes this position clear. Needless to say that if charge sheet is filed on completion of investigation within the

stipulated period, the accused would be detained in custody under the authority of law namely section 209 or 309 of the Code as the case may be. The question of detention in custody under section 167(2) would obviously not arise in cases wherein accused is released on bail under chapter XXXIII of the Code.

Despite this clear mandate of section 167(2), questions and issues have arisen leading to a plethora of case law, at times conflicting and confusing. An attempt is made in this note to analyze the case law in order to arrive at a correct understanding of the provisions.

POWER VESTS WITH THE MAGISTRATE

Section 167(2) deals with powers of the magistrate to detain the accused in custody and release him on bail on expiry of the statutoryperiod. It is quite clear that power is conferred on the magistrate to release the accused on bail under the proviso. The position is well settled by the Supreme Court judgment in *Laxmi Brahman State of U.P. v. Laxmi Brahman, AIR 1983 SC 439* [3]The prevalent impression in some judicial circles that in case of offences that are required to be tried by sessions court, it is only the sessions court which has power to release the accused on bail under section 167(2) is not correct. Restrictions imposed on the powers of the magistrate with regard to grant of regular bail under section 437 of the Code would not be applicable when magistrate exercises power under section 167(2). There is no difficulty with the settled position that non completion of investigation within the period prescribed under Section 167 CrPC gives an accused an "indefeasible right" to be released on bail. But, how long does this right ensure benefit to the accused? In Sanjay Dutt v. State through CBI, Bombay (II): (1994) 5 SCC 410, the Supreme Court held that (page 442):

> "The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement

> thereafter since it is extinguished the moment challan is filed because Section 167 CrPC ceases to apply."

APPLICABILITY OF 90/60 DAYS AND MANNER OF COMPUTATION

The period of 90 or 60 days would begin to run from the day on which the accused is remanded to custody by the magistrate at the first nstance.[4] Since person arrested is to be produced before a magistrate within 24 hours of arrest, date of remand to custody may not necessarily be the same as the date of arrest.

The period of 90/60 days is ,the total period of custody - police custody and/or judicial custody - that can be authorized by the magistrate. Detention in police custody can be authorized only during the first period of fifteen days after an accused is produced before the magistrate. Police custody cannot exceed fifteen days in the whole. The Supreme Court in *Anupam Kulkarni*[5] has made this position is clear in the following words:

> Having regard to the words "in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole" occurring in sub-section (2) of Section (167), now the question is whether it can be construed that the police custody, if any, should be within this period of first fifteen days and not later or alternatively in a case if such remand had not been obtained or the number of days not availed earlier or for the remaining days during the rest of the period of ninety days or sixty days covered by the proviso. Taking the plain language into consideration particularly the words "otherwise than in the custody of the police beyond the period of fifteen days" in the proviso, it has to be held that the custody after the expiry of the first fifteen days can only be judicial custody during the rest of the period of ninety days or sixty days and that police custody, if found necessary, can be ordered only during the first period of fifteen days.

Which are the offences, in respect whereof the prescribed period would be ninety days? Section 167(2)(a)(i) provides that 90 days would be the maximum permissible custody where the investigation relates to "an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years". For offences not covered under section 167(2)(a)(i), maximum period of custody would be sixty days. With regard to the first two categories of offences (punishable with death or imprisonment for life) there can arise no difficulty. With

regard to the third category, *viz.,* offences punishable with imprisonment for a term of "not less than ten years", question arose in *Rajeev*[6],as to whether this expression would cover the offences wherein the punishment provided is imprisonment "for a term which may extend to ten years"., the Supreme Court held:

> In cases where offence is punishable with imprisonment of 10 years or more, the accused would be detained up to a period of 90 days. In this context, the expression "not less than" would mean imprisonment should be 10 years or more and would cover only those offences for which punishment could be imprisonment for a clear period of 10 years or more. Under Section 386 punishment provided is imprisonment of either description for a term which may extend to 10 years and also fine. That means, imprisonment can be for a clear period of 10 years or less. Hence, it could not be said that minimum sentence would be 10 years or more.

