

SUMMARY PAPER FOR FIRST WORKSHOP ON CIVIL SIDE

SECTION 8,9,16 AND 34 OF ARBITRATION ACT.

WHAT IS ARBITRATION?

Arbitration, in simple terms, can be understood as the submission of a dispute to an unbiased third person designated by the parties to the controversy, who agree in advance to comply with the award—a decision to be issued after a hearing at which both parties have an opportunity to be heard. It is a well-established and widely used means to end disputes. It provides parties to a controversy with a choice other than litigation. Unlike litigation, arbitration takes place out of court: the two sides select an impartial third party, known as an arbitrator; agree in advance to comply with the arbitrator's award; and then participate in a hearing at which both sides can present evidence and testimony. The arbitrator's decision is usually final, and courts rarely re-examine it. Arbitration is often used for the resolution of commercial disputes, particularly in the context of international commercial transactions. The use of arbitration is also frequently employed in consumer and employment matters, where arbitration may be mandated by the terms of employment or commercial contracts.

Arbitration as a means of solving disputes has a number of potential advantages over the stringent judicial proceedings. Arbitration aims at amicable means of sorting out disputes which are cost effective as well as time efficient.

HISTORY OF ARBITRATION

As a method of dispensing justice, arbitration is not a modern phenomenon. The Western idea of private arbitration can be traced back to the Roman and Canon law. Arbitration as a dispute resolution mechanism was used in Common Law since the 14th Century. However arbitration and other methods of dispute resolution have become of considerable significance after the 19th Century, with the advent of trans-

national trade and commerce and with a view to have speedy and inexpensive means of resolving grievances. Thus there is a clause for arbitration in most modern day trading contracts.

In India, arbitration was practiced by the Panchayat System. They have been arbitrating on property disputes, torts and even criminal offences like murder and rape since time immemorial. Undoubtedly, one of their most important functions was to dispense justice and ensure that rule of law prevailed. However, after the Constitution of India was enacted, The Panchayats received constitutional recognition under the Constitution (Seventy Third Amendment Act 1992) which was inserted as Part IX of the Constitution of India. It consists of Articles 243 to 243-O. The British during their regime had introduced various laws relating to arbitration which were applicable either to a part of the country or subsequently to the whole nation.

Until 1996, the law governing arbitration in India consisted mainly of three statutes: (i) the 1937 Arbitration (Protocol and Convention) Act, (ii) the 1940 Indian Arbitration Act, and (iii) the 1961 Foreign Awards (Recognition and Enforcement) Act.

The 1940 Act was the general law governing arbitration in India alongwith the lines of the English Arbitration Act of 1934, and both the 1937 and the 1961 Acts were designed to enforce foreign arbitral awards. The government enacted Arbitration and Conciliation Act, 1996 in an effort to modernize the outdated 1940 Act. The 1996 Act is a comprehensive piece of legislation modeled on the lines of the UNCITRAL Model Law. This Act repealed all the three previous statutes. It's primary purpose was to encourage arbitration as a cost-effective and quick mechanism for the settlement of commercial disputes. The 1996 Act covers both domestic arbitration and international commercial arbitration.

DEVELOPMENT OF THE PRESENT ARBITRATION LAWS

Under the 1940 Act, intervention of the court was required in all the three stages of arbitration, i.e. prior to the reference of the dispute to

the arbitral tribunal, in the duration of the proceedings before the arbitral tribunal, and after the award was passed by the arbitral tribunal. Before an arbitral tribunal took cognizance of a dispute, court intervention was required to set the arbitration proceedings in motion. The existence of an agreement and of a dispute was required to be proved. During the course of the proceedings, the intervention of the court was necessary for the extension of time for making an award. Finally, before the award could be enforced, it was required to be made the rule of the court. The Arbitration Act, 1940 dealt with only domestic arbitration. It was considered as a good piece of legislation in writing but with regard to its implementation and enforcement it was proved ineffective.

India opened a fresh chapter in its arbitration laws in 1996 when it enacted the Arbitration and Conciliation Act, 1996. The Arbitration and Conciliation Act was enacted in 1996 repealing the existing Arbitration Act, 1940. The present enactment aims at rectifying all the inadequacies in the previous legislation. It aims at achieving expeditious and effective dispute resolution, attract foreign investments and reassure international investors in the reliability of the Indian legal system to provide an expeditious dispute resolution mechanism.

SECTION 89 OF THE CODE OF CIVIL PROCEDURE VIS-A-VIS

ARBITRATION AND CONCILIATION ACT, 1996:-

As per Section 89 of Code of Civil Procedure, where it appears to the court that, there exist an element of settlement between the parties court may formulate the terms of possible settlement and refer the matter to a) arbitration; b) conciliation; c) judicial settlement including settlement through Lok adalat; and d) mediation.

It further provides that, where the dispute is referred for arbitration or conciliation, the provisions of Arbitration and Conciliation Act, 1996 shall apply. However, the 1996 Act does not contemplate the situation as in Section 89 of the Code. If reference is made to arbitration under Section 89 of the Code, the 1996 Act would apply only from the

stage after reference and not before the stage of reference when options under Section 89 are given by the court and chosen by the parties. Under Section 89 of the Code the matter in which there is no arbitration agreement can also be referred for arbitration. In relation to alternate dispute resolution method, arbitration contemplated under Section 89(1) and 89(2) is not a reference under Section 8 of the Arbitration and conciliation Act, 1996 and that is why the words 'as if' has been used in section 89(2)(a) of the Code. Section 89(1)(a) and 89(2)(a) refer to reference of a dispute for arbitration and does not specifically refer to any reference to arbitrator.

It is well settled that, in absence of a specific clause with regard to appointment of arbitrator in the agreement between parties to a dispute, resort can be taken to alternative dispute mechanism as contemplated under Section 89 of the Code of Civil Procedure, Obviously, if both the parties agree/give their consent for invoking the mode of arbitration. Vide [**Afcons Infrastructure Ltd; .Vs. Cherian Varkey construction Co. (P) Ltd. 2010 AIR SC weekly P. 4983**]

MAIN OBJECTIVES OF THE ACT

- 1) to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;
- 2) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;
- 3) to provide that the arbitral tribunal gives reasons for it's arbitral award;
- 4) to ensure that the arbitral tribunal remains within the limits of it's jurisdiction;
- 5) to minimize the supervisory role of courts in the arbitral process;
- 6) to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to

encourage settlement of disputes;

7) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;

8) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and

9) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two International Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award.

