**IN THE COURT OF SH. RAKESH KUMAR SINGH:
METROPOLITAN MEGISTRATE (NI ACT)-1, CENTRAL:
ROOM NO.-42, TIS HAZARI COURT COMPLEX, DELHI**

T.B.S.L. vs. Jitesh Sharma CC No.1552/10

ORDER

A criminal prosecution is neither for recovery of money nor for enforcement of any security etc. Section 138 of the NI Act is a penal provision the commission of which offence entails a conviction and sentence on proof of the guilt in a duly conducted criminal proceedings. Once the offence under Section 138 is completed the prosecution proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to the penal liability. And as they say, it has always to be kept in mind that the law relating to the penal provisions has to be interpreted strictly so that no one can ingeniously or insidiously or guilefully or strategically be prosecuted.

2. It is proposed to dispose of the issues raised in these complaints. Complainant is same in all these complaints. There are other complaints pending before me in which arguments have already been heard. Those complaints are also proposed to be decided in terms of the reasoning to be given in the present batch of complaints. Arguments on the points involved have been heard. Separate orders shall be passed based on the basis of the reasons given in this order.

3. Issues raised in these complaints are two fold:

a) That there is no requirement of any proof of delivery of legal demand notice;

b) That this Court has jurisdiction to entertain these complaints although the cheques were drawn on the bank situated outside Delhi and accused persons are residing outside Delhi.

4. A further contention has been raised by some of the complainant that such issues should be dealt with at the stage of the trial and the Court should not start a roving inquiry at the pre-summoning stage. Reliance has been placed primarily upon two authorities:

In Trisuns Chemical Industry vs. Rajesh Agarwal and Ors. (1999) 8 SCC 686

"14. **The jurisdictional aspect becomes relevant only when the question of enquiry or trial arises.** It is therefore a fallacious thinking that only a Magistrate having jurisdiction to try the case has the power to take cognizance of the offence. If he is a Magistrate of the First Class his power to take cognizance of the offence is not impaired by territorial restrictions. After taking cognizance he may have to decide as to the court which has jurisdiction to enquire into or try the offence and that situation would reach only during the post-cognizance stage and not earlier." (emphasis added)

In Rajiv Modi vs. Sanjay Jain V (2009) SLT 725:

"22) It is evident from the above decisions, that, to constitute the territorial jurisdiction, the whole or a part of "cause of action" must have arisen within the territorial jurisdiction of the court and the same must be decided on the basis of the averments made in the complaint without embarking upon an enquiry as to the correctness or otherwise of the said facts.

> 29) In view of the above principles, the Court on basis of the averments made in the complaint, if it is prima facie of the opinion that the whole or a part of cause of action has arisen in its jurisdiction, it can certainly take cognizance of the complaint. **There is no need to ascertain that the allegations made are true in fact**." (emphasis added)

5. I do not find the contention acceptable. Above highlighted part in Trisuns(supra) clearly stipulates that jurisdictional aspect becomes relevant only when the question of enquiry or trial arises. Amended section-202 Cr.PC. provides for a mandatory requirement of enquiry when the accused resides outside the local limit of jurisdiction. Hence, the decision relied upon by the complainant far from advancing his case goes to show otherwise.

Above highlighted portion in Rajiv Modi (supra) imposes a restriction to the effect that there is no need to ascertain that the allegations made are true in fact. Again, this decision does not help. There is no depute about the facts stated in the complaint. There is no ascertainment the correctness or otherwise of the said facts. The issue turns out to be an issue of law instead of fact.

Even otherwise, leaving the issue to be decided at the stage of trial will be a futile exercise since scenario remains the same considering the scope of Section-143 & 145 NI Act read with Section-263 Cr.PC.

6. The position may be seen from another angle. Is there any provision which helps the Court when at the stage of trial it comes to a conclusion that it has no jurisdiction to try the offence.

Section-322 Cr.PC. Reads as under:

"322. Procedure in cases, which Magistrate cannot dispose of.

(1) If, in the course of any inquiry into an offence or a trial before a Magistrate **in any district**, the evidence appears to him to warrant a presumption-

(a) That he has no jurisdiction to try the case or commit it for trial, or

(b) That the case is one which should be tried or committed for trial by some other Magistrate **in the district**, or

(c) That the case should be tried by the Chief Judicial Magistrate, he shall stay the proceedings and submit the case, with a brief report explaining its nature **to the Chief Judicial** Magistrate or to Such other Magistrate, having Jurisdiction, as the Chief Judicial Magistrate directs.

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial.

A bare perusal of this section shows that it can not be made applicable to a jurisdictional question arising between two courts situated in two different states. A Chief Judicial/Metropolitan Magistrate does not exercise jurisdiction over any Court situated in another state. The only option in such circumstances lies in Section-406 Cr.PC. Which vest the power in the Hon'ble Supreme Court to transfer cases from one state to another.

Clearly, a Magistrate will be helpless in such circumstances. Even section-462 Cr.PC. does restrict a reversal of a judgment passed in a trial held at wrong place.

7. It has to be further pointed out that when the facts are not in dispute it is not necessary that the question that arise for consideration should be left to be decided at the stage of trial. Only if the issue that arises for consideration is decided at the earliest and a disposal is given it will enable the complainant to seek the alternative remedy of filing a suit to recover the amount covered by the cheque as otherwise such a remedy will also become time barred. Clearly, both the issues have to be decided forthwith. Accordingly, I proceed to do so.

8. I have heard the Ld. counsel for the complainant and gone through the record. I propose to deal with both the issues one be one.

9. The first issue relates to the requirement of proof of delivery. Ld counsel argued that in view of Section-114 Evidence Act, Section-27 General Clause Act and several pronouncement by the Hon'ble Supreme Court, the Court has to presume delivery of notice and can not insist filing of proof of delivery.

10. I have given my anxious consideration to the arguments advanced by the Ld. counsel and carefully gone through the provisions and judicial pronouncements.

11. Section-114 Evidence Act reads as under:-

> "Section 114 - Court may presume existence of certain facts.- The Court may presume the existence of any fact which it thinks likely to have happened. regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume:

(f) That the common course of business has been followed in particular cases;"

12. Section-27 General Clause Act as under:-

"27. Meaning of service by post. - Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service 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".

13. Judicial pronouncements relied upon by the complainant and additional pronouncements to be referred to by this Court are given in the following table:

S. No.	Case	Matter	Mode	Status	Remarks/ Endorsement	Conclusion
1	(1997) 7 SCC510	NI Act	Post	Returned	Unclaimed	Deemed Service
2	(2004) 8 SCC 744	NI Act	Post	Returned	Door locked	Deemed Service
3	(2006) 6 SCC 456	NI Act	Post	Returned	Party not in	Deemed

					station, arrival not known	Service
4	(2007) 6 SCC SJJ	NI Act	Post	Returned	The addressee was abroad	Deemed Service
5	**160(2009) DLT 478**	**NI Act**	**Post**	**Not returned**	**----------**	**No service**
6	1992(1) SCC 647	SRA	Post	Returned	Refusal	Deemed Service
7	1981(2) SCC 535	RENT	Post	Returned	Refusal	Deemed Service
8	1989(1) SCC 264	RENT	Post	Returned	Left without address, returned to sender	Deemed Service
9	M/s Indu Automobiles Vs. M/s Jai Durga Enterprises (Supreme Court)-15.07.2008	NI Act	Post	Returned	Some endorsement of postal authorities	Deemed Service
10	Mayawati Vs. CIT. Delhi (DB) (Delhi High Court)-13.02.2009	Income tax Act	Post	Returned	Some endorsement of postal authorities	Deemed Service

14. Now in the light of the above, I am to consider whether the law requires the complainant to submit any proof of delivery.

