THE NOTICE UNDER SECTION 138 OF THE NEGOTIABLE INSTRUMENTS ACT, 1881.

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1. THE PREFACE

On the first of April 2007 the offence under Section 138 of the Negotiable Instruments Act, 1881 (the N.I. Act hereinafter) having been brought into the Statute Book on the first of April 1989 completed eighteen years of its existence and thus attained the status of a major offence. During these eighteen years several ingredients of the offence have spawned conflicting nay even confusing judicial views from the High Courts. Some of these conflicting views have been settled by the Supreme Court. Some have not yet reached the Supreme Court. This is being penned as an anniversary summary of the law only on one ingredient of the offence relating to dishonour of cheques that is the notice of demand under Section 138 of the N.I. Act.

2. THE STATUTORY PROVISIONS

The provisions of Section 138 of N.I. Act on analysis yield six elements. These are :-

1. **the Drawal of the cheque by a person in discharge of a legally enforceable debt or other liability;**
2. **the Presentation of the cheque to the Bank within six months or within the period of its validity whichever is shorter.**
3. **the Return of the cheque unpaid;**
4. **the Giving of a notice in writing demanding payment of the amount of the cheque from the drawer within thirty days from the date of receipt of information regarding the return of the cheque unpaid;**
5. **the Failure of the drawer to pay the amount within fifteen days of receipt of the notice;**
6. **the Sentence for the offence.**

Proof of the first five elements as above may lead to a conviction of the drawer and then the sentence listed at (6) will follow.

The three provisos to Section 138 of the N.I. Act enact elements (2), (4) and (5) as above and for the present purpose (4) and (5) enacted in proviso (b) and (c) to Section 138 are the most important.

Proviso (b) to Section 138 of the N.I.Act contains four important aspects. It says that the notice (1) must be given by the payee or the holder in due course; (2) must be in writing; (3) must be given within thirty days of receipt of information of dishonour and (4) must make a demand for payment of the amount of the cheque dishonoured. Proviso (c) to Section 138 of the N.I. Act contains two important aspects. It speaks of receipt of the notice by the drawer and his failure to make the payment within fifteen days of such receipt. Only thereafter cause of action for institution of a criminal complaint will legally arise. All these vital aspects of the offence centering round the notice of demand may conveniently be considered topic wise as hereinafter.

3. THE PERSONS – (*WHO ? & WHOM ?*)

Going by the letter of the law one may dub a notice of demand bad by reason of the fact that the notice in writing in question was issued neither by the payee nor by the holder in due course but by a lawyer on behalf of either. In some of the High Courts such a question arose and was rightly answered by holding that notice may be issued by either of them as the case may be or by their duly appointed agent which will include a lawyer duly instructed. Indeed it is usual to go to a lawyer for drafting the notice.

It should have been very clear from the prescriptions of the proviso (b) to Section 138 of the N.I. Act that the notice has to be given to the drawer of the cheque and to none-else. This seems to require no interpretation and should not have created confusion and conflict. There is no scope at all for any confusion and conflict in this regard if the drawer is a natural person and indeed there is none. But when the drawer is an artificial person like a body corporate, a firm or other association of individuals as described in Section 141 of the N.I. Act the High Courts are not unanimous and there is a great deal of confusion in the interpretation of the law in this regard. Digest of cases reported in 1996 1 Bank CLR 302 from Punjub & Haryana High Court, (1997)3 Mah LJ 335 from Bombay High Court and (1992)2 Ker LT 35 from a Division Bench of the Calcutta High Court indicate the law that notice of demand need only to be given to the company and not to other persons sought to be punished with the aid of Section 141 of the N.I. Act not even to the Director who signed the cheque. Unfortunately the full judgments of these cases are not available to the writer. Later decisions like SURAJ