The curious part of the judgment is that even after holding that in case of offence under section 386 of the Penal Code the maximum custody would be sixty days, the Supreme Court did not release the accused on bail. The court dismissed the appeal filed by the accused. In this manner, in *Rajeev Chaudhary,* the Supreme Court held that in case of offence punishable with imprisonment "for a term which may extend to ten years" the maximum custody would be 60 days. The Delhi High Court in Om Parkash Vs. State 121 (2005) DLT 686, decided on 22 June, 2005 held as under:-

> "Ultimately, the Supreme Court, after reference to its earlier decisions including that of a larger bench of three Hon'ble judges in Subbhash Chand v. State of Haryana: (1988) 1 SCC 717, was of the view that "punishable"carries the meaning "liable to be punished". In Sube Singh (supra), the Supreme Court was required to determine whether the offence of murder [section 302 IPC] could be classified as an offence "punishable" with death. The wording of section 302 IPC is -- "Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine" In Sube Singh (supra) it was held that the offence of murder was one which was "punishable" with death although the actual sentence awarded may be life imprisonment. It is clear that the word "punishable" means "liable to be punished". Viewed in the light of this meaning of the word "punishable", it is clear that proviso (a)(i) to section 167 refers to any offence which carries with it the liability (or, shall I say, possibility) of punishment with: (i) death or (ii) life imprisonment or (iii) imprisonment for a term of not less than ten years. If the possibility of any one or more of these eventualities attaches to an offence then it would be an offence referred to in proviso (a)(i) to section 167 CrPC. So, the crucial questions to ask in the context of the case at hand are:-

The Supreme Court in the case of State of Karnataka v. Krishnappa: (2000) 4 SCC 75, considering this proviso in respect of the offence under section 376(2)(e) IPC, had this to say:.

> Coming to first principles, it can be seen that a longer maximum permissible custody of 90 days was provided for by the Legislature in Section 167(a)(i) in the case of more serious offences punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years. The meaning of the words, "term not less than 10 years" as already been construed by the Apex Court so as to mean "10 years or more". If an offence is punishable with imprisonment for life, it necessarily means that the offence is punishable for a period which is 10 years or more. The fact that there is an alternate provision of punishment for a term which may extend to 10 years, does not make the offence one in which a punishment of 10 years or more cannot be granted, when punishment of imprisonment of life contemplated is one of the mode of the punishment by the Section itself. The argument that it is not the maximum punishment which must be taken into consideration but it is the minimum term of punishment which can be imposed, which needs to be taken into consideration for deciding as to whether the offence is one contemplated under Section 167(a)(i) has no merits. Once the offence is one in which a sentence of imprisonment for 10 years or more can be imposed, then the fact that in a given case the power of the Magistrate extends to imposing punishment less than 10 years, looses its significance.

In ***State of M.P.*** **v.** ***Rustam and others***[7], Apex Court has laid down the law that while computing period of ninety days, the day on which the accused was remanded to the judicial custody should be excluded, and the day on which challan is filed in the court, should be included. However, the Supreme Court of India in Pragyna Singh Thakur vs. State of Maharashtra (2011) 10 SCC 445 after considering the provisions of Section 167(2) of the Cr.P.C. and the case laws on the subject, it was held as under:

> 54. There is yet another aspect of the matter. The right under Section 167(2) of Cr.P.C. to be released on bail on default if charge sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge sheet is filed and would not survive after the filing of the charge sheet. In other words, even if an application for bail is filed on the ground that charge sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge sheet is filed, the said right to be released on bail would be lost. After the filing of the charge sheet, if the accused is to be released on bail, it can be only on merits. This is quite evident from Constitution Bench decision of this Court in Sanjay Dutt vs. State (1994) 5 SCC 410 [Paras 48 and 53(2)(b)]. The reasoning is to be found in paras 33 to 49. Hon'ble Supreme Court in Sayed Mohd.Ahmed Kazmi v. State, GNCTD and others 2012(5) Recent Apex Judgments 582, the aforesaid view has been reiterated approvingly. The matter is therefore, no longer res integra that an indefeasible right accrues to the accused if the report under Section 173(3) Cr.P.C. is not submitted by the Investigating Agency within the time stipulated and the Magistrate has no option but to grant bail. The subsequent filing of the challan during the pendency of the bail application would be of no consequence in so far as the right accruing to the accused is concerned. The Hon'ble Supreme Court, in the caseof Aslam Babalal Desai V. State of Maharashtra, AIR 1993 SC 1 held that "once an accused is released on bail under Section 167(2) he cannot be taken back in the custody merely on the fi ling of a Charge-Sheet". Above principle is the last word to release the accused on bail u/s 167(2) Cr.P.C. if the investigation is not completed with in 60/90 days as the case may be. This case is fo llowed in the case of Uday Mohan Lal Acharya Vs. State of Maharashtra AIR 2001 SC 1910