Amongst the main objectives of the Act are 'to minimize the supervisory role of courts in the arbitral process' and 'to provide that every final arbitral award is enforced in the same manner as if it were a decree of the Court'. The 1996 Act has two significant parts - Part I provides for any arbitration conducted in India and enforcement of awards thereunder. Part II provides for enforcement of foreign awards. Any arbitration conducted in India or enforcement of award thereunder (whether domestic or international) is governed by Part I, while enforcement of any foreign award to which the New York Convention or the Geneva Convention applies, is governed by Part II of the 1996 Act.

The dictionary meaning of 'arbitration' is the use of an arbitrator to settle a dispute and arbitrator is an independent person or body officially appointed to settle a dispute and conciliation is the action of pacification, or mediation. So, this Act aims at settlement of disputes without the intervention of Courts. And, it is only in some sections where the intervention of Courts is allowed with restricted scope.

The definition of 'Court' in this Act says that, the Court means, Principal Civil Court of original jurisdiction in a district, including High Court, in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit. The other Courts of inferior grade to such Principal Civil Court or the Small Causes Court are ousted, from this definition of 'Court'.

SECTION 8:

POWER TO REFER PARTIES TO ARBITRATION WHERE THERE IS AN ARBITRATION AGREEMENT

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

Section 8 of the Act empowers the court to refer a matter before it to arbitration, if

(a) there is an arbitration agreement;

(b) a party to the agreement brings an action against the other party to the agreement;

(c) the subject-matter of the action is the same as the subject-matter of the arbitration agreement;

(d) the other party moves the court for referring the parties to arbitration

before it submits its first statement on the substance of the dispute.

The principle that the courts shall not interfere in arbitral proceedings is a fundamental theme underlying the Act. Section 8 states that, a judicial authority before which an action is brought in a matter which is the subject matter of an arbitration agreement shall refer the parties to arbitration. The only condition being that, the party objecting to the court proceedings must do so no later than his first statement on the substance of the dispute. In the meanwhile, the arbitration proceedings may be commenced and continued with and an award rendered. Section 8 permits the court to entertain an objection to the effect that, the arbitration agreement is 'null and void, inoperative or incapable of being performed'. The departures made by the Indian law demonstrate the legislative intent to keep the courts out and let the arbitral stream flow unobstructed.

There is no provision in the Arbitration and Conciliation Act, 1996 that, when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators. There is no provision for partly referring the dispute to arbitration. Bifurcation of suit in two parts, one to be decided by the arbitral tribunal and other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums.

Although Section 34 of the erstwhile Arbitration Act, 1940 provided for stay of legal proceedings initiated by a party to an arbitration agreement, the language of Section 34 of the Arbitration Act, 1940 complicated matters. Questions also frequently arose regarding the fate

of the legal proceedings after passing of the award or when the arbitrator held that, the disputes referred to arbitration were beyond the scope of the arbitration agreement between the parties. Section 8 of the Arbitration and Conciliation Act, 1996, inter alia, seeks to remedy the defects noticed in the working of Section 34 of the Arbitration Act, 1940. Section 8 of the Arbitration and Conciliation Act, 1996 mandates that, a judicial authority before whom an action is brought, which is the subject of an arbitration agreement between the parties, *shall* refer the parties to arbitration. The provision under Sec.34 of the Arbitration Act, 1940 and provision under Sec.8 of Arbitration and Conciliation Act, 1996 are distinct and different from each other. As soon as the matter before any judicial authority is referred to arbitration, the suit/legal proceedings pending before it stand disposed of. Under the Arbitration Act, 1940 the judicial authority, before whom such an application was moved, was empowered to stay further proceedings only if the following twin conditions were satisfied:

- (i) that there is sufficient reason for referring the matter to arbitration in accordance with the arbitration agreement; and
- (ii) that the applicant was, at the time when the proceedings were commenced, and still continues to be, ready and willing to do all things necessary for the proper conduct of the arbitration.

SECTION 9:INTERIM MEASURES ETC. BY COURT

A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure or protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the

subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

Section 9 of the Arbitration & Conciliation Act 1996 provides for interim measures that, may be passed by the court relating to the subject-matter of arbitration or arbitration proceedings.

The Court before the grant of interim measures must broadly satisfy itself that-

- a) the person seeking interim measures has made out a prima facie case;
- b) the balance of convenience is in his favour and
- c) the person in absence of interim measures would suffer irreparable loss or injury.

Under Section 9, the existence of the arbitration clause and the necessity of providing interim measures of protection alone have to be considered by the court for issuing necessary directions. The court has no power under the section to decide the merits of the case or rights of the

parties. The powers of the court under this provision are available only when the place of arbitration is in India.

The opening words of the section 'a party may before or during arbitral proceedings or at any time after making of the arbitral award but before it is enforced in accordance with Section 36' indicate that, an interim measure may be granted only from the date of the arbitration agreement upto the date of enforcement of the award under Section 36. No interim relief may be granted de hors these limits. Even during these limits, relief must be related to the arbitral proceedings.

Simply put, no interim relief can be granted by the court which is not related to any arbitration proceedings or which is beyond the time limits. Any dispute which is not a subject matter of the agreement is beyond the purview of arbitration. For exercising the powers under Section 9, the court has been vested with the same power for making orders as it has for the purpose of and in relation to any proceedings before it. Evidently, this provision permits the court to invoke all those procedural provisions as contained in the Code of Civil Procedure for the purpose of passing the orders or granting relief under the provision of the section. The substantive power conferred on the court by this section is therefore, to be effected by the procedural provisions as contained in the Code of Civil Procedure.

The power under Section 9 of the Act is independent of the specific Relief Act, or that the restrictions placed by the Specific Relief Act cannot control the exercise of power under Section 9 of the Act and cannot prima facie to accepted.

To protect the interest urgently, it was necessary to have such a provisions in the interest of justice. But for such a provision no party would have a right to apply for interim measure before the respondent receives notice under Section 21. It is not unknown when it becomes difficult to serve the respondents. It was, therefore, necessary that provision were made in the Act, which could enable a party to get interim

relief urgently in order to protect, its interest. The court has jurisdiction to entertain an application under Section 9 either before arbitral proceedings or during arbitral proceedings or after the making of the arbitral award but before it is enforced in accordance with section 36 of the Act.

Under the Arbitration and Conciliation Act 1996, Section 9 empowers the court to order a party to take interim measure or protection when an application is made. Besides this Section 17 of the Arbitration and Conciliation Act, 1996 gives power to the Arbitral Tribunal to order interim measures unless the agreement prohibits such power. While drafting arbitration clause, one should keep in mind whether the arbitral tribunal should be given the power to grant interim relief or not. If arbitration clause provides for such power to arbitral Tribunal, then one need not approach the court for such relief. But there exists a doubt about its enforceability, if it is not complied with by the party. Courts can be approached only if interim relief as prayed is refused u/s 37 (2) (b) but not for enforcing the interim relief granted by the arbitrator.

