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The Convolutions of Compounding of Offences Under Section 147 of Negotiable Instruments Act; Exploring ADR Tools to Fill Up the Legal Vacuum.

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Introduction

Interest Reipublicae Ut Sit Finis Litium (Latin) meaning; *in the interest of society as a whole, litigation must come to an end.* Be it civil suit or a criminal case, the interest of society at large lies in the litigation coming to end. The traditional method to end any litigation is by adjudication, and alternative method is by adopting techniques of **A**lternative **D**ispute **R**esolution mechanisms. One such mechanism of ADR is settlement/compounding in criminal cases. In India while the general legal provisions regarding compounding of offences are mentioned under **Section 320** of the

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Code of Criminal Procedure 1973, **section 147 of Negotiable Instrument Act** lays down special provision as to compounding of every offence under the said Act. But experience has shown that, even after the offences under NI Act are compounded, the litigations have not come to an end. This paper focuses on exploring just and possible tools in filling up the legal vacuum found in compounding of offences under the NI Act and how effectively each tool can be utilized for achieving the purpose of the law relating to negotiable instruments.

Compounding of Offences means to establish a compromise between two parties in a criminal case, where the complainant/ victim agrees to have the charges dropped against the accused.

Under section 320 (1) of Cr.P.C the offences punishable under the sections of the Indian Penal Code specified in the first two columns of the Table may be compounded by the persons mentioned in the third column of that Table and under section 320 (2) The offences punishable under the sections of the Indian Penal (45 of 1860) Code specified in the first two columns of the Table next following, may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that Table. Thus section

320 of Cr.P.C prescribes when offences can be compounded with the permission of the court and when parties by themselves can compound the offences prescribed under the Indian Penal Code.

But section 147 of NI Act does not prescribe any such manner in which the offences under the said Act can be compounded and neither it prescribes the consequences of such compounding. Thus, there is legal vacuum in the applicability of the said section. The Hon'ble Supreme court in the case of ***Damodar S Prabhu v Sayed Babalal H***[2] observed that Section 147 of NI Act does not prescribe as to how to proceed with compounding of offences and neither the provisions of Section 320 of CrPC can be applied.

In the Hon'ble Supreme Court in Damodar case, the learned Attorney General urged the Hon'ble Supreme Court to frame guidelines for a graded scheme of imposing costs on parties who unduly delay in compounding of the offence. Accepting the submission the Honble Supreme Court laid down the following graded scheme of cost to be paid by the party for compounding the offence under the NI Act at various stages in various courts.

[2] (2010) 5 SCC 663

Compounding made in	Stage	% of cheque amount to be paid as cost
Trial court	First and second hearing	No cost
Trial court	Later stage	10% to the legal service authority or any other authority
Sessions court or High court	Revision or appeal	15%
Supreme Court	--	20%

Thus, the Hon'ble Apex Court by exercising its power under Article 142 of the Constitution not only laid down guidelines for encouraging compounding in NI Act cases at the earliest stage but also prescribed penalties for compounding at later stages. But the issues regarding consequence of non-compliance of terms of settlement and forums in which the matter can be compounded were not for consideration before the Hon'ble Supreme Court.

In the matters relating to dishonour of cheques, the complainant will compound the case and drop the charges against the accused only when he either receives the entire cheque amount or when he receives the amount agreed upon between the parties. The primary interest of the complainant lies in recovering the money rather than seeing the drawer of the cheque behind the bars.

The threat of punishment is only a mode to ensure recovery. Thus, then the retribution, the compensation is prominent in such cases.

So far as compoundable offences under the Indian Penal Code are concerned, the provisions are prescribed under section 320 of Cr.P.C. Once the matter is compounded under section 320 (1) or (2), consequentially vide section 320(8) the accused is acquitted and the case stands disposed on that day itself when compounding is recorded by the court.

Similarly, in a civil suit, when the matter is compromised under Order XXIII Rule (3) or by any other mode of alternative dispute resolution mechanisms, the suit will stand disposed.

But the same is not the result in the matters of dishonour of cheques, because section 147 of NI Act does not prescribe the manner and mode of compounding of offences under the Act.

In a very few NI cases, usually where the amount is meager, the complainant receives the cheque amount or agreed amount and the case is closed on the same day. In most of such matters where the case is compounded, often the accused will seek installments to pay the amount agreed upon and in more often cases the accused

commits breach of terms of compromise, wherein he fails to pay the amount due in installments.

As discussed earlier there is no prescribed procedure for compounding of cases under section 147 of NI Act. All that is stated in the said section is "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable".

Thus, there is a legal vacuum in respect of convolutions faced especially, with regard to procedure, consequence of failure to act as per terms of settlement, the manner of compounding and forum for compounding under section 147 of NI Act.

Legal vacuum means a legal context which is *non liquet* ("it is not clear"), there is no applicable law, or in which some injustice is uncorrected.

