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INTERIM COMPENSATION FOR DISHONOUR OF CHEQUES: Constitutionality and Justifications

Gunjan Gupta

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Contents

Volume I 2020 HPNLU Law Journal

<i>Articles</i>	<i>Page</i>
1. Competing Concerns of Public Security and Individual Liberty: A Critique of the Supreme Court Judgement in <i>Anuradha Bhasin v. Union of India</i> <i>Priyanka Thakur & Shivani Choudhary</i>	1
2. Interim Compensation for Dishonour of Cheques: Constitutionality and Justifications <i>Gunjan Gupta</i>	19
3. Arguments for Animals Rights: Prohibiting Animal Sacrifice as a form of Cruelty <i>Vanshika Thakur</i>	35
4. <i>Namami Gange</i> Project: A Legal Analysis <i>Aayush Raj</i>	48
5. 'Non-conviction Based Asset Forfeiture Laws: An Appraisal of the Magic Bullet <i>Sezal Rathore & Saurabh Tiwari</i>	66
Notes and Comments	
6. Applying Ashworth's 'Principled Core': An Analysis of the Criminal Law (Amendment) Acts of 2013 and 2018 <i>Ankit Kaushik</i>	85
7. Road to Justice: Analysing the Contours of Prosecution, Peace, Amnesty, and Immunity in International Criminal Law <i>Pranawa Bhaskar Tiwari & Shruti Shreya</i>	96
8. The Contours of Corporate Criminal Liability for Environmental Wrongs <i>Gaurav Puri</i>	112
9. E-commerce Taxation in India: <i>Tax Havens vis-à-vis Indo-Mauritius DTAC</i> <i>Hitendra Hiremath & Netra Koppad</i>	125
10. Ethical and Legal Reflections on Strike: Strikes by Nursing, Medical and Para-Medical Professionals in India <i>Liji Samuel</i>	144
11. Atomic Energy in India: Legal Framework <i>Naveen & Prakash Sharma</i>	165
12. Fingerprint and Footprint Identification: A Legal Analysis <i>Sundaram Bharti</i>	182
13. Regulating Rare Diseases in India: A Comment on National Policy for Treatment of Rare Diseases 2020 <i>Ujwala & Siddharth Sen</i>	193
14. Access to Justice Amidst Corona Pandemic: A Study in India <i>Arvind Malhotra</i>	206

INTERIM COMPENSATION FOR DISHONOUR OF CHEQUES: Constitutionality and Justifications

*Gunjan Gupta**

[Abstract: This paper examines whether these provisions inserted after the amendment of the Negotiable Instruments Act, 1881, advance the purpose for which Section 138 of the Act was introduced. The legislative intent behind Section 138 was to provide for trial on day-to-day basis with additional statutory obligation i.e. to complete the proceeding within six months of the initiation of the trial. It seems with the introduction of these provisions; a new legislative system will evolve leading to a 'mini trial within trial' thereby augmenting the time taken by the existing system in adjudication.]

I

Introduction

The Negotiable Instruments Act, 1881 (hereinafter referred as, the Act of 1881) has been amended vide the Negotiable Instruments (Amendment) Act, 2018¹ thereby inserting section 143A and 148 to Chapter XVII of the Act.² The said chapter relates to law of dishonour of cheques, section 143A and 148 entrust power upon the trial court and the appellate court to grant interim compensation, respectively. The primary aim of the author shall be to scrutinize possible legal justification and access the constitutionality of the aforementioned provisions.

The other aim of the author shall be to see whether these provisions advance the purpose for which section 138 of the Act was introduced. The legislative intent behind section 138 was to provide for trial on day-to-day basis with additional statutory obligation i.e. to complete the proceeding within six months of the initiation of the trial. It seems with the introduction of these provisions; a new legislative system will evolve leading to a 'mini trial within trial' thereby augmenting the time taken by the existing system in adjudication.

* Associate Professor, Campus Law Centre, Delhi University. Email: gunjangupta@cdlu@gmail.com

¹ Ins. by The Negotiable Instruments (Amendment) Act, 2018 [Act 20 of 2018], vide section 2, published in the Gazette of India, Extra., Pt. II, Section 1, No. 32, date. 2 Aug., 2018.

² The Negotiable Instruments Act, 1881 as amended by the Negotiable Instruments (Amendment) Act, 2018 (Act 20 of 2018).