Notwithstanding anything contained in Section 17 of the Arbitration and Conciliation Act, 1996, at any time after the filing of the award, whether notice of the filing has been served or not, upon being satisfied by affidavit or otherwise that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award, or that speedy execution of the award is just and necessary, the Court may pass such interim orders as it deems necessary.

SECTION 16: COMPETENCE OF ARBITRAL TRIBUNAL TO RULE ON IT'S JURISDICTION

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,--

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

Section 16 of the Act is a key provision of the Act. The section provides that, the arbitral tribunal may rule on its own jurisdiction, including with respect to the existence or validity of the arbitration agreement. Further, the arbitration clause shall be treated as independent of the underlying contract and a decision that, the contract is

null and void shall not entail ipso jure the invalidity of the arbitration clause. Where the arbitral tribunal rejects an objection to its jurisdiction, it shall continue with the arbitral proceedings and make the award. Any challenge to the award would be available at that stage. If, on the other hand, the arbitral tribunal accepts the plea as to its lack of jurisdiction, an appeal shall lie to a court of law. This again marks a significant departure from the Model Law which contemplates recourse to a court from a decision of the arbitral tribunal rejecting a challenge to its jurisdiction. The Indian legislature's keenness to keep the courts out of the arbitral process thus becomes evident with every step of the legislation.

SECTION 34: APPLICATION FOR SETTING ASIDE ARBITRAL AWARD

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains

decisions on matter beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation:--Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award, or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was

prevented by sufficient cause from making the application within the said period of three months if may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

Salient Features of Section 34

1. It prohibits any recourse against arbitral award other than the one provided for in Sub-section (1) of Section 34.
2. It limits the grounds on which the award can be assailed in Sub-section (2) of Section 34.
3. It promises a fairly short period of time in Sub-section (3) of Section 34 within which the application for setting aside may be made.
4. It provides for remission of award to the arbitral tribunal to cure defects therein.

In terms of Section 11 of the Indian Contract Act, 1872 Agreements entered in by the following persons are void:

- i) A Minor
- ii) A lunatic
- iii) An undischarged insolvent

If the arbitration agreement has not been valid under the law to which the parties subject themselves or under law for the time being in force and the parties did not choose proper law of arbitration, the reference thereunder and consequential award on the basis of such reference would be invalid and may be set aside. If a contract is illegal

and void, an arbitration clause which is one of the terms thereof shall also be not enforceable. The plea about invalidity of the agreement may be raised before the tribunal itself questioning the jurisdiction of the arbitrator on that ground. If the plea is accepted by the tribunal, the other party can move the court under Sec.37(2) of the Act.

A party to the arbitral reference has the right to challenge the appointment of an arbitrator if doubt arises as to the independence or impartiality or qualification/capability of the arbitrator. Section 12 gives a party right to challenge the arbitrator on the ground of existence of justifiable doubts as to his independence or impartiality of the Arbitrator.

Section 34 of the Act relates to filing of objection petition against the order/award. Section 34 shows that only party to arbitration award can file an application to set aside the arbitration award and that too only on the grounds provided Under Section 34 (2) of the Act. Section 34 of the Act r/w the definition of 'party' in section 2 (1) (h) for the Act make it's amply clear that, only a party to the arbitration agreement can invoke the provisions of Section 34 of the Act. A third party has no locus-standi to challenge the award Under Section 34 of the Act. Section 34(2) of the Act sought to restrict the grounds for challenging an award. Setting aside procedures are provided so as to act as a check on the powers of the arbitrators, to prevent them from going beyond their scope of authority.

Section 34 provides for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. This provision, has given a narrow limit for consideration to Court regardless of errors in application of law, or determination of facts only to the extent about correctness of decision from a legitimate process; else as provided under Section 35 of the Act, an arbitral award shall be final and binding on the parties & person claiming under them respectively.

Award under Section 34 can be set aside by the Court only if

the party making the application furnishes proof that

- a) a party was under some incapacity,
- b) the arbitration agreement is not valid under law,
- c) proper notice of appointment of arbitrator or arbitral proceeding was given, or otherwise, the aggrieved party was unable to present his case,
- d) the arbitral award deals with a dispute not submitted to arbitration or the arbitral award travelled beyond the scope of the submission to arbitration,
- e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

The award also can be set aside if the subject matter of the dispute is not capable of settlement by arbitration under law, or the award is in conflict with the public policy of India, if the making of award was induced or affected by fraud or corruption.

So, the award is the decision of a domestic tribunal chosen by the parties and the Civil Courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers, over the decision, wrong or right, the decision is binding, if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided in the arbitration agreement.

Sub-section (3) of Section 34 specifies a three-month time-period within which the application for setting aside an award has to be made, beginning with the day when the applicant receives the award. The proviso to the sub-section provides that, if the applicant can show that, he was prevented by sufficient cause from making the application within three months, a further period of 30 days can be given to him for filing the application but not thereafter.

However, there is another school of thought which advocates that provision for setting aside of an arbitral award should never be envisaged. The parties should stick to their award and any mistake, however inflated it may be and an award however unreasonable it may

be, should be treated the same as a final judgment. Court cannot reassess the evidence even if arbitrator committed error. The Court has no jurisdiction to substitute its own valuation of conclusion on law/fact. It cannot sit in appeal over the conclusions of arbitrator and re-examine or reappraise evidence which had been already considered by the arbitrator. To investigate misconduct, Court may see simply the record before the arbitrator but not examine it. It is further stated by proponents of this school that Arbitrators are judges of fact as well as law and has jurisdiction and authority to decide wrong as well as right, and thus, if they reach a decision fairly after hearing both sides, their award cannot be attacked. However erroneous his decision may be, it cannot be interfered with by any Court. Furthermore, where reasons have been given by the arbitrator, the Court cannot examine the reasonableness of reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. If arbitrator failed to appreciate the oral and documentary evidence brought on record in the arbitral proceedings, it was held in a case that "the arbitral award is not open to challenge on ground that the arbitral tribunal has reached a wrong conclusion or has failed to appreciate facts/evidence. Thus, it had been well settled that the parties constitute the arbitral tribunal as the sole and final judge of the dispute arising between them and they bind themselves as a rule to accept the arbitral award as final and conclusive and thus, the award is not liable to be set aside on the ground that facts/law is erroneous. This is outside scope of Section 34 of the Arbitration and Conciliation Act. It is not for the Court to take upon itself the task of being the judge of evidence by arbitrator since it is possible that the court may come to a totally different conclusion altogether based on same facts which is not a ground to stay arbitral award. Arbitrator has final say on evidence production and the Court cannot enquire about which document is important, which should be accepted and how should the necessary evidence be appreciated. It cannot be challenged on ground of inadequacy or inadmissibility or impropriety of evidence. But it may be noted that the total absence of evidence or the failure to consider

material documents or admission of parties in arriving at a conclusion are good grounds for challenge since these amount to judicial misconduct.

