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COURTS AND SENTENCING PRINCIPLES : A STUDY

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1) In criminal cases, convictions are followed by punishments as prescribed by law. Unless the law prescribes a mandatory punishment, it invariably provides a minimum limit which may range upto a maximum limit. Within the distance covered by the minimum to the maximum, courts exercise a wide power of a decretionary nature to impose any punishment they think proper in the circumstances of the case. It is not an easy task as the exercise of discretionary power rests on a variety of factors such as deterrence, prevention, retribution and enhanced punishment to those categorized as 'habitual offenders', and also pacifying the feelings of the injured and preventing them in seeking 'private vengeance' by taking law into their hands. Judges have to balance the 'conflicting' interests in choosing the appropriate sentence such as measure of guilt to determine the measure of punishment.

2) In Dull v. State,[1] the Allahabad High Court enunciated the principles of punishment thus :—

i) The object of punishment has to serve two main purposes namely :—

a) To prevent the offender from repeating the crime; and

b) To prevent like-minded persons from committing the crimes

ii) Appropriate punishment can be determined by the court by taking into consideration several relevant factors such as

a) The gravity or magnitude of the offence; and

b) The circumstances in which the crime was committed;

iii) Political or religious or other beliefs to be strictly disregarded;

iv) No vindictive punishment or excessive punishment shall be imposed;

(Excessive punishment defeats the very purpose of punishment and also undermines the respect for law);

v) Punishment by way of fine as an alternative to imprisonment should not exist;

(However this can be done where the gravity of the offence and antecedents of the offender deserves it);

vi) Lenient treatment can be given to youthful offenders by resort to Probation of Offenders Act. (Habitual offenders who had not learnt anything from their previous convictions, need to be treated deterrently).

Such a lenient treatment can be meted out to 'acts' recently made as a crime, which is not unlawful in other parts of the Country and not essentially criminal in character;

vii) Deterrence sentence must be justified for offences committed after pre-planning and for the sake of personal gain and at the cost of an innocent person who are regarded as a menace or safety of the individuals and society;[2] and

viii) The maximum penalty prescribed should be confined to the 'worst cases'.

3) There exists no hard and fast rule to determine the right measure of punishment. Consequently Judges find this as an extremely difficult task to make punishment to suit the gravity of the particular offence. It is always a matter of discretion subject to any mandatory minimum prescribed by law.[3] It has therefore, been a practice adopted by the legislature, to prescribe a sentence of minimum which may extend upto a maximum period for offences. Even a sentence till the rising the court awarded to an officer of Government had more deterrent effect, as there was a demand for his removal from the post,[4] on the ground of conviction without any further enquiry.

4) Where the law prescribed a mandatory

1. AIR 1958 All P. 198.

2. Some of the principles in Dull's case reiterated in D. R. Bhagare v. State of Maharashtra, AIR 1973 SC P. 476.

3. Ramashraya Chakravarthi v. State of M.P., AIR 1976 SC P. 392.

4. See Art. 311 (2) of the Constitution.

minimum punishment, the court has no choice or discretion to award lesser than the prescribed mandatory.[5] However, if the law permits imposition of lesser punishment than the mandatory, for reasons to be recorded in writing, it can be done but this becomes reviewable either in the exercise of revisional or appellate jurisdiction of superior courts. In a case, the High Court of Andhra Pradesh 'suo motu' enhanced the sentence, despite no appeal against the sentence awarded. The order was upheld.[6] In another case of Haryana, the High Court reducing the minimum sentence based on the circumstances and conduct of the victim was not upheld by the Supreme Court, as the court held that reputation or character of the victim has no bearing on adjudication of guilt or imposition of mandatory punishment.

5) Cruel and disproportionate punishments have made judicial review an indispensable necessity. However, in the matter of imposition of punishments, considerable variation is found in the exercise of discretion to award punishments. Either it has been found to be too harsh or too inadequate frustrating the very objective in the imposition of punishments. As observed by the court, "judicial fluctuation has led to legislative standardization of sentences".[7] In practice, as has been found the standardization of sentences by the legislative efforts has taken only in a few cases and not too many to have any impact like statutory mandatory punishment. Even in such cases the courts have wide power in the matter of imposition of enhanced punishments beyond the standardized minimum.[8] In other cases, where there is no prescription of mandatory minimum sentence, the power of the courts to impose punishments depend upon a variety of factors[9] such as:—

a) Nature of offence;

b) Circumstances of the case;

c) Age and character of the accused;

d) Injury to the individual or society;

e) Effect of punishment on the offender;

f) Reformation of the offender; and

several other factors vital to the consideration to sentencing decision. While choosing between short term and long-term imprisonment, it has been found that short-term punishments are to be avoided as it makes the first offender to get the "opportunity to be contaminated with hardened criminals".[10] The long term sentences will result in brutalization of the offender and "make him blunt to finer sensibilities".[11] Thus, the courts have a very sacred duty to take sentencing decision to make "sentences fit the crime". As pointed out in P. K. Tejwani's case:[12] "Soft Justice in gross Injustice". In this case the court dealt with a food adulteration offence, where a mere fine of Rs.100/- was imposed and observed.....:—