THEATHRE, 1998 Cri.L.J 43 and M. RAJENDER 1999(2) CRIMES 556 from the Andhra Pradesh High Court, M/S TARGET OVERSEAS EXPORTS, 2005 Cri.L.J. 1931 of the Kerala High Court and SATISH CHAND SINGHAL, 2006, Cri.L.J. 3854 a Division Bench Judgment of the Gujrat High Court held that in cases under Section 141 of the N.I. Act notice to the company alone is sufficient and others sought to be made vicariously liable need not be served individual notices of demand for successfully prosecuting them. However, while the reason for such a holding in most of the above cases is squarely based on the language of Section 7, 138 and 141 of the N.I. Act in SATISH CHAND (Supra) it was held that by reason of the legal fiction in Section 141 of the N.I. Act notice on the Director or other officers would be deemed to have been served. This is in a way assuming that notice is required. Such a requirement does not follow from the provisions themselves. Thus the reason contrary to what the other High Courts indicated above have put forward even contrary to M.S. RAGHU NATHN 2005 Cri.L.J 2077 by a Single Judge of the same High Court not noticed by the Division Bench is difficult to appreciate. The other view conflicting with view of the majority of the high Courts indicated above can be read in B. RAMAN 2006 Cri.L.J. 4552, a Division Bench Judgment of the Madras High Court. In the face of the clear language of the statute not amenable to plurality of meanings that notice has to be given to the drawer of the cheque the conclusion and the reason for the same in B. RAMAN (Supra) is difficult to appreciate.

The question whether notice has to be served on all the persons sought to be prosecuted under Section 138 read with Section 141 of the N.I. Act has yet to be considered and answered by the Supreme Court directly. However two decisions of the Supreme Court having an indirect relevance to the question may be considered. The first of these two cases decided on the 12th of March 1999 is BILAKCHAND GYANCHAND Co. Vs A. CHINNASWAMI (1999)5 SCC 693. The case reached the Supreme Court from the Bombay High Court. The Judgment of the High Court is reported in 1998(3) CRIMES 395. A CHINASWAMI the only accused in the complaint is the Managing Director of M/S SHAKTI SPINNERS Ltd. and he signed the cheques on behalf of the Company. The High Court held that the notice issued to A. Chinnaswami at his office address is a notice to him individually and not to the company who is the drawer of the cheque and quashed the complaint. The Supreme Court in a short order simply said thus :

> ***"In our opinion the High Court erred in quashing the complaint. It is evident that the proceedings were initiated by the appellant against A. Chinnaswami who happened to be the Managing Director of Shakti Spinners Ltd. The cheques in question which were dishonoured were signed by him. The process was issued by the Judicial Magistrate in his name.***

We see no infirmity in the notice issued under Section 138 A. Chinnaswami, who was a signatory of the said cheque."

Since that was a brief order the Supreme Court seems to have failed to address clearly the main point on which the High Court quashed the complaint. The question is whether the notice issued in the case was a notice issued individually to A. Chinnaswami the accused or to the Company who is the main accused though not prosecuted. The law is well settled that without a notice to the Company prosecution against the other or others mentioned in Section 141 of the N.I. Act will not be maintainable. The Supreme Court has said that the notice is valid but has not said whether it is valid as against the Company or as against A. Chinnaswami only. Only by implication one can gather that it must be valid as against the Company further implication being that no notice is necessary to the signatory/Managing Director of the Company.

The other decision of the Supreme Court is of the 4th January 2001 RAJNESH AGARWAL -Vs- AMIT BHALLA (2001) 1 SCC 631. Here also the High Court held that the notice addressed to "Shri Amit, J. Bhalla, Bhalla Techtron Industries Ltd., 116 –JorBagh, New Delhi-110003" is not a notice to the drawer Company Techtran Industries Ltd. and is only a notice individually to the Director of the Company A Bhalla. The Supreme Court like BILAKCHAND (Supra) implied that the notice was to the drawer. The provisions of Section 7, 138 and 141 and the holding in majority of the High Court Judgments thus result in the legal position that notice is required only to the drawer and the signatory of the cheque need not necessarily be the drawer in cases covered by Section 141 of the N.I. Act. It has to be borne in mind that a Company being only an artificial / juristic person has to act through a natural person in drawing a cheque and this natural person is the signatory of the cheque only the drawer of the cheque being the Company.

4. THE CONTENT – (WHAT ?)

Proviso (b) to Section 138 pinpoints two vital elements of the notice demanding payment. The notice must be in writing and it must demand payment of the "said amount of money" meaning the amount of the dishonoured cheque. The provision does not speak of any other requirement as to its content. The notice of demand therefore must be distinguished from a mere information regarding the dishonour. Such an information will not be a notice and no case can be founded on such information. A telephonic demand will also not qualify as a notice, the requirement of writing being absent. Apart from the above in the early days of the offence notice demanding payment within a period either shorter or longer than the fifteen days mentioned in the proviso(c) also were held by a few High Courts to be bad. The statute does not require that any time need be mentioned in the notice to fulfill the demand. Therefore absence or existence of a shorter or longer period in the notice

is irrelevant as a test of validity of the notice. The law on this aspect has been settled by the Supreme Court in at least six decisions. These decisions are :

(i) SIL IMPORT USA –Vs- M/S EXIM AIDES SILK, AIR 1999 S.C. 1609 decided on the 3rd of May 1999 where at first the notice was sent through FAX and then on advice of lawyers a notice by registered post was also sent later and the eventual complaint was filed on its basis. The complaint was held to be barred by limitation because the first notice through FAX was valid.