One of the purposes of law is justice. When a matter between the parties in NI case is compounded and the court is satisfied that the compounding is legal and done voluntarily by the parties and the court proceeds to record the settlement, justice demands that the complainant should receive either the cheque amount or the amount agreed between the parties. If this is not done, then there will be

injustice which needs to be corrected. In short what should be the effect of any such settlement vis-à-vis the complaint case under section 138 of NI Act? When there is legislative vacuum, all legal and justifiable possibilities including those as ADR mechanisms/tools leading to logical conclusion of a case must be explored and applied, to meet the ends of justice. Therefore, there is dire need to explore ADR tools to fill up the legal vacuum in settlement of cheque bounce cases or offences under the NI Act. The most effective ADR mechanism/tools are (i) compounding under section 147 of NI Act (ii) Lok Adalat and (iii) Mediation. The same are discussed below;

The offences under the NI Act can be compounded under section 147 of NI Act:

Section 147 of the NI Act states "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable."

Thus, the parties at any stage, can compound the matter by filing a joint memo of compromise or an application to compound the matter

There is no bar either in the NI Act or any other law to file a joint memo of compromise or an application to compound the case by the parties under section 147 of NI Act.

The compounding of the offence at later stages of litigation in cheque bounce cases has also been upheld by the Hon'ble Supreme Court in ***K M Ibrahim v K P Mohammed and Anr***[3], wherein it is noted:-

"11. As far as the non-obstante clause included in section 147 of the 1881 Act is concerned, the 1881 Act being a special statute, the provisions of section 147 will have an overriding effect over the provisions of the Code of Criminal Procedure relating to compounding of offences. ...

12. It is true that the application under section 147 of the Negotiable Instruments Act was made by the parties after the proceedings had been concluded before the Appellate Forum. However, section 147 of the aforesaid Act does not bar the parties from compounding an offence under section 138 even at the appellate stage of the proceedings. Accordingly, we find no reason

[3] (2010 (1) SCC 798)

to reject the application under section 147 of the aforesaid Act even in a proceeding under Article 136 of the Constitution."

Similarly, in the case of ***M/S Moser Baer Photo Voltaic Ltd vs M/S Photon Energy Systems Ltd and ors***[4] wherein the compounding was allowed at later stage, on the condition of regular monthly payment for 12 months, and on proof of such payments, the complaint case would stand quashed if the entire amount as agreed upon is paid. The Apex Court put a rider that till then the case of the complaint would be kept in abeyance.

The above opinion held by Hon'ble Apex Court was subject to compromise between the parties in that particular case. Reserving liberty with the complainant to move the concerned court for proceeding with criminal case for nonpayment is not the ratio in the case, therefore it is not a precedent to that point.

Thus, the Moser Baer (2016) case mentioned supra presently, is just an instance where compounding is permissible even at the highest appellate stage. As the matter was subsequently compounded by the parties, the Hon'ble Supreme Court had no

[4]Criminal Appeal no 235 of 2016

occasion to refer to its earlier decisions in Damodar (2010) or Prateek Jain (2014) or K M Ibrahim (2009) cases.

Thus, there is no statutory or judicial bar that the concerned parties, voluntarily, can at any stage, compound the offences under the NI Act under section 147 and can have their own terms and conditions of settlement and also prescribe mode of payments which are legally acceptable to the court, subject to payment of graded cost as laid down in **Damodar** *case mentioned supra.*

After formulating the payment of graded cost in Damodar case which are already extracted above, the Hon'ble Apex Court made very pertinent observations at para 17, which are as below;

"17. We are also conscious of the view that the judicial endorsement of the above quoted guidelines could be seen as an act of judicial law-making and therefore an intrusion into the legislative domain. It must be kept in mind that section 147 of the Act does not carry any guidance on how to proceed with the compounding of offences under the Act. We have already explained that the scheme contemplated under section 320 of the CrPC cannot be followed in the strict sense. In view of the legislative vacuum, we see no hurdle to the endorsement of some suggestions which have been designed to discourage litigants from unduly delaying the

composition of the offence in cases involving section 138 of the Act. The graded scheme for imposing costs is a means to encourage compounding at an early stage of litigation. In the status quo, valuable time of the Court is spent on the trial of these cases and the parties are not liable to pay any Court fee since the proceedings are governed by the code of Criminal Procedure, even though the impact of the offence is largely confined to the private parties. Even though the imposition of costs by the competent court is a matter of discretion, the scale of costs has been suggested in the interest of uniformity. The competent Court can of course reduce the costs with regard to the specific facts and circumstances of a case, while recording reasons in writing for such variance. Bona fide litigants should of course contest the proceedings to their logical end. Even in the past, this Court has used its power to do complete justice under Article 142 of the Constitution to frame guidelines in relation to subject-matter where there was a legislative vacuum."