APPLICABILITY TO SPECIAL ACTS

Provisions of the Code of Criminal Procedure, 1973 apply to investigation, inquiry and trial of all offences under the Indian Penal Code. Section 4(2) of the Code provides for application of the Code to other laws. It stipulates that offences under "any other law" are also to be investigated, inquired into, tried and otherwise dealt with according to the same provisions. This is "subject to any enactment for the time being in force regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences". Hence, unless a special act provides to the contrary, provisions of section 167 would apply even in the case of an accused arrested for offendes under a special act. Section 49 of the Prevention of Terrorism Act, 2002 (POTA) provides that section 167 of the Code shall apply in relation to a case involving an offence punishable under the said Act subject to the modifications mentioned therein. These modifications, so far as relevant for the present discussion, are that investigation is required to be completed within 90 days for all categories of offences under POTA, with a further proviso that the special court under the Act can extend the period up to 180 days. Accordingly, section 167(2) of the Code would have to be read subject to the modifications. If the charge sheet is not filed within the period of 90 days or within the extended period, the accused would have a right to be released on bail under the proviso to section 167(2). In *Deepak Mahajan,* the Supreme Court held that provisions of section 167 of the Code would apply to foreign exchange offences under the Foreign Exchange Regulation Act, 1973 and the Customs Act, 1962. With regard to the Narcotic Drugs and Psychotropic Substances Act, 1985 in *Thamisharashi*, the Supreme Court held that section 167(2) of the Code would apply in case of offences under the said Act. The court held that in order to exclude the application of the proviso to section 167(2) of the Code in such cases, an express provision indicating the contrary intention was required or at least some provision from which such a conclusion emerged by necessary implication. Supreme Court in the case of Union of India through CBI vs. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav, (2014) 9 SCC 457, in which the accused filed an application under Section 167(2) of Cr. P.C. and after

filing of the application for statutory bail, the prosecution filed the charge sheet and that too without filing any application for extension of time for filing the charge sheet. In that case, it was held that "A Court cannot act to extinguish the right of an accused if the law so confers on him. Law has to prevail. The prosecution cannot avail such subterfuges to frustrate or destroy the legal right of the accused. Such an act is not permissible. If we permit ourselves to say so, the prosecution exhibited sheer negligence in not filing the application within the time which it was entitled to do so in law but made all adroit attempts to redeem the cause by its conduct."

BAIL GRANTED NOT TO BE CANCELLED ON COMPLETION OF INVESTIGATION

Whether bail granted under section 167(2) is liable to be cancelled on completion of investigation and filing of a charge sheet? In *Rajnikant Jivanlal,* the Supreme Court (K. Jagannatha Shetty J. sitting single during vacation) held that an order for release on bail under proviso (a) to section 167(2) may appropriately be termed as an "order on default". The court further observed:

> The accused cannot, therefore, claim any special right to remain on bail. If the investigation reveals that the accused has committed a serious offence and charge sheet is filed, the bail granted under proviso (a) to Section 167(2) could be cancelled.

Relying on *Rajnikant,* a full bench of the Gujarat High Court in *Shardulbhai*,[8] took the view that after the "defect is cured by filing the charge sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed non-bailable offence and that it is necessary to arrest him and commit to custody".

The judgment in *Rajnikant,*[9] on the aspect regarding cancellation of bail after charge sheet is filed was overruled by the Supreme Court in *AsiaBabalal*.[10]The Supreme Court held that an order of bail under section 167(2) could be cancelled only on the considerations that are valid for cancellation of bail granted under chapter XXXIII of the Code. The court observed:

> Once the accused has been released on bail his liberty cannot be interfered with lightly, i.e. on the ground that the prosecution has subsequently submitted a charge sheet. Such a view would introduce a sense of complacency in the investigating agency and would destroy the very purpose of instilling a sense of urgency expected by Sec. 57 and 167(2).

The legal position in this regard thus stands concluded, namely, that the mere fact of filing of the charge sheet subsequent to release of the accused on bail under section 167(2) would not affect the order of bail.