II

Constitutionality of Interim Compensation u/s 143A

Rule of fairness envisaged by virtue of Article 14 of the Constitution³ requires that nobody be condemned unheard, and therefore, prior to the passing of any adverse order against anybody, such person should be provided a reasonable opportunity to defend oneself. A necessary corollary thereto is another aspect of rule of fairness *i.e.* under certain peculiar situations it is necessary for the court to grant interim relief or even *ex-parte ad-interim* relief, without even hearing the opposite party. The *ex-parte ad-interim* reliefs are always of a nature that the main relief sought in the litigation itself is not frustrated by the time a decision is pronounced by the court. Therefore, a harmonious construction between the afore-stated distinct but equally important aspects of fairness would be required to be made.

It would be apposite to refer to that the principle is codified in Rules 1 and 2 of Order XXXIX of the Code of Civil Procedure, 1908, that deals with the grant of interim relief with 'cases in which temporary injunction may be granted'.⁴ The perusal of the said provision of the Code which some may argue partake the character of special status from Article 14 of the Constitution, reveals that the Rules deal with 'interim injunctions' as against payment of 'interim compensation'. Thus, the said provision does not empower the court to direct payment of any 'interim compensation' whatsoever.

The scheme of Code of Civil Procedure, 1908 is that payment of money during trial can be directed by the court only in few specified situations, but it does not envisage the power for 'interim compensation'. Certain such relevant provisions that deal with power of the court to direct payment of money before the conclusion of trial have been separately dealt with herein under. Barring those provisions of law,⁵ there is no such provision found in the entire Indian legislative scheme. Therefore, it can, in no uncertain terms it can be said that the provision of law under scrutiny is exceptional in its inherent nature.

³ Article 14, Constitution of India

⁴ Relevant provisions of Rules 1 and 2 of Order XXXIX of the Code of Civil Procedure, 1908 specifies cases in which temporary injunction may be granted for which the relevant provisions may kindly be referred.

⁵ *Viz.*, in the arena of matrimonial litigation where provisions for payment of interim maintenance have been envisaged and similarly, traces of such provisions can also be found in the cases of motor accidents. This aspect of the matter has also been separately dealt with in greater detail herein under under a separate topic.

The decision of a three Judges' bench of the Hon'ble Supreme Court in *Mardia Chemical Ltd. v. Union of India*.⁶ is of relevance for our inquiry. The Court in this case determined the constitutionality of Section 17⁷ of the SARFAESI Act.⁸ Section 17 of SARFAESI provided for the filing an appeal to the Debt Recovery Tribunal within forty-five days of any action taken against the borrower under sub-section (4) of Section 13 of the Act.⁹ Section 13(4), as it existed, provided that, 'an appeal under Section 17(1) of SARFAESI Act would lie only after some measure has been taken under sub-sec.(4) of Section 13 of that Act and not before the stage of taking of any such measure.¹⁰ According to Sub-Section (2), the borrower had to deposit seventy five percent of the amount claimed by the secured creditor before his appeal could be entertained. At the same time by virtue of Section 34 of the SARFAESI Act, the jurisdiction of the Civil Court was barred.¹¹ In the backdrop of

⁶ A.I.R. 2004 S.C. 2371.

⁷ As it then was, for now it stands amended in tune with the dictum of the Supreme Court in *Mardia Chemicals, supra*. Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 reads, as it then was, reads as under:

17. Right to appeal: (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-Section (4) of Section 13 taken by the secured creditor or his authorized officer under this Chapter, may prefer an appeal to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken.

(2) Where an appeal is preferred by a borrower, such appeal shall not be entertained by the Debts Recovery Tribunal unless the borrower has deposited with the Debts Recovery Tribunal seventy-five per cent of the amount claimed in the notice referred to in sub-Section (2) of Section 13 :

Provided that the Debts Recovery Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.

(3) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and Rules made thereunder.

⁸ The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (Act No. 54 of 2002).

⁹ SARFAESI Act, *supra*.

¹⁰ Section 17(1), SARFAESI Act, 2002: ... (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, [may make an application along with such fee, as may be prescribed] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken.