Subsequently referring to the above para of Damodar case, the Hon'ble Supreme Court in ***Madhya Pradesh State Legal Services Authority v Prateek Jain***[5] was pleased to hold:

[5] (2014) 10 SCC 690

"In the opinion of the Court, since section 147 of the Act did not carry any guidance on how to proceed with compounding of the offences under the Act and section 320 of the Code of Criminal Procedure, 1973 could not be followed in strict sense in respect of offences pertaining to section 138 of the Act, there was a legislative vacuum which prompted the Court to frame those guidelines to achieve the following objectives:

(i) to discourage litigants from unduly delaying the composition of offences in cases involving section 138 of the Act;

(ii) it would result in encouraging compounding at an early stage of litigation saving valuable time of the Court which is spent on the trial of such cases; and

(iii) even though imposition of costs by the competent Court is a matter of discretion, the scale of cost had been suggested to attain uniformity.

At the same time, the Court also made it abundantly clear that the concerned Court would be at liberty to reduce the costs with regard to specific facts and circumstances of a case, while recording reasons in writing for such variance.

What follows from the above is that normally costs as specified in the guidelines laid down in the said judgment has to be imposed on the accused persons while permitting compounding. There can be departure therefrom in a particular case, for good reasons to be recorded in writing by the concerned Court."

Thus, the courts while dealing with applications for compounding of offences under section 147 of NI Act must be guided by the guidelines laid down in **Damodar's case** read with **Prateek Jain's case,** so that the litigations under the NI Act reach their logical end through compounding.

Lok Adalat as another effective tool to compound the offences under the NI Act:

The Lok Adalats are constituted as per the provisions contained under the Legal Services Authorities Act, 1987. The constitution, scope and jurisdiction of the Lok Adalat has been prescribed under Sections 19, 20, 21 and 22 of the Act.

Section 19(5) of The Legal Services Authority Act, prescribes jurisdiction of a lok adalat.

Section 19(5): A Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of :-

(i) Any case pending before or

(ii) Any matter which is falling within the jurisdiction of, and is not brought before, any court for which the Lok Adalat is organised.

Provided that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law.

Similarly, the proviso to regulation 10 of the **National Legal Services Authority (Lok Adalat) Regulations 2009** states that matters relating to divorce and criminal cases which are not compoundable under the Code of Criminal Procedure, 1973 (2 of 1974) shall not be referred to Lok Adalat.

Thus, barring matters relating to an offence not compoundable under any law, the Lok Adalat has jurisdiction to determine and arrive at a compromise in respect of any case which falls within its jurisdiction, including compoundable criminal cases.

The Hon'ble Apex Court in ***K N Govindan Kutty Menon v C D Shaji***[6] case held as follows;

"As per Section 21(of the Legal Services Authority Act), every award of the Lok Adalat shall be deemed to be a decree of a civil Court and as such it is executable by the Court. The Act does not make out any such distinction between the reference made by a civil Court and criminal court."

"There is no restriction on the power of the Lok Adalat to pass an award based on the compromise arrived at between the parties in respect of cases referred to by various Courts (both civil and criminal), Tribunals, Family Court, Rent Control Act, Consumer Redressal Forum, Motor Accident Claims Tribunal and other forums fo similar nature."

"Even if a matter is referred by a criminal Court under section 138 of the Negotiable Instruments Act, 1881 by virtue of the deeming provisions in section 21, the award passed by the Lok Adalat based on a compromise has to be treated as a decree capable of execution by a civil Court."

[6] 2011(4) KLT857 (SC)

In a later decision rendered by the Hon'ble Supreme Court in Prateek Jain case mentioned supra it held that when a case is decided in the Lok Adalath, the requirement of following the guidelines contained in ***Damodar case*** **(***mentioned supra)* should normally not be dispensed with. It is emphasized that an application should be moved by the accused opting for compounding the offence apparently to ensure that the compromise is initiated at the instance of the accused rather than the complainant. Doubtless there is no bar in filing joint memo of compromise before the lok adalat.

Once the parties enter into compromise before the Lok Adalat and award in terms of settlement is passed, the parties are not permitted to resile from the same. It attains finality to the dispute between the parties and binds all. When at the time of settlement and award before the lok adalat, no question of any pecuniary jurisdiction is raised or required to be considered by the Lok Adalat, the said questions cannot be raised as objections at the time of the execution.[7]

The above said view is acknowledged by the Hon'ble Supreme Court in ***Govindan Kutty's*** case mentioned *supra.* Thus,

[7] **Subhash Narasappa Mangrule (M/S) and Others vs.Sidramappa Jagdevappa Unnad** 2009 (3) Mh.L.J. 857

as per Govindan Kutty's case, when a matter pertaining to offence u/s 138 of NI Act is referred to Lok Adalat, an award passed by the Lok Adalat based on such settlement/ agreement is deemed to be award/decree capable of execution by a civil court.