(ii) CENTRAL BANK OF INDIA –Vs- M/S SAXONS FARMS, AIR 199 S.C. 3607 decided on the 7th of October 1999, where the words "my client shall represent the two cheques again and if they are returned unpaid, the matter will be reported to police" and "kindly make the payment if you want to avoid unpleasant action of my client" were held to constitute a valid notice demanding payment of the amount of the cheques.

(iii) SUMAN SETHI –Vs- AJAY K. CHURIWAL, AIR 2000 S.C. 828 decided on the 2nd of February 2000 wherein it was held that the notice of demand would not be bad if other amounts such as interest and/or costs etc are also demanded provided the amount of the cheque is separately and distinctly shown. If however an aggregate sum in excess of the cheque amount is mentioned the notice may be bad.

(iv) UNIPLAS INDIA LTD. AND OTHERS –Vs- STATE (GOVT. OF NCT OF DELHI) AND ANOTHER, (2001)6 SCC 8 decided on the 17th of July 2001, wherein the Supreme Court ruled that even a notice under Sections 433 and 435 of the Companies Act, 1956 can double as a notice under Section 138 of the N.I. Act provided that such a notice was issued within fifteen days (now thirty days) of the receipt of information of dishonour. In that case the earlier notice under Section 434 of the Companies Act, 1956 was sent beyond the fifteen days prescribed as such was of no avail to create a cause of action and the notice under Section 138 of the N.I. Act sent after second dishonour of the cheque only created the requisite cause of action to sustain the prosecution.

(v) MUNOTH INVESTMENTS LTD. –Vs- PUTTUKOLA PROPERTIES, AIR 2001 S.C. 2752, decided on the 14th of August 2001 wherein the Supreme Court again emphasized the subtle point that fifteen days (now thirty days) has to be counted from the date of receipt of information of dishonour and not from the date of dishonour itself. It was also pointed out that counting from such a date only if the notice fell beyond the period mandated by Section 138 of the N.I. Act the prosecution may be unsustainable.

(vi) K.R. INDIRA –VS- DR. G. ADINARAYANA, (2003) 8 SCC 300 decided on the 19th of October, 2003 wherein the Supreme Court dealt with the question of validity of a consolidated/common notice to one person by two different drawers of different cheques, CENTRAL BANK OF INDIA (Supra) and SUMAN SETHI (Supra) were reiterated. The Supreme Court summed up thus :-

> ***"Though no formal notice is prescribed in the provision, the statutory provision indicates in unmistakable terms as to what should be clearly indicated in the notice and what manner of demand it should make .... In a given case if the consolidated notice is found to provide sufficient information envisaged by the statutory provision and there was a specific demand for the payment of the sum covered by the cheque dishonoured, mere fact that it was a consolidated notice, and/or that further demands in addition to the statutorily envisaged demand were also found to have been made may not invalidate the same .... However, according to the respondent the notice in question is not separable in that way and that there was no specific demand for payment of the amount covered by the cheque."***

The Supreme Court in that case found that the notice covered only the loan amount and not the amount of the cheque and as such was bad in law.

(vii) KRISHNA EXPORTS AND OTHERS –Vs- RAJU DAS. (2004)13 SCC 498 decided on the 14th of September, 2004, the Supreme Court construed the first letter as

the notice and not the second notice after second presentation and dishonour of the cheque.

5. THE TIME - (WHEN ?)

UNIPLAS INDIA LTD. (Supra) and MUNOTH INVESTMENTS LTD.(Supra) leave no room for any doubt that notice has to be issued within the period of time indicated in proviso (b) to Section 138 of the N.I. Act, which is now thirty days. Even if there could have been some scope for controversy as regards the nature of the information from the Bank on and from the 6th of February 2003 on coming into force of Section 146 of the N.I. Act there can be no controversy that this information from the Bank must also be in writing through a Bank slip or memo. Lastly section 9 of the General Clause Act, 1897 will come into play in counting the period of thirty days mentioned in the section. No process need be issued in a case where no mention of giving of the notice at all has been made in the complaint vide SHAKTI TRAVEL & TOURS –Vs- STATE OF BIHAR, (2002)9 SCC 415. Even in a case where ex-facie it appears from the complaint that the notice has been issued beyond the period of thirty days duly calculated no process need be issued. PREM CHAND VIJAY KUMAR –Vs- YASHPAL SINGH AND ANOTHER, (2005)4 SCC 417 decided on the 2nd May 2005 also emphasize the law that if the notice is not given within the period indicated in proviso (b) no cause of action would arise.