¹¹ Section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 read as under:

afore-stated circumstances, while declaring the said provision of deposit of seventy five percent of the 'amount due' as a condition precedent as *ultra vires* the constitutional framework. It was held by the Hon'ble Court that the challenge in the name of 'appeal' in fact was the first challenge in a court of law and that being so, the nomenclature of the said challenge as that of 'an appeal' was wrong. A distinction was drawn between the 'first challenge in a court of law' and 'an appeal' such that in the former case it was found not justiciable to lay down such cumbersome condition of deposit of amount on the petitioner for exhausting the legal remedy at the very first instance. Whereas such condition at the time of filing of appeal against the judicial order was found not without any force. In this view of the matter, and after multifarious reasons assigned for the purpose, it was held that the requirement of deposit of seventy five percent of the amount claimed before entertaining an appeal, which, in fact, was not an appeal but was only an original petition under Section 17 of that Act, was liable to be struck down as unconstitutional being oppressive, onerous, and arbitrary.

In light of the foregoing discussion, the newly added provisions to the Act of 1881 are to a large extent similar in nature and *pari-materia* to the provisions contained in Section 17 of the SARFAESI Act. Therefore, the provision of Section 143A should, if a matter be perused on similar lines, be declared unconstitutional for the same reasons. Moreover, there is, at present, nothing in the Indian legislative scheme to award 'partial punishment' without completing the trial in a criminal case.

Hence, it would suffice to mention that, some in legal fraternity opine that there would be significant quantum of cases pertaining to the misuse of blank cheques with the insertion of the amended sections. Therefore, if considering the likely possibility that, a blank cheque is misused by the complainant by filling up of an out of proportion amount, it would be very difficult under the amended Act for the purported drawer of the cheque to defend the contingent interim order likely to be passed under the Act, and thereby would inevitably tantamount to denial of right to defend of the accused.

-
34. Civil Court not to have jurisdiction - No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).

Forfeiture of right of accused 'not to disclose his defense' under Articles 14 and 20(3) of Constitution

Right to fair trial emanating from Article 14 of the Constitution along with the protection under Article 20(3), requires that accused under no circumstances can be compelled to disclose his defense. This procedure has been adopted to safeguard his interest in the matter till the fag end of the trial. The premise being, that if the accused is forced to disclose his defense evidence at an earlier stage, this procedure will necessarily provide succor to the prosecution either to improve their case or to plug loopholes therein. This possibility will be prejudicial and detrimental to the interest of the accused in any criminal trial. Therefore, the amendment Act seems to depart from the principle which reflects essence of criminal justice system.

For example, if the defense of the accused is; at the time of alleged delivery of goods or handing over of cash loan amount etc., as the case may be, the complainant was out of station, such that it was impossible for the accused on that day to have supplied the goods or to have given loan as alleged. If the defense is disclosed at the initial stage, the complainant can make improvements in his version; and hence it would be naturally be the most appropriate to disclose the defense only after the conclusion of the complainant's evidence thereby giving no chance to the complainant to change his stand.

Similarly, when the case of the complainant is of issuance of post-dated cheque against supply of goods etc. on a particular day and whereas the accused as a matter of fact got issued the cheque book containing cheque leaf in question at a much later date such that by production of a certificate of banker under the Bankers' Books Evidence Act, 1891. This factum of issuance of cheque book at a much later date can be proved with ease by the accused as a defense. If the accused is compelled to disclose this kind of defense at an earlier stage, it is quite possible for the complainant to improve his version to defeat the defense version of the accused and in such circumstances it would be appropriate to withhold and not disclose the defense till the completion of complainant's evidence or alternatively, such question should be put to the complainant only as a last question to put the matter to quietus.

However, if interim compensation under Section 143A of the Act is likely to be granted to the complainant, the accused shall have only two possible options, *viz.*, either to bear the brunt of the interim order to pay compensation silently or to contest the application for grant of interim compensation by disclosure of his defense; and the latter being the only plausible situation, it would tantamount to forfeiture of right of the accused not to disclose his defense at the earlier stage of trial. It is a time tested principle of anglo-saxon jurisprudence that what cannot be

done directly cannot be done indirectly; hence even an indirect curtailment of right to not disclose defenses is untenable in the court of law. Such provision, therefore, is unreasonable and finds foul on the touchstone of Article 14 of the Constitution.

III

Interpretation of 'may', 'shall', 'minimum of' and 'non-obstante clause'

Whereas clause (1) appended to Section 143A uses the expression 'may order the drawer of the cheque to pay interim compensation', clause (2) thereof uses the expression 'interim compensation shall not exceed twenty per cent of the amount of cheque'.

