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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **CRL.REF.No.1/2016**

% ***Reserved on : 28th February 2017***
***Date of decision : 17th October 2017***

DAYAWATI ..... Petitioner
Through: *Mr. Gautam Pal, Adv. for the complainant*

versus

YOGESH KUMAR GOSAIN ..... Respondent
Through: *Mr. Ajay Digpaul, Adv. for the respondent*

*Mr. J.P. Sengh, Sr. Adv., Ms. Veena Ralli alongwith Mr. Ravin Kapur and Mr. Siddharth Aggarwal, Advs. as Amici Curiae.*

**CORAM:**
**HON'BLE THE ACTING CHIEF JUSTICE**
**HON'BLE MS. JUSTICE ANU MALHOTRA**

**JUDGMENT**

**GITA MITTAL, ACTING CHIEF JUSTICE**

1. The legal permissibility of referring a complaint cases under Section 138 of the NI Act for amicable settlement through mediation; procedure to be followed upon settlement and the legal implications of breach of the mediation settlement is the subject matter of this judgment. Shri Bharat Chugh, as the concerned Metropolitan

Magistrate (NI Act) – Central - 01/THC/ Delhi, when seized of Complaint Case Nos.519662/2016 and 519664/2016 (*Old Complaint Case Nos.2429/2015 and 2430/2015*) under Section 138 of the Negotiable Instruments Act (*"NI Act"* hereafter) passed an order dated 13th January, 2016, the following questions under Section 395 of the Code of Criminal Procedure ("*Cr.P.C*" hereafter) to this court for consideration :

> *"1. What is the **legality of referral of a criminal compoundable case** (such as one u/s 138 of the NI Act) to mediation?*
>
> *2. Can the Mediation and Conciliation Rules, 2004 formulated in exercise of powers under the CPC, be imported and applied in criminal cases? If not, how to fill the legal vacuum? Is there a **need for separate rules framed in this regard** (possibly u/s 477 of the CrPC)?*
>
> *3. In cases where the dispute has already been referred to mediation – What is the **procedure to be followed thereafter**? Is the matter to be disposed of taking the very mediated settlement agreement to be evidence of compounding of the case and dispose of the case, or the same is to be kept pending, awaiting compliance thereof (for example, when the payments are spread over a long period of time, as is usually the case in such settlement agreements)?*
>
> *4. If the **settlement** in Mediation is **not complied with** – is the court required to proceed with the case for a trial on merits, or hold such a settlement agreement to be executable as a decree?*
>
> *5. If the **Mediated Settlement Agreement**, by itself, is taken to **be tantamount to a decree, then, how the same is to be executed?** Is the complainant to be relegated to file an application for execution in a civil court? **If yes**, what*

*should be the* ***appropriate orders*** *with respect to the criminal complaint case at hand. What would be the* ***effect of such a mediated settlement vis-à-vis the complaint case****?"*

*(Emphasis by us)*

The reference has been registered as Crl.Ref.No.1/2016.

2. Given the importance of the questions raised in criminal law, by an order dated 15th March, 2016, we had appointed Mr. Siddharth Aggarwal, Advocate as *amicus curiae* in the matter. On the 20th of July 2016, having regard to the nature of the above issues which had been crystallized by the ld. Metropolitan Magistrate and in view of their extensive experience on all aspects of mediation, we had also appointed Mr. J.P. Sengh, Sr. Advocate as well as Ms. Veena Ralli, Advocate (*currently Member and Organizing Secretary respectively of the Organizing Committee of Samadhan - Delhi High Court Mediation and Conciliation Centre*), both senior and experienced mediators, as *amici curiae* in the matter.

3. Court notice was also issued to the counsel for the parties in both *CC Nos.2429/2015 & 2430/2015, Dayawati v. Yogesh Kumar Gosain* pending in the court of the Metropolitan Magistrate for appearance before us and they stand represented through counsel before us.

4. Written submissions stand filed by learned *amici curiae* to assist this court. We have had the benefit of hearing Mr. J.P. Sengh, Senior Advocate, Ms. Veena Ralli, Advocate and Mr. Siddharth Aggarwal,

Advocate as *amici curiae* as well as Mr. Gautam Pal, ld. counsel for the complainant and Mr. Ajay Digpaul, ld. counsel for the respondent in the complaints under Section 138 of the NI Act.

5. We set down hereunder the headings under which we have considered the matter :

***I.*** ***Factual matrix*** *(paras 6 to 16)*

***II.*** ***Alternate dispute resolution mechanisms statutorily recognized*** *(paras 17 to 20)*

***III.*** ***Statutory provisions*** *(paras 21 to 31)*

***IV.*** ***Scope of Section 89 of the Code of Civil Procedure, 1908*** *(paras 32 to 41)*

***V.*** ***Statutory power to refer matters for dispute resolution and effect of a settlement*** *(paras 42 to 49)*

***VI.*** ***Power of criminal courts to refer cases to mediation*** *(paras 50 to 57)*

***VII.*** ***Process to be followed in reference of above disputes in criminal law to mediation*** *(para 58)*

***VIII.*** ***Dispute resolution encouraged in several cases by the Supreme Court in non-compoundable cases as well*** *(paras 59 to 62)*

***IX.*** ***Nature of proceedings under Section 138 of the NI Act*** *(paras 63 to 67)*

***X.*** ***Permissibility of settlement of offence under Section 138 of the NI Act*** *(paras 68 to 73)*

***XI.*** ***<u>Mediation and Conciliation Rules, 2004 – notified the Delhi High Court</u>*** *(paras 74 to 77)*

***XII.*** ***<u>Impact of settlement of disputes in a complaint under Section 138 Negotiable Instruments Act by virtue of Lok Adalat under the Legal Services Authorities Act, 1987</u>*** *(paras 78 to 80)*

***XIII.*** ***<u>What is the procedure to be followed if in a complaint case under Section 138 of the NI Act, a settlement is reached in mediation?</u>*** *(paras 81 to 107)*

***XIV.*** ***<u>Breach of such settlement accepted by the court – consequences?</u>*** *(paras 108 to 117)*

***XV.*** ***<u>Reference answered</u>*** *(para 118)*

***XVI.*** ***<u>Result</u>*** *(paras 119 to 121)*

We now propose to discuss the above issues in *seriatim* :

## *I.* ***<u>Factual matrix</u>***

6. Before dealing with the questions raised before us, it is necessary to briefly note some essential facts of the case. The appellant Smt. Dayawati ("*complainant*" hereafter) filed a complaint under Section 138 of the NI Act, complaining that the respondent Shri Yogesh Kumar Gosain herein ("*respondent*" hereafter) had a liability of ₹55,99,600/- towards her as on 7th April, 2013 as recorded in a regular ledger account for supply of fire-fighting goods and equipment to the respondent on different dates and different quantities. In part discharge of this liability, the respondent was stated to have issued two account payee cheques in favour of the complainants of ₹11,00,000/- (Cheque No.365406/- dated 1st December, 2014) and ₹16,00,000/-

(Cheque No.563707 dated 28th November, 2014). Unfortunately, these two cheques were dishonoured by the respondent's bank on presentation on account of "*insufficiency of funds*".

7. As a result, the complainant was compelled to serve a legal notice of demand on the respondent which, when went unheeded, led to the filing of two complaint cases under Section 138 of the NI Act before the Patiala House Courts, New Delhi being CC Nos.89/1/15 and 266/1/15. In these proceedings, both parties had expressed the intention to amicably settle their disputes. Consequently, by a common order dated 1st April, 2015 recorded in both the complaint cases, the matter was referred for mediation to the Delhi High Court Mediation and Conciliation Centre.

8. We extract hereunder the operative part of the order dated 1st April, 2015 which reads as follows :

> *"... Ld. Counsel for accused submits that accused is willing to explore the possibilities of compromise. Ld. Counsel for complainant is also interested (sic) in compromise talk. Let the matter be referred to Mediation Cell, High Court Delhi, Delhi. Parties are directed to appear before the Mediation Cell, Hon'ble High Court, Delhi on 15.04.2015 at 2:30 p.m."*

9. It appears that after negotiations at the Delhi High Court Mediation and Conciliation Centre, the parties settled their disputes under a common settlement agreement dated 14th May, 2015 under which the accused agreed to pay a total sum of ₹55,54,600/- to the complainant as full and final settlement amount in installments with

regard to which a mutually agreed payment schedule was drawn up. It was undertaken that the complainant would withdraw the complaint cases after receipt of the entire amount. In the agreement drawn up, the parties agreed to comply with the terms of the settlement which was signed by both the parties along with their respective counsels. We extract the essential terms of the settlement hereunder :

> *"xxx xxx xxx*
>
> *6. The following **settlement** has been **arrived** at between the parties hereto :*
>
> *a) That the **second party shall pay** a total sum of Rs.55,54,600/- to the first party **towards full and final settlement of all the claims of the first party** against the second party.*
>
> *b) That **on 25.06.2015**, the **second party shall pay** Rs.11,00,000/- to the first party by way of NEFT/RTGS/demand draft.*
>
> *c) That **on 25.10.2015**, the second party **shall pay** Rs.16,00,000/- **to the first party** by way of NEFT/RTGS/demand draft.*
>
> *d) The **balance sum of Rs.28,54,600/- shall be paid by** the second party **to the first party within 18 months from 25.11.2015** by way of NEFT/RTGS/demand draft in equal monthly installments i.e. Rs.1,58,600/-*
>
> *e) That the **second party shall also provide "C-Form (Sales Tax, Mumbai)" to the first party** against Bill Nos.R 605 dated 27.02.2013 and R 607 dated 06.03.2013.*
>
> *f) That the **first party undertakes to withdraw the present CC Nos. 89/1/15 and 266/1/15 upon receipt of entire settlement amount from the second party.**"*
>
> *(Emphasis by us)*

10. This settlement agreement was placed before the court on 1st June, 2015 when the following order was recorded :

> *"File received back from the Mediation Centre with* ***report of settlement. Settlement agreement dated 14.05.2015 gone through. At joint request, put up for compliance of abovesaid settlement agreement and for making of first installment on 30.06.2015****"*
>
> *(Emphasis by us)*

11. Unfortunately, the accused/respondent herein failed to comply with the terms of the settlement. Though vested with the obligation thereunder to pay a sum of ₹11,00,000/- as the first installment on 25th June, 2015, he paid only a sum of ₹5,00,000/- to the complainant through RTGS without giving any justification. On the 30th June of 2015, the Metropolitan Magistrate consequently recorded thus:

> *"... Ld. Counsel for complainant submits that the* ***accused has not made the payment of first installment in terms of mediation settlement dated 14.05.2015****.*
>
> *Ld. Counsel for complainant further submits that accused was to pay first installment of Rs. 11,00,000/- on or before the 25.06.2015 however he has paid only Rs. 5,00,000/- through RTGS.* ***No reasonable explanation for the non-payment of full amount*** *of first installment is given by the accused. Further,* ***no assurance*** *is given by the accused* ***for making of the due installments within the stipulated time****.*
>
> *Considering the facts of the case and submissions on behalf of both the parties, it is* ***apparent that the accused is not willing to comply with the terms and conditions of the mediation settlement. Hence, mediation settlement failed****.*

*Let the matter be proceeded on merit, put up on 14.08.2015*"

*(Emphasis by us)*

12. Thereafter, two more opportunities were given by the Metropolitan Magistrate on 14th August, 2015 and 21st August, 2015 to the accused to comply with the settlement. Finally, in view of the continued non-compliance, the matter was listed for framing of notice on 28th September, 2015 and trial on merits.