15. **Section 94 NI Act reads as under :-**

"94. Mode in which notice may be given.__Notice of dishonour

> may be given to a duly authorized agent of the person to whom it is required to be given, or, where he has died, to his legal representative, or, where he has been declared an insolvent, to his assignee; may be oral or written; may, if written, be sent by post; and may be in any form; but it must inform the party to whom it is given, either in express terms or by reasonable intendment, that the instrument has been dishonoured, and in what way, and that he Will be held liable thereon; and it must be given within a reasonable time after dishonour, at the place of business or (in case such party has no place of business) at the residence of the party for whom it is intended.
>
> If the notice is duly directed and sent by post and miscarries, such miscarriage does not render the notice invalid."

It is pertinent to note that section-94 appears in the Chapter-VIII entitled "Of notice of dishonour". Ways of dishonour are defined in Ss-91 & 92. Parties by whom and to whom notice should be given are mentioned in Section-93. Ss 95, 96, 97 & 98 further conditions and restrictions. Section-98 even provides for waiver of notice. Whereas no such conditions, restrictions, modalities mode or waiver are provided under proviso-(b) & (c) of Section-138.

It is clear that Section-94 can not be made applicable to Section-138.

16. **Section-138 NI Act reads as under:-**

> 138. Dishonour of cheques for insufficiency, etc., of funds in the account.--
>
> x x x x x x x. Provided that nothing contained in this section

shall apply unless--

(a) x x x x x x x x x x

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

If the ingredients for constitution of the offence laid down in the provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would.

17. **Effect of combined reading of Ss-94 & 138 NI Act:**

It is well settled that if legislature provides two different connotations in the same statute, both the provisions have to be strictly followed. It can be fairly said that while enacting section-138 the omission of the expression **"If the notice is duly directed and sent by post and miscarries, such miscarriage does not render the notice invalid"**

appearing in section-94 was deliberate on the part of the legislature. Reason is obvious. Section-94 attracts a civil liability whereas Section-138 attracts a criminal liability.

If Parliament did not think it appropriate to provide the same consequence, it would not be just to import such consequence in the Section-138.

18. **In C.C. Alavi Haji v. Palapetty Muhammed and Another (2007) 6 SCC 555**

> "It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of Criminal Law, where there is no stipulation of giving of a notice before filing a complaint. **Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected.** A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, **cannot obviously contend that there was no proper service of notice** as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the G.C. Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation."

19. **Effect of above observation and direction given in CC Alavi Haji (supra):**

What will be the effect of above observation and direction is the question which

may lead to a result concluding the controversy. Above highlighted portions go to show that once summoned, the accused has only two options. Either to make the requisite payment within 15 days of the receipt of the summons or to leave the defence of non-receipt of the notice.

At this juncture it may be noted that after the decision in Adalat Prasad v. Rooplal Jindal (2004) 7 SCC 338, the summoning order cannot be recalled any more for any reason.

Clearly, combined effect of both the decisions would not only cause great prejudice to the accused but also render the proviso-(b) & (c) to Section-138 NI Act nugatory.

And what is the burden on the complainant? Nothing. He does not want to be asked about any proof of delivery.

At this stage, it will be apt to quote an observation made by the Hon'ble High Court of Delhi in HDFC vs. Amit Kumar Singh, dated 22.05.2009:

> "26. What is happening is that without the complainant being put to any trouble in finding out the correct address of the complainant, the burden is shifted to the court. Our Magistrates are stuck with several such complaints which they are unable to dismiss and are yet unable to proceed with because the accused has not been served. This was perhaps not the intention of the legislature when it introduced penal provisions into the NI Act. While on the one hand a penal statute should be strictly construed, at the same time the construction to be placed on the statue, and in particular Section 138 (b) and (c) should be that which advances the cause of justice keeping in view the object of the provision. The construction that commends itself to be adopted is that the Court must at the pre-summoning stage insist on the complainant showing to it some proof of delivery of

> notice in the form of the returned cover with the endorsement, or an internet generated delivery report or a delivery certificate stating inter alia that the drawer refused or has left or is not available. Anything short of this it would be unsafe for the Court to accept and proceed on a presumption of deemed service in terms of Section 27 GC Act."

20. Proviso-(b) & (c) to Section-138 NI Act and both the decisions of the Hon'ble Supreme Court if read harmoniously, would require that there must be some proof of delivery of notice, may be in the form of acceptance, refusal, any endorsement of the postal authorities.

It is apt to mention that even in the case of CC Alavi Haji(supra), **the notice was returned with some endorsement or remark. It was not a case where there was nothing to establish the date or deemed date of receipt of notice.**

21. A further contention has been raised on the basis of proviso to Rule-19A, Order-V, CPC. This proviso reads as under:

> "Provided that where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgement due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgement having been lost or mislaid, or for other reason, has not been received by the Court within thirty days from the date of the issue of the summons."

It is argued on the strength of the above proviso that the same reasoning should be made applicable for the notice sent by the post under Section-138 NI Act.

22. I do not agree. Rule-19A was inserted in the CPC in year 1976 when Section-27 General Clauses Act was already in existence. If the Parliament despite having being conscious of the provision of Section-27 General Clauses Act thought it necessary to provide such mandatory consequence for civil summoning procedure, it would not be just to import such consequence in the provision of Section-27 General Clauses Act.

The position may be seen from another angle. In the year 2003, Parliament provides for an additional summoning procedure under Section-144, NI Act on the line of Rule-19A, Order-V, CPC.

Section 144 NI Act reads as under :-

> "144. Mode of service of summons.__(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), and for the purposes of this Chapter, a Magistrate issuing a summons to an accused or a witness may direct a copy of summons to be served at the place where such accused or witness ordinarily resides or carries on business or personally works; for gain, by speed post or by such courier services as are approved by a Court of Session.
>
> (2) Where an acknowledgment purporting to be signed by the accused or the witness or an endorsement purported to be made by any person authorized by the postal department or the courier services that the accused or the witness refused to take delivery of summons has been received, the Court issuing the summons

may declare that the summons has been duly served."

23. It is plain from Section 144(2) that summons to a person, who is arraigned as an accused in a complaint under Section 138 NI Act, when sent by registered A/D post has to be followed by placing before the Court either the signed acknowledgement due card purported to be signed by the addressee, or an endorsement by the postal department or the courier service that the accused refused to take delivery of the summons. In the absence of such acknowledgement or endorsement of the postal authority or the courier services, the Court will not draw a presumption that such summons have been duly served.

24. **In Dadi Jagannadham v. Jammulu Ramulu, 2001 AIR SCW 3051,** the Apex Court held:

> "The settled principles of interpretation are that the Court must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do. The Court must, as far as possible, adopt a construction, which will carry out the obvious intention of the Legislature. Undoubtedly if there is a defect or an omission in the words used by the Legislature, the Court could not go to its aid to correct or make up the deficiency. The Court could not add words to a statute or read words into it which are not here, especially when the literal reading produces an intelligible result. The Court cannot aid the Legislature's defective phrasing of an Act, or add and mend, and, by construction, make up deficiencies which are there."