"Primary necessaries are sold with spurious admixtures for making profits and if the offenders get away with payment of trivial fines..... it brings the law into contempt and its enforcement a mockery". Imposition of heavier fine in a less serious offence, may result in driving him out of trade — a violation of Art. 21 i.e., deprivation of means of livelihood. The Supreme Court even disapproved the application of Probation of Offenders Act to 'food adultrants' which might result in loss of human life. The court observed in Raman's case" "No chances to be

5. See Sec. 302, IPC prescribes death or imprisonment of life and also Sec. 397 (Robbery with attempt to cause death) not less than (7) years.

6. Nagam Gangadhar v. State and see also State of A. P. v. S. R. Rangadamappa. In the later case reduction from mandatory prescribed was not upheld.

7. Inderjeet v. State of U.P., AIR 1951 All P. 71.

8. See for illustrative sections 302, 397 etc., of the Indian Penal Code.

9. Ramashraya Chakravarthi v. State of M.P., AIR 1976 SC P. 392.

10. See for details Kameshwar Thakur's case.

11. Ashok Kumar v. State, 1991 Cri LJ P. 2483 (SC).

12. P. K. Tejwani's case. In this case the court had to intervene when a mere fine was imposed for adulteration of food items.

taken with a man whose anti-social operations, disguised as a respectable trade are unlikely to be dissuaded by the gentle probationary process".[13] In the context of enlarging dimension and area of crimes like slave traffic, professional crimes and others, the law is required to meet the growing challenges to tackle such offences by the strong arm of the law. New heads of public policy have emerged[14] making deterrence, a sure component of sentencing decisions. In other words, sentencing policy must result in "protection of society and stamping out criminal adventures". If the courts fail to protect the injured then the injured will resort to private vengeance[15]. This was stated by Chief Justice Warren while making a reference to high-rate of crimes. The sentencing policy can be stated thus :—

(i) Only Judges should decide the sentence;

(ii) Errors in sentencing decisions can be corrected by appellate or revisional or inherent jurisdiction of the courts, as the case may be;

(iii) Statutes prescribe the offences and punishments giving wide discretion to Judges to decide the quantum just like medicines to be administered according to the nature and severity of the disease by the physicians; and

(iv) Courts to exercise discretion informed by tradition, methodized by analogy and disciplined by the system (per Justice Cardozo)

6) Aggrevating or mitigating circumstances is another relevant factor in sentencing-decisions :—

It can be spelt out thus :—

a) Circumstances should be proper and recognized expressly such as:—

a) Perpetrated;

b) Whether the offence was committed by force or fraud;

c) Whether it was actuated by malicious motives; and

d) Whether the individual or society suffers by the crime committed; (which might include time, place or persons in the context of the crime committed);

e) Other factors to be considered such as:

i) Minority of the offender;

ii) Old age;

iii) Condition of the offender;

iv) Provocation; and

v) Acts done in obedience to the orders of a superior officer;

f) Combination of above factors and

g) Delay in the disposal of cases. Delay is considered as a factor to reduce the sentences.

7) Since standardization can be attempted by the legislature only in a few cases. Whether it can be capable of covering all cases require a detailed study. An attempt is made in this study as to the practicability of such an exercise. As observed by the Apex Court: "Standardization is well neigh impossible".[16]

In the first place, it may be stated that punishment must depend upon the seriousness of the offence i.e., harm done by the act and the offender's degree of culpability. Measuring these two vital factors is not an easy task and presents many intricate problems, which almost makes the exercise of standardization impossible. The difficulties faced may be stated thus:—

I) Two criminal cases may not be identical, each case presenting a differential variation. Human behaviour is unpredictable unless it is expressed in an act or omission from which an inference can be drawn. All criminal cases do not fall into set-behavioural patterns and when standardization cannot be made with regard to crimes, equally no such standardization can be made in sentencing decisions;

II) Variation in culpability makes little room for categorizing 'single-offence' category. Commission of a crime has to be considered by a series of multiple factors and

13. 34 Cri LJ P. 1259.