13. In the meantime, the Negotiable Instruments (Amendment) Ordinance, 2015, received the assent of the President of India on the 26th of December, 2016. On account of promulgation of the ordinance, Section 142 of the Negotiable Instuments Act, 1881 stood amended with regard to jurisdiction of offences under Section 138 of the enactment and therefore these cases stood transferred from Patiala House Courts to Tis Hazari Courts at which stage the matter came to be placed before the ld. referral judge.

14. At this stage, an application dated 16th November, 2015 was filed by the complainant seeking enforcement of the settlement agreement dated 14th May, 2015 placing reliance on the judicial precedents reported at ***2013 SCC OnLine Del 124 Hardeep Bajaj v. ICICI; 2015 SCC OnLine Del 7309 Manoj Chandak v. M/s Tour Lovers Tourism (India) Pvt Ltd*** and ***2015 SCC OnLine Del 9334 M/s Arun International v. State of Delhi***. The complainant urged that the settlement agreement was arrived at after long negotiations and meetings; that it was never repudiated by the accused nor challenged

on grounds of it being vitiated for lack of free consent or any other ground and lastly, that the accused having paid part of the first agreed installment, has also acted upon the mediation settlement and cannot be allowed to wriggle free of his obligation under the same.

15. The respondent, on the other hand, argued that the settlement agreement was not binding contending primarily, for the first time, that the settlement amount was exorbitant and onerous pointing out that the complaints were filed with regard to two cheques which were for a cumulative amount of ₹27,00,000/- while the settlement amount was of ₹55,54,600/- and this by itself was evidence that the agreement was unfair, arbitrary and not binding on the accused. It was further urged that on receipt of the case from the mediation cell, the statement of the parties ought to have been recorded before the court whereby the parties would have adopted the mediation settlement agreement so that the same bore the *imprimatur* of the court. As per the respondent, absence of such statement in the case denuded the settlement agreement of its binding nature and efficacy.

16. The ld. Metropolitan Magistrate was of the view that these questions had arisen, not just in this case, but a plethora of other cases as well. Consequently, the order dated 13th of January 2016 was passed making the aforestated reference under Section 395 of the Cr.P.C. to this court. At the same time, so far as the complaints under Section 138 of the NI Act are concerned, the ld. MM additionally directed thus :

*"In view of the question of law that has arose in the present case, the decision on which is necessary for further proceedings and a proper adjudication of the present case – a reference has been made u/s 395 of the CrPC for consideration and guidance of the Hon'ble High Court of Delhi.*

*The office attached to this court is directed to send this Reference Order to the Ld. Registrar General, Hon'ble High Court of Delhi in appropriate manner and through proper channel.*

*List the matter now on 06.06.2016 awaiting the outcome of the reference and clarity on the legal issue."*

## *II. Alternate dispute resolution mechanisms statutorily recognized*

17. Let us, first and foremost, briefly examine the genesis, modes and methods of dispute resolution available to disputants. It is common knowledge that other than the traditional adversarial litigation before courts, alternate dispute resolution mechanisms found as being increasingly suited for various classes of cases, stand given statutory recognition and have received judicial recommendation as well.

18. The legislature has increasingly awarded statutory recognition and provided for alternate dispute resolution mechanisms to parties in several enactments, some completely dedicated to this process. These include ***lok adalats*** (Section 19 of the *Legal Services Authorities Act, 1987*); ***arbitration and conciliation*** (Parts I & III of *Arbitration and Conciliation Act, 1996* as well as Section 89(a) & (b) of the *Code of Civil Procedure, 1908* incorporated on 1st of July 2002); ***judicial***

***settlement and mediation*** (Section 89(c) & (d) of the *Code of Civil Procedure*).

19. Some other statutes that recognize and prescribe alternate dispute resolution attempts mandatorily include *the Hindu Marriage Act (Section 23), the Family Courts Act, 1984 (Section 9) and; the Industrial Disputes Act, 1947 (Section 10)*.

20. We find that so far as criminal proceedings are concerned, statutory recognition stands given to settlements between complainants/victims and accused persons under Section 320 of the Cr.P.C which also provides the limits of permissibility and the procedure to be followed by the court in compounding of offences.

## *III. Statutory provisions*

21. Before examining the reference, we may for expediency extract the relevant provisions of the ***Negotiable Instruments Act, 1881; the Legal Services Authority Act, 1987; the Code of Civil Procedure, 1908*** and ***the Code of Criminal Procedure, 1973*** in one place.

22. The relevant statutory provisions of ***Negotiable Instruments Act, 1881*** read as follows:

> *"**138 Dishonour of cheque for insufficiency, etc., of funds in the account. —**Where any **cheque** drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is **returned by the bank unpaid**, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it*

*exceeds the amount arranged to be paid from that account by an agreement made with that bank,* ***such person shall be deemed to have committed an offence*** *and* ***shall****, without prejudice to any other provisions of this Act,* ***be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both****: Provided that nothing contained in this section shall apply unless—*

*(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;*

*(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*

*(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*

*Explanation.— For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]"*

*xxx* *xxx* *xxx*

***143. Power of Court to try cases summarily.-*** *(1)* ***Notwithstanding anything contained in the Code of Criminal Procedure, 1973****, all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the* ***provisions of Sections 262 to 265*** *(both inclusive) of the said Code* ***shall, as far as may be, apply to such trials****:*

*Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to* ***pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees****:*

*Provided further that when at the commencement of, or in the course of, a summary trial under this section, it* ***appears to the Magistrate*** *that the nature of the case is such that a* ***sentence of imprisonment for a term exceeding one year*** *may have to be passed or that it is, for any other reason,* ***undesirable to try the case summarily,*** *the Magistrate* ***shall after hearing the parties, record an order*** *to that effect and thereafter* ***recall any witness*** *who may have been examined and* ***proceed to hear or rehear*** *the case in the manner provided by the said Code.*

*(2) The trial of a case under this section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion, unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing.*

*(3) Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint."*

*xxx xxx xxx*

***147. Offences to be compoundable.****—Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),* ***every offence*** *punishable under this Act shall be* ***compoundable****."*

*(Emphasis by us)*

23. The ***Legal Services Authorities Act, 1987*** provides for constitution of legal services authorities to provide free and competent

legal services to the weaker sections of the society as well as to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and also postulates alternate dispute resolution mechanism as lok adalats. The relevant statutory provisions of *Legal Services Authorities Act, 1987* regarding dispute resolution are reproduced hereafter :

> *"**19. <u>Organisation of Lok Adalats</u>.—***
>
> *(1) Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may be, Taluk Legal Services Committee may organise Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit.*
>
> *xxx xxx xxx*
>
> *(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**.*
>
> ***20. <u>Cognizance of cases by Lok Adalats</u>.—***
>
> *(1) Where in any case referred to in clause (i) of sub-section (5) of section 19*
>
> *(i) (a) the **parties** thereof **agree**; or*
>
> *(b) **one of the parties** thereof **makes an application** to the court,*

*for **referring the case to the Lok Adalat for settlement** and if such **court is prima facie satisfied** that there are **chances of such settlement**; or*

*(ii) the **court is satisfied** that the **matter is an appropriate** one to be taken cognizance of by the Lok Adalat,*

*the **court shall refer the case** to the Lok Adalat:*

*Provided that no case shall be referred to the Lok Adalat under sub-clause (b) of clause (i) or clause (ii) by such court except after giving a reasonable opportunity of being heard to the parties.*

*(2) **Notwithstanding anything contained in any other** law for the time being in force, the **Authority or Committee** organising the Lok Adalat under sub-section (1) of section 19 may, **on receipt of an application** from any one of the parties to any matter referred to in clause (ii) of sub-section (5) of section 19 that such matter needs to be determined by a Lok Adalat, refer such matter to the Lok Adalat, for determination:*

*Provided that no matter shall be referred to the Lok Adalat except after giving a reasonable opportunity of being heard to the other party.*

*(3) Where **any case** is referred to a Lok Adalat under sub-section (1) or where a reference has been made to it under sub-section (2), the **Lok Adalat shall proceed to dispose of the case** or **matter** and **arrive at a compromise or settlement** between the parties.*

*(4) Every Lok Adalat shall, while determining any reference before it under this Act, act with **utmost expedition** to arrive at a compromise or settlement between the parties and shall be **guided** by the **principles of justice, equity, fair play and other legal principles**.*

*(5) Where **no award** is made by the Lok Adalat on the ground that **no compromise or settlement** could be arrived*

*at between the parties, the **record of the case shall be returned by it to the court**, from which the reference has been received under sub-section (1) for disposal in accordance with law.*

*(6) Where **no award** is made by the Lok Adalat on the ground that **no compromise or settlement** could be arrived at between the parties, in a matter referred to in sub-section (2), that Lok Adalat shall advise the parties to seek remedy in a court.*

*(7) Where the **record of the case is returned** under sub-section (5) to the court, **such court shall proceed to deal with such case from the stage** which was reached before such reference under sub-section (1).*

***21. <u>Award of Lok Adalat</u>.-***

*(1) **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, the **court-free paid** in such case **shall be refunded** in the manner provided under the Court Fees Act, 1870 (7 of 1870).]"*

*(2) 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**.*

*(Emphasis by us)*

24. Let us also examine Section 89 of the ***Code of Civil Procedure, 1908*** ("*CPC*" hereafter), relevant statutory provisions whereof also prescribe alternate dispute resolution mechanisms, which are as under:

*"89. **Settlement of disputes outside the Court***

*(1) Where it **appears to the court** that there **exist elements of a settlement** which may be acceptable to the parties, the **court shall formulate the terms of settlement** and **give them to the parties for their observations** and after receiving the observation of the parties, the **court may reformulate the terms of a possible settlement and refer the same for-***

***(a) arbitration;***

***(b) conciliation***

***(c) judicial settlement including settlement through Lok Adalat; or***

***(d) mediation.***

*(2) Where a dispute had been referred-*

*(a) for **arbitration or conciliation**, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.*

*(b) to **Lok Adalat**, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;*

*(c) for **judicial settlement**, the court shall refer the same to a suitable institution or person and **such institution or person** shall be **deemed to be** a **Lok Adalat** and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute*

*were referred to a Lok Adalat under the provisions of that Act;*

*(d) for **mediation**, the court **shall effect a compromise** between the parties and **shall follow such procedure as may be prescribed**."*

*(Emphasis supplied)*

25. So far as the civil suits are concerned, the Legislature has amended the CPC to incorporate ***Rules 1A, 1B and 1C*** in ***Order X*** which are reproduced hereunder:

***"1-A. Direction of the court to opt for any one mode of alternative dispute resolution**.— **After recording the admissions and denials**, the **Court shall direct** the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of Section 89. On the option of the parties, the **court shall fix the date of appearance** before **such forum or authority as may be opted by the parties**.*

***1-B. Appearance before the conciliatory forum or authority**.— Where a suit is referred under Rule 1-A, the **parties shall appear before such forum or authority for conciliation of the suit**.*

***1-C. Appearance before the Court consequent to the failure of efforts of conciliation**.— Where a suit is referred under Rule 1-A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the court and direct the parties to appear before the Court on the date fixed by it."*

*(Emphasis by us)*

26. We may also usefully extract the provisions of ***Rule 3 of Order XXIII of the CPC*** which provide the manner in which a civil court will proceed upon adjustment of a suit, wholly or in part, by an agreement or compromise. This provision reads thus :

> ***"3. <u>Compromise of suit</u>.-*** *Where it is* ***proved to the satisfaction of the court*** *that a* ***suit has been adjusted wholly or in part by any <u>lawful agreement or compromise in writing and signed by the parties</u>, or where the defendant satisfies the plaintiff*** *in respect of the whole or any part of the subject matter of the suit,* ***the court shall <u>order such agreement</u>, compromise or satisfaction to be <u>recorded</u>****, and* ***shall <u>pass a decree</u> in accordance therewith so far as it relates to the parties*** *to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit: -*
>
> *Provided that* ***where it is alleged by one party and denied by the other than an adjustment or satisfaction has been arrived at****, the* ***court shall decide the question****; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment."*
>
> *(Emphasis by us)*

27. At this point, it is also necessary to examine from the ***Cr.P.C.,*** the provisions of ***Section 29***, which provides the sentence which a magistrate may pass; ***Section 320*** which stipulates cases which may be compounded by the parties as well as those which may be compounded with the leave of the court or otherwise; ***Section 357*** which provides for award of compensation while awarding a sentence of fine or of which fine forms a part; ***Section 421*** which provides for the manner in which a fine may be recovered and ***Section 431*** which

enables a court to recover any money by virtue of an order made under the Cr.P.C.