Now a question arises as to whether an aggrieved complainant has no other option but to recover his/her money only through civil proceedings?

On 7/2/2020, in the case between **Sri. Somashekara Reddy vs Smt. G.S. Geetha** the **Hon'ble High Court of Karnataka "**contemporized" the perspective of Lok Adalat stating that merely because the settlement was arrived at before the Lok-Adalat, it cannot be contended that the criminal proceedings have been converted into civil proceedings revoking the right of the complainant to enforce his or her rights in terms of the applicable criminal law.

In the above case the matter under NI Act was compromised before the trial court in Lok-Adalat and an award was passed thereon. It was also agreed between the parties that in the event of the accused failing to make payment of the installments within the stipulated period, the complainant was at liberty to recover the same as per the provisions of Section 431 of Cr.P.C. along with costs. In

furtherance of the settlement, award was passed and subsequently the accused failed to comply with the terms of settlement. Hence constrained the complainant filed application under Section 431 of Cr.P.C for recovery of payment as per the settlement. It was then that the accused contended that, by virtue of Hon'ble Supreme Court's decision in Govindan Kutty case and Hon'ble High Court of Karnataka case in ***M/s Yash Investment Consultants vs Mr.Kartik Ravichandar***[8] an award of lok adalat was deemed to be an executable decree and cannot be enforced under section 431 of Cr.P.C. Upholding the contention of the accused, the trial court dismissed the application filed by the complainant u/s 431 of Cr.P.C. Against this dismissal order, the complainant filed writ petition before the Hon'ble High Court of Karnataka. The points that arose for determination before the Hon'ble High court were:

1)Whether a compromise arrived at before the Lok-Adalat in a criminal proceeding can only be enforced as a Civil decree or can it also be enforced in terms of the applicable provisions of Cr.P.C., more particularly Section 431 of Cr.P.C. thereof?

[8] (2017) 5 KLJ 409

2)Can this Court or the Trial Court set-aside the compromise arrived at before the Lok-Adalat on account of a default of the accused and restore the complaint?

With reference to Govindan Kutty's case, the Hon'ble High Court of Karnataka observed thus;

"*The Apex Court considered the objects of the LSA Act, the purpose of referring to the Lok-Adalats, settlement thereof as an alternative system of Administration of justice, etc., and by referring to Section 21 of the LSA Act as reproduced hereinabove held that there was a deeming provision for an award of the Lok-Adalat to be treated as a decree of the Civil Court.*

Hence, the Hon'ble Apex Court referred to various decisions held that even if a matter was referred to Lok-Adalat by a Criminal Court under Section 138 of N.I.Act, by virtue of the deeming provision under Section 21 of LSA Act, the award passed by the Lok-Adalat based on a compromise was to be treated as a decree capable of execution by a Civil Court.

Thus, the question raised by the Hon'ble Apex Court was answered by holding that the Execution Court cannot refuse to

execute the award passed by the Lok-Adalat even in a criminal proceeding like that under Section 138 of N.I.Act.

The said decision in Govindan Kutty's case does not in any manner relate to or restrict the invocation of Section 431 of Cr.P.C. There was no issue raised before the Hon'ble Apex Court as regards if the complainant who had settled the matter before the Lok-Adalat could on default invoke Section 431 of Cr.P.C or not in respect of a compromise arrived at in the Lok-Adalat."

So far as its own earlier decision in ***Yash Investment case*** mentioned supra is concerned, the Hon'ble High Court distinguished the case on the ground that in the settlement before the lok adalat, no liberty was reserved by the parties in that case to resort to section 431 of Cr.P.C, thereby held that the said decision is not applicable to present case.

Thus, the Hon'ble High Court of Karnataka held that whenever a matter pertaining to section 138 of NI Act is compounded before lok adalat, depending on the terms of a compromise arrived at before the Lok-Adalat, it can be enforced as a Civil decree or in terms of the applicable provisions of Cr.P.C., including that under Section 431 of Cr.P.C, if so provided in the

compromise. It further held that in the event of a default of a compromise arrived at before the Lok-Adalat the High Court or the Trial Court can on an application made by the Complainant set-aside the compromise arrived at before the Lok-Adalat, restore the complaint on its file and proceed with the complaint or enforce the compromise as per the terms of the compromise including by issuance of a Fine Levy Warrant under Section 431 of the Cr.P.C.

As stated in the beginning of the paper, the interest of the society at large is that a litigation must come to an end. Thus, a settlement before lok adalat means, not only resolving dispute by an agreement, but attaining complete finality as regards the dispute being resolved is concerned.