The use of the word 'shall' raises a presumption of its being imperative in its application, whereas the word 'may' raises a presumption of it being discretionary; the court interpreted such expressions differently in various cases, as per the circumstance, when read in the context of the statute as a whole and for such other considerations as the court find appropriate. There may be case such that 'shall' was read as 'may' and 'may' was read as 'shall'.¹²

The above interpretation leaves no matter of doubt that the said expressions can connote distinct intention in the context in which they are used. Necessarily therefore, when a combination of the said expressions is used at different places, in the same statute or in the same provision or in the same clause of a provision, the same can bring out result differently. In this view of the matter, therefore, the use of the expression 'may' in clause (1) and 'shall' in clause (2) of Section 143A leaves, in the opinion of the author, no manner of doubt that the same should cumulatively mean as 'may' thereby giving full discretion to the court to grant or to refuse such interim compensation; but under no circumstances, the same can be allowed beyond twenty per cent of the cheque amount.

Insofar, as the provision of Section 148 of the Act relating to the power of the appellate court to order payment during the pendency of appeal is concerned, the provision uses the expression 'may order' followed by 'which shall be a minimum of twenty per cent'. Whereas the former expression uses the word 'may', the latter uses the words 'shall' along with 'minimum of'; and when they are read in juxtaposition to gather the overall intention of the legislature it leaves no room of doubt that the said combination of words would make it imperative for the

¹² G.P. Singh, PRINCIPLES OF STATUTORY INTERPRETATION 298 (2017).

appellate court to pass an order of payment to the minimum of twenty per cent of fine or compensation awarded by the trial court in all cases during the pendency of appeal.

Non-obstante clause

Both the provisions under analysis, Sec.143A and Sec.148 start with the expression 'notwithstanding anything contained in the Code of Criminal Procedure, 1973...'. It is necessary to understand the meaning of the said expression in general and to the word 'notwithstanding' in particular. Such clause, beginning with 'notwithstanding anything contained in this Act or in some other Act or any other law for the time being in force' is generally appended to a statutory provision in the beginning with a view to give the enacting part of the provision in case of conflict an overriding effect over such other provision of law. The use of expression 'notwithstanding' makes the clause as 'non-obstante' clause, thereby making the provision with which such expression is appended as superior to the other provision of law.¹³

Rule of 'Interim Relief' is Foreign to Criminal Jurisprudence

The Code of Criminal Procedure, 1973, with special reference to Section 357¹⁴ that deals with payment of compensation, is devoid of any mechanism whereby

¹³ A.B. Kafaliya, TEXTBOOK ON INTERPRETATION OF STATUTES 159 (2020).

¹⁴ Section 357 of the Code of Criminal Procedure, 1973 reads as under:

357. Order to pay compensation. (1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

interim compensation can be awarded *i.e.* in essence the idea is alien within the realm of Code of Criminal Procedure. Exception can be found in provisions that deals with the aspect of payment of maintenance to wife, children and other dependents, wherein there is always a provision made for grant of interim maintenance.¹⁵ It may, however, be noted that the nature of 'maintenance' is totally different from the payment of 'interim compensation' consequent to the dishonour of cheque.

It is, therefore, submitted that when in almost fifty percent of the cases the plea is taken as that of misuse of a blank cheque, and some may later be found to be correct in their plea, provision for the award of partial interim punishment does not seem to be a sound principle of law. Even otherwise it is submitted that a trial for dishonor of cheques under Section 138 of the Act, due to technical interpretations given by the courts or due to dilatory tactics adopted by lawyers, is dragged for decades. The blame should primarily go to the courts concerned and

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this Section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this Section.

¹⁵ Reference in this connection may be made to criminal provision as adumbrated by virtue of Section 125 etc. of Code of Criminal Procedure, 1973, though the same is also construed essentially of civil nature wherein appropriate provision is made for the grant of interim maintenance; and insofar as civil law of maintenance is concerned, reference may be made to Section 24 of the Hindu Marriage Act, 1955, Section 18 of Hindu Adoption and Maintenance Act, 1956 and Section 20 read with Section 23 of the Protection of Women from Domestic Violence Act, 2005 and so on as they all provides remedy for passing of orders by the court of competent jurisdiction for payment of interim maintenance.