28. Sections 29 and 320 of the Cr.P.C., are relevant for the present consideration, read as follows :

> *"**29. <u>Sentences which Magistrates may pass</u>***
>
> *(1) The Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.*
>
> *(2) The Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding five thousand rupees, or of both.*
>
> *(3) The Court of a Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding one thousand rupees, or of both.*
>
> *(4) The Court of a Chief Metropolitan Magistrate shall have the powers of the Court of a Chief Judicial Magistrate and that of a Metropolitan Magistrate, the powers of the Court of a Magistrate of the first class."*
>
> ***320. <u>Compounding of offences</u>**.—(1) The **offences** punishable under the sections of the Indian Penal Code (45 of 1860) **specified in the first two columns** of the Table next following **may be compounded by the persons** mentioned in the **third column** of that Table:—*
>
> *xxx xxx xxx*
>
> *(2) The **offences punishable under the sections** of the Indian Penal Code (45 of 1860) **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:—*

*xxx xxx xxx"*

*(Emphasis supplied)*

29. The provisions of Sections 357, 421, 431 of the Cr.P.C. which enable the court to direct payments of monetary amounts and enable recovery thereof, by the trial courts also may be extracted and read as follows :

***"357. <u>Order to pay compensation</u>***

*(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.*

*(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."*

*"****421. Warrant for levy of fine***

*(1)* ***When an offender has been sentenced to pay a fine****, the* ***Court passing the sentence may take action for the recovery of the fine in either or both*** *of the following* ***ways****, that is to say, it may-*

*(a)* ***issue a warrant*** *for the levy of the amount by* ***attachment and sale of any movable property belonging to the offender****;*

*(b)* ***issue a warrant to the Collector*** *of the district,* ***authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter****: Provided that, if the sentence directs that in default of payment of the fine, the offender shall be*

*imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under section 357.*

*(2) The **State Government may make rules** regulating the manner In which warrants under clause (a) of sub- section (1) are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.*

*(3) Where the **Court issues a warrant** to the Collector under clause (b) of sub- section (1), the **Collector shall realise the amount in accordance with the law relating to recovery of arrears of land revenue**, as if such warrant were a certificate issued under such law: Provided that no such warrant shall be executed by the arrest or detention in prison of the offender."*

*"**431. Money ordered to be paid recoverable as fine***

***Any money (other than a fine) payable by virtue of any order made under this Code**, and the **method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine**:*

*Provided that section 421 shall, in its application to an order under section 359, by virtue of this section, be construed as if in the proviso to sub- section (1) of section 421, after the words and figures" under section 357", the words and figures" or an order for payment of costs under section 359" had been inserted."*

*(Emphasis supplied)*

30. Given the questions referred to us, we may also extract hereunder the extent of the rule making power of the High Court under Section 477 of the Cr.P.C. which reads thus :

> ***"477. <u>Power of High Court to make rules</u> -***
>
> *(1) Every* ***High Court*** *may,* ***with the previous approval of the State Government, make rules****—*
>
> *(a) as to the persons who may be permitted to act as petition-writers in the Criminal Courts subordinate to it;*
>
> *(b) regulating the issue of licences to such persons, the conduct of business by them, and the scale of fees to be charged by them.*
>
> *(c) providing a penalty for a contravention of any of the rules so made and determining the authority by which such contravention may be investigated and the penalties imposed;*
>
> ***(d) any other matter which is required to be, may be, prescribed.***
>
> ***(2) All rules made under this section shall be published in the Official Gazette."***
>
> *(Emphasis supplied)*

31. The ***Delhi High Court*** has on 11th August, 2005 notified the "***<u>Mediation And Conciliation Rules 2004</u>***" to guide mediation in Delhi. We extract hereunder the relevant extract, as amended, thereof:

> *"(TO BE PUBLISHED IN PART IV OF DELHI GAZETTE EXTRAORDINARY)*
>
> ***HIGH COURT OF DELHI : NEW DELHI***
> ***NOTIFICATION***

***No.171/Rules/DHC*** ***Dated: 11th August, 2005***

*In exercise of the rule making power under Part X of the* ***Code of Civil Procedure, 1908*** *(5 of 1908) and clause (d) of sub-section (2) of* ***Section 89*** *of the said Code and* ***all other powers enabling it in this behalf****, the High Court of Delhi hereby makes the following rules :-*

## ***MEDIATION AND CONCILIATION RULES, 2004***

### ***Rule 1 : Title***

*"The Rules will* ***apply to all mediation and conciliation*** *connected with* ***any suit or other proceeding pending in the High Court of Delhi or in any court subordinate to the High Court of Delhi****. The mediation* ***in respect of any suit*** *or* ***proceeding pending*** *before the High Court of Delhi or* ***any other Court or Tribunal*** *may be referred to the Delhi High Court Mediation and Conciliation Centre or any other Mediation Centre set up by Legal Services Authorities. Upon such a reference being made to Delhi High Court Mediation and Conciliation Centre, the same will be governed by the Charter of the Delhi High Court Mediation and Conciliation Centre and to those mediation proceedings, the* ***present Rules will apply mutatis mutandi." These Rules shall be called the Mediation and Conciliation Rules, 2004****.*

### ***Rule 2: Appointment of Mediator/Conciliator***

*(a) Parties to a* ***suit or other proceeding*** *may agree on the name of the sole mediator/conciliator for mediating between them. ...*

*xxx* *xxx* *xxx*

### ***Rule 3 : Panel of mediators/conciliators***

*xxx* *xxx* *xxx*

*(b)(i) The* ***District & Sessions Judge shall****, for the purpose of appointing the mediator/conciliator to mediate between the parties in the* ***suits or proceedings*** ***prepare a panel of the mediators/conciliators*** *within a period of thirty days of the commencement of these rules and shall submit the same to the High Court for approval. On approval of the said panel by the High Court, with or without modification, which shall be done within thirty days of the submission of the panel by the District & Sessions Judge, the same shall be put on the Notice Board.*

*xxx* *xxx* *xxx*

***Rule 24 : Settlement agreement***

*a) Where an* ***agreement is reached between the parties in regard to all the issues in the suit or proceeding or some of the issues****, the same* ***shall be reduced to writing*** *and* ***signed by the parties or their constituted attorney.*** *If any counsel has represented the parties, the conciliator/mediator may obtain his signature also on the settlement agreement.*

*(b) The* ***agreement of the parties*** *so signed* ***shall be submitted to the mediator/conciliator who shall, with a covering letter signed by him, forward the same to the Court*** *in which the suit* ***or proceeding is pending****.*

*(c) Where* ***no agreement*** *is arrived at between the parties, before the time limit stated in Rule 18 of where, the* ***mediator/conciliator*** *is of the view that* ***no settlement*** *is possible, he* ***shall report the same to the Court in writing****.*

***Rule 25 : Court to fix a date for Recording settlement and passing decree***

*(a) On* ***receipt of any settlement, the Court shall fix a date of hearing*** *normally within seven days but in any case not beyond a period of fourteen days. On such date of hearing,* ***if the Court is satisfied that the parties have settled their dispute(s),*** *it* ***shall pass a decree*** *in accordance with terms thereof.*

*(b) If the* ***settlement dispose of only certain issues*** *arising in the suit* ***or proceeding****, on the basis of which any decree is passed as stated in Clause (a), the* ***Court shall proceed further to decide remaining issues.****"*

*(Emphasis supplied)*

## *IV. Scope of Section 89 of the Code of Civil Procedure, 1908*

32. Mediation as a mode of alternate dispute settlement thus finds statutory recognition in Section 89 of the Code of Civil Procedure.

33. Valuable light is thrown on the interpretation of Section 89 in the judicial pronouncements rendered by the Supreme Court of India

in ***(2003) 1 SCC 49, Salem Advocate Bar Assn. v. Union of India (Salem Bar I); (2005) 6 SCC 344, Salem Advocate Bar Assn. v. Union Of India (Salem Bar II)*** and ***(2010) 8 SCC 24, Afcons Infrastructure Ltd. & Anr. v. Cherian Varkey Constructions Co. Pvt. Ltd.***

34. Extensive amendments were effected to the Code of Civil Procedure by the Legislature by Act 46 of 1999. Amongst the provisions inserted, was Section 89 which provided for settlement of disputes outside the court through use of alternate dispute redressal mechanisms. Several writ petitions came to be filed before the Supreme Court of India challenging the amendments effected to the Code of Civil Procedure by the Amendment Act 46 of 1999 and Amendment Act 22 of 2002. Amongst these was W.P.(C)No.496/2000 titled ***Salem Advocate Bar Assn. v. Union of India.*** This writ petition came to be decided, along with connected writ petitions, by way of the judgment dated 25th October, 2002 reported at ***(2003) 1 SCC 49, Salem Advocate Bar Assn. v. Union of India (****commonly known as* ***Salem Bar I).*** So far as the amendments and insertion of Section 89 of the Code of Civil Procedure was concerned, the Supreme Court observed that Section 89 was a new provision and even through arbitration or conciliation had been in place as modes of settling the disputes, this had not really reduced the burden of the courts. The court was of the view that modalities had to be formulated for the manner in which Section 89 as well as other provisions which had been introduced by way of amendments, may have to be operated. For

this purpose, a Committee was constituted to ensure that the amendments made became effective and resulted in quicker dispensation of justice.