6. THE PLACE – (WHERE ?)

The place wherefrom the notice of demand is given and the place where it is received normally do not have much importance except for the fact that these places may have in a rare case an impact on the jurisdiction of the court to try an offence under Section 138 of the N.I. Act. In K. BHASKARAN VS. SANKARAN VAIDHYAN BALAN, AIR 1999 S.C. 3762, (1999)7 SCC 510 the Supreme Court spoke thus :

> ***" The 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.***
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> ***It is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at five different localities. ....***
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> ***Thus it is clear, if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local areas can become the place for trial for the offence under S.138 of the Act. In other words,***

the complainant can choose any one of those Courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done."

Thus ordinarily though the notice is issued from the place of residence or business of the payee and is addressed to the place of residence or business of the drawer as a matter of law notice will not be bad if it is issued from or served at any other place. The law requires only giving of and the receipt of the notice. The places wherefrom and whereto the notice is given and addressed would only confer jurisdiction to try the offence on the Courts there. To end this topic it is necessary to mention that in two recent decisions the Bombay High Court having quoted para 14, 15 and 16 of K. BHASKARAN (Supra) reached the conclusion demonstrably different from what those paragraphs (a shortened version thereof has been extracted above) say. These decisions are reported in 2006 Cri.L.J. 3704 and 2007 Cri.L.J 115.

The complainants in those two cases launched the criminal prosecution in courts having jurisdiction in the place wherefrom Notices were issued. The High Court held in those two cases that the courts in those places have no jurisdiction. In the former case the mis-reading of K. BHASKARAN (Supra) is patent and in the latter the attempted explaining of K. BHASKARAN (Supra) is difficult to understand.

7. THE SERVICE – (HOW ?)

As already indicated provisos (b) and (c) to Section 138 of the N.I. Act contain two most vital ingredients of the offence under the said section. Not only giving of the notice but also the receipt of the notice has to be proved by the complainant. Following the principles of interpretation that penal statutes should be strictly construed in the early days of enactment of the offence under Section 138 of the N.I. Act, the Courts required strict proof of actual service of the notice demanding payment of the amount of the cheque on the drawer. No quarter was given to constructive or deemed service which was recognized as valid by reason of the provisions of Section 27 of the General Clauses Act 1897 and/or illustration (f) to Section 114 of the Evidence Act in Civil cases under Rent Control legislation in relation to notice on the Tenant by the Landlord or under Specific Relief Act to show readiness and willingness to perform the agreement to sell and purchase respectively in HARCHARAN SINGH –Vs- SHIVRANI (1981)2 SCC 535 and in JAGDISH SINGH –Vs- NATHU SINGH, (1992) 1 SCC 647. Gradually the principles of strict construction began giving way to purposive construction based on the Mischief Rule enunciated in Heydon's case by the English Common Law Court. Perhaps one of the earliest cases employing the principles of purposive construction in explaining Section 138 of the N.I. Act is MADHU –Vs- OMEGA PIPES LTD., (1994) 1 AnLT (Cri.) 603 from the Kerala High Court where occurs the following :-

> ***" If receipt or even tender of the notice is indispensable for giving the notice in the context of clause (b) an evader would successfully keep the postal article at bay atleast till the period of fifteen days expires. Law shall not help the wrongdoer to take advantage of his tactics. Hence the realistic interpretation for the expression "giving notice" in the present context is that, if the payee has dispatched notice in the correct address of the drawer reasonably ahead of the expiry of fifteen days, it can be regarded that he made the demand by giving notice within the statutory period. Any other interpretation is likely to frustrate the purpose for providing such a notice".***

Deemed or constructive service of notice has been judicially recognized by the Supreme Court in following decisions. These decisions are briefly considered hereunder.