14. See the observation of Viscount Simonds in Lady's Directory case (Shaw v. DPP) (1961)2 All ER P 446.

15. See the observations of Warren, CJ in Stacks v. Boyle (1951) 342 US 1.

16. Bachan Singh v. State of Punjab, AIR 1980 SC P. 898.

even the slightest variation makes a lot of difference in sentencing decisions, often resulting in miscarriage of justice;

III) Standardization of sentence is a matter for a legislative policy and not a matter for judiciary to lay down. When legislatures have found it to be a difficult attempt to do so, it is equally not within the reach of courts to standardize the sentences. Courts can lay down broad guidelines to be followed in the award of sentences leaving it to superior courts to correct any error that has crept into sentencing decision;

IV) Sentencing is the last stage in a criminal trial that too it is invoked depending upon the fact that the accused is convicted and the sentence to be imposed is for consideration for the court. Even in some case the adjudication of guilt is pronounced and on the question of sentence, the offender is heard before it is decided like Mrs. Jayalalitha's case (former CM of Tamil Nadu) and now the issue in appeal;

V) Sentencing decisions raises social justification like imprisonment, fine, community services or externment of a person not to enter a particular State and others, and the reasons to be stated for the award of the punishment. Justified reasons make sentences conformable to the essence of criminal justice system;

VI) Whether the 'rule of law' applies to sentencing-decision is a moot question which arises for consideration. In fact, sentencing decision depend on a variety of factors, circumstances and facts of individual cases, no uniformity in the award of sentences could be predicted. Rule of law and its application to decisions in the award of sentences postulate two essential pre-requisites namely

a) Openness; and

b) Standards declared in advance

Openness is complied with when Judgments are delivered in the open court and the Judgment being a public document made available to the public which is subjected to fair comment by all sections of the public, standard cannot be declared in advance. Legislations do not lay down procedure, determination of guilt or award of punishments in individual cases but lay down in broad terms as to what constitutes a crime, courts competent to try and adjudication of the crime conferring wide discretion to court to award punishment as the case deserves. Judges have their philosophy to follow and the aim of sentence to which they subscribe such as:

a) To punish the offender;

b) Deter the offender;

c) Deter others;

d) Rehabilitation of the offender;

e) Compensation to victims;

f) Protect the public; and

g) Reflect the public concern in criminal justice system.

In view of the above facts, it is difficult to make 'rule of law' applicable to standardize the sentencing-decisions. In fact matters relating to award of sentences, Judges are invariably required to consult their 'conscience' and not the law-books. If at all judiciary has been able to standardize the sentencing-decision, it is rare and in the 'rarest of rare cases' imposition of death penalty to be awarded. It can only be an insignificant exception to the rule that standardization of sentence can be attempted only by the legislature;

VII) Sentencing should be regarded as one of the societal institution such as family, adoption and others. It should therefore, be grounded on social values and to the extent to which it can serve the society and ends of criminal justice system;

VIII) One cannot rule out the role of political party in power in a democratic system to influence or modify or replace the sentencing policy, just like it has the right to frame the policy and to render that policy into a binding rule of conduct. For instance Foreign Exchange Regulation Act being replaced by Foreign Exchange Management Act which has made criminal liability cases into that of 'civil liabilities'. In effect, the change in the statute has almost made sentencing policy inapplicable;

IX) No sentencing theory has stood the law and order pressures. Despite criminal

laws and heavy sentences prescribed, crime control has become difficult and crime rate increasing day by day and new types of crimes occurring in cyber World, which is governed by computers;

X) Controllers of sentencing policy use sentencing powers as tools in their hands, which heavily depends on political, social and legal traditions that lay at the roots of the society. What appears just may be unjust in a different period. Illustrates are not lacking to support this view;

XI) Criminal justice system in the Country is in constant struggle in making sentences to fall in line with the demand for criminal justice and the criminal justice system to suit the social policy. The growing opinion that crimes could be prevented not by sentencing power but by resort to social, situational and other measures cannot be ruled out altogether. In fact, crimes relating to corporate body eludes any standardization of sentences; and

XII) Research holds the key to bring changes namely:—

a) In reducing variations in the sentencing policy;

b) The standardization of sentences at least in a wider area of criminal activity; and

c) The extent to which judiciary can play its role in the task of standardization.[17]

17. For example, Judiciary has standardized the sentences Sec. 302 IPC — Death in the rarest of rare cases and imprisonment for life in others. Despite the fact that the rarest of rare cases, it is still in the stage of development