35. This was followed by a later pronouncement in the same case reported at ***(2005) 6 SCC 344, Salem Advocate Bar Assn. v. Union Of India (****commonly referred to as* ***Salem Bar II)***, whereby the Supreme Court further clarified the position holding as follows :

> ***"57.*** *A doubt has been expressed in relation to clause (d) of Section 89(2) of the Code on the* ***question*** *as to finalisation of the terms of the compromise. The question is* ***whether the terms of compromise are to be finalised by or before the mediator or by or before the court.*** *It is evident that all the four alternatives, namely, arbitration, conciliation, judicial settlement including settlement through the Lok Adalat and mediation are meant to be the action of persons or institutions outside the court and not before the court. Order 10 Rule 1-C speaks of the "Conciliation Forum" referring back the dispute to the court. In fact, the* ***court is not involved in the actual mediation****/conciliation.* ***Clause (d) of Section 89(2) only means that when mediation succeeds and parties agree to the terms of settlement, the mediator will report to the court and the court, after giving notice and hearing to the parties, "effect" the compromise and pass a decree in accordance with the terms of settlement accepted by the parties****. Further, in this view, there is no question of the court which refers the matter to mediation/conciliation being debarred from hearing the matter where settlement is not arrived at. The judge who makes the reference only considers the limited question as to whether there are reasonable grounds to expect that there will be a settlement, and on that ground he cannot be treated to be disqualified to try the suit afterwards, if no settlement is arrived at between the parties.*
>
> *xxx xxx xxx*
>
> ***62. When the parties come to a settlement upon a reference made by the court for mediation****, as suggested by the Committee*

*that* ***there has to be some public record of the manner in which the suit is disposed of*** *and, therefore, the* ***court has to first record the settlement*** *and* ***pass a decree in terms thereof and if necessary proceed to execute it in accordance with law****. It cannot be accepted that such a procedure would be unnecessary. If the settlement is not filed in the court for the purpose of passing of a decree, there will be no public record of the settlement. It is, however, a different matter* ***if the parties do not want the court to record a settlement and pass a decree and feel that the settlement can be implemented even without a decree****. In such eventuality,* ***nothing prevents them*** *in* ***informing the court that the suit may be dismissed as a dispute has been settled*** *between the parties outside the court."*

*(Emphasis by us)*

36. In ***(2010) 8 SCC 24, Afcons Infrastructure Ltd. & Anr. v. Cherian Varkey Constructions Co. Pvt. Ltd.***, the Supreme Court was called upon to consider the scope of Section 89 of the CPC. Certain errors by the draftsman were noted in Section 89 of the CPC. In this judgment, the court further interpreted the statute to implement the spirit, object and intendment of the provisions. We may usefully refer to para 25 of the judgment in this regard, which reads as follows:

"***25****. In view of the foregoing, it has to be concluded that proper interpretation of Section 89 of the Code requires two changes from a plain and literal reading of the section.* ***Firstly****, it is* ***not necessary for the court,*** *before referring the parties to an ADR process* ***to formulate or reformulate the terms of a possible settlement****. It is* ***sufficient if the court merely describes the nature of dispute*** *(in a sentence or two) and makes the reference.* ***Secondly****, the* ***definitions of "judicial settlement****" and "****mediation****" in clauses (c) and (d) of Section 89(2) shall have to be interchanged to correct the draftsman's error.*

***Clauses (c) and (d) of Section 89(2)*** *of the Code will read as under when the two terms are interchanged:*

*(c) for "**mediation**", the court shall refer the same to a **suitable institution or person** and such **institution or person shall be deemed to be a Lok Adalat** and **all the provisions of the Legal Services Authorities Act, 1987** (39 of 1987) **shall apply as if the dispute were referred to a Lok Adalat** under the provisions of that Act;*

*(d) for "judicial settlement", the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.*

*The **above changes made by interpretative process shall remain in force till the legislature corrects the mistakes, so that Section 89 is not rendered meaningless and infructuous**."*

*(Emphasis supplied)*

37. With regard to anomalies in Section 89 of the CPC, the Supreme Court has thus held that where the court has referred the matter to mediation, the mediator shall be deemed to be a Lok Adalat under the Legal Services Act. For cases covered under Section 89 of the CPC, it is thus abundantly clear that the mediated settlement and settlement before "*another Judge*", would have the same efficacy and binding status as an award of the Lok Adalat which is deemed to be a decree.

38. The Supreme Court has also stipulated that mediated settlement would have to be placed before the courts concerned for recording of the settlement and disposal of the case. We extract hereunder para 39 of ***Afcons*** wherein this is discussed :

> ***"39.*** *Where the* ***reference is to a neutral third party*** *("****mediation****" as defined above)* ***on a court reference****, though it will be* ***deemed to be reference to Lok Adalat****, as the court retains its control and jurisdiction over the matter, the* ***mediation settlement will have to be placed before the court for recording the settlement and disposal.*** *Where the matter is* ***referred to another Judge*** *and settlement is arrived at before him, such* ***settlement agreement*** *will* ***also have to be placed before the court which referred the matter and that court will make a decree in terms of it****."*
>
> *(Emphasis supplied)*

As a result of the pronouncement in ***Afcons,*** Section 89 of the C.P.C. thus stands modified to the extent noted above.

39. So far as the procedure to be adopted by a court upon reference of the disputes in a civil case to an ADR mechanism is concerned, the same stands further considered in ***Afcons.*** The relevant portion of the judgment is reproduced as under :

> ***"43*** *We may summarise the procedure to be adopted by a court under Section 89 of the Code as under:*
>
> *(a) When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of the dispute between the parties.*
> *(b) The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes. If it finds that the case falls under any excluded category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR*

*processes. It will then proceed with the framing of issues and trial.*

*(c) In other cases (that is, in cases which can be referred to ADR processes) the* ***court should explain the choice of five ADR processes*** *to the parties to enable them to exercise their option.*

*(d) The* ***court*** *should* ***first ascertain*** *whether the* ***parties are willing for arbitration****. The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.*

*(e) If the* ***parties are not agreeable for arbitration, the court should ascertain*** *whether the parties are* ***agreeable for reference to conciliation*** *which will be governed by the provisions of the AC Act. If all the parties agree for reference to conciliation and agree upon the conciliator(s), the court can refer the matter to conciliation in accordance with Section 64 of the AC Act.*

*(f) If the parties are* ***not agreeable*** *for arbitration and conciliation, which is likely to happen in most of the cases* ***for want of consensus****, the court should, keeping in view the preferences/options of parties,* ***refer the matter to any one of the other three ADR processes****: (a) Lok Adalat; (b)* ***mediation by a neutral third-party facilitator or mediator****; and (c) a judicial settlement, where a Judge assists the parties to arrive at a settlement.*

*(g) If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat.* ***In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation****. Where the*

*facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.*

*(h) If the* ***reference to the ADR process fails****, on receipt of the report of the ADR forum,* ***the court shall proceed with hearing of the suit. If there is a settlement****,* ***the court shall examine the settlement*** *and* ***make a decree*** *in terms of it,* ***keeping the principles of Order 23 Rule 3 of the Code in mind****.*

*(i) If the settlement includes disputes which are not the subject-matter of the suit, the court may direct that the same will be governed by Section 74 of the AC Act (if it is a conciliation settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat).* ***If the settlement is through mediation and it relates not only to disputes which are the subject-matter of the suit, but also other disputes involving persons other than the parties to the suit, the court may adopt the principle underlying Order 23 Rule 3 of the Code****. This will be necessary as many settlement agreements deal with not only the disputes which are the subject-matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject-matter of the suit.*

*(j)* ***If any term of the settlement is ex facie illegal or unenforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability****."*

*(Emphasis by us)*

40. In para 44, the Supreme Court has also laid down certain consequential aspects which have to be borne in mind while giving effect to Section 89 of the Code. Para 44 of the judgment is reproduced as under :

***"44.*** *The court should also bear in mind the following consequential aspects, while giving effect to Section 89 of the Code:*

*(i) If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need be stated in the order-sheet.*

*(ii) If the* ***reference*** *is to any other ADR process, the* ***court should briefly record that having regard to the nature of dispute****, the* ***case deserves*** *to be referred to Lok Adalat, or* ***mediation*** *or judicial settlement, as the case may be. There is* ***no need for an elaborate order for making the reference****.*

*(iii) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that the* ***court has to briefly refer to the nature of dispute*** *and decide upon the appropriate ADR process.*

*(iv) If the* ***Judge in charge of the case assists the parties and if settlement negotiations fail****, he should* ***not deal with the adjudication of the matter,*** *to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for judicial settlement to another Judge.*

*(v) If the* ***court refers the matter to an ADR*** *process (other than arbitration), it should* ***keep track of the matter by fixing a hearing date for the ADR report****. The period allotted for the ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of the alternative forum, the nature of case, etc.). Under* ***no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on the proceedings****.*

*(vi) Normally the* ***court should not send the original record*** *of the case when referring the matter to an ADR forum. It should* ***make available only copies of relevant papers to the ADR forum****. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However* ***if the case is referred to a court***

***annexed mediation centre which is under the exclusive control and supervision of a judicial officer, the original file may be made available wherever necessary****."*

*(Emphasis by us)*

41. In para 45, the court had clarified that these were guidelines subject to such changes as the concerned court may deem fit with reference to the special circumstances of the case.

There is thus complete clarity on the manner in which a court must proceed when making a reference to mediation.

## *V. Statutory power to refer matters for dispute resolution and effect of a settlement*

42. We have extracted above Section 19 of the Legal Services Act, 1987 providing for the organization of Lok Adalats. The Lok Adalats have the jurisdiction under sub-section 5 of Section 19 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 organized.*

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

Thus so far as criminal cases are concerned, a Lok Adalat has jurisdiction over only such criminal matters that relate to offences

compoundable by law i.e. under Section 320 of the Cr.P.C. or under any special enactment.

It is also to be noted that under this enactment, it is also specifically provided that "*court*" means a "*civil, **criminal** or revenue court*".

43. So far as cognizance of cases by Lok Adalats are concerned, the same is taken in accordance with Section 20 of the enactment. This may be by agreement between the parties or upon one party making an application. It can also be by way of a reference by the court.

44. By virtue of Section 21 of the Legal Services Act, an award made by the Lok Adalats shall be final and binding and no appeal shall lie in any court against it. The award is deemed to be "*decree of civil court*" or, as the case may be, "*an order of any other court*".

The statute therefore, makes no distinction between an award in a civil or criminal case.

45. So far as the civil suits which are tried in accordance with the provisions of Code of Civil Procedure are concerned, the mandate of Section 89 of the C.P.C. enables the court to refer the parties for settlement of disputes outside the court including for judicial settlement to Lok Adalats and mediation.

46. Order X of the C.P.C. provides the modalities for implementing the mandate of Section 89 CPC.

47. Additionally the provisions of the Arbitration and Conciliation Act, 1996 enable reference of matters where there is an arbitration agreement, for dispute resolution by arbitration and conciliation.

48. The Code of Criminal Procedure, 1973 and the Negotiable Instruments Act, 1881 unfortunately contain no provisions for reference of the matters thereunder to alternate dispute resolution mechanisms.

49. As the Code of Civil Procedure would have no application to criminal proceedings to which the Code of Criminal Procedure applies, Section 89 of the C.P.C. cannot and would not, in terms, apply to the proceedings under Section 138 of the NI Act.

## ***VI. Power of criminal courts to refer cases to mediation***

50. We have found that, though the Code of Civil Procedure contains a specific provision in Section 89 of the C.P.C. enabling reference of matters to alternate dispute redressal, however, so far as criminal cases are concerned, it is amply clear that the Code of Criminal Procedure does not contain any express statutory provision enabling the criminal court to refer the parties to a forum for alternate dispute resolution including mediation. The same is the position regarding cases under the NI Act. Therefore, the question which first begs an answer is whether the criminal court can in any manner refer parties before it to dispute resolution by mediation.

51. In para 18 of ***Afcons,*** the Supreme Court has given illustrations of certain categories of cases that were normally not considered

suitable for alternate dispute resolution processes. Prosecution for criminal offences has been mentioned as not suitable. The judgment also notes that the categorization enumerated is merely illustrative and not inflexible. As the legal validity of mediation in criminal compoundable cases was not specifically in question, there is thus no authoritative judicial pronouncement prohibiting the same.

52. Out of the alternate dispute redressal mechanisms adopted by this country's legal system, the mediation movement as a reliable mechanism, has gained both acceptability and popularity. In an article titled "*Mediation : Constituents, Process and Merit*" *(http://gujarathighcourt.nic.in/mediation/sbs1.htm)* authored by *S.B. Sinha, J. (Retd. Judge of the Supreme Court of India),* it has been noted that unlike litigation and arbitration, which consists of formal evidentiary hearings and a final adjudication, mediation was a semi-formal negotiation aimed at allowing parties to settle disputes, not only amicably but also economically and expeditiously by a process of self and participatory determination. It is noted that mediation as a method of dispute resolution was not a unique or new concept and that it had in fact evolved through long standing traditions, was being used by tribes and villages across our country long before it came to be statutorily recognized in the recent past. The roots of mediation have been traced back to texts such as "*Kautilya's Arthashastra*" as well as the Panchayati Raj system. The references to Lord Krishna's mediation between *Kauravas* and *Pandavas* during the Mahabharata are legendary.