In K. BHASKARAN –Vs- SANKARAN VAIDHYAN BALAN, AIR 1999 S.C. 3762, (1999)7 SCC 510 decided on the 29th September, 1999 the notice sent by registered post was returned to the complainant on 15.02.1993 with the endorsement "unclaimed". Four other endorsements on the postal article were – "3.02.1993, 04.02.1993, 05.02.1993 – addressee absent 06.02.1993 information served on addresses house". Apart from the negative finding as regards territorial jurisdiction the Trial Court acquitted the accused holding that as the accused did not receive the notice no cause of action arose. The High Court set aside the acquittal and convicted the accused. The Supreme Court concurred with the conviction though not with the sentence. The crucial question about the service of notice has been considered by the Supreme Court at great length from para 17 to 25 (in SCC) and deemed service was approved with the help, among others, of the provision of Section 27 of the General Clauses Act, 1897. Para 20 of the Judgment reads thus :

> ***" If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that the court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure."***

It was finally held by the Supreme Court that when a notice is returned "as unclaimed such date would be the commencing date in reckoning the period of 15 days" envisaged under proviso (c) to Section

138 of the N.I. Act. This would however be subject to the right of the drawer to rebut the presumption of service by evidence.

In SRIDHAR M.A. –Vs. METALLOY N STEEL CORPORATION, (2000)1 SCC 397 decided on the 27th January 1998, the Trial Court acquitted the accused holding that he did not get notice. The High Court set aside the acquittal proceeding on the basis of deemed service. Sounding a note of caution the Supreme Court observed thus :-

> ***"Although, in appropriate case deemed service is to be accepted by the Court, as indicated in the decision of this Court reported in State of M.P. –Vs- Hiralal, (1996)7 SCC 523, but it may also be noted that such presumption of deemed service is not a matter of course in all cases and deemed service is to be accepted in the facts of each case. Considering the facts of the present case, it appears to us that the appellant is entitled to benefit of doubt as to whether such service, in fact, has been effected on the appellant."***

Incidentally (1996)7 SCC 523 is a short order relating to service of notice on the respondent under the provision of Supreme Court Rules.

In V. RAJA KUMARI –Vs- P. SUBBARAMA NAIDU AND ANOTHER, (2004) 8 SCC 774 decided on the 2nd November 2004 the complaint contained the statement that the notice was returned with an endorsement that the door of the house of the accused was locked. The Trial Court holding that the mandatory notice was not served dismissed the complaint. The High Court reversed the order. The Supreme Court reiterated the statement of law enunciated in K. BHASKARAN (Supra) as regards deemed service.

In D. VINOD SHIVAPPA –Vs. NANDA BELLIPPA. (2006) 6 SCC 456 decided on the 25th of May 2006 the Supreme court had again an occasion to deal with the concept of deemed service. There the notices of demand in five out of seven cases were returned with the endorsement "party not in station, arrival not known". In the other two cases the notices were returned with the endorsement, "addressee always absent during delivery time. Hence returned to the sender". The Magistrate issued process. The recourse to Section 482 Cr.P.C. in the High Court failed. The Supreme Court reiterated the law as in K. BHASKARAN (Supra) and V. RAJA KUMARI (Supra) and summed up the law as to deemed service thus :-

> ***"The question as to whether there was deemed service of notice, in the sense that the endorsement made on the returned envelope was a manipulated and false endorsement,***

is essentially a question of fact and that must be considered in the light of evidence on record."

Recently (*Judgment dated May 18, 2007*) a Three Judge Bench of the Supreme Court in C.C. ALAVI HAJI VS PALAPETTY MUHAMMED & ANR, 2007 (7) SCALE 380 considered the question of deemed service afresh. The Three Judge Bench reiterated the view expressed in K. BHASKARAN (Supra) and D. VINOD SHIVAPPA (Supra) and implied that – "absence of any averments in the complaint to the effect that the accused had a role to play in the matter of non receipt of legal notice, or that the accused deliberately avoided service of notice"- would not make the complaint non-maintainable.

8. THE CONCLUDING COMMENTS

It is hoped that before the offence under Section 138 of the N.I. Act sheds the teens or soon thereafter it will receive further illumination from the Supreme Court atleast as regards the persons entitled to notice in a prosecution against a Company and as regards service of notice. The decisions considered in this anniversary summary do not deal with a case where neither the acknowledgment card nor the envelope is returned. The twofold presumption under Section 27 of the General Clauses Act could still be called to aid in such cases. Though deemed service is permissible and may suffice for purposes of taking cognizance by the Trial Court it carries the risk of failure at the conclusion of the trial. It is for the Parliament to enact measures to relieve this dilemma of the complainant.