In a criminal proceeding pertaining to offence under section 138 of the NI Act, when the accused states that he is ready to compound the matter and on reference to lok adalat, agrees to the terms of payment and in default to be bound by section 431 of Cr.P.C and later fails to comply the payment and does not adhere to settlement arrived at before lok adalat, the conduct of the accused is nothing but "dishonest." Consequentially when the complainant seeks to invoke the provision under section 431 of Cr.P.C, which legally enables him/her to recover any money (other than a fine)

payable by virtue of any order made under Cr.P.C, as if it were a fine, and thereupon the accused takes the shelter on the ground that an award passed by lok adalat is executable decree where remedy is only under long drawn civil procedure, the very purpose of settlement before lok adalat by way of quick disposal and litigation to attain finality by way of ADR are defeated. If the accused is permitted to resile from such terms of settlement under the garb of process, it amounts to abuse of process of law.

The Hon'ble Supreme Court in ***Madhya Pradesh State Legal Services Authority v Prateek Jain***[9], has very beautifully culled out the objectives and purposes of lok adalat. It is held as follows;

"In fact, the concept of Lok Adalat is an innovative Indian contribution to the world jurisprudence. It is a new form of the justice dispensation system and has largely succeeded in providing a supplementary forum to the victims for settlement of their disputes. This system is based on Gandhian principles. It is one of the components of Alternate Dispute Resolution systems specifically provided in Section 89 of the Code of Civil Procedure, 1908 as well. It has proved to be a very effective alternative to litigation. Lok Adalats have been created to restore access to remedies and

[9] (2014) 10 SCC 690

protections and alleviate the institutional burden of the millions of petty cases clogging the regular courts. It offers the aggrieved claimant whose case would otherwise sit in the regular courts for decades, at least some compensation now"…. xxxxx

Broadly, the objectives of lok adalat as effective ADR is twofold. One, speedy disposal of litigation and second - finality of litigation where the award binds the parties to the dispute with no appeal provided against the same, to any Court. By virtue of section 21(2) of the Legal Services Authorities Act, every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any Court against the award. Therefore undoubtedly, the settlement and proceedings of lok adalat cannot be allowed to be abused under the garb of process.

Moreover Section 21(1) of the LSA Act, states that every award of the Lok Adalat shall be deemed to be a decree of a civil Court, **or as the case may be**, **an order of any other Court** and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under Sub-section (1) of Section 20…xxxxx

The above provision itself makes it clear that the award of the lok adalat shall be deemed to be a decree of a civil court "***or as the***

case may be an order of any other court*"* implying that, it includes order of a criminal court as well. Thus, legally there is no bar on the parties to a settlement of NI case in Lok adalat, to agree to the terms that, in case of failure to make payment by the accused, the complainant is at liberty to invoke the provisions of section 431 r/w 421 of Cr.P.C for recovery of money. When such an agreement is entered upon in lok adalat, the accused at a later stage cannot resile on the terms saying that settlement before the lok adalat is an award and is deemed to be executable decree to avoid criminal proceedings. If the accused is allowed to resile the terms, then the very purpose of Lok adalat as effective mechanism of ADR and its objectives as prescribed in Prateek Jain case mentioned supra would be defeated.

Therefore, a court while encouraging parties to settle the matter before Lok Adalat, should also emphasise on adding default clause of recovery of payment under section 431 r/w 421 of Cr.P.C to ensure that the litigation under NI Act in its true sense reaches its finality and the settlement before lok adalat is respected by the parties by adhering to it. Thus, the settlement of NI cases can be effectively done in lok adalat thereby filling up the legal vacuum in compounding of an offence under section 138 of NI Act.

Mediation as the most effective tool to compound the offences under the NI Act:

Out of the ADR mechanisms adopted, mediation is the most reliable mechanism, which has gained popularity and acceptance in every legal system.

Though the Code of Civil Procedure contains a specific provision under Section 89 enabling reference of matters to ADR, however, so far as criminal cases are concerned, the Code of Criminal Procedure does not contain any express statutory provision enabling the criminal courts to refer the parties to a forum for ADR including mediation. The same is the position concerning cases under the NI Act. Neither there is any authoritative/judicial pronouncement barring referral of criminal compoundable cases to mediation for dispute resolution.

When compoundable cases can be referred to Lok Adalat, the same logic should apply for Mediation also. While referring a criminal case to lok adalat, the court makes preliminary examination with respect to permissibility of the same, so also while referring the case to mediation, the courts must first undertake a preliminary examination with respect to its permissibility.

Mediation undoubtedly provides an efficient, effective, speedy, convenient and inexpensive process to resolve disputes with dignity, mutuality, respect and civility where parties participate in arriving at an assisted negotiated settlement rather than being confronted with a third-party adjudication of their disputes. The very fact that it enables warring parties to sit across the table and negotiate, even if unsuccessful in dispute resolution, undergoing the process creates an atmosphere of harmony and peace in which parties learn to 'agree to disagree'[10]. In fact, this is very much in consonance with spirit of chapter XVII of NI Act containing sections 138 to 142. This Chapter was introduced in the Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (Acts 66 of 1998) with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions and in order to promote efficacy of banking operations. These very objects of the NI Act can be best achieved through mediation.