25. Obviously, omission of the consequence mentioned in Rule-19A, Order-V, CPC was deliberate considering the criminality of the provision.

If the contention of the Ld. counsel that the analogy summoning procedure is to

be accepted, it must be the analogy of summoning procedure provided in Section-144 NI Act and not as provided in proviso to Rule-19A, Order-V, CPC.

Viewed from any angle, contention of the Ld. counsel is unacceptable.

26. I then turn to the decision in V. Raja Kumari vs P. Subbarama Naidu & Anr. Strong reliance has been placed by the counsel for the complainant upon this decision and the fact that the Hon'ble Delhi High Court while deciding the case of HDFC vs Amit Kumar Singh did not take it into consideration. On the basis of this circumstance, Ld. counsel pleaded that HDFC(supra) is not binding.

I am unable to accept. A paragraph from Rajakumari(supra) makes it clear:

> "Learned counsel for the respondent-complainant, on the other hand, submitted that the complaint clearly indicated that the accused managed to get an endorsement about the 'house been locked'. This was clearly stated to be incorrect endorsement. Therefore, as rightly held by the High Court the effect of the endorsement has to be considered during trial."

Clearly, this was again a case where something in the form of returned envelop with endorsement was placed before the Hon'ble Supreme Court. The situation in Rajakumari(supra) is not otherwise than the situation in CC Alavi Haji(supra). While deciding HDFC(supra) Hon'ble Delhi High Court has taken into consideration such situation.

Once the Hon'ble Delhi High Court distinguishes the ratio, it will be open for this court to prove any further.

27. We may now see the true import of proviso-(c) to Section-138 NI Act as propounded by the Hon'ble Supreme Court.

In M/s Dalmia Cement (Bharat) Ltd. vs. M/s Galaxy Traders & Agencies Ltd. & ors. (AIR 2001 SC 676):

> "The payee or holder of the cheque may, therefore, without taking peremptory action in exercise of his right under clause (b) of Section 138 of the Act, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque. But once a notice under clause (b) of Section 138 of the Act is 'received' by the drawer of the cheque, the payee or the holder of the cheque forfeits his right to again present the cheque as cause of action has accrued when there was failure to pay the amount within the prescribed period and the period of limitation starts to run which cannot be stopped on any account."

Clearly while issuance of a notice by the holder of a negotiable instrument is necessary, service thereof is also imperative. Only on a service of such notice and failure on the part of the accused to pay the demanded amount within a period of 15 days thereafter, commission of an completes. Giving of notice, therefore, cannot have any precedent over the service. It is only from that view of the matter in Dalmia Cement (Bharat) Ltd. v. GalaxyTraders & Agencies Ltd., (2001) 6 SCC 463 emphasis has been laid on service of notice.

\ In **Sadanandan Bhadran vs. Madhavan Sunil Kumar, JT 1998 (6) SC 48**

> "The combined reading of the above two sections of the Act leaves no room for doubt that cause of action within the meaning of Section 142@ arises - and can arise - only once. Besides the language of Sections 138 and 142 which clearly postulates only

one cause of action there are other formidable impediments which negates the concept of successive causes of action. One of them is that for dishonour of one cheque there cane be only one offence and such offence is committed by the drawer immediately in his failure to make the payment within fifteen days of the receipt of the notice served in accordance with clause (b) of the proviso to Section 138. That necessarily means that for similar failure after service of fresh notice on subsequent dishonour the drawer cannot be liable for any offence nor can the first offence be treated as non-est so as to give the payee a right to file a complaint treating the second offence as the first one. At that stage it will not be a question of waiver of the right of the payee to prosecute the drawer but of absolution of the drawer of an offence, which stands already committed by him and which cannot be committed by him again.

The other impediment to the acceptance of the concept of successive causes of action is that it will make the period of limitation under clause @ of Section 142 otiose, for, a payee who failed to file his complaint within one month and thereby forfeited his right to prosecute the drawer, can circumvent the above limitative clause by filing a complaint on the basis of a fresh presentation of the cheque and its dishonour. Since in the interpretation of statutes the Court always presumes that the legislature inserted every part thereof for a purpose and the legislative intention is that the very part should have effect the above conclusion cannot be drawn for, that will make the provision for limiting the period of making the complaint nugatory."

It was further held therein:

> "Having given our anxious consideration to this question, we are of the opinion that the above two provisions can be harmonized, with the interpretation that on each presentation of the cheque and its dishonour a fresh right - and not cause of action - accrues in his favour. He may, therefore, without taking pre-emptory action in exercise of this such right under clause (b) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque. But, once he gives a notice under clause (b) of Section 138 he forfeits such right for in case of failure of the drawer to pay the money and the cause of action for filing the complaint will arise."

In Harman Electronics Private Limited and Anr. v. National Panasonic India Private Limited', (2009) 1 SCC 720

> "14. It is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of a cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence under Section 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso appended thereto, however, imposes

certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in the provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would."

In Shivakumar vs Natarajan, Supreme Court in Appeal(Crl.)-1077/2009 dated 15.05.2009

"11. We may, however, at the outset notice that both clauses (a) and (b) of the proviso appended to Section 138 of the Act employed the term "within a period". Whereas clause (a) refers to presentation of the cheque to the bank within a period of six months from the date on which it is drawn, clause (b) provides for issuance of notice "to the drawer of the cheque within thirty days of the receipt of information". The words "within thirty days of the receipt of information" are significant. Indisputably, intimation was received by the respondent from the bank on 3.12.2003. The Parliament advisedly did not use the words `from the date of receipt of information' in Section 138 of the Act. It is also of some significance to notice that in terms of Section 9 of the General Clauses Act, 1897, whereupon reliance

> has been placed by the High Court, the statute is required to use the word "from" and for the purpose of including the last in a series of days or any other period of time, to use the word "to".
> The departure made from the provisions of Section 9 of the General Clauses Act by the Parliament, therefore, deserves serious consideration."

28. **Effect of Shivakumar, Harman Electronics, Dalmia Cement and Sadanandan Bhadran (spra):**

Section-142(b) employs the expression "within one month of the date when the cause of action arises".

Proviso-(c) to Section-138 employs the expression "within fifteen days of the receipt of the said notice".

Proviso-(b) to Section-138 employs the expression "within thirty days of the receipt of information".

Clearly, if the date of receipt of notice is to be included while counting the period of 15 days within which the drawer must fail to repay the amount of cheque so as to give rise to a cause of action as required by section-142(b), inevitably there has to be a concrete date of receipt of notice to be established by the complainant in the complaint.

If exclusion or inclusion of one day can change the game, it can't be left at the mercy of the complainant.

At this juncture, it is pertinent to mention that if there is a delay even of one day, judicial pronouncements require that condonation can only be done after giving an

opportunity to the proposed accused person. The language used in the above section admits of no doubt that Court is forbidden from taking cognizance of the offence if the complaint was not filed within one month of the date on which the cause of action arose. Completion of the offence is the immediate forerunner of rising of cause of action. In other words cause of action would arise soon after completion of the offence, and the period of limitation for filing the complaint would simultaneously start running.

29. Now, how can it be ensured that even a delay of one day be easily counted? Answer is simple. The Court has to know the exact day on which the cause of action arose.

And how will the Court know such thing?

Only when it knows the last day preceding the date of failure.

And how will the last day be calculated?

Only when the Court knows the first day it can calculate a 15 days including the first day.

How will the Court know the first day?