POSITION AFTER FILING OF CHARGE SHEET

It is obvious that if investigation is completed and charge sheet is filed before the expiry of the maximum period of custody of 90/60 days, the right of the accused to be released on bail under section 167(2) would come to an end. What would be the position in cases wherein charge sheet is filed after the expiry of the stipulated period but the accused has not been released on bail in the meanwhile? Would the accused have a right to be released on default bail in such cases? These would be cases wherein the accused has not been released on default bail inspite of the fact that the investigation was not completed within the stipulated period. Custody of an accused in such cases would be in breach of the statutory provision that prohibits custody beyond the period of 90/60 days. Such situations do occur in courts throughout the country. Though the statute does not provide that accused has to prefer an application, no order for release on default bail is passed unless an application is preferred. This is so, because an impression is harbored that for being released on bail under section 167(2) an accused person has to make an application. Judgements of the courts proceed on a premise that accused has to 'avail' his right by making an application for release on bail. For instance, in *Sanjay* Duff[11] the Supreme Court observed:

> The indefeasible right' of the accused to be released on bail in accordance with Section 20(4)(bb) (of TAD A) read with Section 167(2), Cr.P.C. in default of completion of the investigation and filing of the challan within the time allowed is a right which ensures to and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed..,. The right of the accused to be released on bail after filing of the challan, notwithstanding the

> default in filing it within the time allowed is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at the stage.

It is implicit in these observations that the accused has to "enforce" his right to be released on default bail by submitting an application in that regard. It is also implicit that if a charge sheet was filed pending such an application, the right would "not survive or remain enforceable on the challan being filed." In this regard a full bench of the Gujarat High Court in *Babubhai Parshottamdas v. Stale of Gujarat,* [12] stated the legal position on this aspect correctly. The high court held that on the expiry of 90/60 days the magistrate's power to remand the accused to custody comes to an end. The court observed:

> Once the period of ninety days or sixty days is over and an application has been made on behalf of the accused showing his preparedness to furnish bail the order must be passed without any delay to enlarge the accused on bail on such terms and conditions as the Magistrate deems proper.

The full bench in *Babubhai,* relied on the observations of the Supreme Court in *Natabar Parinda* and *Bashir*,[13] to the effect that section 167(2) did not grant any discretion to the court and made it obligatory for it to release the accused on bail. Subsequently, another full bench of the Gujarat High Court in *Shardulbhai*[14] held that *Babubhai* was no longer good law in view of the decision of the Supreme Court in *Laxmi Brahman.*[15] It was held in *Shardulbhai* that right of an accused to be released on bail under section 167(2)(a) of the Code is not absolute in the sense that it could be exercised at any stage. It was held that in such cases accused has a right to be released on bail as of right *before* the charge sheet is filed. When the accused is not actually released on bail and charge sheet is filed (even if it be after the stipulated period) the accused will have no such right to be released on bail as investigation comes to an end once charge sheet is filed. However, what was held in *Babubhai* has since been fortified by a recent judgment of the Supreme Court in *Uday Mohanlal*The Supreme Court examined the provisions of default bail under section 167(2) of the

Code in the context of fundamental right of personal liberty under article 21 of the Constitution. The Supreme Court in *Uday Mohanlal*, interpreted the words "if already not availed of" and held:

> [I]t would be more in consonance with the legislative mandate to hold that the accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail, and offers to abide by the terms and conditions of bail. To interpret the expression 'availed of' to mean actually being released on bail after furnishing the necessary bail required, would cause great injustice to the filed before an order is passed.The Magistrate will have no option but to release the accused on bail.

The situation still leaves many questions unanswered. The accused is deemed to have availed of his right 'the moment he files an application' for bail. Which is 'the moment'? This can be a million-dollar question. Let us take a hypothetical situation. The stipulated time period is over. On the very next day, the accused or his lawyer places a bail application on the table of the concerned clerk. The clerk is not around. By the time the clerk turns up, a police constable has reached the same table with the charge sheet. Has the application been filed before the charge sheet? Now reverse the situation. The policeman has walked in first with the charge sheet and the lawyer has come to the court office later on. Both wait for the clerk. The lawyer has placed the application on the clerk's table whereas the policeman keeps the charge sheet in his bag and removes it as soon as the clerk arrives. Is the application filed before the charge sheet? If the clerk obliges the lawyer and registers the application first and then takes the charge sheet in his hand, will that clinch the issue? Separate registers are maintained for bail applications and for charge sheet. Date of registration is mentioned but not the time. How will the issue be resolved? Different clerks sitting in different rooms of the court building may be performing these two different tasks. If the application and the charge sheet are filed on the same day, how will the magistrate determine which was the first in point of time? Those familiar with the ground realities in magistrates' courts would readily understand such a scenario. Something is obviously amiss in the interpretation placed on section 167(2) by holding that accused is deemed to have availed of his right "the moment he files an application".