Unless the arbitrator disregards principles of natural justice in the arbitration proceedings such as being radically wrong or vicious in proceedings or disregarding the fundamental rules of evidence, the Court cannot interfere. Therefore, finality should always be the price to be paid by the defeated litigants in adjudication and arbitration alike. After all, as soon as a judgment becomes final and no appeals are provided for, does not the judgment become sacrosanct? It has also been stated that the reason for this unequal treatment and partial subjugation is that arbitration is yet to be recognised as an autonomous institution, separate and independent from the judiciary. "It has been to a varying degree tolerated by the State and tentatively incorporated into a somehow cohesive system of the overall administration of justice."

Setting aside measures have made the judges an important player in determining the validity and enforceability of the arbitration. However, the role of Courts has been drastically reduced in arbitral proceedings. A party cannot approach Courts for setting aside an arbitral award except on very limited grounds. The grounds to set aside an award have been reduced considerably and have been specified minutely without an omnibus ground as "or is otherwise invalid" as in Section 30 of the Arbitration Act, 1940. This has been done so as to lessen the burden on Court and this would lead to settlement of disputes without resorting to cumbersome Court procedures.

Thus the powers of arbitral tribunal are absolute and unshackled. This was aimed to inspire the parties to refer the dispute resolution by arbitration and conciliation as a worldwide economic reforms needs that the contractual disputes in between the parties are to be resolved by certain alternative and quick methods rather than to recourse of lengthy procedure of Court .

The makers of law have carved the fine check on such powers by the Court to avoid the misuse of the powers by the Arbitral tribunal's and thus the Courts are armed with the superintendence and supervision over the acts of the Arbitral tribunal and thus the Court has very limited jurisdiction to interference in the awards and these powers as confined to the statutory provisions under section 34 and powers are not the appellate powers. Thus the Court cannot act as appellate forum of Arbitral Tribunal, but the Court can interfere the awards on very restricted grounds and that too within the specific time time limit as provided in law .

Conclusion:-

The Arbitration and Conciliation Act 1996 is a long leap in the direction of alternate dispute resolution system. The object of the arbitration is to provide fair and impartial resolution of disputes without causing unnecessarily delay or expense and at the same time, it allows freedom to the parties to agree upon the manner in which their dispute should be resolved, subject only to safeguard imposed in public interest.

Arbitration as a means of dispute resolution is becoming extremely popular. Comparing it to the traditional means of dispute resolution, arbitration has grown in terms of providing redressal mechanism faster, more efficiently and even more cost effective. It's a fact that arbitration often end up in courts, especially when government which is the largest litigant is a party to the transactions. The Supreme Court of India explained how "time-consuming and disproportionately expensive" is arbitration is in this country. The solution lies in structuring Arbitration in India by developing a strong institutional arbitration mechanism which is given the mandate to recognize, train and monitor arbitrators and arbitral sittings in India. A system of practice based on timelines and rating mechanism shall go a long way in bringing confidence towards Indian Arbitration.

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Summary of Papers on the Topic
TERRITORIAL JURISDICTION IN CASES UNDER S.138
OF NEGOTIABLE INSTRUMENTS ACT

INTRODUCTION:

1. Advent of cheques in the market have given a new dimension to the commercial and corporate world, its time when people have preferred to carry and execute a small piece of paper called Cheque than carrying the currency worth the value of cheque. Dealings in cheques are vital and important not only for banking purposes but also for the commerce and industry and the economy of the country. But pursuant to the rise in dealings with cheques also rises the practice of giving cheques without any intention of honoring them. Before 1988 there being no effective legal provision to restrain people from issuing cheques without having sufficient funds in their account or any stringent provision to punish them in the vent of such cheque not being honoured by their bankers and returned unpaid. Of course on dishonour of cheques there is a civil liability accrued. However in reality the processes to seek civil justice becomes notoriously dilatory and recover by way of a civil suit takes an inordinately long time. To ensure promptitude and remedy against defaulters and to ensure credibility of the holders of the negotiable instrument a criminal remedy of penalty was inserted in Negotiable Instruments Act, 1881 in form of the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 which were further modified by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002[3].

2. The importance as to the study of S.138 of the Negotiable Instruments Act lies in the very fact that today it is the most litigated piece of legislation in India. By the way of this project researcher have tried to briefly analyze this section by highlighting its ingredients in light of the judgments given by courts. This section has been elaborately dealt in numerous case-laws by the apex court and other courts of our country which makes the material available on this section to be huge. The main object of this piece of legislation is to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments.

LEGISLATIVE HISTORY:

3. Over a period of time negotiable instruments were considered by the business community as a safe and very dependable method of discharging pecuniary liability and as a substitute of cash payment. Dishonour of cheque was however a civil liability. Until 1988, there was no effective legal position to restrain people from issuing cheques without having sufficient funds in their account or any stringent provision to punish them, in the event of such cheques being dishonored by their Banker. To remedy this situation willful dishonor of cheque was made a punishable crime. The Negotiable Instrument Act 1881 was amended by inserting Chapter XVII in the year 1988 containing Sections 138 to 142. The Amending Act is called the Banking Public Financial Institutions and Negotiable Instrument Laws [Amendment] Act 1988. These provisions were incorporated with a view to encouraging the culture of transactions by cheques and insuring the credibility of the instrument. The object was also to enhance the acceptability of cheque in settlement of liabilities. To make those provisions more effective and to club the loopholes Section 143 to 147 were inserted in the chapter by the Negotiable Instruments [Amendment] And Miscellaneous Provisions Act 2002(3).

4. From 1st April, 1989, a person issuing a cheque will be committing an offence if the cheque is dishonoured for insufficiency of funds. The offence will be punishable with imprisonment for a term up to one year or with a fine twice the amount of the cheque or both. The Act also provides that the cheque in question should be issued in discharge of a liability and, therefore, a cheque given as gift will not fall in this framework. The cheque in question should be presented within six months or its specific validity period, whichever is earlier. The payee or holder in due course should give notice demanding payment within 15 days of his receiving information of dishonour, which should be for no reason other than insufficiency of funds. The drawer can make payment within 15 days of the receipt of the notice and only if he fails to do so, prosecution can take place. The complaint can be made only by the payee or holder in due course. The complaint is to be made within one month from expiry of notice period. No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate, First Class, will try the offence.