TRACKING THE DILEMMA OVER JURISDICTION IN 138 MATTERS OF THE NI ACT, 1881

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INTRODUCTION AND ISSUE

Very recently, Hon'ble Supreme Court of India in Dashrath Rup Singh Rathod v. State of Maharashtra[1-2] clarified a legal nodus of substantial public importance pertaining to Court's territorial jurisdiction concerning criminal complaints filed under Chapter XVII of the Negotiable Instruments Act, 1881 (for short, 'the NI Act') by holding that dishonour of cheque cases can be filed only to the Court within whose local jurisdiction, the offence was committed; i.e., where the cheque is dishonoured by the bank on which it is drawn. In this landmark judgment, Full Bench of Hon'ble Apex Court overruled K. Bhaskaran v. Sankaran Vaidhyan Balan[3] wherein two Judge Bench had held that "the offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. Following are the acts which are ingredients 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". Hon'ble Apex Court had laid down that "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 of trial for the offence under Section 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."[4] It took almost 15 years for Hon'ble Court after *Bhaskaran* judgment to clear the position pertaining to territorial jurisdiction, when as per 213th Law Commission of India report which came in the year 2008, over 38 lacs cheque bouncing cases are pending in various courts in the country. Therefore, analyzing all the minor or major changes that took place during this period, this article mainly deals with the legal intricacies of territorial jurisdiction with respect to criminal complaints filed under Section

1-2. AIR 2014 SC 3519 : 2014 Cri LJ 4350.

3. AIR 1999 SC 3762 : 1999 Cri LJ 4606.

4. *Ibid.*

138 of the NI Act and critically analyses the current landmark judgment i.e. *Dashrath Singh* with jurisprudential aspect.

K. Bhaskaran — A Trend Setter Law :

Bhaskaran judgment, gave the law on criminal court jurisdiction in matters of Section 138, the NI Act which settled the trend unless and until, it was recently overruled by the Dashrath Rup Singh judgment [Present case].[5] In *Bhaskaran*, Hon'ble Apex Court took the view that the jurisdiction to try an offence under Section 138 could not be determined only by reference to the place where the cheque was dishonoured. That is because dishonour of the cheque was not by itself an offence under Section 138 of The NI Act. The offence is complete only when the drawer fails to pay the cheque amount within the period of fifteen days stipulated under Clause (c) of the proviso to Section 138 of the Act.[6] Having realised the difficulty in fixing a place where such failure could be said to have taken place the Court said that, it could be the place where the drawer resides or the place where the payee resides or the place where either of them carries on business. To resolve this uncertainty the Hon'ble Court turned to Sections 178[7] and 179[8] of the Code of Criminal Procedure to hold that since an offence under Section 138 can be completed only with the concatenation of five acts that constituted the components of the offence any Court within whose jurisdiction any one of those acts was committed would have the jurisdiction to try the offence.

Hon'ble Court further clarified that it is not necessary that all the five acts should have been perpetrated at the same locality. There is a possibility that each of those five acts could be done at five different localities. If the five different acts were done in five different localities, any of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under section 138 of the Act. In other words, the complainant has all the discretionary power to choose any of those courts within whose local jurisdiction any of the five acts was done.

Subsequently, Hon'ble Apex Court and various Hon'ble High Courts followed *Bhaskaran case* and pronounced the judgments falling in line with the principles laid down in it. For instance, Hon'ble Apex Court in the case of Shamsad Begam v. B. Mohammed[9] referred to the five acts as stated in Bhaskaran and said that in the present case one of the components of the offence under section 138 was giving notice in writing to the drawer of the cheque demanding payment of the cheque amount. Therefore, court decided that 'M' had jurisdiction to the case, within whose jurisdiction the said action of issuance of notice took place. In the year, 2002, Hon'ble Delhi High Court in Sunil Srivastava v. Ashok Kalra[10] also followed the 'trendsetter law' propounded by Bhaskaran.[11] Similarly, in the case Mattathil

5. Hari Dev Kohli, Dishonour of Cheques, Universal Law Publishing Co. (2010) page 185.
6. *Supra* note 1.
7. Section 178 - Place of inquiry or trial.
   (a) When it is uncertain in which of several local areas an offence was committed, or
   (b) where an offence is committed, partly in one local area and partly in another, or
   (c) where an offence, is a continuing one, and continues to be committed in more local areas than one, or
   (d) where it 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.
8. Section 179. Offence triable where act is done or consequence ensues:- When an act is an offence, due to 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.
9. AIR 2009 SC 1355.
10. 2003 Cri LJ 1443 (Del).
11. Supra note 4, at pages 185 & 186.