Insofar as cases of motor accidents are concerned, there also is a provision for payment of interim compensation under Section 140 of the Motor Vehicles Act, 1988, however, the nature of claim therein again is different from the kind of claim that has been dealt with herein. Similar, exceptional provisions can be found in related legislation in cases of other kinds of accidents as well!

this unhealthy practice due to their lethargy, lack of expertise, inasmuch as the system of bails, of application under Section 145(2), of framing of charge etc. are all futile attempts having no nexus with the object sought to be achieved by the legislation in question. The reason being obvious, that, neither the system of grant of bail to the accused is not going to serve any purpose, nor asking the accused as to whether he is willing to cross-examine the complainant on his affidavit under Section 145 of the Act. Similarly, the concept of issuing notice under Section 251 of the Code of Criminal Procedure, 1973 etc. also seems to be totally stale in the present-day inasmuch as when the accused has been served with copy of complaint along with all the documents. It seems purposeless to tell him formally as to what is the case against him and ask him as what is his defense. Thus, if an effective system is devised whereby the accused is asked to put relevant question in cross-examination of the complainant on the first day of hearing and to bring his defense evidence on the very same day without wasting time, then under such condition it is possible for the court to conclude the trial in a single day.

IV

Principles of Interim Relief in Civil Law

Temporary injunction can be granted based on the simultaneous satisfaction of three well established prerequisites, namely, *prima facie* case, balance of convenience and irreparable loss or injury¹⁶. The requirement of 'irreparable loss' and 'balance of convenience' cannot be satisfied in the matter of 'payment of interim compensation' as against matters involving 'immoveable properties'. Interim orders are most often passed in the form of *status quo* orders, which are totally different from the order directing payment of interim compensation. Granting an injunction is a matter of discretion and in its exercise the Court must satisfy itself whether the petitioners have a triable case. Before invoking the jurisdiction of the Court to seek temporary injunction, the petitioners were bound to show that they have a legal right and that there was an invasion of that right.¹⁷ Therefore grant of temporary injunction is a distinct legal principle.

Guidelines not framed on the basis whereof court to exercise discretion

Even otherwise, empowering the court to pass orders for the payment of interim compensation, without however providing for any guidelines based on which

¹⁶ *Dalpat Kumar and Anr. v. Prahlad Singh and Ors.*, (1992) 1 S.C.C. 719, para 5.

¹⁷ *Chandu Lal v. Municipal Corporation of Delhi*, A.I.R. 1978 Delhi SC 174, by T Tatachari, P Raj, Y Dayal, JJ; *Gangubai Bablya Chaudhary v Sitaram Bhalchandra Sukhtankar*, dt. 13 May 1983, AIR 1983 SC 742, 1983 (1) SCALE 775, (1983) 4 SCC 31, by D Desai and O C Reddy, JJ.

such discretion shall be exercised, in the opinion of the present author seems to be violative of Article 14 of the Constitution.

No provision for partial payment in civil law

The analysis of relevant provisions of Code of Civil Procedure, 1908 particularly those as contained in Rules 1 and 2 of Order XXXIX read with Section 151 shows a different paradigm than the amendments to the Act. The afore-stated rules envisage a grant of interim relief in the matters of injunctions only which have nothing to do with payment of money. There would be very few provisions in the Code that deal with payment of money by the defendant to the plaintiff in partial satisfaction of the claim amount or in its entirety, but none is for payment of interim compensation.

Related provisions in Code of Civil Procedure, 1908, but none is akin to section 143A

- (a) **Judgment on admissions under Order XII, Rule 6 of Code of Civil Procedure, 1908:** These provisions are based on the cardinal rule of construction. The rule states that when the parties are not at any issue or when there is no issue left to be decided between the parties and the relevant facts are admitted on record in pleadings or otherwise, then the decree of money may be drawn without remitting the matter for trial. The rule refers only to admissions on the point of facts and not on law.¹⁸ Under these provisions, a party can seek judgment on the point where there is no issue arising between the parties due to admissions in pleadings or otherwise.¹⁹ For succeeding under this Rule, the admission should be clear and unambiguous making it almost impossible for the party making it to succeed.²⁰

However, the said provision does not deal with the aspect of payment of interim compensation or interim relief in any form whatsoever. Therefore, the provision under scrutiny is of no help to support the provision of Section 143A of the Act in any manner whatsoever.