Only the complainant can inform the Court about the first day.

Which will be the first day?

As per proviso-(c) to Section-138 and the interpretation given by the Hon'ble Supreme Court in Shivakumar(supra), first day will be the date of the receipt of the said notice.

How can the "the date" be arrived at?

Answer is simple. By showing anything which bears "the date". Or by establishing the date by cogent oral evidence.

Who will do the exercise?

Naturally, it is the complainant who has to take the exercise. Court can not take on itself a task that is to be performed by the complainant. The Court can not by any deductive reasoning arrive at "the date", neither by presuming that the legal notice might have been received by the drawer within certain period from nor by adding any number of days to the date of dispatch of the same.

30. There may be four situations in respect of a notice:

a) Notice delivered to the drawer;

b) Notice refused by the drawer;

c) Notice returned undelivered for the reasons attributable to the drawer; and

d) Status of the notice unknown.

With respect to the first two situations, there will be no problem at all. Even for the third situation, there is no problem since the returned envelop has to bear a specific date of last visit by the postal authority. Therefore in these three situations, a presumption under Section-27 General Clauses Act read with Section-114 Evidence Act may safely be raised and thereby the requirement of Section-138 & Section-142 NI Act in respect of a "specific concrete date" may be satisfied.

Problem arises only with the fourth situation, wherein it is not possible for anyone to fix a specific concrete date which will result in non-compliance of requirements of Ss-138 & 142.

In **D. Vinod Shivappa v. Nanda Belliappa (2006) 6 SCC 456** the Supreme Court discussed in detail the situations arising in respect of a notice:

> "If a notice is issued and served upon the drawer of the cheque, no controversy arises. Similarly if the notice is refused by the addressee, it may be presumed to have been served. This is also not disputed. **This leaves us with the third situation where the notice could not be served on the addressee for one or the other reason, such as his non-availability at the time of delivery, or premises remaining locked on account of his having gone elsewhere, etc. etc.** If in each such case the law is understood to mean that there has been no service of notice, it would completely defeat the very purpose of the Act....."

Even the Hon'ble Supreme Court envisaged only three situations out of the four referred to above. Third situation was the last one for the Hon'ble Supreme Court. The fourth situation was not even contemplated by the Supreme Court. The reason is obvious.

In such situation, if a presumption has to be arrived, it would further become dangerous besides resulting in non-compliance of requirements of Ss-138 & 142.

How dangerous this presumption is can be easily demonstrated, and how it would lead to miscarriage of justice can be manifestly established. I want to give a simple example.

In a given situation, Court-A presumes delivery within 3 days whereas Court-B presumes delivery within 5 days (in the absence of any law, rule, or regulation providing any specific days to be added, both the Courts are free to exercise their discretion). And the limitation for filing complaint lasts on the 4th day.

Court-A summons the accused whereas Court-B decline to take cognizance though all other circumstances are same. (This example may further be stretched to the condonation of delay, but the result will be the same.)

Such absolute discretionary discriminative approach can neither be attributed to the Legislature nor to the Hon'ble Supreme Court.

31. I can now deal with the contention in respect of a decision of the Hon'ble High Court of Delhi in HDFC vs Amit Kumar Singh, Crl. REV P No. 296/2009 dated 22.05.2009. It has been argued that this decision is per incuriam. Ld. Counsel has cited numerous authorities of Hon'ble Supreme Court and Hon'ble Delhi High Court and other Hon'ble High Courts to contend that a decision is not binding if given contrary to binding precedents of the Hon'ble Supreme Court. No quarrel with the contention of the Ld. Counsel. Ld. Counsel further argued that this court being bound by the direct binding precedents of the Hon'ble Supreme Court should ignore the ratio of HDFC(supra).

32. I am unable to accept this submission. However, before proceeding further, I would like to quote certain paragraphs from HDFC(supra):

> "15. There can be no doubt that Section 138 has been introduced into the NI Act as a penal provision. The NI Act was otherwise not a criminal law statute. Chapter XVII NI Act was introduced to make the dishonor of the cheque for insufficiency of funds a punishable offence. The object of the introduction of Chapter

XVII was no doubt to have a deterrent effect on unscrupulous drawers of cheques who were issuing cheques thus without any intention of making payment. Sections 138 to 147 NI Act are criminal law provisions and have, therefore, to be strictly construed. At the outset, this Court therefore, rejects the plea that the principles informing Section 94 NI Act regarding notice of dishonour of a cheque should be incorporated pro-tanto into Sections 138 to 147 NI Act.

16. The above legal position is consistent with the legislative intent of the Parliament in enacting Section 144 NI Act. Although this provision talks of the mode of service of summons to either a witness or an accused under the NI Act, this Court finds no reason why the same standard should not be insisted upon for service of legal notice upon the accused by the complainant prior to the filing of the complaint. The reason for this is that whenever a summoning order is passed and summons are sent to the accused, it would be sent at the same address shown for the accused in the complaint. This address ought not to be any different from the address in the legal notice. It is therefore a continuous chain of events. First there is a dishonor of the cheque. Next is the legal notice to be sent to the drawer within 30 days of the payee receiving an intimation from the Bank of the dishonor of the cheque. Such legal notice in writing has to be addressed to the drawer at the address of the drawer available with the complainant such notice. Such notice has to be received by the drawer and he should fail to make payment within 15 days after receipt of such notice. This chain thereafter continues into the next stage following the failure to make the payment. The complainant or the drawee then approaches the

criminal court with a complaint in which he will implead as the accused, the drawer of the cheque, with the address being shown as the same to which the legal notice was sent. The summon, therefore, goes to the same address.

17. In a situation where there is no proof of delivery submitted before the Court to show that the legal notice has in fact been received by the accused if a presumption is to be drawn and after taking cognizance summons are issued to the accused at the same address, it would either not be received back at all or received back with the remarks that the accused is not available at the address. Thereafter no further progress can be made in the criminal complaint. This is an outcome that ought to be avoided. Therefore, the appropriate course to be adopted, which is also the more practical one, is to insist on the same standard of proof of service of the legal notice as that envisaged under Section 144 NI Act in the context of summons."

33. I am now providing reasons for disagreement with the submission of the Ld. Counsel. Reasons are many fold:

a) This is not the appropriate forum to raise a point that the decision of the Hon’ble High Court is per incuriam;

b) The decision in HDFC(supra) has considered the relevant decisions of the Hon’ble Supreme Court relied upon by the Ld. Counsel. (It may be noted that reliance placed upon the decision in V. Rajakumari(supra) can not help the Ld. Counsel as elaborated hereinabove.);

c) Once Hon'ble High Court deals with and distinguishes the ratio of the decisions of the Hon'ble Supreme Court, it will not be open for this court to prove the matter any further;

d) Even otherwise, with great respect, the view taken in HDFC (supra) is in consonance with the legislative mandate under section-138 & 144 NI Act and the authoritative pronouncements of the Hon'ble Supreme Court in CC Alavi HajI, D. Vinod Shivappa and Harman Electronics(supra).

34. **Interpretation prejudicial to the complainant**

Much emphasis has been laid by the counsel for the complainant on the fact that if the complainant is forced to produce a proof of delivery, it will cause great prejudice to him.