Ouseph Ittira v. State of Kerala,[12] the Hon'ble Kerala High Court relied on Bhaskaran and held that the court at Thiruvalla has the territorial jurisdiction to try the offence under section 138,[13] as at Thiruvalla the cheque was presented for collection even though the cheque was issued in Sharjah, drawn on a bank at Sharjah, and entire transaction took place in Sharjah. The exercise was repeated by the Hon'ble Apex Court last year in the judgments FIL Industries Ltd. v. Imtiyaz Ahmad Bhat[14] and in Escorts Ltd. v. Rama Mukherjee[15] which too followed Bhaskaran and held that complaint under Section 138, NI Act could be instituted at any one of the five places referred to in Bhaskaran's case.

PROBLEM CREATED BY BHASKARAN–

Hon'ble Court in the current judgment wisely recognized the fact that Section 138, the NI Act was being rampantly misused all these years so far as territorial jurisdiction for trial of the accused is concerned.[16] *Bhaskaran* which gave a shot in the arm of the complainant by allowing him to unilaterally act in presenting a cheque at a place of his choice or issuing a notice for payment of the dishonoured amount, lead to both physical and mental harassment of the drawer. After this judgment it was the payee that vested the jurisdiction in the court, which otherwise it would have not.[17] Law, in fact, did not contemplate such induced place of cause-of-action by self-created intention of the payee, which also runs counter to the jurisprudence laid down by the Hon'ble Court, which has preference for simplifying the law.[18] Law's endeavour must be to bring the culprit to book and to provide succour for the aggrieved party and not harass the former through vexatious proceedings.[19] In this process, courts are enjoined to interpret the law so as to eradicate ambiguity or imprecision, and to safeguard that legal proceedings are not used as a tool for harassment, even of an apparent transgressor of the law.[20]

It appears that, the conclusion in *Bhaskaran* was influenced in large measure by curial compassion towards the unpaid payee/holder, whereas with the passage of time the manipulative abuse of territorial jurisdiction has become a recurring and piquant factor.[21] In simple understanding, equities have transferred from one end of the pendulum to the other. Therefore, Hon'ble Court in current case was judicious in calling for a stricter and necessary interpretation of the statute in a precise manner especially where the location of litigation is concerned.[22]

SLIGHT BUT DEFINITE DEPARTURE FROM BHASKARAN

Although, *Bhaskaran* which was a trend setter law kept its important place in deciding the matters of jurisdiction over all these years, and several judgments of Hon'ble Supreme Court and Hon'ble High Courts came which in principle upheld the ratio laid down by the *Bhaskaran,* but on the same hand there were some cases which diluted the substance of it to a major extent.

1. Dilution of ingredient 2 i.e. jurisdictional power conferred on the place where cheque was presented :— First blow to the view taken by the Hon'ble Supreme Court in Bhaskaran's case was soon dealt by a three-Judge Bench decision in Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd[23], in the year 2001. The question that arose in that case was whether the limitation of six months for presentation of a cheque for encashment was applicable vis-a-vis presentation to the bank of the payee or that of the drawer. In answer to that question Hon'ble Court did a combined reading of Sections 3, 72, and 138 of the NI Act, and held that presentation of the cheque ought to be done within six months to the drawee bank (i.e.

12. 2003 Cr LJ 514 (Ker).
13. *Ibid.*
14. (2014) 2 SCC 266.
15. AIR 2013 SC (Cri) 2208.
16. *Supra* note 1.
17. Supra note 4, at page 187.
18. *Ibid.*
19. *Supra* note 1.
20. *Ibid.*
21. *Ibid.*
22. *Ibid.*
23. 2001 Cri LJ 1250 : AIR 2001 SC 1161.

bank of the drawer) if the drawer is to be held criminally liable.[24] So, when this decision is logically extended to the question – whether the place where cheque has been presented for encashment has any jurisdiction to try the offence under Section 138, the answer would be in negative because the dishonour of the cheque would be localised at the place where the drawee bank is situated.[25] This reasoning negates the jurisdictional power conferred by *Bhaskaran* on the place where cheque was presented. This decision clarifies that the place where a complainant may present the cheque for encashment would not confer or create territorial jurisdiction, and in this respect runs counter to the essence of Bhaskaran which paradoxically, makes actions of the complainant an integral nay nuclear constituent of the crime itself. Similarly, Hon'ble Bombay High Court in Ahuja Nand Kishore Dongre v. State of Maharashtra,[26] observed that though complainant may have accounts at several places, it does not follow that the complainant could file complaint at a place where he had account, because jurisdiction would have to be gathered from the place where money was intended to be paid.[27] If the Courts within whose jurisdiction the cheque was merely presented for realization, were to be allowed to entertain complaints, the result would be opening flood gates for harassment to persons who issued cheques.[28]