Object & Purpose of section 138:

5. The Parliament in its wisdom had chosen to bring section 138 on the Statute book in order to introduce financial discipline in business dealings. Prior to insertion of section 138 of the Negotiable Instruments Act, a dishonoured cheque left the person aggrieved with the only remedy of filing a claim. The object and purpose of bringing new provisions in the Act was to make the persons dealing in commercial transactions work with a sense of responsibility and for that reason, under the amended provisions of law, lapse on their part to honour their commitment renders the person liable for criminal prosecution.^[4] In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. The Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment, enacted the aforesaid provisions. The remedy available in Civil Court is a long drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee.^[5]

Scope of section 138:

6. Section 138 of Negotiable Instruments Act, reflects the anxiety of the legislature to usher in a new healthy commercial morality through the instrumentality of the penal law. Here is a classic example where, as part of an attempt to evolve a healthy norm of commercial behaviour, the principal of social engineering through the instrumentality of penal law is put into operation. What was, prior to the amendment of the Negotiable Instruments Act in 1988 only a moral or civil wrong, has been transformed and exalted to the position of a crime by a deft amendment of the Statute.^[6]

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

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

- (b) The said cheque is issued for the discharge, in whole or in part of any debt or other liability.
- (c) The cheque is returned by the bank unpaid on account of insufficient amount to honour the cheque or it exceeds the amount arranged to be paid from that account by an agreement made with the bank.
- (d) The cheque is presented within 6 months from the date on which it is drawn or within the period of its validity.
- (e) within 30 days demand notice is issued by the payee or the holder in due course on receipt of information by him from the bank regarding the dishonour of the cheque.
- (f) The drawer of said cheque fails to make payment of the said amount of the money to the payee or the holder on due course within 15 days of the said notice.
- (g) The debt or liability against which the cheque was issued is legally enforceable.

JURISDICTION:

7. So far as jurisdiction of the Area is concerned, the complainant can choose any one of those courts having jurisdiction over any of the local areas within the territorial limits of which any one of the following acts took place :

- i) Drawing of the cheque.
- ii) Presentation of the cheque
- iii) Returning of the cheque by drawee bank
- iv) Giving of notice in writing to the drawer of the cheque demanding payment of cheque and failure of the drawer to make payments within 15 days of receipt of notice.
- v) Failure of the drawer to make payment within 15 days of the receipt of the notice. 1

A. Jurisdiction u/s 138 of N.I. Act prior to Bhaskaran's case -

8. Where a cheque was issued for business purchased at one place and the recipient of the cheque also deposited the cheque into his account at that very place, but, after dishonour, he issued notice of dishonour from his place of business in some other town, it was held that a complaint filed at that place was competent. The cause of action partly arose there because to discharge his liability the drawer would have to make arrangement for payment at the recipient place. Thus the places where the payment was to be made and where the cheque was delivered are also relevant. Where a cheque was given at Delhi but was deposited by the payee at some other place, there was no jurisdiction at that place. It is the duty of the debtor to seek his creditor and, therefore, the court at the place of the payee had jurisdiction. Cause of action may arise at the place where the cheque was issued or delivered or where the money was expressly or impliedly payable. Where there was averment in the complaint of an agreement to return the money at the residence of the complainant, it was held that the cause of action arose there.

B. Where Refusal Takes Place –

9. Section 177 of The Code of Criminal Procedure states that every offence shall ordinarily be enquired into and tried by Court within whose local jurisdiction it was committed and Section 179 of the said Code states that when an act is an offence by reason of anything which has been done, and of a consequence which has ensued, the offence may be enquired into or tried by the Court within whose local jurisdiction such thing has been done or such a consequence has ensued. So far as the complaint lodged by the respondent No. 2 against the petitioners for an alleged offence under Section 138 of the Negotiable Instruments Act, 1881 is concerned, from the complaint, it is evident that the

cheques that were issued by the petitioner No 1 under the signature of the petitioner No. 2 in the name of the respondent No. 2, were drawn on the Vijaya Bank at Shakespeare Sarani in Calcutta, although sent to Bombay, and the cheques were produced at Vijaya Bank at Shakespeare Sarani in Calcutta for encashment where those were dishonoured. Accordingly, if any offence was committed by the petitioners at all, it was committed in Calcutta as per the provisions of Section 179 read with Section 177 of the Code of Criminal Procedure and such an offence is to be tried by the Court within whose local jurisdiction such offence was committed namely, by a competent Criminal Court in Calcutta. The ratio of the decisions in AIR 1954 SC 429: AIR 1960 Cal 513: AIR 1963 Pat. 398 and AIR 1974 P & H 2, therefore, apply with full force so far as the contention of Mr. Mukherjee regarding the lack jurisdiction of the Metropolitan Magistrate's Court in Bombay to entertain the disputed complaint against the petitioners is concerned, as from the facts of the present case, it becomes quite clear, that if there be any cause of action for starting a criminal proceeding against the writ petitioners for their alleged offence at all, such cause of action has arisen wholly in Calcutta when the alleged offence has been committed and not in Bombay as no part of such cause of action has arisen there.³

10. Once the cheque is dishonoured and the payee serves the notice he is entitled to enforce his rights under Section 138 of the Negotiable Instruments Act at the place of his business.

11. The Courts at Khanna have the jurisdiction to try the criminal charges against the petitioner. No case is thus, made out for quashing of the complaint and consequent proceedings.⁴

12. The complaint can be filed in a Court within the jurisdiction of which the cheque has been drawn or the place where the cheque is presented for collection and received an endorsement about the dishonour of the cheque or the place where the cheque is dishonoured. In this case the cheques drawn on State Bank of India, Kurnool Branch of Hyderabad for collection where

a part of the cause of action arose. Therefore, the Court at Hyderabad has got jurisdiction to try the case. Under those circumstances, the learned Magistrate is perfectly right in dismissing the petition filed by the accused which does not call for interference.⁵

2 MMTTC Ltd. v. Meehi Chemicals & Pharma (P) Ltd. AIR 2002 Cr.L.J. 266 (SC)

3 Indmark Finance and Investment Co. (Pvt) Ltd. v. The Learned Metropolitan Magistrate 28th Court, 1992(1) Crimes 993 at p. 997

C. In Case of Non Payment –

13. Since Section 142(b) of the Act speaks of cause of action. What does cause of action mean? A court gets jurisdiction over the matter if the cause of action arises within the local limits of its jurisdiction. Cause of action means: “the whole bundle of material facts which it is necessary for the plaintiff to prove in order to entitle him to succeed in the suit” to ascertain whether the bundle of facts give rise to the cause of action and to determine whether one or more of those facts had occurred within the territorial jurisdiction of the Court the entire plaint has to be taken into consideration.