The aid of Section 151 of the Code can be used to pronounce judgment, and a decree be drawn with respect to partial admitted amount of the money as well. For the purpose of payment of partially admitted amount pending

¹⁸ *Beni Pershad v. Dudhnath*, (1900) 27 Cal. 156 (PC).

¹⁹ A.I.R. 1953 Trav 220 (FB).

²⁰ *Uttam Singh Duggal & Co. Ltd. v. Union Bank of India and Ors.*, (2000) 7 S.C.C. 120, para – 13.

trial for the remainder, reference may additionally be made to Or. XXIV, Rule 1 of the Code as discussed below.

- (b) Deposit of admitted amount under Order XXIV, Rule 1 of Code of Civil Procedure, 1908:** In a money suit the provision under analysis, that says that defendant may deposit in court an amount he thinks appropriate in satisfaction of claim of the plaintiff, again is a species of Or. XII, Rule 6 of the Code inasmuch as in the provision the judgment is pronounced with respect to the whole claim, whereas in the provision in hand, the payment is made with respect to part of the claim that is admitted and tendered by the defendant. The rule contemplates an unconditional deposit of a sum of money in court by the defendant.²¹ Mere expression of willingness by the defendant to pay is not sufficient compliance of this provision which requires deposit as a matter of fact.²² However, the provision does not apply to return of goods or their value.²³

Thus, nature of the two provisions is same. However, none of the two provisions deal with grant of interim relief in any form whatsoever, and least in the nature of grant of 'interim compensation'.

- (c) Attachment before judgment under Order XXXVIII of Code of Civil Procedure, 1908:** As we have already discussed above, for the reason that there is a reasonable apprehension in the mind of the plaintiff that the defendant may run away from the jurisdiction of the court. Thereby making it impossible for the plaintiff to recover his money in case his claim is allowed by the court, and for the purpose of securing the said amount, steps can be taken for attachment of properties of the defendant before the pronouncement of judgment. The purpose of the provision is to prevent any attempt on the part of the defendant to defeat the realization of the decree that may be passed in his favour.²⁴ The rule is applicable on the basis of the apprehension of the plaintiff that the property of the defendant can be disposed off or taken outside the jurisdiction of the court, and not in cases where the property already stands disposed off.²⁵

This provision is in no way related to payment of money, be it interim or final, to the plaintiff claimant. In this view of the matter, therefore, the

²¹ *K.M. Bose & Co. v. Allen Brothers*, 1926 S.C. OnLine Cal 330, para – 7.

²² (1892) 16 Bom. 141.

²³ (1857) 156 ER 1330.

²⁴ A.I.R. 1982 SC 989; AIR 1962 SC 218.

²⁵ A.I.R. 2005 Bom. 165.

provision under scrutiny does not help those who advocate the validity of Section 143A of the Act which devises a novel system for payment of interim compensation in criminal law.

- (d) **Interim maintenance under matrimonial law:** This legal aspect deals with the cases when maintenance is claimed by the dependents, be they children, wife or old aged parents of the defendant, the nature of such claims and the power to award interim compensation under Section 143A of the Act are totally different as they involve personal obligations of the defendants and therefore it does not come for the rescue of the complainant claiming interim compensation.

Compensation under Section 148, Pending Appeal

There is substantial difference between the original claim petition and an appeal. Such that the burden lies on the one who approaches before a court of law, and therefore, onus of proof lies on the claimant to prove his case; and presumption of innocence is attracted for the accused. However, in the case of appeal preferred by the accused against an order directing him payment, the burden of proof is shifted upon the appellant. In terms of judgment of three Judges of the Hon'ble Supreme Court in *Mardia Chemicals*²⁶ wherein the court opined that, direction for payment, though cannot be imposed by the legislature in original jurisdiction before a judicial forum but, can certainly be done in an appeal when the defendant has suffered an order or a direction or a decree of payment of money against him. In this view of the matter, therefore, there is no room to say such power conferred on the appellate court is *ultra vires* the Constitution. However, the problem lies in the fact that in the light of the phraseology used in Section 148 of the Act, it becomes mandatory for the appellate court to pass orders of payment which in no case shall be less than twenty per cent of fine or compensation.

It is a submission of the author that in appropriate cases when the appellant is able to initially satisfy the appellate court about the impropriety of the impugned order of the lower court, in those situations providing that still it shall be obligatory for the appellate court to pass interim orders of this nature does not sound good. Thus, such powers should be interpreted to be discretionary only, for which appropriate direction of the Constitutional Courts shall be awaited.