Violation of Constitutional Authority

In the current case Hon'ble Supreme Court observed that the dictum in *Ishar Alloy* is very relevant and conclusive to the discussion pertaining to the territorial jurisdiction. It also put emphasis on the fact that *Ishar Alloy* is the only case placed before them which was decided by a three-Judge Bench and, therefore, was binding on all smaller Benches as per constitutional authority given under Article 141. But unfortunately, this court itself in a recent 2013 judgment of Nishant Aggarwal v. Kailash Kumar Sharma[29] went against constitutional authority of precedents and relied on view taken in Bhaskaran, conferring the jurisdiction on Court at Bhiwani in Haryana within whose territorial jurisdiction the complainant had presented the cheque for encashment, although the cheque was drawn on a bank at Gauhati in Assam.

2. Dilution of ingredient No. 4 i.e. Jurisdiction of place from where the notice of demand is made :— Hon'ble Supreme Court in M/s.Harman Electronics P. Ltd v. M/s. National Panasonic India Ltd.,[30] further diluted the Bhaskaran judgment. The issue before the Hon'ble Apex Court in this case was, "whether giving of notice" or "receiving of notice" is the criteria for conferring jurisdiction over any place. The Apex Court held that "cause-of-action" arose when the notice was received and the court under whose jurisdiction the "cause-of-action arose" has only the jurisdiction. Harman was followed by Hon'ble Delhi High Court in Online IT Shoppe India Pvt. Ltd. v. State[31], which took the similar view. Hence, the place from where the notice of demand has been made does not have any jurisdiction to try the offences under Section 138. View taken by the Hon'ble Court in Harman was further asserted by Hon'ble High Court of Kerala in A. Haji v. The State of Kerala.[32] In this case the Court observed that it would be travesty of justice to assume in such a situation that the notice of demand is made at the place where the notice is put into post or where the person, who makes the demand happens to be present. Such approach might lend to ridiculous and preposterous consequences. One cannot obviously engage a lawyer at a far off place to make demand on his behalf against the indictee and later contend that the court at such place of the lawyer has juris-

24. *Supra* note 1.
25. *Ibid.*
26. AIR 2007 (DOC) 95 (Bom).
27. R. N. Chaudhary, Law Relating to Cheques: New Horizons, Deep & Deep Publications Pvt. Ltd., 2009, New Delhi, page 381.
28. *Ibid.*
29. 2013 Cri LJ 3771 : AIR 2013 SC 2634.
30. 2009 Cri LJ 1109 : AIR 2009 SC 1168.
31. AIR 2010 (NOC) 509 (Del).
32. AIR 2007 (DOC) 130 Ker.

diction.[33]

DASHRATH SINGH: DIFFERENCE BETWEEN COMMISSION & COGNIZANCE OF OFFENCE

Hon'ble Apex Court in this case, realizing the need of strict interpretation of laws and statutes, interpreted the law so as to eradicate ambiguity or nebulousness. In the current judgment Hon'ble Supreme Court threw light on the Section 138 of NI Act and noted that it is structured in two parts - the primary and the provisory. While, primary part defines the offence, the provisory part lays down certain conditions which need to be fulfilled before the cognizance of that offence can be taken and the person is prosecuted. Black's Law Dictionary defines proviso that it is - "a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided". It should be kept in mind that a proviso or a condition are synonymous. Hon'ble Court noted in present case that the contents of the proviso place conditions on the operation of the main provision, while it does form a constituent of the crime itself, it modulates or regulates the crime in circumstances where, unless its provisions are complied with, the already committed crime remains impervious to prosecution. Although *Bhaskaran* held that the concatenation of all these concomitants, constituents or ingredients of Section 138, NI Act, is essential for the successful initiation or launch of the prosecution. But, here court took the different view and held that as far as the offence itself is concerned the proviso has no role to play. Accordingly a reading of Section 138, NI Act in conjunction with Section 177[34], Code of Criminal Procedure leaves no manner of doubt that the return of the cheque by the drawee bank alone constitutes the commission of the offence and indicates the place where the offence is committed.