14. In the decision in the State of Madras v. C.P. Agencies,⁶ the Supreme Court quoted with approval the following observations in Ms. Chand Kaur v. Partap Singh,⁷

“Now the cause of action has no relation whatever to the defence which may set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion to his favour.”

15. The question whether the Court within whose jurisdiction cheque is delivered can entertain the suit arose for consideration in the decision of Lachhman Dass v.Chuhra Mal. 8 It was held that in a suit for recovery of loan, the cause of action does not constitute merely the giving of loan but it consists for of a bundle of facts including the agreement relating to the loan, the place where the plaintiff delivered tothe defendant the cheque for the amount of loan and the place where the loan was to be paid back.

 4 T.K.Khungar v. Sanjay Ghai, 1994(3) Crimes 802
 5 M/s Goutham T.V. Centre v. M/s Apex Agencies, 1993(1) Crimes
 723: 1993 Cri. LJ 1004.

155
 6 AIR 1960 SC 1309.

8 AIR 1952 Pepsu 5.

16. It was observed that if no cash was advanced by plaintiff to the defendant but it was the cheque that constituted the loan, then the place where the defendant got the cheque from the plaintiff gives rise to a part of the cause of action and the plaintiff has a right to institute the suit in the Civil Courts within whose territorial jurisdiction the cheque was delivered to the defendant. The complaint can be laid at the place wherein the cheque was dishonoured and also at the place where the cheque was issued, which means that the complaints laid in these cases before the Judicial First Class Magistrate-II Kannur has jurisdiction to try the offence.⁹

17. As per Section 179 of Cr. P.C. the place where the cheque was given or handed over will have jurisdiction and the courts of that place will

have jurisdiction to try the offence. Likewise for purpose of Section 178(b) payment of cheque may be one part of an offence and dishonour of the cheque may be another part and, therefore, both places, i.e. place where the cheque was handed over and the place where it was dishonoured will have jurisdiction.¹⁰

D. The Court to Try Offence :

18. The offence falling under Section 138 of the Act will not be the only solitary act of dishonour by the Bank on which the cheque is drawn. Even giving of the cheque by the accused when he has not made arrangements for honouring of the cheque itself will be a part of the facts constituting the offence. Section 178(b), Cr.P.C. lays down that when an offence is committed partly in one local area and partly in another area, it may be enquired into and tried by a Court having jurisdiction over any of such local areas. Under Section 179, Cr. P.C. when an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued. Giving the cheque by the accused to the complainant and giving the cheque for collection by the complainant to its Banker at Bangalore will also be the facts constituting the offence. Therefore, in view of the provisions of Sections 178(b) and 179 Cr. P.C. the complaint can be filed in a court within the jurisdiction of which the cheque has been issued or the place where the cheque is presented for collection or the place where the cheque is not honoured. In view of this position of law, the learned Magistrate was wrong in coming to the conclusion that he has no jurisdiction to entertain the complaint. He has the jurisdiction to entertain the complaint in view of the fact that the cheque was issued by the accused at Bangalore and the cheque was given for collection by the complainant to its Banker at Bangalore. These are the facts which took place within the jurisdiction of the Court.¹¹

Mohammed Kunhi v. Abdul Kagged, 1996(3) Crimes 406: 1 (1996) BC 271 Ker.

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10

CanBank Financial Services Ltd. v. Gitajli Motors Pvt. 1996 (1) BC 221: 1995
Cri. LJ 1222: 1995

(1) Crimes 342 : 1995(1) Civil LJ 902.

11

M/s. Pohathi Agencies v. The State of Karnataka, 1991 Cr. LJ 2530 at p. 2531
Kar.

19. It is well settled now that the Court has jurisdiction over the area where the cheque was issued or delivered or where the drawer of the cheque fails to make payment of the money or where the cheque was presented for encashment or the area where the payment was to be made. Therefore, the appellant had cause of action to file the complaint before the lower Court where the cheque was presented for encashment and the lower court had jurisdiction to take cognizance of the offence. Therefore, the finding of the lower court that it had no jurisdiction to take cognizance of the offence is absolutely unsustainable.¹² The non payment of cheque amount at Madras, despite the written demand from the Registered Office at Madras, would make the offence complete. This is made clear even from the observation made by the High Court of Kerala in P.K. Muraleedharan case,¹³ that the cause of action arises at the place, where the cheque was issued or delivered or the place where the money was expressly or impliedly payable. In the instant case, the complainant, the Registered office at Madras demands money from Madras, asking the drawer to pay the money to Madras office. Therefore, the place where the money is payable also will have the jurisdiction.¹⁴

E. Where Cheque Dishonoured- Under Section 138 of Negotiable Instruments Act, 1881

and Sections 177 to 179 Cr. P.C. :

20. Chapter XIII of the Code of Criminal Procedure deals with “the jurisdiction of the Criminal Courts in inquiries and trials”. S.177 of Cr.P.C.

is the basic provision which states that the Court within whose local jurisdiction; the offence is committed, is competent to try it. The more exhaustive and elaborative procedure in this regard is given in S.178 of Cr.P.C. S.178 [d] contemplates that “when it [offence] consists of several acts done in different local areas”, it may be inquired into or tried by a Court having jurisdiction over any of such local areas. S.179 of Cr.P.C. is more exhaustive than S.178 of Cr.P.C. It covers the local area where the act is done and even the local area where the consequences of that act ensued.

12

Varghese v. C.K. Ramani, 1998 Cri. LJ 2755 at p. 2757.

13 1993(1) Crimes 46.

14

Narang Industries Ltd. v. Ashok Leyland Finance Ltd., I (1998) BC 532 at p. 542.

15

AIR 1930 Bom. 490(FB).

16

M/s. Goutham T.V. Centre v. M/s. Apex Agenceis, 1993 Cr. LJ 1004 at pp. 1005-1007 AP.