53. 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 a 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'*.

54. The examination of the statutory regime and the practice governing mediation shows that the genesis of the mediation may rest on a court referral whereby the court refers the parties in a pending case, with their consent, to mediation. However, the availability of mediation as a platform to negotiate a settlement does not rest on a court referral. The parties are enabled to approach the mediation centre or the mediator even without the court order in what is referred to as '*pre-litigation mediation*' which is really an effort to resolve the dispute before filing a case to explore the possibility of dispute resolution without court intervention. Inasmuch as we are not concerned with the consequences of a settlement in a pre-litigation mediation or the manner of its enforceability, we do not propose to dwell on it in this judgment.

55. Mr. J.P. Sengh, Senior Advocate would emphasize before us that it is the parties who are referred to the mediation, and, not the *lis* before the court. It is contended that the power to refer parties to mediation is irrespective of the nature of the case before the court, and

that it could be civil or criminal. We find that inasmuch as it is the parties who are referred to mediation, this would be the correct legal position.

56. We have extracted above the provisions of Section 320 of the Cr.P.C. Section 320 of the Cr.P.C. enumerates and draws a distinction between offences as compoundable, either between the parties or with the leave of the court. This provision clearly permits and recognizes the settlement of specified criminal offences. Settlement of the issue(s) is inherent in this provision envisaging compounding. The settlement can obviously be only by a voluntary process *inter se* the parties. To facilitate this process, there can be no possible exclusion of external third party assistance to the parties, say that of neutral mediators or conciliators.

57. Therefore, 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.

## *VII. Process to be followed in reference of above disputes in criminal law to mediation*

58. So what is the process to be followed in disputes under criminal law? So far as criminal matters are concerned, Section 477 of the Cr.P.C. enables the High Court to make rules regarding any other matter which is required to be prescribed. The Mediation and Conciliation Rules stand notified by the Delhi High Court in exercise of the rule making power under Part X of the Code of Civil Procedure, Section 89(2)(d) of the C.P.C. as well as "*all other powers enabling the High Court*" in this behalf. The Rules therefore, clearly provide for mediation not only in civil suits, but also to "***proceeding pending in the High Court of Delhi or in any court subordinate to the High Court of Delhi*".** So far as Delhi is concerned, these rules would apply to mediation in a matter referred by the court concerned with a criminal case as well as proceedings under Section 138 of the NI Act.

## *VIII. Dispute resolution encouraged in several cases by the Supreme Court in non-compoundable cases as well*

59. We note that there have been several instances when the Supreme Court has approved exercise of inherent powers under Section 482 of the Cr.P.C. by the High Court for quashing criminal cases on account of compromise/settlement even though they are not included in the list of compoundable cases under Section 320 of the Cr.P.C. In ***(2012) 10 SCC 303, Gian Singh v. State of Punjab,*** it was held that this was in exercise of statutory power of the High Court under Section 482 of the Cr.P.C. The relevant extract of the judgment is reproduced as under :

> ***"61.*** *... But the* ***criminal cases having overwhelmingly and predominatingly civil flavour*** *stand on a different footing for the purposes of quashing, particularly the* ***offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute.*** *In this category of cases, the* ***High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim,*** *the possibility of conviction is remote and bleak and* ***continuation of the criminal case would put the accused to great oppression and prejudice*** *and* ***extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim.*** *In other words, the High Court must consider* ***whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding*** *or* ***continuation of the criminal proceeding would tantamount to abuse of process of law*** *despite settlement and compromise between the victim and the wrongdoer and* ***whether to secure the ends of justice, it is appropriate that the criminal case is put to an end*** *and if the answer to the above question(s) is in the* ***affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding****."*
>
> *(Emphasis supplied)*

60. In a recent pronouncement dated 4th October, 2017, reported at ***2017 SCC OnLine SC 1189 Parabatbhai Aahir @ Parbatbhai Bhimsinhabhai Karmur and Ors Vs State of Gujarat and Anr*** a three-Judge bench of the Supreme Court speaking through *D.Y. Chandrachud, J.* cited with approval, *inter alia*, the judgment in ***Gian Singh*** reiterating that in exercise of its inherent jurisdiction under

Section 482 of the Cr.P.C, the High Court is empowered to quash FIRs/Criminal Proceedings emanating from non-compoundable offences if the ends of justice and the facts of the case, so warrant. While, so approving the Supreme Court, laid down the exposition of the law in the form of exhaustive guidelines which are extracted thus:

> *'(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;*
>
> *(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973.* ***The power to quash under Section 482 is attracted even if the offence is non-compoundable****.*
>
> *(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;*
>
> *(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;*

*(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;*

*(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due* ***regard to the nature and gravity of the offence. Heinous and serious offences*** *involving mental depravity or offences such as murder, rape and* ***dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute.*** *Such offences are, truly speaking,* ***not private in nature but have a serious impact upon society.*** *The decision to continue with the trial in such cases is founded on the* ***overriding element of public interest in punishing persons*** *for serious offences;*

*(vii)* ***As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned****;*

*(viii)* ***Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute****;*

*(ix)* ***In such a case, the High Court may quash the criminal proceeding if in view of the compromise*** *between the disputants,* ***the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and***

> *(x) There is yet an **exception** to the principle set out in **propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state** have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be **justified in declining to quash** where the offender is involved in an **activity akin to a financial or economic fraud or misdemeanour**. The consequences of the act complained of upon the financial or economic system will weigh in the balance.'*

61. The judicial precedent in ***(2013) 5 SCC 226, K. Srinivas Rao v. D.A. Deepa*** is in the context of a complaint filed by the respondent wife under Section 498A of the Indian Penal Code, against the appellant husband and his family members, the offence under Section 498A of the IPC being non-compoundable. Noting that mediation, as a method of alternative dispute redressal had got legal recognition, observations regarding settlements of matrimonial disputes were made in paras 39 and 46 by the Supreme Court to the courts dealing with matrimonial matters which read thus :

> ***"39.** Quite often, the **cause** of the misunderstanding in a matrimonial dispute **is trivial** and **can be sorted out**. Mediation as a method of alternative dispute resolution has got legal recognition now. We have referred several matrimonial disputes to mediation centres. Our experience shows that about 10% to 15% of matrimonial disputes get settled in this Court through various mediation centres. We, therefore, feel that **at the earliest stage i.e. when the dispute is taken up by the Family Court or by the court of first instance for hearing, it must be referred to mediation centres**. ...*

*xxx* *xxx* *xxx*

***44.*** *We, therefore, feel that* ***though offence punishable under Section 498-A IPC is not compoundable, in appropriate cases if the parties are willing and if it appears to the criminal court that there exist elements of settlement, it should direct the parties to explore the possibility of settlement through mediation****. This is, obviously, not to dilute the rigour, efficacy and purport of Section 498-A IPC, but to locate cases where the matrimonial dispute can be nipped in bud in an equitable manner. The Judges, with their expertise, must ensure that this exercise does not lead to the erring spouse using mediation process to get out of clutches of the law. During mediation, the parties can either decide to part company on mutually agreed terms or they may decide to patch up and stay together.* ***In either case for the settlement to come through, the complaint will have to be quashed. In that event, they can approach the High Court and get the complaint quashed. If, however, they choose not to settle, they can proceed with the complaint.*** *In this exercise, there is no loss to anyone. If there is settlement, the parties will be saved from the trials and tribulations of a criminal case and that will reduce the burden on the courts which will be in the larger public interest. Obviously,* ***the High Court will quash the complaint only if after considering all circumstances it finds the settlement to be equitable and genuine.*** *Such a course, in our opinion, will be beneficial to those who genuinely want to accord a quietus to their matrimonial disputes.*

*xxx* *xxx* *xxx*

***46.*** *We, therefore, issue directions, which the courts dealing with the matrimonial matters shall follow.*

*xxx* *xxx* *xxx*

***46.2.*** *The* ***criminal courts dealing with the complaint under Section 498-A IPC should, at any stage and particularly, before they take up the complaint for hearing, refer the parties to mediation centre if they feel***

***that there exist elements of settlement and both the parties are willing****. However, they should take care to see that in this exercise, rigour, purport and efficacy of Section 498-A IPC is not diluted. Needless to say that the discretion to grant or not to grant bail is not in any way curtailed by this direction. It will be for the court concerned to work out the modalities taking into consideration the facts of each case.*

***46.3. All mediation centres shall set up pre-litigation desks/clinics; give them wide publicity and make efforts to settle matrimonial disputes at pre-litigation stage****."*

*(Emphasis supplied)*

62. Therefore, the Supreme Court has recognized the permissibility of the High Court's quashing the criminal prosecutions in exercise of their inherent jurisdiction under Section 482 of the Cr.P.C. on a consideration of the subject matter of the cases. The Supreme Court has accepted compromises in non-compoundable offences upon evaluation of the genuineness, fairness, equity and interests of justice in continuing with the criminal proceedings relating to non-compoundable offences, after settlement of the entire dispute especially in offences arising from "*commercial, financial, civil, partnership*" or such like transactions or relating to matrimonial or family disputes which are private in nature.

## *IX. Nature of proceedings under Section 138 of the NI Act*

63. Before proceeding with the examination of the questions under reference, it is necessary to examine the spirit, intendment and object of the incorporation of Section 138 of the NI Act**,** the Preamble whereof states *"Whereas it is expedient to define and amend the law*

*relating to promissory notes, bills of exchange and cheques"***.** It is therefore, evident that Section 138 of the NI Act was introduced to inculcate faith in the efficacy of banking operations and credibility in transacting business of negotiable instruments (***Ref.: (2003) 3 SCC 232, Goaplast P. Ltd. V. Chico Ursula D'Souza & Anr.***).

64. In ***(2011) 4 SCC 593, Kaushalya Devi Massand v. Roopkishore Khore,*** the Supreme Court drew the following distinction between the traditional criminal offences and the offence under Section 138 of the NI Act observing thus :

> *"**11**. Having considered the submissions made on behalf of the parties, we are of the view that the **gravity of a complaint under the Negotiable Instruments Act cannot be equated with an offence under the provisions of the Penal Code, 1860 or other criminal offences. An offence under Section 138 of the Negotiable Instruments Act, 1881, is almost in the nature of a civil wrong which has been given criminal overtones.**"*
>
> *(Emphasis supplied)*

65. We also find useful the observations of the Supreme Court in ***(2012) 1 SCC 260, R. Vijayan v. Baby*** wherein the court was determining an issue in respect of compensation when fine is imposed as the sentence or it forms part of the sentence. In this pronouncement, the Supreme Court noted that cases arising under Section 138 of the NI Act are really "*civil cases masquerading as criminal cases*". The statutory object in effect appears to be both punitive as also compensatory and restitutive in regard to cheque dishonouring cases. The judgment notes that Chapter XVII of the

enactment is a unique exercise which bears the dividing line between civil and criminal jurisdictions and that it provides a single forum to enforce a civil and criminal remedy.