It must, therefore, be interpreted strictly, for it is one of the accepted rules of interpretation that in a penal statute, the Courts would hesitate to ascribe a meaning, broader than what the phrase would ordinarily bear. As mentioned earlier Section 138 is in two parts. The enacting part of the provision makes it abundantly clear that what constitutes an offence punishable with imprisonment and/or fine is the dishonour of a cheque for insufficiency of funds etc. in the account maintained by the drawer with a bank for discharge of a debt or other liability whether in full or part. The language used in the provision is unambiguous and the ingredients of the offence clearly discernible. It follows that an offence within the contemplation of Section 138 is complete with the dishonour of the cheque but taking cognizance of the same by any Court is forbidden so long as the complainant does not have the cause of action to file a complaint in terms of Clause (c) of the proviso read with Section 142.

Hon'ble Court said that a proper understanding of the scheme underlying the provision would thus make it abundantly clear that while the offence is complete upon dishonour, prosecution for such offence is deferred till the time the cause of action for such prosecution accrues to the complainant. The proviso in that sense, simply postpones the actual prosecution of the offender till such time he fails to pay the amount within the statutory period prescribed for such payment. This scheme may be unique to Section 138, NI Act, but there is hardly any doubt that the Parliament is competent to legislate so to provide for situations where a cheque is dishonoured even without any criminal intention on the part of the drawer. The scheme of Section 138 thus not only saves the honest drawer but gives a chance to even the dishonest ones to make amends and escape prosecution. Compliance with the provision is, in that view, a mandatory requirement.[35]

If the Parliament intended to make the conditions stipulated in the proviso, also as in-

33. *Supra* note 26, at pg. 382.

34. Section 177 - Ordinary place of inquiry and trial: Every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed.

35. Alavi Haji v. Palapetty Muhammed and Anr., 2007 Cri LJ 3214 (SC).

gredients of the offence, the provision would have read differently. It would then have specifically added the words "and the drawer has despite receipt of a notice demanding the payment of the amount, failed to pay the same within a period of fifteen days from the date of such demand made in writing by a notice". That, however, is not how the enacting provision of Section 138 reads. The legislature has, it is obvious, made a clear distinction between what would constitute an offence and what would give to the complainant the cause of action to file a complaint for the court competent to take cognizance.

Proviso to Section 138 according to the Hon'ble Court only insists on certain conditions precedent which have to be satisfied if the person who is deemed to have committed the offence were to be prosecuted successfully. The offence is already committed when the cheque is returned by the bank. But the cause of action for prosecution will be available to the complainant not when the offence is committed but only after the conditions precedent enumerated in the proviso are satisfied.

Harman in that view correctly held that "what would constitute an offence is stated in the main provision. The proviso appended thereto however imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken".[36] In this regard Hon'ble Delhi High Court in K.O. Issac v. State[37] observed, if the ingredients of Part I are satisfied the offence is said to have been committed. Part II of section 138 is introduced with a clear motive that the dishonest evader is to be punished and the honest person who could not arrange payment when the cheque is presented, be given a chance to show his honesty. Thus non-payment within 15 days of the receipt of notice is not that the offence is completed but it means that cognizance of the complaint is to be taken. Hon'ble High Court of Kerala has also correctly interpreted Section 138 of the NI Act in Kairali Marketing and Processing Co-operative Society Ltd. v. Pullengadi Service Co-operative Ltd[38] when it said that ingredients of the offence have got to be distinguished from the conditions precedent for valid initiation of prosecution.

36. *Supra* note 1.

37. 2010 (1) CC Cases (Del) 207.

CIVIL LAW CONCEPTS NOT STRICTLY APPLICABLE

"Section 177 the Code of Criminal Procedure unambiguously states that every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed. "Offence", by virtue of the definition ascribed to the word by Section 2(n) the Code of Criminal Procedure means any act or omission made punishable by any law. Halsbury states that the venue for the trial of a crime is confined to the place of its occurrence. Blackstone opines that crime is local and jurisdiction over it vests in the Court and country where the crime is committed. This is obviously the raison d'etre for the Code of Criminal Procedure making a departure from the Code of Civil Procedure in not making the "cause of action" routinely relevant for the determination of territoriality of criminal courts. The word "action" has traditionally been understood to be synonymous to "suit", or as ordinary proceedings in a Court of justice for enforcement or protection of the rights of the initiator of the proceedings. "Action, generally means a litigation in a civil Court for the recovery of individual right or redress of individual wrong, inclusive, in its proper legal sense, of suits by the Crown".[39] Unlike civil actions, where the Plaintiff has the burden of filing and proving its case, the responsibility of investigating a crime, marshalling evidence and witnesses, rests with the State. Therefore, while the convenience of the Defendant in a civil action may be relevant, the convenience of the so called complainant/ victim has little or no role to play in criminal prosecution."[40]

LIMITATION ON JURISDICTION DOES NOT MEAN THAT YOU DO NOT HAVE OTHER OPTION/OTHER ALTERNATIVES

Hon'ble Court felt compelled to reiterate

38. (2007) 1 KLT 287.