The contention is fallacious and can be rejected for more reasons than one.

a) There is no requirement in the statute that the notice can be given only by the post;

b) Complainant can easily procure a receipt from the postal department. There is ample time almost 45 days for the complainant to procure the receipt;

c) Complainant can always use currier service of which a status report can easily be generated from the website;

d) Complainant can also use the mode of speed post which is a registered mode prescribed by the postal department, and a

internet generated delivery report can be filed on affidavit;

e) The complainant is not precluded from using the mode of fax in appropriate cases;

f) The complainant can always use the traditional mode of delivery of notice against a proper direct receipt.

In the above circumstances, I consider that no prejudice will be caused to the complainant if he is asked to give a proof of delivery.

35. I now turn to a decision cited by the Ld. Counsel. He wanted to draw some support from Harcharan Singh vs Shiv Rani & Ors. AIR 1981 SC 1248. However, it would not help.

Hon'ble Supreme Court has posed a question in the first paragraph itself:

> ".....and the only question of substance raised in the appeal is whether when the landlords' notice demanding arrears and seeking eviction is sent by registered post and **is refused** by the tenant the latter **could be imputed the knowledge of the contents thereof that** upon his failure to comply with the notice the tenant could be said to have committed willful default in payment of rent ?"

The answer given was in affirmative.

In Bharat Petroleum Corporation Ltd. And another v. N.R.Vairamani and Another, AIR 2004 SC 4778, it was held that:

> "Judgments, even of summit court, are not scriptural absolutes but relative reasoning. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and, that too, torn out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

The frequently quoted opinion of the House of Lords in Quinn v. Leathem 1901 AC 495 : (1900-3) All ER Rep 1 is that of Lord Halsbury, namely, that "every judgment must be read as applicable to the particular facts proved or assumed to be proved.... The other is that a case is only an authority for what is actually decides". These quotations have been reiterated in Goodyear India Ltd. v. State of Haryana and State of Orissa v. Sudhansu Sekhar Misra . In the latter case, the Court explicitly opined that "a decision on a question which has not been argued cannot be treated as a precedent".

Impact of the authority Harcharan Singh vs Shiv Rani & Ors. AIR 1981 SC 1248 rests with the portions highlighted above that if there is an endorsement of refusal on the envelop, deemed service of notice can be declared and the noticee can also be imputed

with the knowledge of the contents. Nothing more nothing less.

36. **Other cases cited by the complainant**

These cases nowhere say that even if there is nothing to establish a fixed date as required by the statutory provisions, the court can presume on its own a date at its discretion. These cases even can not be treated as an authority on the point of presumption of service. It is well settled that a decision is an authority for what it decides.

Presumption has to be raised not on the hypothesis or surmises but if the foundational facts are laid down therefor. Only because presumption of service of notice is possible to be raised at the trial, the same by itself may not be a ground to hold that the distinction between giving of notice and service of notice ceases to exist.

37. I have already discussed all the judgments referred and not so referred by the Ld. Counsel. However, my zeal to consider the issue in detail led me to a decision of the Division Bench of Hon'ble High Court of Delhi.

In Prakash Jewellers vs A.K. Jewellers 99 (2002) DLT 244, it was held that:

> "10. As it is, Section 138 does not prescribe any mode for giving of demand notice by the payee or holder of the cheque. But where such notice is served by post through registered post or postal certificate, etc. with the correct address of the drawer written on it, it would raise a presumption of service unless the drawer proves that it was not received by him in fact and that he was not responsible for such non-service. This is in tune with the principle embodied in Section 27 of the General Clauses Act or even Rule 19-A of Order V CPC.

11. Section 27 of General Clauses Act deals with the presumption of service of notice sent by post and provides that service of such notice shall be deemed to have been affected unless the contrary is proved. This principles is equally applicable to the service of notice for purpose of Section 138 of Negotiable Instrument Act also. The same could be said about the provision of Rule 19-A or Order V CPC which requires a court to make a declaration of summons having been duly served and dispatched through registered post notwithstanding that AD Card had been lost or misplaced or not received back within 30 days for some other reason. The relevant proviso provides:-

> "Provided that where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgement due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgement having been lost or mislaid, or for other reason, has not been received by the Court within thirty days from the date of the issue of the summons."

12. **Proceeding on this premise and going by this logic**, we find no hitch in taking the view that payee or the holder of a cheque was as much entitled to claim the benefit of presumption of service once he had dispatched the demand notice through registered post or postal certificate on the correct address of the sendee written on it and where he had proved such dispatch through original receipts. It becomes inconsequential whether

> sender had not received back the AD card or that he could not produce or prove it for having misplaced it or for some other reason.
>
> 13. We are conscious that presumption of service by post under Section 27 of General Clauses Act is rebuttable. But such rebuttal does not assume finality merely because of the sendee's denial to receive the notice. It would be so only where the sendee proves that he had not in fact received the notice and that he was not responsible for such non-service. His resort to tactics and strategy to avoid service of notice and consequential liability would not do....."

38. From the above it is clear that the basic premise of the result was the analogy of declaratory summoning procedure provided in Rule-19A, Order-V, CPC. However, I have already shown that after the insertion of Section-144(2) in the NI Act, if any analogy is to be drawn, it has to relate to the summoning procedure provided in Section-144(2) and not as provided in CPC. And as already discussed, Section-144(2) in the NI Act does restrict the declaration of service of summons to the situation where some receipt/endorsement exists and does not extend to a situation covered by proviso to Rule-9(5), Order-V, CPC (analogous to Rule-19A). If at that time principle enshrined in Rule-19A related to a summons in a civil case was to be proviso-(c) to Section-138 NI Act, a fortiori, restriction enshrined in Section-144(2) NI Act related to a criminal case that too for the offence under the statute itself has to be applied with much force.

39. Am I going against the judicial discipline? I think I am not. Should I go by the ratio of HDFC(supra) which seems to be in consonance with the legislative mandate under section-138 & 144 NI Act and the authoritative pronouncements of the Hon’ble Supreme Court in CC Alavi HajI, D. Vinod Shivappa and Harman Electronics(supra)?

I think I should.

It is well settled law that statutory provisions shall have precedents over the judicial pronouncements and a judgment cannot be read as a statute. If Statue requires that an exact concrete date must be shown, the provision of Ss-138 & 142 cannot be put to nullity and the onus cannot be shifted to the accused to rebut the presumption even where the complainant is unable to establish the date. What is not in existence can not be destroyed.

Further, in 2002 when this decision was rendered by the Hon'ble Division Bench, Section-144(2) was not there in the Negotiable Instruments Act nor the Adalat Prasad, CC Alavi Haji, D. Vinod Shivappa, Harman Electronics(supra) had seen the light of the day. Effect of these three things does not leave any scope for this court to go by the result arrived at in the above referred decision.

40. To conclude the issue, it would be appropriate to quote HDFC(supra):

> "29. This Court is unable to accept the proposition that by merely filing an affidavit stating that the drawer resides at the address given in the legal notice, the complainant can satisfy the requirement of having to satisfy the Court that notice was in fact was delivered to the drawer. In the considered view of this Court, such an affidavit can be accepted only if the deponent states that he either went personally and found that the accused was residing at the address or is able to produce some postal certificate or an endorsement by a courier service agency that the accused is in fact residing at the address and yet refusing to accept the notice. If the affidavit merely states that the accused is residing at the address without giving any further documentary proof in support thereof such an affidavit cannot be

accepted as satisfying the requirement of Section 138 (b) read with Section 138 (c) of the NI Act.