66. In this regard, the observations of the Supreme Court in ***(2010) 5 SCC 663, Damodar S. Prabhu v. Sayed Babalal H*** also shed valuable light, relevant extract whereof is as below :

> ***"17.*** *In a recently* ***published commentary****, the following observations have been made with* ***regard to the offence punishable under Section 138 of the Act*** *[cited from: Arun Mohan, Some thoughts towards law reforms on the topic of Section 138, Negotiable Instruments Act—Tackling an avalanche of cases (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2009) at p. 5]:*
>
> > *"... **Unlike** that for **other forms of crime**, the punishment here (insofar as the complainant is concerned) is **not a means of seeking retribution, but is more a means to ensure payment of money**. The complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The **threat of jail is only a mode to ensure recovery**. As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque.*
> >
> > *If we were to examine the number of complaints filed which were 'compromised' or 'settled' before the final judgment on one side and the cases which proceeded to judgment and conviction on the other, we will find that the bulk was settled and only a miniscule number continued."*
>
> ***18.*** *It is quite obvious that* ***with respect to the offence of dishonour of cheques, it is the compensatory aspect of the remedy which should be given priority over the punitive aspect.*** *There is also some support for the apprehensions raised by the learned Attorney General that a* ***majority of cheque bounce cases are indeed being compromised or settled by way of compounding, albeit during the later stages***

***of litigation thereby contributing to undue delay in justice delivery****. The problem herein is with the tendency of litigants to belatedly choose compounding as a means to resolve their dispute. Furthermore, the written submissions filed on behalf of the learned Attorney General have stressed on the fact that unlike Section 320 CrPC, Section 147 of the Negotiable Instruments Act provides no explicit guidance as to what stage compounding can or cannot be done and whether compounding can be done at the instance of the complainant or with the leave of the court."*

*(Emphasis by us)*

67. It is quite apparent that proceedings under Section 138 of the NI Act have a special character. They arise from a civil dispute relating to dishonouring to a cheque but may result in a criminal consequence. Even though the statute is punitive in nature, however, its spirit, intendment and object is to provide compensation and ensure restitution as well which aspects must received priority over punishment. The proceedings under Section 138 of the NI Act are therefore, distinct from other criminal cases. It is well settled that they are really in the nature of a civil wrong which has been given criminal overtones.

## *X. Permissibility of settlement of offence under Section 138 of the NI Act*

68. So far as the offence/proceedings under Section 138 of the NI Act are concerned, the Legislature has provided Section 147 which specifically stipulates that "*every offence punishable under this Act shall be compoundable*". It is important to note that Section 147 of the statute contains a non-obstante provision and is applicable

notwithstanding anything contained in the Code of Criminal Procedure. Therefore, irrespective of and apart from the offences stipulated under Section 320 of the Cr.P.C., Section 147 of the NI Act makes the offence under Section 138 of the NI Act specifically compoundable.

69. The impact of the non-obstante clause in Section 147 of the NI Act has been considered by the High Court of Gujarat in the judgment reported at ***(2005) CriLJ 431, Rameshbhai Somabhai Patel v. Dineshbhai Achalanand Rathi*** wherein the court held thus:

> ***"8.*** *The* ***victim of the offence can compound the offence notwithstanding anything contained in Cr. P.C. 1973****. In other words, the* ***parties can settle the alleged criminal wrong and conclude their dispute under adjudication*** *and request the Court where it is pending to pass appropriate order viz: order of acquittal. Undisputedly, the petitioner accused has approached this Court for scrutiny of the legality and validity of the order of conviction and sentence and, therefore, the original complainant can positively appear before this Court and say that he has compounded the offence with the accused and now he has not to pursue the remedy, that he is not interested in proceeding with the complaint and to see that the accused is sent to the prison. The effect of the same would be practically or say similar to a withdrawal from the prosecution with or without any qualification. So,* ***the original complainant if comes to the Court and says that he is withdrawing himself from prosecution on account of compromise and he has compounded the matter****, then obviously the conviction and sentence shall have to be annulled/set aside.* ***Considering the language of the section, even there is no scope for the Court to consider whether such a request should be accepted or not. No formal permission to compound the offence is required to be sought for****.*

> ***9. Considering the language of Section 147*** *of the N.I. Act, it is* ***not necessary to consider the scheme of Section 320 of CrPC****, but to appreciate the questions posed, it can still be looked into other relevant provision. Section 320 of CrPC divides compoundable offences in two different parts by Sub-section (1). and Sub-section (2). Subsequent subsections deal with other contingencies, qualifications or embargoes.* ***But Section 147 of the N.I. Act says that offence shall be compoundable and it does not provide for any other or further qualification or embargo like Sub-section (2) of Section 320 of CrPC. The parties can compound the offence as if the offence is otherwise compoundable****. Thus, the offence is made straightaway compoundable like the case described under Sub-section (1) of Section 320 of CrPC.* ***Subsection (9) of Section 320 of CrPC has no room to play because of non obstante clause in Section 147 of the N.I. Act****. ....*
>
> ***10.*** *The declaration placed before the Court and the presence of the original complainant respondent No. 1 today before the Court takes me to a conclusion that the say of the complainant should be accepted that he has withdrawn from prosecution because he has compounded the offence out of the Court. As per the* ***settled legal position, the effect of compounding of the offence is that of acquittal.****"*
>
> *(Emphasis by us)*

70. On this aspect, valuable light is thrown on this issue also in the pronouncement of the Supreme Court in ***Damodar S. Prabhu's*** case wherein the Supreme Court has laid down the guidelines while interpreting Section 138 and 147 of the NI Act to encourage litigants in cheque dishonouring cases to opt for compounding during early stages of the litigation to ease choking of the criminal justice system. To encourage this, a graded scheme of imposing costs on parties who unduly delay compounding of the offence and for controlling filing of

the complaints in multiple jurisdictions relatable to same transactions has been proscribed. We extract hereunder the relevant directions of the Supreme Court in this regard :

> ***"21.*** *... In view of this submission, we direct that the following guidelines be followed:*
>
> ***THE GUIDELINES***
>
> *(i) In the circumstances, it is proposed as follows:*
>
> *(a) That directions can be given that the writ of summons be suitably modified* ***making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case*** *and that if such an application is made,* ***compounding may be allowed by the court without imposing any costs on the accused***.
>
> *(b)* ***If the accused does not make an application for compounding*** *as aforesaid,* ***then if an application for compounding is made before the Magistrate at a subsequent stage, compounding*** *can be allowed* ***subject to the condition*** *that the accused will be* ***required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the court deems fit***.
>
> *(c) Similarly,* ***if the application for compounding*** *is made* ***before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed*** *on the* ***condition*** *that the accused* ***pays 15% of the cheque amount by way of costs***.
>
> *(d) Finally,* ***if the application for compounding*** *is made* ***before the Supreme Court, the figure would increase to 20% of the cheque amount****."*
>
> *(Emphasis supplied)*

71. The court has however, observed in this judgment that Section 147 of the Act did not carry any guidance on how the court will proceed with the compounding of the offence under the enactment and that the scheme legislatively contemplated under Section 320 of the Cr.P.C. cannot be followed in the strict sense. It was to overcome the hurdle because of the legislative vacuum that the graded scheme was provided to give some guidance and to save valuable time of the courts.

72. In this regard, reference may also usefully be made to the pronouncement of the Supreme Court reported at ***(2014) 5 SCC 590, Indian Banks Association & Ors. v. Union of India*** wherein the court observed thus :

> *"**21.** This Court in **Damodar S. Prabhu v. Sayed Babalal H.** [(2010) 5 SCC 663 : (2010) 2 SCC (Civ) 520 : (2010) 2 SCC (Cri) 1328] laid down certain **guidelines while interpreting Sections 138 and 147 of the Negotiable Instruments Act to encourage litigants** in cheque dishonour cases **to opt for compounding during early stages of litigation to ease choking of criminal justice system; for graded scheme of imposing costs on parties who unduly delay compounding of offence**; and for controlling of filing of complaints in multiple jurisdictions relatable to same transaction, which have also to be borne in mind by the Magistrate while dealing with cases under Section 138 of the Negotiable Instruments Act."*
>
> *(Emphasis by us)*

73. The above further reinforces the position that there is no legal prohibition upon a court, seized of a complaint under NI Act, to encourage dispute resolution by recourse to the alternate dispute

resolution methods including mediation. On the contrary, the guidelines laid down by the court in ***Damodar S. Prabhu*** unequivocally encourage settlement. Mediation, as a mechanism for dispute resolution and arriving at a settlement automatically gets reinforced so far as a case under Section 138 of the NI Act is concerned.

## *XI. Mediation and Conciliation Rules, 2004 – notified the Delhi High Court*

74. Mediation in Delhi is guided by the Mediation and Conciliation Rules, 2004. These Rules source the rule making power to "*Part X and Clause (d) of sub-section (2) of Section 89*" of the Code of Civil Procedure, 1908 as well as "*all other powers enabling*" the High Court of Delhi to make such Rules.

75. The Delhi Mediation and Conciliation Rules, 2004 apply to all mediations and conciliations connected with "*any suit or other proceedings pending in the High Court of Delhi or in any other court subordinate to the High Court of Delhi*". These rules further state that mediation in respect of any "*suit or proceeding pending before the High Court or any other court or tribunal*" may be referred to the Delhi High Court Mediation and Conciliation Centre or any other mediation centre set up by the Legal Services Authorities Act, 1987.

76. In this regard, we may advert to Article 227 of the Constitution of India as well as Section 477 of the Cr.P.C. which enables the High Court to make such rules.

77. The Mediation and Conciliation Rules, 2004 stand notified by the High Court of Delhi which would guide the process to be followed even in references to mediation arising under Section 138 of the N.I. Act.

## *XII. Impact of settlement of disputes in a complaint under Section 138 Negotiable Instruments Act by virtue of Lok Adalat under the Legal Services Authorities Act, 1987*

78. Given the reference under examination, it is therefore, necessary to examine what would be the impact of a settlement of disputes in a complaint under Section 138 of the NI Act before the Lok Adalat constituted under the Legal Services Authorities Act, 1987? This issue was the subject matter of consideration before the Supreme Court in the judgment reported at ***(2012) 2 SCC 51, K. Govindam Kutty Menon v. C.D. Shaji.*** The Kerala High Court had taken a view that when a criminal case is settled at a Lok Adalat, the award passed by it has to be treated only as an order of the criminal court and that it cannot be executed as a decree of the civil court. This finding was overturned by the Supreme Court. We extract hereunder the observations of the Supreme Court in paras 12, 13 and 26 :

> ***"12.*** *Unfortunately, the said argument was not acceptable to the High Court. On the other hand, the* ***High Court has concluded*** *that* ***when a criminal case is referred to the Lok Adalat and it is settled at the Lok Adalat, the award passed has to be treated only as an order of that criminal court*** *and it cannot be executed as a decree of the civil court. After saying so, the* ***High Court finally concluded that*** *"an* ***award passed by the Lok Adalat on reference of a criminal case by the criminal court as already concluded can only be construed as an order by the criminal court***

***and it is not a decree passed by a civil court****" and confirmed the order of the Principal Munsif who declined the request of the petitioner therein to execute the award passed by the Lok Adalat on reference of a complaint by the criminal court.*

***13.*** *On going through the Statement of Objects and Reasons, definition of "court", "legal service" as well as Section 21 of the Act, in addition to the reasons given hereunder,* ***we are of the view that the interpretation adopted by the Kerala High Court in the impugned order is erroneous.***

*xxx xxx xxx*

***26.*** *From the above discussion, the following propositions emerge:*

*(1) In view of the unambiguous language of Section 21 of the 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 that court****.*

***(2) The Act does not make out any such distinction between the reference made by a civil court and a criminal court.***

*(3) 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 Court, Consumer Redressal Forum, Motor Accidents Claims Tribunal and other forums of similar nature.*

*(4)* ***Even if a matter is referred by a criminal court under Section 138 of the Negotiable Instruments Act, 1881 and by virtue of the deeming provisions, 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****."*