IMPORTANT JUDGMENTS

In the case of Hitendra Vishnu Thakur Vs. State of Maharashtra AIR 1994 SC 2623 Hon'ble Apex Court held that if the investigation agency fails to fi le charge-sheet before the expiry of 60/90 days, as the case may be, the accused in custody should be released on bail u/s 167 (2) Cr.P.C, 1973.

The Hon'ble Supreme Court, in the case of Aslam Babalal Desai V. State of Maharashtra, AIR 1993 SC 1 held that "once an accused is released on bail under Section 167(2) he cannot be taken back in the custody merely on the fi ling of a Charge-Sheet". Above principle is the last word to release the accused on bail u/s 167(2) Cr.P.C. if the investigation is not completed with in 60/90 days as the case may be. This case is fo llowed in the case of Uday Mohan Lal Acharya Vs. State of Maharashtra AIR 2001 SC 1910.

In the case of Directorate of Enforcement v. Deepak Mahajan and another, AIR 1994 SC 1775, the Apex Court laid down that to if a case registered against an offender arrested by the Magistrate, surrendered or brought before the Magistrate, the Magistrate can in exercise of the powers conferred upon him by Section 167 (2) keep such officer under judicial custody In Simranjit Singh Maan v. State of Bihar AIR 1987 SC 149 held that in such a case, the filing of the challan will not alter the situation and the order for release on bail of such a person make under the proviso to Section 167 (2) would not be defeated.

In the case of Ashok Sharma Vs. State of M. P., 1993 JLJ 1999 it was held that the prosecution cannot claim the benefit of 90th day being a holiday because challan need not be filed before the Court and it could be filed before the Magpage-13istrate. Therefore. Section 10 (2) of General Clauses Act. 1897 was inapplicable while computing the total period of 60/90 days u/s 167 (2) Cr.P.C.

In the case of Union of India V Than1sharasi 1995 AIR SCW 2543. Hon'ble Apex Court made it clear that the provisions of section 167(2) Cr.P.C . are equally be applicable in special cases.

Apex Court in the case of Rajeev Choudhary V. State, AIR 2001 SC 2369 that the expression "not less than" would mean imprisonment should be 10 year or more and would cover only those offences for which punishment could be imprisonment for a clear period of 10 years or more for the purpose of clause(i) of proviso (a) of Section 167 (2). Cr.P.C. 1973. This view also relied in the case of Bhupinder Singh & others V Jarnail Singh & another 2006 Cr.LJ. 3621.

In the case Union of India through C.B.I. v. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav, (2014) 9 SCC 457 while considering a similar issue, the Hon'ble Supreme Court relying upon the judgment of three Judges coram Uday Mohanlal Acharya (supra), held in paragraph-22 as follows:-

> "22. In Uday Mohanlal Acharya the majority, after referring to the Constitution Bench decision in Sanjay Dutt case, posed the question about the true meaning of the expression of the following lines:"3. ... 48. ... The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of.?
>
> Answering the said question the Court observed thus:
>
> "13. .... Does it mean that an accused files an application for bail and offers his willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression 'availed of' to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167(2) of the Criminal Procedure Code and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when an accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. If the expression 'availed of' is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a charge-sheet then also the so-called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression ,,if not availed of, in a manner which is capable of being abused by the prosecution. A two-Judge Bench decision of this Court in State of M.P. v. Rustam setting aside the order of grant of bail by the High Court on a conclusion that on the date of the order the prosecution had already submitted a police report and, therefore, the right stood extinguished, in our considered opinion, does not express the

correct position in law of the expression „if already not availed of, used by the Constitution Bench in Sanjay Dutt."

The Hon'ble Supreme Court considering the similar other judgments like Sanjay Dutt v. State, (1994) 5 SCC 410 and State of M.P. v. Rustam, 1995 Supp (3) SCC 221 further held in paragraph-25 as follows:-

25. Elaborating further, the Court held that:-

"13. .... if the charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished necessarily, therefore, if an accused is entitled to be released on bail by application of the proviso to sub-section (2) of Section 167 Cr PC, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then the accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail."