17 M/s. Meltro Enterprises v. Ramesh Chander Jain, 1997 (3) Crimes 360 at p. 361.

F. Where Even Part Cause of Action Arises :

21. Coming to the question of jurisdiction, it is to be considered that the issuance of the cheques and their dishonouring are only a part of cause of action, the offence was complete only when the petitioners failed to discharge their liability to the respondent-firm. For discharging a debt, it is the debtor who has to find out his creditor and since in the present case the

respondent, who is the creditor, has its office at Panchkula, the Court at Ambala had the territorial jurisdiction to try the offence complained of.¹⁸ In the present case the cheques were issued at Moga and these were presented by the respondent for collection of payment to State of Patiala at Moga. The cheques were dishonoured by the State Bank of India Jalanadhar but intimation of dishonour was received at Moga. Notices were sent by the respondent to make payment at Moga. Moga Court had, therefore, jurisdiction to try the case. Similar view was taken in the case of *M/s Probathi Agencies v. State of Karnataka*.¹⁹ The Court at Moga, thus, had jurisdiction to entertain the complaints. No. case is made out for quashing the complaints and consequent proceedings. ²⁰

18 *M/s. Ess Bee Food Spectalities v. Kapoor Brothers*, 1992 Cri. LJ 739 at pp.741, 742 P & H .

19 1991(2) Recent Criminal Reports 685.

Milestone judgment on the point of jurisdiction :

PREVIOUS DIVERGENT DECISIONS:

22. In *Bhaskaran v. Sankaran Vaidhyan Balan* [“**Bhaskaran**”], the Court read Section [138](#) of the Act with Sections [177](#) to [179](#) of the Code of Criminal Procedure, 1973 (“**CrPC**”). It observed that the offence under Section [138](#) can be completed only with the concatenation of the following five acts:

- Drawing of the cheque;
- Presentation of the cheque to the bank;
- Returning the cheque unpaid by the drawee bank;
- Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount;
- Failure of the drawer to make payment within 15 days of the receipt of the notice.

It was held that upon the completion of the offence, any Court, within whose jurisdiction, any one of the five acts took place, would have the

requisite jurisdiction to try such case.

23. The ruling in Bhaskaran was diluted in Harman Electronics Pvt. Ltd. v. National Panasonic India Pvt. Ltd. The Court addressed the issue of whether a Delhi Court would have jurisdiction solely because the statutory notice under Section [138](#) of the Act was issued from Delhi. The Court held that:

- Issue of the statutory notice does not give rise to a cause of action. Only receipt of the notice does;
- Only the main provision of Section [138](#) constitutes an offence. The proviso thereto merely enlisted the conditions necessary for taking cognizance of the offence;
- If mere presentation of the cheque or issue of notice would bestow upon a court the territorial jurisdiction to try offences under Section [138](#) of the Act, it would inevitably lead to harassment of the drawer.

24. The judgments in Bhaskaran and Harman represent the liberal and the strict views, respectively, on the issue of territorial jurisdiction for trial of the offence of dishonour of cheques under Section [138](#) of the Act.

25. After considering the provisions of Section 177 to 179 of Cr.P.C., the Hon'ble Supreme Court had opined that where an offence consists of several acts done in many local areas, such offence can be tried in any Court having jurisdiction over those local areas. In other words, the complainant has the liberty to choose any one of those courts having jurisdiction over any one of the local areas within the territorial limits any one of those five acts was done.

Divergent view of the Court on the point of territorial jurisdiction. :

26. The judgment of the **K Bhaskaran's** case by Hon'ble Apex Court was later on followed in various judgments of the Hon'ble High Courts, on one or the other count. However **In the case of Dalmia Cement Ltd. .vs. Galaxy Traders and Agencies Ltd. 2001(6) Supreme Court Cases 463**, the Honourable Apex Court has held that giving of notice cannot have any precedent over the service. The views of the various High Courts were different though they have discussed the five factors in different way, but in the same manner. **In Laxmi Travels .vs. G.E.**

Country wide consumer, 2006 All MR (Cri) 2482, the Honourable Aurangabad High Court no doubt referred K.Bhaskaran's case, but in a different angle, the Court has observed otherwise. In the said case the complainant had issued a demand notice from Aurangabad and demanded the amount, except this the other parts of the matter were occurred at Nagpur. The Honourable High Court has held that the Honourable Apex Court in K.Bhaskaran's case has referred to the basic ingredients which are necessary for an offence under Sec.138 of the Act. There is no dispute about this that all these ingredients are necessary, but the place of issuance of notice and non-payment thereof cannot sufficient to file a complaint under Sec.138 of the act. The notice was though sent from Aurangabad, but received at Nagpur, therefore, issuance of notice from Aurangabad itself cannot give cause of action to file a complaint at Aurangabad.

27. In the case of “**Mosaraff Hussain Khan -Vs- Bhageeratha Engineering Limited**” [2006 [2] ALL MR 140 [SC], cheques were issued at Ernaculam, Kerala State in favour of complainant who submitted them for encashment at Birbhum, Suri, West-Bengal. The cognizance was taken by Chief Judicial Magistrate, Birbhum at Suri. In this judgment, no importance was given to the third ingredient laid down in Bhaskaran's case [supra]. If ratio of Bhaskaran's case [supra] would have followed, the jurisdiction would have gone to Ernculam Court.

28. . In the case of **Ahuja Nandkishor Dongare ..v/s..State of Maharashtra and another 2007 Cr. L.J. 115** it is held that cheque as a Negotiable Instrument is required to be discharged at place mentioned therein. Jurisdiction has to be gathered from place where money was intended to be paid. Court at another place within whose jurisdiction cheque was merely presented for realization can not be said to have jurisdiction to try the offence.

29. In the case of **Shaha & Modi Developers .vs. State of Maharashtra, 2009 All MR (Cri) 3038**, the Honourable High Court in Para No.7 has held that the complainant cannot make ground to file a complaint at a particular place merely because he has issued the notice from that place. In this case, the complainant had lodged the complaint at the place where he has deposited the cheque for encashment in his bank.

30. In the case of **Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd.,(2001) 3 SCC 609** three-Judge Bench held that a combined reading of Sections 3, 72 and 138 of the NI Act mandates the cheque must be presented at the bank on which it is drawn, if the drawer is to be held criminally liable. The decision in this case clarified that the place where a complainant may present the cheque for encashment would not confer or create territorial jurisdiction. The ruling in this case runs counter to the essence of **Bhaskaran Case**.

31. The approach of Supreme Court in **Bhaskaran's Case** was majorly influenced by curial compassion towards the unpaid payee/holder. However, later in **Harman's Case**, the Court highlighted the reality of Section 138 being rampantly misused for applicability of territorial jurisdiction for trial of the complaints regarding dishonour of cheque. The ruling in Bhaskaran was diluted in “**Harman Electronics Private Limited -Vs- National Panasonic India Private Limited**” [2009 [1] ALL MR 479 [SC]. In this case much significance was given to receipt of notice in relation to cause of action and jurisdiction of the Court. The Court held that : Issue of the statutory notice does not give rise to a cause of action. Only receipt of the notice does. It is remarkable to note that there are number of decisions by two-Judge Benches on Section 138 of the Act, the majority of which apply **Bhaskaran's case** without noting or distinguishing on facts of **Ishar Alloy's case** which was the only three-Judge Bench decision on the issue and thus binding on smaller benches.