Retrospective effect of Sections 143A and 148 of the Act

Procedure for recovery of fine and compensation being already prescribed under the Code of Criminal Procedure, 1973 as contemplated under Section 421 and 424

26 Supra. note 8

there is nothing novel that is ordained by virtue of Section 148 of the Negotiable Instruments Act, 1881 that prescribes for the power of the Appellate Court to order partial payment of fine or compensation pending the appeal. Therefore, there is nothing unconstitutional in the said provision by giving retrospective operation to the pending cases. Section 421 and Section 424 of the Criminal Procedure Code being in force which deals with the recovery of fine and compensation pending appeal. The High Court of Punjab and Haryana in *Ginni Garments v. Sethi Garments*²⁷ carved out a distinction between Section 148 and Section 143A, such that, it clarified that retrospective operation should not be given to Section 143A of the Act inasmuch as Section 143A has created a new obligation against the accused which earlier was not contemplated.

In this view of the matter it was held that though Section 148 of the Act shall apply to pending cases, insofar as Section 143A of the Act is concerned the same cannot be given retrospective effect to make the same applicable to pending cases.

Further, the Bombay High Court in *Ajay Vinodchandra Shah v. State of Maharashtra*,²⁸ held that the use of the expressions 'may' and 'shall' under Section 148 of the Act provides a full discretion to the court whether to grant interim compensation to the complainant or not pending appeal and if it chooses to exercise its discretion to so direct, then it shall be obligatory for the court to grant minimum of twenty percent of the fine or compensation so imposed.²⁹

Furthermore, where while setting aside the order directing issuance of Non Bailable Warrant an order for payment as a condition precedent to deposit twenty percent of the cheque amount was passed by the trial court, the Madras High Court while setting aside the same held, without entering into the legal and technical issue of the power of the court to so direct under Section 143A in pending

²⁷ (2019) 4 S.C.C. 38, para 33.

²⁸ 2019 S.C.C. OnLine Bom 436, para 21.

²⁹ In *Amandeep Singh v Monika Bhatia*, CRM-M-54046-2018 (O&M), dated 06-12-2018, the Punjab and Haryana High Court upheld the order of the appellate court under Section 148 of the Act granting 25% of the fine and compensation so granted by the trial court pending appeal. Going a step further, Chattisgarh High Court in *Ashok Panchbhai v State Bank of India*, CRMP No. 325 of 2019, dated 08-02-2019, while upholding payment of compensation to the extent of 50% held that it would be incorrect to hold that beyond 20% of the amount could not be ordered under Section 148 of the Act. In *India Green Reality Pvt. Ltd. v State of Gujarat*, R/Special Criminal Application No. 5814 of 2018, dated 10-12-2018, Gujarat High Court upheld payment of 30% amount by the Appellate Court as envisaged under Section 148 of the Act particularly when the cheque amount was huge.

cases, that the said condition for recalling of NBW was too onerous as a condition particularly when the application was filed on the same day.³⁰

While interpreting the words and expressions as articulated under Section 148 of the Act, the Bombay High Court in *Ajay Vinodchandra Shah v. State of Maharashtra*,³¹ held that the use of the expressions 'may' and 'shall' gives a full discretion to the court to grant interim compensation and if it chooses to exercise its discretion then it shall be obligatory for the court to grant minimum of twenty percent of the fine or compensation so imposed.

In *Amandeep Singh v. Monika Bhatia*³² the Punjab and Haryana High Court upheld the order of the appellate court under Section 148 of the Act granting twenty five percent of the fine and compensation so granted by the trial court pending appeal. Going a step further, Chattisgarh High Court in *Ashok Panchbhai v. State Bank of India*³³ while upholding payment of compensation to the extent of fifty percent held that it would be incorrect to hold that beyond twenty percent of the amount could not be ordered under Section 148 of the Act. In another case Gujarat High Court upheld payment of thirty percent amount by the Appellate Court as envisaged under Section 148 of the Act particularly when the cheque amount was huge.³⁴

In a matter, in which while pressing for grant of anticipatory bail in a police case for cheating and forgery based on dishonour of cheque the counsel for the applicant himself offered for deposit of twenty percent of cheque amount, the Court refused to accept the offer of the counsel for the bail applicant dismissing the application for the grant of anticipatory bail referring to the seriousness of the crime and peculiar facts and circumstances of the case.³⁵

³⁰ N. Lingusamy v. V. Ravindran, Crl.O.P. No. 29468 of 2018, dated 17-12-2018, available at - <https://www.legitquest.com/case/n-lingusamy-v-v-ravindran/10C316> (last visited - Aug. 18, 2020).