In ***Dayawati v Yogesh Kumar Gosain***[11], the Hon'ble High Court of Delhi held as follows;

[10] (2017) 243 DLT 117; Dayawati v Yogesh Kumar Gosain
[11] *supra*

"Even though an express statutory provision enabling the criminal court to refer the complainant and accused persons to alternate dispute redressal mechanisms has not been specifically provided by the Legislature, however, the Cr.P.C. does permit and recognize settlement without stipulating or restricting the process by which it may be reached. There is thus no bar to utilizing the alternate dispute mechanisms including arbitration, mediation, conciliation (recognized under Section 89 of CPC) for the purposes of settling disputes which are the subject matter of offences covered under section 320 of the Cr.P.C."

The Hon'ble Delhi High Court in Dayawati case mentioned supra also said that the Delhi Mediation Conciliation Rules, 2004 can be applied in compoundable criminal cases and prescribed the process to be followed in reference of the dispute in such criminal cases.

In the context of reference of the parties, in a case arising under section 138 of the NI Act, the Hon'ble Delhi High Court has prescribed the following procedure:

(i) When the respondent first enters appearance in a complaint under section 138 of the NI Act, before proceeding further with the

case, the Magistrate may proceed to record admission and denial of documents in accordance with section 294 of the Cr.P.C., and if satisfied, at any stage before the complaint is taken up for hearing, there exist elements of settlement, the magistrate shall inquire from the parties if they are open to exploring possibility of an amicable resolution of the disputes.

(ii) If the parties are so inclined, they should be informed by the court of the various mechanisms available to them by which they can arrive at such settlement including out of court settlement; referral to Lok Adalat under the Legal Services Authorities Act, 1987; referral to the court annexed mediation centre; as well as conciliation under the Arbitration and Conciliation Act, 1996.

(iii) Once the parties have chosen the appropriate mechanism which they would be willing to use to resolve their disputes, the court should refer the parties to such forum while stipulating the prescribed time period, within which the matter should be negotiated (ideally a period of six weeks) and the next date of hearing when the case should be again placed before the concerned court to enable it to monitor the progress and outcome of such negotiations.

(iv) In the event that the parties seek reference to mediation, the court should list the matter before the concerned mediation centre/mediator on a fixed date directing the presence of the parties/authorized representatives before the mediator on the said date.

(v) If referred to mediation, the courts, as well as the mediators, should encourage parties to resolve their overall disputes, not confined to the case in which the reference is made or the subject matter of the criminal complaint which relates only to dishonouring of a particular cheque.

(vi) The parties should endeavour to interact/discuss their individual resolutions/proposals with each other as well and facilitate as many interactions necessary for efficient resolution within the period granted by the court. The parties shall be directed to appear before the mediator in a time bound manner keeping in view the time period fixed by the magistrate.

(vii) In the event that all parties seek extension of time beyond the initial six-week period, the magistrate may, after considering the progress of the mediation proceedings, in the interest of justice, grant extension of time to the parties for facilitating the settlement. For the purposes of such extension, the magistrate may call for an

interim report from the mediator, however keeping in mind the confidentiality attached to the mediation process. Upon being satisfied that bona fide and sincere efforts for settlement were being made by the parties, the magistrate may fix a reasonable time period for the parties to appear before the mediator appointing a next date of hearing for a report on the progress in the mediation. Such time period would depend on the facts and circumstances and is best left to the discretion of the magistrate who would appoint the same keeping in view the best interest of both parties.

(viii) If a settlement is reached during the mediation, the settlement agreement which is drawn-up must incorporate :

(a) a clear stipulation as to the amount which is agreed to be paid by the party;

(b) a clear and simple mechanism/method of payment and the manner and mode of payment;

(c) undertakings of all parties to abide and be bound by the terms of the settlement must be contained in the agreement to ensure that the parties comply with the terms agreed upon;

(d) a clear stipulation, if agreed upon, of the penalty which would ensure to the party if a default of the agreed terms is committed in addition to the consequences of the breach of the terms of the settlement;

(e) an unequivocal declaration that both parties have executed the agreement after understanding the terms of the settlement agreement as well as of the consequences of its breach;

(f) a stipulation regarding the voluntariness of the settlement and declaration that the executors of the settlement agreement were executing and signing the same without any kind of force, pressure and undue influence.

(ix) The mediator should forward a carefully executed settlement agreement duly signed by both parties along with his report to the court on the date fixed, when the parties or their authorized representatives would appear before the court.