30. To recapitulate, a complainant in a case under Section 138 NI Act has Crl.Rev.P. No. 296/2009 Page 19 of 21 at the pre-summoning stage to satisfy the learned MM that the legal notice in terms of the Section 138 (b) NI Act was in fact "served" on the drawer of the dishonored cheque. If some proof of delivery, or an internet generated or postal delivery report or a signed acknowledgement due card of the drawer, or the unserved cover with the postal endorsement is produced before the learned MM, it will be in the discretion of the learned MM to form an opinion if a presumption of service should be drawn. If the complainant chooses to file an affidavit, the deponent should state that he either went personally and found that the accused was residing at the address or is able to produce some postal certificate or an endorsement by a courier service agency that the accused is in fact residing at the address and yet refusing to accept the notice. If the affidavit merely states that the accused is residing at the address without giving any further documentary proof in support thereof such an affidavit cannot be accepted as satisfying the requirement of Section 138 (b) read with Section 138 (c) of the NI Act."

41. The next issue pertains to territorial jurisdiction in the offences U/s 138 NI Act, the NI Act. In all the complaints, the cheque were drawn at the bank situated outside Delhi and the accused persons were residing at the places situated outside Delhi. However, complainants are claiming jurisdiction of Delhi Court mainly on the following grounds:

A. That the business dealings and business transactions had taken place in Delhi,

B. That the complainant presented the cheque to his bank situated in Delhi,

C. That ratio of Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd. does not apply to the jurisdictional aspect;

D. That the complainant received intimation about dishonour of the cheque in Delhi;

E. That the complainant issued the Demand Notice from Delhi;

F. That the pronouncement of Hon'ble Supreme Court in Harman Electronics Private Limited is per incuriam; and

G. That the registered office of complainant is situated in Delhi and/or complainants reside in Delhi.

42. On the basis of the above submissions and contentions, counsels for the complainant claims jurisdiction and relied upon judgments of the Hon ’ble High Court of Delhi and the Hon’ble Supreme Court of India. Heavy reliance is placed upon the following decisions rendered by the Hon’ble High Court of Delhi:

A. Harjat Singh Vs. Godrej Agrovet Ltd. dated 31.05.2010;

B. M/s Religare Finvest Ltd. Vs. Sambath Kumar A dated 02.07.2010;

C. M/s Patiala Casting P. Ltd. & Ors. Vs. Bhushan Steel Ltd. dated 11.08.2010;

D. M/s Religare Finvest Ltd. Vs. State, dated 23.09.2010.

43. I have given my considerable thoughts to the contentions raised by ld. Counsel for the complainants and gone through all the authorities placed and referred to by the counsel.

44. **Ingredients constituting the offence**

There is no necessity to look any further to consider the scope of territorial jurisdiction in respect of cheque dishonour cases U/s 138 NIs Act. The Hon ’ble Supreme Court of India in K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another AIR 1999 SC 3762 (Supra) has considered the scope of Section 177 Cr.P.C. With respect to 138 NI Act and held that:

From **K. Bhaskaran vs Sankaran Vaidhyan Balan And Another AIR 1999 SC 3762:**

"The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. Following are the acts which are components of the said offence :

(1) Drawing of the cheque,

(2) Presentation of the cheque to the bank,

(3) Returning the cheque unpaid by the drawee bank,

(4) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount,

(5) Failure of the drawer to make payment within 15 days of the receipt of the notice."

I consider that all the above ingredients described in K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another AIR 1999 SC 3762 (Supra) should be dealt with one by one.

45. **Drawing of cheque**

Dictum in Bhaskaran(supra) is only that an essential ingredient of the offence is "drawing of cheque". It does no where elaborate the concept of drawing of the cheque.

Section-6 provides:

"A cheque is a bill of exchange drwan on a specified banker....."

Clearly, drawing of cheque is an effect and not a process.

This may be seen from another angle. When a post-dated cheque is written or drawn, it is only a bill of exchange. The post dated cheque become a cheque under the Act on the date which is written on the said cheque.

Section-138 uses the expression "cheque drawn". This is the third form of the verb.

Section-6 and section-138 go to show that section-138 will come into picture only

when the cheque does have an existence.

Clearly, nothing which is anterior to the existence of the cheque can be considered for the commission of the offence.

Place of delivery of the cheque is immaterial for the purpose of Section-177 of Cr.PC. For example, if a leaf duly filled in but post dated is delivered at any place to any one from the cheque book, the place would be immaterial since at that point of time the cheque would have no existence.

Place of business dealings or business negotiations is also immaterial for the purpose of Section-177 of Cr.PC. for the same reason, i.e. this activity is anterior to the existence of the cheque. Business dealings may attract civil liability and may create jurisdiction for the purposes of Contract Act, Specific Relief Act, Recovery Suits etc. **Even in K. Bhaskaran (supra), place of business of complainant has not been identified as the place vesting the court with necessary jurisdiction.**

At this juncture, a recent decision of a 3 judges bench of the Hon'ble Supreme Court in CRIMINAL APPEAL NO. 1020 OF 2010 (07.05.2010) is worth mentioning. The Hon'ble Supreme Court has held that:

> “In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability....."

Means the complainant is not required to show the existence of a legally enforceable debt or liability. It is for the accused to rebut the same. The whole concept of business dealings is related with the existence of a legally enforceable debt or liability.

46. **Presentation of the cheque to the bank**

Section-72: Presentment of cheque to charge drawer.-

> " Subject to the provisions of section-84, a cheque must, in order to charge the drawer, be presented at the bank upon which it is drawn before the relation between the drawer and his banker has been altered to the prejudice of the drawer. "

The second place enumerated in the Bhaskaran refers to "the bank". Meaning of "the bank" has been explained by a larger bench of the Hon'ble Supreme Court in the following terms:

** From **Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd, (2001) 3 SCC 609:**

> "The use of the words "a bank" and "the bank" in the Section is indicator of the intention of the Legislature. The former is indirect article and the latter is pre-fixed by direct article. If the Legislature intended to have the same meanings for "a bank" and "the bank", there was no cause or occasion for mentioning it distinctly and differently by using two different articles. It is worth noticing that the word "banker" in Section 3 of the Act is pre-fixed by the indefinite article "a" and the word "bank" where the cheque is intended to be presented under Section 138 is pre-fixed by the definite article "the". The same Section permits a person to issue a cheuqe on an account maintained by him with "a bank" and makes him liable for criminal prosecution if it is returned by "the bank" unpaid. The payment of the cheque is contemplated by "the bank" meaning thereby where the person issuing the cheque has an account. "The" is the word used before

nouns, with a specifying of particularizing effect opposed to the indefinite or generalizing force of "a" or "an". It determines what particular thing is meant; that is, what particular thing we are to assume to be meant. "The" is always mentioned to denote particular thing or a person. "The" would, therefore, refer implicitly to a specified bank and not any bank.

"The payee of the cheque has the option to present the cheque in any bank including the collecting bank where he has his account but **to attract the criminal liability of the drawer of the cheque such collecting bank is obliged to present the cheque in the drawee or payee bank on which the cheque is drawn** within the period of six months from the date on which it is shown to have been issued."

"The expression `bank' used in Section 138 of the Negotiable Instruments Act would always mean the bank of the drawer and not the bank of the payee. **The payee may have multiple accounts and may deposit the cheque in any of the accounts maintained by it.** In fact, if the payee is a large company or organization, it is likely to have multiple accounts in different places."