32. In the case of **Hemlata Pendharkar .vs. Javad Singh Sonawane, 2010 All MR(Cri) 3201 Bom.,** the Honourable High Court discussed both the earlier decisions of the Honourable Apex Court i.e. K. Bhaskaran's case and Harman Electronics case and held that the decision in Harman's case being the latest decision, will prevail and the said decision is followed wherein it is held that, “Mere issuance of notice from a particular place does not decide the jurisdiction of the place.”

33. Later on the Apex Court in the cases of **Nishant Agrawal vs. Kailash Kumar Sharma (2013) 10 SCC 72 ; FIL Industries Ltd. vs. Imtiyaz Ahmed Bhat (2014) 2 SCC 266 and Escorts Ltd. vs. Rama Mukharjee(2014) 2 SCC 255** followed K. Bhaskaran's case and held that the complaint under section 138 of N. I. Act could be instituted at any one of the five places referred to in K.

Bhaskaran's case. In these cases the Hon'ble court has explained the cases of Ishar Alloy and Harman.

34. In the circumstance considering these legal positions it can safely be stated that, there was more inconvenience to the complainant than the accused as regards to the place of jurisdiction. The point of jurisdiction becomes vital issue because there was no uniformity in the decision on these issues. Till the recent ruling of the bench of three judges of the Honourable Apex Court in the case of Dashrath Rupsing Rathod V/s. State of Maharashtra, in most of the cases the milestone decision reported in K. Bhaskaran's case was followed, wherein the five components were held to be the proper guidelines to determine the place of jurisdiction within whose area any one of them occurs.

Recent view of the Honourable Apex Court. :

35. Ultimately, the question of jurisdiction is now finally settled by Hon'ble Apex Court. The Honourable Apex Court consisting the Bench of three Judges overruled the judgment of K. Bhaskaran's delivered by the Bench of two Judges of the same Court. In **Dashrath Rupsingh Rathod .vs. State of Maharashtra**, decided on 1st August 2014, the Honourable Apex Court held that once the cause of action accrues to the complainant the jurisdiction of the Court to try the cases will be determined with reference to the place where the cheque is dishonoured. General Rule stipulated under Sec.177 of the Code applies to cases under Sec.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, excepting situation where the offence to dishonour of the cheque punishable under Sec.138 is committed along with the other offences in a single transaction within the meaning of Sec.220(1) read with Sec.184 of the Code or is covered with the provision under Sec.182(1) read with Sec.(s) 184 & 220 of the Code . The Court also concluded that under Section 138 of the Act, the offence is committed when the drawee bank returns the cheque unpaid. The proviso to the Section 138 of the Act, merely postpones the prosecution of the offender till the time that he fails to pay the amounts within 15 days of the statutory notice.

Impact of the Dashrath Rathod 's judgment:

36. The Apex court has considered the ramifications of its judgment on several pending cases in the lower courts. In order to mitigate the rigors of this judgment, it indicated in the judgment itself following path for convenience of the complainants and courts.

1. Principle laid down by this judgment will be prospective in operation.

2. In respect of pending cases it distinguished them into following categories and suggested actions as follows:

a. Cases in which trial has commenced: Cases in which summoning and appearance of the accused has taken place and recording of evidence has a commenced will continue at the same court. These cases will be deemed to have been transferred from the court which had jurisdiction to the court where they are tried, as per the relaxation provided in public interest.

b. Cases pending at the pre summoning stage: Cases in which summons have not been issued will be maintainable only at the place where the cheque stands dishonoured. Even though evidence is led on affidavit or by oral statement, further proceedings can not continue.

Interpretation of Honourable Bombay High Court in at par cheque cases :

37. After the aforesaid ruling of the Apex Court the Honourable Bombay High Court in the case of **Ramanbhai Mathurbhai Patel vs. State of Maharashtra decided on 25.08.2014**, discussed the judgment of the Apex Court delivered in **Dashrath Rupsingh Rathod .vs. State of Maharashtra** and held that “By issuing cheques payable at all branches, the drawer of the cheques had given an option to the banker of payee to get the cheques cleared from the nearest available

branch of bank of the drawer. It, therefore, follows that the cheques have been dishonoured within the territorial jurisdiction of Court of Metropolitan Magistrate at Kurla. In view of judgment of Hon'ble Supreme Court in the matter of **Dashrath v. State of Maharashtra**, the learned Metropolitan Magistrate of Kurla Court has jurisdiction to entertain and decide the complaint in question.

38. However, the said decision was challenged before the Apex Court and the Apex Court stayed its operation for four weeks. Thereafter, the Apex Court in **Ramanbhai Patel .vs. State of Maharashtra 2014(10) LJSOFT SC 16** has overruled the judgment of Honourable Bombay High Court and held that presentation of cheque for collection on the drawee bank or issue of notice from a place of the choice of the complainant could not by themselves confer jurisdiction upon Courts. The Honourable Apex Court further held that the Honourable High Court committed error in holding that the Magistrate had the jurisdiction to entertain the complaint as the cheque had been presented before bank at Bombay.

Present position.:

39. In the circumstances in view of ratio laid down in Dashrath's case followed in the case of **Sree Mahesh Stationaries and another Vs. Indiabulls Financial Services Ltd., 2014 ALL M.R. (Cri.) 3387 (SC)**, the territorial jurisdiction to deal with the offence under section 138 of N.I. Act is limited to the local area within which the offence was committed. It means only the Court under whose local area the cheque was dishonoured by the drawer's bank i.e. drawee bank shall have territorial jurisdiction to deal with the offence under section 138 of the Negotiable Instruments Act, except in situations where the offence of dishonour of cheque punishable under Sec.138 is committed along with the other offences in a single transaction.

CONCLUSION:

40. The offence is completed as soon as the cheque is dishonoured by drawee-bank. Hence, the cause of action arises within the local limits

of the Court in whose jurisdiction, the drawee bank is situated. Giving and serving statutory notice is a permitted span of time to give opportunity to drawer to pay the cheque amount, but does not give rise to any cause of action.

41. There will be a return of pending cases (where recording of evidence has not yet begun). The complainant will be required to file the complaint before the appropriate court within 30 days of such return. Return of proceedings may also lead to further procedural red-tape and consequential delays. In some instances, a complainant may now find it cumbersome to prosecute a complaint before the appropriate court, which may well be in another city. Hence, by the decision of Hon'ble Apex Court in Dashrath's case, the controversy has been conclusively settled.

Date 04/11/2014

Akola