(x) Proceedings before the court: The magistrate would adopt a procedure akin to that followed by the civil court under Order XXIII of the C.P.C. III

(xi) The magistrate should record a statement on oath of the parties affirming the terms of the settlement that it was entered into voluntarily, of the free will of the parties, after fully understanding the contents and implications thereof, affirming the contents of the agreement placed before the court; confirming their signatures thereon. A clear undertaking to abide by the terms of the settlement should also be recorded as a matter of abundant caution.

(xii) A statement to the above effect may be obtained on affidavit. However, the magistrate must record a statement of the parties proving the affidavit and the settlement agreement on court record.

(xiii) The magistrate should independently apply his judicial mind and satisfy himself that the settlement agreement is genuine, equitable, lawful, not opposed to public policy, voluntary and that there is no legal impediment in accepting the same.

(xiv) Pursuant to recording of the statement of the parties, the magistrate should specifically accept the statement of the parties as well as their undertakings and hold them bound by the terms of the settlement terms entered into by and between them. This order should clearly stipulate that in the event of default by either party, the amount agreed to be paid in the settlement agreement will be

recoverable in terms of section 431 read with section 421 of the Cr.P.C.

(xv) Upon receiving a request from the complainant, that on account of the compromise vide the settlement agreement, it is withdrawing himself from prosecution, the matter has to be compounded. Such prayer of the complainant has to be accepted in keeping with the scheme of section 147 of the NI Act. At this point, the trial court should discharge/acquit the accused person, depending on the stage of the case. This procedure should be followed even where the settlement terms require implementation of the terms and payment over a period of time.

(xvi) In the event that after various rounds of mediation, the parties conclude that the matter cannot be amicably resolved or settled, information to this effect should be placed before the magistrate who should proceed in that complaint on merits, as per the procedure prescribed by law.

(xvii) The magistrate should ensure strict compliance with the guidelines and principles laid down by the Supreme Court in the Damodar case and and so far as the settlement at the later stage is concerned as in Prateek Jain case.

The Delhi High Court in Dayawati's case further stated:

(i) In the event of default or non-compliance or breach of the settlement agreement by the accused person, the magistrate would pass an order under section 431 read with section 421 of the Cr.P.C. to recover the amount agreed to be paid by the accused in the same manner as a fine would be recovered.

(ii) Additionally, for breach of the undertaking given to the magistrate/court, the court would take appropriate action permissible in law to enforce compliance with the undertaking as well as the orders of the court based thereon, including proceeding under section 2(b) of the Contempt of Courts Act, 1971 for violation thereof.

Thus, a very comprehensive procedure for settlement of dispute through mediation and consequences thereof, in non-compliance of settlement terms in respect of offences under the NI Act has been laid down by the Hon'ble Delhi High Court in the Dayawati case, which is to be followed by a court in case the matter is refferred to mediation. The basic rules of mediation in all the states are the same, hence the procedure laid down by the Hon'ble Delhi High Court in the Dayawati case can be adopted as a

persuasive precedent and standard operating procedure (SOP) for settlement of NI cases through mediation.

Conclusions*:*

The interest of the society as a whole, lies not only in the fact that litigation must come to an end, but also that, in the end, justice must be seen to be done. And justice is done when the object and and purpose of *'a law'* for which it has come to existence is achieved.

So far as the object of law relating to dishonour of cheques especially under section 138 of NI Act is concerned, the Hon'ble Supreme Court in ***Electronic Trade and Technology Development Corporation Ltd v Indian Technologist and Engineers***[12], held that "The object of bringing section 138 in the statute book is to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments."

Quoting the above said decision in ***Vinay Devanna Nayak v Ryod Sewa Sahakari Bant Ltd***[13] the Hon'ble Supreme Court further enunciated the object and purpose of section 138 of NI Act and the insertion of section 147 as thus;

[12] (1996) 2 SCC 739
[13] (2008) 2 SCC 305

"The provision is intended to prevent dishonesty on the part of the drawer of negotiable instruments in issuing cheques without sufficient funds or with a view to inducing the payee or holder in due course to act upon it. It thus seeks to promote the efficacy of bank operations and ensures credibility in transacting business through cheques. In such matters, therefore, normally compounding of offences should not be denied. Presumably, Parliament also realized this aspect and inserted section 147 by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002. (ACT 55 of 2002)."

Thus the purpose of the NI Act is to preserve banking and financial relationship amongst the stake holders. When it comes to preserving relationships, be it business or personal, mediation is the best tool in the quiver of ADR mechanism. One of the most overlooked benefits of mediation is that it helps in preserving relationships, business and personal, that is likely be destroyed through years of litigation. Because it is a collaborative, rather than adversarial process, and because mediation isn't inherently a win/lose process, important relationships can be saved.

Upholding this feature of mediation in preserving relationship, the Hon'ble Supreme Court in ***Vikram Bakshi and others v Sonia***

Khosla (dead) by Lrs[14] held "When the two parties joined together for collaborative business venture, it is but natural that the relationship starts with mutual trust and faith in each other. At the time of fostering such a relationship, they expect that with joint efforts in the proposed business venture, they would be able to achieve unparallel milestones, which would otherwise be impossible with their individual efforts."