³¹ *Supra* note 28.

³² CRM-M-54046-2018 (O&M), dated 06-12-2018.

³³ 2019 SCC OnLine Chh 69.

³⁴ India Green Reality Pvt. Ltd. v State of Gujarat, R/Special Criminal Application No. 5814 of 2018, dated 10-12-2018, available at - <https://indiankanoon.org/doc/5361932/> (last visited - Aug. 18, 2020).

³⁵ Md. Shamim Ahmad v State of Bihar, Patna High Court, CM No. 15854 of 2019, dated 15-03-2019, available at - <https://indiankanoon.org/doc/137065091/> (last visited - Aug. 18, 2020).

V

Judicial Approach to Section 143A

While hearing an SLP³⁶ on the question of law as to whether by virtue of Section 143A of the Negotiable Instruments Act, 1881 as added by an amendment made in the year 2018, the trial court would be right in directing payment of interim compensation with retrospective effect in pending cases. The order was passed *ad-interim* in the absence of the opposite party to the effect that let the special leave petitioner/ drawer of the cheque deposit fifteen percent of the cheque amount for hearing the matter as an interim measure and adjourned the case to next date of hearing.

V

Conclusion

In the Indian legal system, we have developed a system of trial within trial. Therefore, when an application is moved under Section 143A of the Act for the grant of interim compensation, the same shall firstly require few adjournments for compilation of pleadings by the parties and thereafter some additional documents are likely to be pressed in service from each side followed by arguments, re-arguments, filing of written submissions and so on, till the matter is relegated for pronouncement of orders which again is likely to take a few dates till the orders are ultimately pronounced on the application. After the pronouncement of the orders, another innings of appeals and revisions shall start. If this is the way this provision is going to be practiced, only god can help us; and there is a big saying that even the god cannot help those who do not want to help themselves, in deed. Therefore, the provision under scrutiny is nothing but a Pandora Box for mini trial within trial which is devised by the legislature itself without seeking any opinion from the experts and even without any prior debate.

Further, the author is of the opinion that though the very concept of grant of interim compensation as adumbrated by virtue of Section 143A of the Act is unreasonable, arbitrary and unconstitutional. Without prejudice to the aforementioned view even if upon presuming the same to be legally valid, there is no gainsaying that the same shall not have retrospective effect and shall not apply

³⁶ *G.J. Raja v. Tejraj Surana*, Criminal Appeal No. 1160 of 2019 @ S.L.P. (Crl.) No. 3342 of 2019, (Sup. Ct. July 30, 2019).

to the pending cases. In other words, the author is of the considered opinion that the very concept of grant of interim compensation is illegal and unconstitutional. However, presuming the same to be legally and constitutionally valid, it would not be appropriate to deny its applicability to all pending cases for the reason that the same is only a procedural law.

Furthermore, reading two expressions together as under Section 148 of the Act, namely, 'may' and 'shall', in the facts and circumstances and the manner in which the whole of the Section has been paraphrased, would lead to the conclusion that it shall be obligatory for the court to direct payment of minimum of fine or compensation to the extent of twenty percent of the fine so imposed by the Trial Court; and ultimately, in the opinion of the author, the Hon'ble Supreme Court is likely to ultimately pronounce the interpretation to the effect that in exceptional cases it shall be the ultimate discretion of the court dealing with the matter to decide whether fine can be directed to be deposited or paid pending appeal and if so to what extent keeping in view peculiar facts and circumstances of each case and exceptional hardship of the respective parties.³⁷

In the end it is a considered view of the author, that the amount of time and energy that required for decision on an application under Section 143A for the grant of interim compensation, which though *per se* is arbitrary and unreasonable, the case of the complainant can effectively be decided in its entirety by the Court concerned if the judge presiding the Court has such intention and expertise in the matters and keeps in mind the nature of the offence. Therefore, correctness and Constitutional validity of this amendment is in doubt which requires further analysis and debate.

³⁷ *Id.*