39. Bradlaugh v. Clarke (1883) 8 App. Case 354.

40. *Supra* note 1.

their empathy with a payee who has been duped or fooled by a swindler into accepting a cheque as consideration for delivery of any of his property; or because of the receipt of a cheque has induced the payee to omit to do anything resulting in some damage to the payee.[41] But, it should be known to the complainant that the relief introduced by Section 138 of the NI Act is in addition to the contemplations in the Indian Penal Code. It is still open to such a payee/recipient of a dishonoured cheque to lodge a First Information Report with the Police or file a complaint directly before the concerned Magistrate.[42] If the payee succeeds in establishing that the inducement for accepting a cheque which subsequently bounced had occurred where he resides or ordinarily transacts business, he will not have to suffer the travails of journeying to the place where the cheque has been dishonoured.[43] All remedies under the Indian Penal Code and Code of Criminal Procedure are available to such a payee if he chooses to pursue this course of action, rather than a complaint under section 138 of the NI Act. And of course, he can always file a suit for recovery under civil law wherever the cause of action arises dependent on his choosing.[44]

CONCLUSION

No doubt that the decision of the Hon'ble Apex Court in *Bhaskaran* creates judicial inconvenience and judicial uncertainty in the matter of territorial jurisdiction where Section 177 of Cr.P.C. was made almost nugatory. Even Section 178 of Cr.P.C. was subjected to discretionary interpretation.[45] Therefore, Hon'ble Court in current case rightly expressed an opinion that the decision in *Bhaskaran* is not in the right perspective. Law is meant to punish the guilty but not to harass him through legally assumed notions. It is seen that in order to create hazardous compulsion and harassment to the drawer of the cheque, the payee presents the cheque to the bank for collection at a place thousands of kilometer away from the place where the transaction took place and then issues the demand notice from that place and files the complaint there if the drawer of the cheque fails to make the payment.[46] The situation similar to the aforesaid one can be seen in Laxmi Travels Nagpur v. G. E. Countrywide Consumer[47] case, where except issuance of demand notice from Aurangabad all transactions took place at Nagpur. Here, court rightly held that mere issuance of notice from Aurangabad itself cannot give cause-of-action to file complaint at Aurangabad. Convenience of parties is also an important fact.

It cannot be contested that Dashrath Rup Singh's judgment has been welcomed by the criminal justice system at the Magistrate's level of this country which is been so far choked by an avalanche of cases involving dishonour of cheques. As per the 213th Report of Law Commission of India which came in the year 2008, there were more than 38 lakhs cases estimated to be pending in the courts of the country. More than five lakh such cases were pending in criminal courts in Delhi alone as of 1st June, 2008.[48] Now with the passing of this judgment, accused can heave a sigh of relief as Hon'ble Court clarifies that the complainant is statutorily bound, *inter alia,* to comply with Section 177 etc. of the Code of Criminal Procedure and therefore the place or situs where the Section 138 complaint is to be filed is not of his choosing. The territorial jurisdiction has now been restricted to the Court within whose local jurisdiction the offence was committed, which in the present context is where the cheque is dishonoured by the bank on which it is drawn.

While this judgment can be seen as an end to the hardship, harassment and inconvenience to the accused persons, there are still some grey areas left which need to be addressed as soon as possible to achieve the purpose to its fullest. With the advancement of banking facilities, where cheques are

41. *Ibid.*
42. *Ibid.*
43. *Ibid.*
44. *Ibid.*
45. *Supra* note 4, at page 187.
46. *Ibid.*
47. 2006 Cri LJ 3704 (Bom).
48. *Supra* note 1.

cleared by not being presented to the drawee bank but at nodal branches of the concerned banks, the subject matter of jurisdiction may have to be decided keeping in view that the drawee bank has created an agency where the cheque in question is transmitted for clearance and the situs where the clearance takes place would then arguably become the place where the cheque would be required to be treated as presented to "the bank" i.e. the drawee bank. So, to conclude it would be suffice to say that unless and until other technical issues which are important relating to the matter gets addressed, this judgment might fail in the expected goals.