"A combined reading of Sections 3, 72 and 138 of the Act would leave no doubt in our mind that the law mandates the cheque to be presented at the bank on which it is drawn if the drawer is to be held criminally liable....."

** From Hon ’ble Delhi High Court’s Division Bench judgment in **Arinits Sales Pvt. Ltd. vs Rockwell Plastic Pvt. Ltd. And Ors.149 (2008) DLT 123:**

"Specific reference was made to Clause 2 of the terms and conditions of sale which states that all disputes are subject to Delhi Jurisdiction only. Our attention was also drawn to Clause 4 thereof, which provides as follows:

> " All cheque/drafts are to be drawn in the name of the Company Arinits Sales Corporation marked "A/C PAYEE" payable at Delhi only unless otherwise specified to be made through our Branch Office. "

It was also submitted by the counsel appearing for the appellant that since the cheque was presented in the bank account of the appellant in Delhi, therefore, Delhi Court will have jurisdiction.

The plea of the counsel appearing for the appellant that the cheques were presented for encashment at Delhi and, therefore, in view of the said position and the clauses in the invoices, i.e., Clause 4 and Clause 2, the appellant would be entitled to file,

institute and continue the suit at Delhi is also considered by us. In this connection, we may refer to a similar contention which was urged before us in the case of Mountain Mist Agro India (Pvt.) Ltd. and Anr. v. S. Subramaniyam disposed of on 14.01.2008. In the said case also, **the territorial jurisdiction of Delhi Court was sought to be invoked on the ground that the cheque was deposited in a bank at Delhi, where the branch office of the company was located** and, therefore, it was urged

> that cause of action arose partly in Delhi. **The said contention was negated both by the Single Bench and also by the Division Bench.** In the aforesaid decision, the Division Bench of this Court referred to the decision delivered by the Hon'ble Supreme Court in Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd."

The ratio of the above referred judgment of the Hon'ble Supreme Court and the Division Bench of Hon'ble High Court of Delhi is that a cheque is deemed to have been presented to the banker of the drawer irrespective of the fact whether it is deposited by the payee in his own bank.

I consider that if it is held that the expression `bank' in Section 138 of the Negotiable Instruments Act mean the bank of the payee, it will be possible for the complainant to institute the complaint in any city where he may be having a bank account and, thereby harass the drawer of the cheque by filing complaints at the place where the cheque is deposited by him. 30. On the other hand, if the expression `bank' is taken to mean the bank on which the cheque is drawn, the place of presentation of the cheque would always be a fixed place and will not change depending upon the place at which the cheque is presented by the payee to its bank.

I also consider that even if two interpretations of the expression `bank' are possible, the Court would take the interpretation which is favourable to the accused, the provisions of the Negotiable Instruments Act being penal provisions requiring strict interpretation of law.

Therefore, it cannot be said that the cheque issued by the petitioner was presented in Delhi. Despite the fact that the bank in which the complainant have an account was in Delhi, the cheque shall be deemed to have been presented only to the bank where it was drawn.

In view of the authoritative pronouncement of the Hon'ble Supreme Court in the case of Shri Ishar Alloy Steels Ltd. (supra), it is not possible for this Court to say that the cheque even if deposited with the bank of the complainant situated in Delhi was presented to the bank in Delhi.

` Therefore, deposit of cheque in Delhi would not confer jurisdiction on this court to try this complaint.

47. **Returning the cheque unpaid by the drawee bank**

The third place enumerated in the Bhaskaran directly refers to "the drawee bank". It needs no further explanations.

Section-7 defines drawee as ".....the person thereby directed to pay....".

Clearly it will include the bank on which the cheque is drawn and other banks which are specifically directed to pay the amount like the cheques payable at par in all the branches, but will not include the bank of the complainant informing him about the dishonour. The dishonour will occur only at "the drawee bank".

The question which will arise in accepting this interpretation is this:

> " If presentation of cheque to the drawee bank alone is reckoned as presentation, return of the cheque by the drawee bank and presentation will invariably always be at the same venue. There will hence be only 4 possible venues and not 5 as contemplated in Bhaskaran v. Balan . I note the said point. No possible instance of the two events - presentation as held in Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd. and dishonour, being at

> different venues occurs to my mind now. But in the light of the decision of the larger Bench in Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd. no other explanation or interpretation appears to be possible. Even if the number of possible venues may get reduced to 4 in effect, the conclusion cannot be different. ”

Courts are bound by the dictum in Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd. under Article 141 of the Constitution of India and it cannot therefore be held that the bank referred to as venue 2 in Bhaskaran v. Balan refers to the collecting bank and not the drawee bank. That subsequent pronouncement of the larger Bench must influence and bind the Courts while subsequently understanding and interpreting the law whether statutory or precedential. In principle also, no other stand appears to be possible as the collecting bank under law can be reckoned only as the agent of the complainant to present the cheque before the drawee bank. Handing over of the cheque by the complainant to the agent of the complainant, the "collecting bank" cannot in law be reckoned as presentation of the cheque for encashment as to confer jurisdiction on the court at that venue to try the drawer of the cheque. It can in law be reckoned as only the conduct of the principal entrusting the cheque to his agent to present the same before the drawee bank. By such handing over of the cheque to his agent at whatever place it pleases the complainant, law cannot oblige the drawer of the cheque to go to distant places to defend the indictment against him. If venue No.2 mentioned in Bhaskaran v. Balan were given such a wide and expansive meaning, it will certainly amount to denial of the inalienable right of an indictee guaranteed under Article 21 of the Constitution to reasonable opportunity to defend himself.

At this juncture, it is necessary to deal with one of the contentions raised by the Ld. Counsel. He argued that since the complainant received the intimation about the dishonour of the cheque in Delhi, this Court therefore has jurisdiction.

The argument though attractive is clearly fallacious. It is clear that the complainant will receive the intimation where he deposited the cheque with his banker. It has already been held by the Hon ’ble Division Bench of High Court of Delhi applying the ratio of Shri Ishar Alloy(supra) that the place where the complainant deposited the cheque with his banker can not give jurisdiction.

It may well be argued that in some exceptional cases the complainant residence may be at some different place than the place where his bank is situated. And in such cases, complainant will receive the intimation at his residence giving rise to jurisdiction since the receipt of intimation is a necessary ingredient under proviso-(b) to Section-138. I consider that this argument proceeds on a misconception that every act or omission should be considered for jurisdiction. If mere sending is not sufficient to create jurisdiction, a fortiori mere receipt of intimation of dishonour can not create jurisdiction. This may be seen from another angle. If this argument is accepted, it would virtually mean that the place where the complainant resides will create jurisdiction. But it is not so. Hon ’ble Supreme Court in Mosaraf Hossain Khan vs. Bhagheeratha Engineering Ltd and Hon’ble Division Bench of High Court of Delhi in Arinit Sales(supra) have held that the place where the complainant resides does not create jurisdiction. If the argument of the Ld. Counsel is accepted, it would amount to a direct violation of Article-141 of the Constitution of India.

48. **Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount**

The fourth place enumerated in the Bhaskaran has been dealt with by the Hon'ble Supreme Court in **M/s Harman Electronics Private Limited vs M/s National Panasonic India Ltd as:**

> ".....If the ingredients for constitution of the offence laid down in the provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would."
>
> ".....While issuance of a notice by the holder of a negotiable instrument is necessary, service thereof is also imperative. Only on a service of such notice and failure on the part
> of the accused to pay the demanded amount within a period of 15 days thereafter, commission of an completes. Giving of notice, therefore, cannot have any precedent over the service."