It is true that earlier in the case Pragyna Singh Thakur v. State of Maharashtra, (2011) 10 SCC 445, the Hon'ble Supreme Court had taken the view in paragraph-54 in the following manner:-

"54. There is yet another aspect of the matter. The right under Section 167(2) Cr PC to be released on bail on default if charge-sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge-sheet is filed and would not survive after the filing of the charge-sheet. In other words, even if an application for bail is filed on the ground that charge-sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge-sheet is filed, the said right to be released on bail would be lost. After the filing of the charge-sheet, if the accused is to be released on bail, it can be only on merits. This is quite evident from the Constitution Bench decision of this Court in Sanjay Dutt v. State [paras 48 and 53 (2)(b)]. The reasoning is to be found in paras 33 to 49."

SUMMARY

The discussion in this article can be summarized as follows:

1.Power to release an accused person on default bail vests with the magistrate whatever is the nature of the accusation against the accused.

2.Period of 90/60 days would begin to run from the date on which the magistrate remands an accused to custody. This may not necessarily be the date of arrest.

3.Detention in police custody can be authorized only during the first period of 15 days beginning with the day an accused is produced before a magistrate and remanded to custody. Police custody cannot exceed fifteen days in the whole. This is subject to provisions of a special act such as POTA.

4.For offences such as those under section 306 and 386 punishable with imprisonment "which may extend to ten years", the maximum period of custody would be 90 days. Such offences

5. covered within the category of offences punishable with imprisonment for a term of "not less than ten years" within the meaning of that expression used in section 167(2)(a)(i) of the Code. For offences not covered in this category the maximum period of custody would be 60 days.

6.Provision of section 167 of the Code would apply to offences under a special act unless such act provides to the contrary or makes the provisions applicable with modifications. POTA is an example of legislation of this nature.

7.Bail granted under section 167(2) is not liable to be cancelled on completion of investigation and filing of charge sheet. Bail can be cancelled only on considerations valid for cancellation of regular bail granted under chapter XXXIII of the Code.

8.In cases where accused has filed application for default bail, he is deemed to have "availed" of his right. In such cases, the magistrate shall have to pass an order of bail on expiry of the stipulated period even if charge sheet is filed after such period of over.

9.The interpretation suggested by the author is that immediately on expiry of the statutory period the magistrate has to pass an order to bail and call upon the accused to furnish bail. This is the statutory duty of the magistrate that must be performed even in the absence of an application by the accused in this regard.

[1] **Section 167(2) lays down:**

The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case, from time to time, authorize the detention of the accused person in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction.

Provided that:

(a) the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this paragraph for a total period exceeding:

i. **ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;**

ii. **sixty days, where the investigation relates to any other offence, and on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this subsection shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter.**

[2] ***Natabar Parinda v. State of Orissa, AIR 1975 SC 1465.***

[3] Also see, Gujarat High Court judgment in *Sharciulbhai Laxmanbhai* v. *State of Gujarat,* 1989 (2) GLR 1388 (para 29 and 27).

[4]***Chaganti Satyanarayana v. State of Andhra,AIR 1986 SC 2130;***

State of Maharashtra v. Bharati Chandumal , (2002) 2 SCC 121.

[5] ***Central Bureau of Investigation v. Anupam , AIR 1992 SC 1768: JT.***

[6] ***Rajeev Chaudhary v. State (NC.T) of Delhi, 2001 Cr LJ 2023 (Delhi).***

[7] 1995 Supp (3) SCC 221

[8] ***Shardulbhai Laxmanbhai v. State of, supra note 3.***

[9] Rajnikant Jivanlal Patel V. Intelligence Officer, NCB, AIR 1990 SC 71

[10] Aslant Babalal Desai V. State of Maharashtra, AIR 1993 SC 1

[11] ***Sanjay Dutt v. The State through CBI Bombay, 1995 Cr LJ 477. Para 55.***

[12] ***Babubhai Parshottamdas*** **v.** ***Stale of Gujarat,*** **1981 GLR 1232 1981 GLH 348. Para 2**

[13] ***Bashir*** **v.** ***State of Haryana,*** **AIR 1978 SC 55.**

[14] ***Supra*** **note 3 (paragraph 29 and 47).**

[15] ***Uday Mohanlal Acharya*** **v.** ***State of Maharashtra,*** **2001(3) Supreme 142: 2001 (2) GLR 1148.**