*(Emphasis by us)*

79. The judgment of the Supreme Court reported at ***(2014) 10 SCC 690 Madhya Pradesh State Legal Services Authority v. Prateek Jain*** in Civil Appeal No. 8614/2014 decided on 10th September, 2014, also brings forth that even when cases under Section 138 of the NI Act were settled before the Lok Adalat, the guidelines in ***Damodar S. Prabhu*** are to be followed, with modifications, if any, *qua* reduction of costs if necessary. In para 23 of the judgment, the court stated the legal position thus :

> ***"23.*** *Having regard thereto,* ***we are of the opinion that even when a case is decided in the Lok Adalat, the requirement of following the Guidelines contained in Damodar S. Prabhu*** *[Damodar S. Prabhu v. Sayed Babalal H., (2010) 5 SCC 663 : (2010) 2 SCC (Civ) 520 : (2010) 2 SCC (Cri) 1328]* ***should normally not be dispensed with. However, if there is a special/specific reason to deviate therefrom****,* ***the court is not remediless*** *as* ***Damodar S. Prabhu*** *[Damodar S. Prabhu v. Sayed Babalal H., (2010) 5 SCC 663 : (2010) 2 SCC (Civ) 520 : (2010) 2 SCC (Cri) 1328] itself* ***has given discretion to the court concerned to reduce the costs with regard to specific facts and circumstances of the case, while recording reasons in writing about such variance****. Therefore, in those matters where the case has to be decided/settled in the Lok Adalat, if the court finds that it* ***is a result of positive attitude of the parties, in such appropriate cases, the court can always reduce the costs by imposing minimal costs or even waive the same.*** *For that,* ***it would be for the parties, particularly the accused person, to make out a plausible case for the waiver/reduction of costs and to convince the court concerned about the same****. This course of action, according to us, would strike a balance between the two competing but equally important interests, namely, achieving the objectives delineated in Damodar S. Prabhu [Damodar S. Prabhu v. Sayed Babalal H., (2010) 5 SCC 663 : (2010) 2 SCC (Civ) 520 : (2010) 2 SCC (Cri) 1328] on the one hand*

*and the public interest which is sought to be achieved by encouraging settlements/resolution of case through the Lok Adalats on the other hand."*

*(Emphasis by us)*

80. The Supreme Court has thus declared the legal position that the Legal Services Authorities Act did not make out any distinction between the reference made by a civil court and a criminal court. Upon settlement before the Lok Adalat even in a criminal case, the award of the Lok Adalat has to be treated as a decree capable of execution by a civil court. The guidelines contained in ***Damodar S. Prabhu*** are required to be followed even upon such settlement subject to the discretion to the court concerned to reduce/wave the costs with regard to the specific facts and circumstances of the case.

## *XIII. <u>What is the procedure to be followed if in a complaint case under Section 138 of the NI Act, a settlement is reached in mediation?</u>*

81. So what would be the appropriate procedure for recording a settlement reached by the parties upon their referral to mediation during the pendency of a complaint under Section 138 of the NI Act?

82. The above discussion would show that proceedings under Section 138 of the NI Act stand categorized as *quasi-civil*. In order to provide meaningful interpretation and to do complete justice in such proceedings, criminal courts are known to have often utilized the principles in the Code of Civil Procedure in such cases. These include the summary proceedings for maintenance under Section 125 of the Cr.P.C. as well as the proceedings under Section 145 of the Cr.P.C.

83. In this regard, reference may usefully be made to a judgment of the High Court of Madhya Pradesh reported at ***MANU/MP/1150/2012, Sunitabai v. Narayan.*** The court in this revision petition was considering a challenge to a trial court order rejecting an application for amendment of pleadings in proceedings under Section 125 of the Cr.P.C. While considering the permissibility of amendment of the petition under Section 125 of the Cr.P.C., the court held thus :

> *"06. As per settled preposition, the proceeding under Section 125 of the Cr.P.C. is treated to be a* ***quasi-civil proceeding*** *and in such premises, the* ***provisions of Order 6 Rule 17 of the CPC or some other provision of such Code could not be applied strictly but whenever the specific provision in this regard is not available in the special enactment then in that position, Court may adopt the principal*** *(sic:principle)* ***laid down by the Apex Court either in the civil case or in the criminal case****. In such premises, if the present matter is examined in the light of the* ***decision of the Apex Court*** *in the matter of* ***P. Venkateswarlu v. Motor & General Traders reported in AIR 1975 Supreme Court 1409*** *holding that the parties have right to amend the pleadings on the basis of the subsequent event which has come into existence during pendency of the suit, then the* ***aforesaid application of amendment deserves to be allowed by allowing this revision****."*
>
> *(Emphasis by us)*

Thus the court permitted application of the principles which bind a civil court regarding amendment of pleadings, to proceedings under Section 125 of the Cr.P.C. treated as quasi civil in nature and permitted its amendment.

84. In a decision dated 3rd February, 2010 in Crl.R.C.No.780/2006 entitled ***Chinnappaiyan v. Chinnathayee,*** a Single Judge of the Madras High Court held that:

> "*…though a petition under* ***Section 125 (1)*** *of the Code is* ***made before the criminal court*** *- as defined under Section 6 of the Code essentially,* ***the right that is decided*** *by the said Court* ***is purely civil in nature****. Therefore, undoubtedly, the order made by the Magistrate under Section 125 (1) of the Code* ***for maintenance is the culmination of such a civil right of an individual. But, Section 125(3)*** *of the Code* ***empowers the Court to impose a sentence of imprisonment, in the event of failure to obey such order*** *made under Section 125(1) of the Code.* ***To this extent, the proceeding is criminal in nature****. To put it comprehensively, a* ***proceeding initiated under Section 125 of the Code is quasi-civil and quasi-criminal****. The Hon'ble Supreme Court has held so in several judgments. Regarding the procedure for making claim before the Court for maintenance, what is filed under Section 125 (1) of the Code is pure and simple a* ***petition*** *and* ***not a complaint*** *as defined in Section 2(d) of the Code****. This would again indicate that a proceeding under Section 125 of the Code is treated as a quasi-civil and quasi criminal proceeding.***"
>
> *(Emphasis furnished)*

85. In the context of proceedings under Section 145 of the Cr.P.C., in ***1963 CriLJ 491, Madansetty Tirpataiah v. Stats S.I.P. Atmakur,*** the High Court of Andhra Pradesh was considering a revision petition challenging the order of the Sub-Divisional Magistrate whereby the petitioner's application for *inter alia* filing additional documents was rejected. The court was therefore, called upon to rule on jurisdiction of the SDM to permit filing of documents at a late stage. While

considering such question, the court also observed on the nature of the proceedings and held thus :

> ***"6.*** *Further, to my mind, proceedings under* ***Section 145 of the Cr PC are more or less of a quasi-civil nature****. So that on* ***analogy of Civil Suit, in cases under this Section*** *if within the time fixed by the Magistrate, the party is not in a position to file documents in his possession which support his claim, and he is able to satisfy the Court that for sufficient and valid reasons he could not file the said documents with in the prescribed time, it would be* ***open to the Magistrate in the ends of justice to allow a party to file the said documents****.*
>
> ***7. It is no doubt true that there is no provision in the Criminal Procedure Code analogous to Civil Procedure, for filing of documents at a late stage, but having regard to the nature of the proceedings in the ends of justice such exercise of discretion cannot entirely be ruled out.***
>
> *xxx xxx xxx."*
>
> *(Emphasis by us)*

86. Thus courts have had regard to the nature of proceedings, and, wherever found that criminal proceedings are really quasi-civil in nature, so far as matters of procedure is concerned, consistently expanded the limits of specific statutory prescription in order to do complete justice between the parties, keeping in mind the elements of public interest as well as the spirit, object and intendment of the legislation.

87. In the present case, other than the settlement agreement, there is no judicial order of any court that binds the respondent to honour the settlement arrived at during mediation.

88. It is reported that even if a mediated settlement agreement is reached, generally criminal complaints under Section 138 of the NI Act are withdrawn/compounded by the complainants only after receipt of the entire amount(s) agreed as part of the settlement. The criminal courts thus necessarily have to keep the complaint pending, awaiting the implementation of the negotiated settlement.

89. The present reference manifests that in the event of breach of the settlement, the courts have to recommence proceedings on merits and the evidentiary/legal value of the mediated settlement remains undetermined. This has enabled many accused to divert the complaint to mediation only with the intent to effectively delay the proceedings under Section 138 of the NI Act.

90. Mr. Siddharth Aggarwal, ld. amicus curiae has placed certain judicial precedents on this aspect before us. In ***(2013) SCC OnLine Del 124, Hardeep Bajaj v. ICICI Bank Ltd.,*** the petitioner had entered into an amicable settlement dated 26th May, 2012 for payment to the respondent bank in mediation undertaken during the pendency of the complaint under Section 138 of the NI Act to make payment of Rs.9,08,800/- in full and final settlement of the bank claim in monthly installments of Rs.1,50,000/- commencing from 26th May, 2012, the last of which was payable on 26th October, 2012. Without abiding with the settlement, the petitioner approached the ld. MM for modifying the settlement. The ld. MM noticed that the petitioner had violated the successive undertakings given by him and dismissed the application for modification with costs. The petitioner approached

this court by way of a revision petition which was dismissed. In para 10 of the judgment, the ld. Single Judge of this court has noted that "*once the settlement reached is accepted by the court or an undertaking is given, it becomes binding on the parties*".

91. In ***(2015) SCC OnLine Del 7309, Manoj Chandak v. Tour Lovers Tourism (India) Pvt. Ltd.,*** the respondent failed to honour the mediated settlement dated 26th July, 2013 reached in complaints under Section 138 of the NI Act, 1881. Instead, after three months, it filed an application for reconsideration of the settlement on the ground that the signatures of its authorized representatives were forcibly obtained and that he had no instructions to agree to the terms of the settlement. This application was allowed by the trial court by the order dated 25th April, 2014 and the parties were again referred to mediation. A challenge was laid regarding the voluntariness of the mediated settlement. The learned Single Judge therefore, held that "*since question of fact are being raised regarding voluntariness of the mediated settlement, therefore, it would be appropriate that an opportunity is granted by trial court to respondents to lead evidence to show that the mediated settlement was not a voluntary one*".

92. In yet another pronouncement reported at ***(2015) SCC OnLine Del 9334, M/s Arun International v. State of Delhi & Anr.,*** a settlement regarding the subject matter of the complaint under Section 138 of the NI Act was reached before the Court annexed mediation centre in the Rohini District Courts which was placed before the magistrate in the pending proceedings. The court recorded the

statement of the respondent no.2 admitting the claim of the complainant and seeking an adjournment to pay the agreed amount. Two years were sought by the respondent no.2 from the the 25th November, 2013 being the date of making of the statement before the ld. Metropolitan Magistrate. Vide order dated 16th February, 2015, the ld. Metropolitan Magistrate returned the complaints for want of territorial jurisdiction, in view of the ratio of the Supreme Court in the pronouncement of ***Dashrath Rupsingh Rathore v. State.*** The ld. Single Judge held that the order dated 16th February, 2015 was illegal and contrary to law, in view of the fact that the matter stood settled before the Mediation Centre as also that the decision in ***Dashrath Rupsingh Rathore*** was inapplicable, the complaint cases having gone to the stage of Section 145(2) of the Cr.P.C. In para 7, the learned Single Judge had observed that "*it is settled law and even otherwise the settlement of the mediation as well is deemed to be a decree and cannot be challenged*".

In view of the above enunciation of the law, this position is not legally correct.