The place of communication is material and not the place of dispatch of notice. And according to decision in M/s Harman Electronics (supra), notice will be deemed to be communicated at the place where it is received.

Here it is important to note and decide one of the contentions of the Ld. Counsel in respect of Harman Electronics(supra). He has argued that Harman(supra) is per incuriam and this Court has to held that the place from where notice is issued does create jurisdiction. The point that decision of Hon'ble Supreme Court in Harman Electronics Private Limited is contrary to the statutory provisions of NI Act is noted merely to be summarily rejected. This court is not the appropriate forum for such contentions to be raised. Issuance of legal notice from Delhi can not confer jurisdiction on this court.

49. **Failure of the drawer to make payment within 15 days of the receipt of the notice**

The fifth place enumerated in the Bhaskaran relates to the place of failure.

The contention that since the accused was required to pay the amount in Delhi and thereafter his failure has to be treated as occurred in Delhi can not be sustained for the similar reasons. Complainant can not create jurisdiction by choosing a place where he wanted the money to be repaid.

It is well settled law that a Court derives a jurisdiction only when the cause of action arose within his jurisdiction. The same cannot be conferred by any act or omission or commission on the part of the any party.

From **Mosaraf Hossain Khan vs. Bhagheeratha Engineering Ltd., and others (2006 (3) SCC 658):**

> "Sending of cheques from Ernakulam or **the respondents having an office at that place did not form an integral part of 'cause of action'** for which the complaint petition was filed by the appellant..."

Clearly, the fact that complainant has an office in Delhi or he resides in Delhi will have no bearing on the question of jurisdiction so far as the commission of offence under section-138 of Negotiable Instruments Act is concerned.

Even further, in **M/s Harman Electronics Private Limited vs. M/s National Panasonic India Ltd:**

> "26. Learned counsel for the respondent contends that the

principle that the debtor must seek the creditor should be applied in a case of this nature.

27. We regret that such a principle cannot be applied in a criminal case. Jurisdiction of the Court to try a criminal case is governed by the provisions of the Criminal Procedure Code and not on common law principle."

It is clear that the failure as required in the proviso-(c) to section-138 can not be held to be occurred at the place from where the payment was demanded.

50. **Concept of Core Banking System**

Much emphasis has be laid on the point that since in a core banking system branch of a bank in Delhi can also clear the outside cheques and further that cheque need not be sent to the drawee bank, it must be held that the presentation and dishonour have occurred in Delhi.

I am unable to accept this submission.

The core banking system is not a very new concept. It was definitely in existence in 2008 when the Hon'ble Division Bench of Delhi High Court was applying the ratio of the Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd.

Even otherwise the submission can not be accepted.

Purpose of the introduction of truncated cheque is provided in Explanation-I(b) to Section-6:

".....substituting the further physical movement of the cheque in writing."

There is nothing to suggest that there will be no movement at all.

Further, to a specific quarry of the court as to whether the branch at Delhi can alter the nomenclature, information etc. of the account at the request of the person having an account in the Mumbai branch, the answer given was in negative. It was replied that the account may be debited or credited by the branch at Delhi but the administrative and procedural work has to be done by the branch where the account exists.

One more thing may be added here. When the branch at Delhi by using CBS decides about insufficiency of funds, a deduction of some processing fee has to be made in the account of the accused.

To attract the applicability of section- 138, some activity should be shown to have been occurred in the drawee bank.

Even the branch at Delhi has to access certain data to decide about the sufficiency of amount in the bank account. The data will be available at the branch where the account of the accused exists or in the main server located at a place somewhere else in the world.

It is clear that the core banking system has not diluted the essence of the drawee bank. The distinction between "a bank" and "the bank" is steel in existence. Statute has not been amended to provide something different. The decision of the Hon'ble Supreme Court in Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd. has not been overruled by any subsequent judgment.

51. **Contentions in respect of combined effect**

Counsels for the complainant vehemently argued that if all the activities are considered cumulatively, the same will give jurisdiction to Delhi courts. However, I am unable to accept such submissions. Negative things if separately cannot result in a

positive thing, they cannot produce a positive result cumulatively. The question of territorial jurisdiction is not a mathematical equation wherein negatives can produce a positive result. The question has to be considered in the light of personal liberty of persons. The Hon ’ble Supreme Court of India has already decided in Adalat Prasad Vs. Roopal Jindal (2004) that once a person is summoned he has to face the trial.

It is clear that issuance of summons will definitely curtail or restrict liberty of a person, since the proceeding once initiated cannot be dropped in view of the judgment in Adalat Prasad Vs. Roopal Jindal (2004).

I consider that strict interpretation to Section 138 NI Act is necessary. The contention of the ld. Counsels for the complainant in respect of combined effect cannot be sustained.

52. **Conclusion:**

Sending of notice from Delhi and receipt of intimation of dishonour at complainant residence do not confer jurisdiction on Delhi Court in view of the decision of the Hon'ble Supreme Court in the case of Harman Electronics Private Limited (supra) and Mosaraf Hossain Khan(supra) and;

The deposit of cheque with the banker of complainant does not confer jurisdiction of Delhi court when the cheque has to be presented to a bank outside Delhi in view of the decision of the Hon'ble Supreme Court in Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd. and further that;

Principal of common law "the debtor must seek the creditor" can not be made applicable to the criminal case in view of Mosaraf Hossain Khan and Harman Electronics Private Limited. Demand shall be deemed to have been made at the place where the notice is served upon the drawer and not at the place from where it is dispatched to him,

as per Harman Electronics Private Limited, meaning thereby that the failure in making the payment shall be deemed to have occurred at the place where the accused had received the demand; and further that;

The places of business dealings or business negotiations are not material being an event anterior to the existence of the cheque which is not covered by the section-138 of the NI Act, and the places of registered office of the complainant or the residence of the complainant are not material in view of Mosaraf Hossain Khan and Harman Electronics Private Limited. Even K. Bhasakran(supra) does not identify the place of business dealings.

Though the Division Bench of Hon'ble Delhi High Court was considering a civil suit, it applied the ratio of Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd. for jurisdictional purposes. It can be fairly said that jurisdiction in civil suit in respect of cheque dishonour is much wider than jurisdiction in criminal cases in respect of the same dishonour. Ratio of the division bench has to be given full effect.

Concept of core banking system does not help the complainant;

Case laws heavily relied upon by the complainant would not help in view of the authoritative pronouncements of the Hon ’ble Supreme Court of India and Hon'ble Division Bench of Delhi High Court more so when several decisions rendered by Hon'ble Single Bench of the High Court of Delhi are available on both sides, the latest being M/s Mehika Enterprises vs State decided on 01.10.2010 which goes against the contentions of the complainant;

Article-141 of the Constitution of India in the circumstances discussed above does not leave any further scope for this court to consider the pleas raised by the complainant;

From the above discussion, this court is of the considered view that the

complainant can not claim jurisdiction. However, the cases in which the cheques are payable at par will be on different footing in view of the definition of drawee as provided in section-7. Those complaints can be entertained.

53. **Result:**

In the ultimate result, all the contentions of the Ld. Counsel for the complainant in respect of territorial jurisdiction and no necessity of proof of delivery are rejected.

Separate orders to be passed in each case.

Announced in the open court today on 12.10.2010

(RAKESH KUMAR SINGH)
MM(NI Act)-01/Central/Delhi/01.10.2010