Banking and financial relationships are undoubtedly collaborative business venture involving mutual trust and faith of the stakeholders in each other. Such relationships can be best preserved by resolving the dispute through mediation and compounding the case thereunder. The Honb'le Supreme Court in Vikram Bakshi case mentoned supra observed thus;

"16. Mediation being a form of Alternative Dispute Resolution is a shift from adversarial litigation. When the parties desire an on-going relationship, mediation can build and improve their relationships. To preserve, develop and improve communication, build bridges of understanding, find out options for settlement for mutual gains, search unobvious from obvious, dive underneath a problem and dig out underlying interests of the

[14] SLP(Crl) No 6873 of 2010

disputing parties, preserve and maintain relationships and collaborative problem solving are some of the fundamental advantages of mediation. Even in those cases where relationships have turned bitter, mediation has been able to produce positive outcomes, restoring the peace and amity between the parties."

"17. There is always a difference between winning a case and seeking a solution. Via mediation, the parties will become partners in the solution rather than partners in problems. The beauty of settlement through mediation is that it may bring about a solution which may not only be to the satisfaction of the parties and, therefore, create a win win situation, the outcome which cannot be achieved by means of judicial adjudication."

Certainly by way of Lok Adalat and settlement u/s 147 of NI Act, the offences under the NI Act are compounded and disposed off, but settlement through mediation has undoubtedly an advantage over these tools.

When parties themselves compound the matter u/s 147 of NI Act there is no intervention or involvement by a third party other than the respective advocates if there are any. It is by way of negotiation that the matters are settled u/s 147 of NI Act. In such cases, there is possibility that one party has over powered the other,

to come to terms. No doubt it is the duty of the court to enquire whether the compounding is voluntarily done or not, but it cannot be ensured. Once the parties state before the court, that the matter is voluntarily compounded, the court just proceeds to record the compounding as per the terms.

So far as settlement before the lok adalat is concerned, the procedure in Lok Adalat is not flexible enough and often there is judicial intervention and imposition of settlement on the parties. Deliberations are held only on the dates when lok adalat sittings are notified by appropriate authority. No doubt there can be pre conciliation sittings, but it has its own challenges when a judge has to do it along with regular court work.

The Hon'ble Apex Court in ***State of Punjab v Jalour Singh***[15] said lok adalat has limited scope and discussed as follows *:-*

"8. It is evident from the said provisions that Lok Adalats have no adjudicatory or judicial functions. Their functions relate purely to conciliation. A Lok Adalat determines a reference on the basis of a compromise or settlement between the parties at its instance, and put its seal of confirmation by making an award in terms of the

[15] (2008) 2 SCC 660

compromise or settlement. When the Lok Adalat is not able to arrive at a settlement or compromise, no award is made and the case record is returned to the court from which the reference was received, for disposal in accordance with law"

Relying on the above case and other cases mentioned thereby in the Govindan Kutty's case, by and large, an award in the Lok Adalat is declared as deemed to be an executable decree. Though legally there is no bar on the parties to the settlement before lok adalat to implement the terms of compromise u/s 421 r/w 431 of Cr.P.C, it is left to the court to accept such compromise and compel its fulfillment as a civil decree or u/s 421 r/w 431 of Cr.P.C depending on the terms of the compromise and reasonably distinguish the case from Govindan Kutty's case. The decision of the Hon'ble Apex Court in Govindan Kutty's case cannot be easily overlooked in case of settlement before lok adalat, unless this aspect is specifically taken up for consideration by the Hon'ble Apex Court itself in some other case.

Thus, the offences under the NI Act are more effectively compounded through mediation which is a process in which a neutral (means not supporting any one side) third party, called as mediator assists the parties in conflict to reach a solution, who

facilitates communication between the parties and manages communication process between the parties fairly, honestly and impartially. The mediators do not take sides. They give legal advice or provide counseling. They do not act as Judge or arbitrator. They assist by clarifying the issues in dispute and identifying the underlying concerns. With the assistance of the mediator and of course with the aid of their respective advocates, the parties are at liberty to opt for the consequences for non compliance of settlement. They are at liberty to choose whether the settlement has to be an executable decree or the recovery can be made under sections 431 read with 421 of Cr.P.C.

The new Mediation Bill is underway, which prescribes the powers of the mediators, the award based on the settlement etc. But so far, only time will tell, about its impact on settlement in NI cases. Therefore, as of now it is concluded in this paper that mediation, read with the guidelines/ SOP laid down in Dayawati's case by Hon'ble Delhi High Court is regarded as best and most effective tool for filling up the vacuum in compounding the offences under the NI Act to keep up with the spirit and objective of the NI Act, as well as interest of the society in seeing that litigation ends with justice done.