93. Our attention is also drawn to the pronouncement of the ld. Single Judge of the Kerala High Court in the judgment reported at ***(2014) 3 KLJ 637, Sreelal v. Murali Menon & Anr.*** The petitioner in this case was the complainant in a complaint under Section 138 of the NI Act. On the date for evidence, on the request of the accused, the matter was referred for mediation where a settlement dated 17th February, 2014 was reached and six months time was given for

payment. In the settlement, the parties had agreed that in default, the complainant was allowed to proceed with the case and, if the amount was paid, then the complainant would have to withdraw the case. While the petitioner/complainant was willing to wait the agreed period for payment, the respondent was insisting that the mediated agreement had the effect of an award; that the petitioner was not entitled to proceed with the case; and that his remedy was to execute the agreement as if it was an award under the Legal Services Act. In paras 12 and 13 of the judgment, the court has explained the alternative dispute resolution process in cases under Section 138 of the NI Act thus :

> *"**12.** Then, the question is **what is to effect of mediation agreement in a criminal matter**. Admittedly, if the matter is referred for mediation, the **mediator is not acting neither as Adalath nor as an Arbitrator or Conciliator** to resolve the disputes **by passing an award** either under the provisions of Legal Services Authorities Act or under the provisions of the Arbitration and Conciliation Act. **Even** if, the matter is referred **in a civil case** for mediation under S. 89 of the Code of Civil Procedure, even then, the **mediator is not passing any judgment,** but he is only **facilitating the parties** to arrive at the settlement and help them to draw the mediation agreement and **after the agreement is signed by the parties, and counter signed by the Advocates**, then, it **will be forwarded to the Court which referred the matter and that Court will pass a decree on the basis of the agreement applying the principle under O. 23 R. 3 of Code of Civil Procedure accordingly. Till, the seal of the court is affixed on the agreement, and a decree is passed on that basis that agreement, it has no legal effect in the eye of law.** So, **even if a mediation agreement reaches the criminal court, agreeing to settle the issue on certain***

***terms, the criminal court cannot rely on that agreement and pass a civil decree***, *relegating the parties to get the amount realized by filing execution petition before the Civil Court and it* ***can only on the basis of the evidence either convict or acquit the accused and if the case is compounded, if it is a compoundable offence, then it can record compounding and that compounding will have the effect of an acquittal under S. 320(8) of Code of Criminal Procedure.***

***13.*** *Further, the counsel for the respondent relied on the decision reported in* ***Govindankutty Metion v. Shaji (2011 (4) KLT 857 (SC))*** *and argued that since the matter is referred for mediation and the parties have settled the dispute in the mediation, then it will have the effect of a civil decree and the complainant cannot proceed with the criminal case and he can only execute the award as though it is a civil decree. It is true that in the decision relied on by the counsel for the respondent namely,* ***Govindankutty Menon's case (supra)****, the Hon'ble Supreme Court has held that if the case under* ***S. 138 of the Negotiable Instruments Act is referred to Adalath by a criminal court and if the matter is settled in the Adalath****,* ***then by virtue of the deeming provision****, an* ***award passed by the Adalath based on the compromise has to be treated as a decree capable of execution by a civil court****.* ***In that case****, a* ***case under S. 138*** *of the Negotiable Instruments Act was* ***referred to Adalath constituted under the Legal Services Authorities Act*** *by a Criminal Court and in the Adalath, parties have agreed on terms and provided time for payment of the amount and that compromise was recorded and accordingly an award was passed in the Adalath and the criminal case was closed. When, the complainant filed an execution petition before the Munsiff s Court for realisation of the amount and the Munsiff dismissed the execution petition on the ground that Criminal Court cannot pass a civil decree even in Adalath which was affirmed by this court but when that was challenged before the Hon'ble Supreme Court, the Hon'ble Supreme Court reversed the*

*finding and held that* ***by virtue of the deeming provision under S. 21 of the Legal Services Authorities Act, even, in cases under S. 138 of the Negotiable Instruments Act if a compromise was accepted and an award has been passed in the Adalath, then that will have the effect of a civil decree and that can be executed through civil court*** *as though it is a decree of a civil court.* ***The facts are different in this case as already discussed****, the* ***mediation cannot be treated at par with Lok Adalath as mediator has no power to pass any award as provided under the Legal Services Authorities Act. So the dictum is not applicable to the facts in this case****.''*

*(Emphasis by us)*

In view of the position in legislation, the court had declared the correct legal position that mediation cannot be treated at par with the Lok Adalat and that the mediator has no power to pass an award as a Lok Adalat which is deemed to be a decree under the Legal Service Authority Act, 1987.

94. In para 14, the Kerala High Court considered the question as to whether such agreement could be treated as evidence in a criminal matter. While answering this question, it was observed by the court that even if the complainant had agreed in the mediation to settle the matter for a lesser amount than the amount mentioned in the cheque, it could not be said that the actual amount due is the amount agreed in the mediation. Para 14 of the judgment reads as follows :

***"14.*** *Then, the question is* ***whether the agreement entered into between the parties in a mediation can be treated as evidence in a criminal matter****. It may be mentioned here,* ***unless the agreement is accepted by the court and a decree is passed under S. 89 of the Code of Criminal Procedure r/w O. 23 R. 3***

***of Code of Civil Procedure, that will have no effect, unless that has been converted into a conciliation agreement based on which an award is passed by the Conciliator under the provisions of the Arbitration and Conciliation Act.*** *Further, it is the cardinal principle in the mediation that whatever transpired in the mediation cannot be disclosed even before the court of law and that cannot be called upon to be produced as evidence as well as it will affect the confidentiality of the things transpired in the process of mediation. So the party who did not honour the* ***settlement*** *which was* ***effected in*** *the process of* ***mediation****, then, is* ***not entitled to use the same as evidence before the court and agreement also cannot be marked in evidence as it has no legal effect unless it is accepted by the court and a decree is passed under S. 89 r/w O. 23 R. 3 of the Code of Civil Procedure. That cannot be possible in a Criminal Court****. Further even if the party had agreed to settle the matter for a lesser amount than the amount mentioned in the cheque in the mediation, it cannot be said that, that was the amount payable as* ***in the mediation, parties can forgo so many things for the purpose of achieving harmony*** *between the parties and* ***restore their relationship. So the amounts arrived in a mediation also cannot be used as evidence for coming to the conclusion that the amount mentioned in the cheque is not the real amount due, and the complainant is not entitled to maintain the action on the basis of that cheque.*** *The court has to allow the parties to adduce evidence ignoring the mediation agreement and dispose of the case on the basis of evidence adduced by parties as it should not be put in evidence in view of the bar under rules 20, 21 and 22 of the Civil Procedure (Alternative Disputes Resolution) Rules Kerala 2008 which reads as follows:—*

> ***Rule 20:— Confidentiality, disclosure and inadmissibility of information—***
>
> *(1) The mediator shall not disclose confidential information concerning the dispute received from any party to the proceedings unless permitted in writing by the said party.*

*(2) Parties shall maintain confidentiality in respect of events that transpired during mediation and shall not rely on or introduce the said information in any other proceedings as to:*

*(a) views expressed by a party in the course of the mediation proceedings;*

*(b) documents obtained during the mediation which were expressly required to be treated as confidential or other notes, drafts or information given by parties or mediators;*

*(c) Proposals made or views expressed by the mediator.*

*(d) Admission made by a party in the course of mediation proceedings.*

*(e) The fact that a party had or had not indicated willingness to accept a proposal.*

*(3) There shall be no stenographic or audio or video recording of the mediation proceedings.*

***Rule 21:— Privacy-*** *Mediation sessions and meetings are private; only the concerned parties or their counsel or authorised representatives can attend. Other persons may attend only with the permission of the parties or with the consent of the mediator.*

***Rule 22:— Immunity-*** *No mediator shall be held liable for anything bona fide or omitted to be done by him during the mediation proceedings for civil or criminal action nor shall he be summoned by any party to the suit to appear in a court of law to testify in regard to information received by him or action taken by him or in respect of drafts or records prepared by him or shown to him during the mediation proceedings."*

95. It was held by the court that the agreement arrived at in the mediation cannot be used as the evidence to contend that the amount mentioned in the cheque was not the real amount. In these

circumstances, the party violating the mediation agreement, cannot use the same as evidence before the court and that the agreement has no legal effect unless it has been "*accepted by the court and a decree is passed under Section 89 r/w Order 23 Rule 3 of the Code of Civil Procedure.*" which was not possible in a criminal court.

96. So far as mediation in Delhi is concerned, in the "*Mediation and Conciliation Rules, 2004*", Rule 20 is concerned with "*confidentiality, disclosure and inadmissibility of information*", Rule 21 mandates privacy in the mediation sessions while Rule 22 prescribes immunity from civil/criminal proceedings to the mediator for anything done *bona fide* or omitted to be done during the mediation proceedings.

97. In cases under Section 138 of the NI Act, judicial reinforcement of this sound principle is to be found in the encouragement by the Supreme Court to settlements of the disputes between parties at early stages. This is in keeping with the legislative mandate of Section 147, so that the spirit, intendment and object of this statutory provision can be effectively realized.

98. We have noted above that Section 147 of the NI Act has made the offence under Section 138 of the NI Act compoundable. Proceedings under Section 138 of the NI Act have been considered as quasi civil by the courts. Therefore, in principle, the procedure which applies to recording a settlement in civil cases could guide the procedure to be followed and be applied for recording a settlement between the parties to a complaint under Section 138 of the NI Act.

Guidance on this aspect is provided by the provisions of Order XXIII Rule 3 of the CPC and the practice followed by the civil courts upon a compromise arrived at between the parties to a suit.

99. So far as the statutory provision is concerned, Order XXIII Rule 3 of the CPC reads as follows :

> ***"3. Compromise of suit.-*** *Where it is proved to the satisfaction of the court that a* ***suit has been adjusted wholly or in part*** *by any* ***lawful agreement or compromise in writing*** *and* ***signed by the parties****, or where the* ***defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit****, the* ***court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree*** *in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit: -*
>
> *Provided that where it is alleged by one party and denied by the other than an adjustment or satisfaction has been arrived at, the court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment."*
>
> *(Emphasis by us)*

100. The Code of Criminal Procedure as well as the NI Act have provided only for compounding of offences. No procedure regarding the manner in which a settlement agreement required to be placed or considered by the court has been provided.

101. Reference can usefully be made to certain pronouncements under the Code of Civil Procedure, wherein the Legislature has

provided Rule 3 of Order XXIII, which specifically provides for "*Compromise of suits*". The Legislature has prescripted that if it is "*proved to the satisfaction of the court*" that a suit has been adjusted wholly or in part by any "*lawful agreement or compromise in writing and signed by the parties*", the court shall order such agreement or compromise to be recorded and shall pass a decree in accordance thereof, so far as it relates to the parties in the suit. It is important to note that Order XXIII Rule 3 of the CPC permits the consideration of the agreement, whether or not the subject matter of the agreement or compromise is the same as the subject matter of the suit. While the Code of Civil Procedure would have no application to the proceedings which are guided by the Criminal Procedure Code, however, given the legislative vacuum, there appears to be no reason as to why the principles which apply to consideration of a settlement under Order XXIII Rule 3 of the CPC cannot be applied for consideration of a settlement which is the subject matter of consideration by a court under Section 320 of the Cr.P.C. or Section 147 of the NI Act. The principles of Rule 3 or Order XXIII of the C.P.C., as laid in judicial pronouncements, can be summarized thus:

(i) *For a compromise to be held to be binding, it has to be signed either by the parties or by their counsels or both, failing which Order XXIII Rule 3 of the CPC would not be applicable.*
(***Ref. : (1988) 1 SCC 270, Gurpreet Singh v. Chatur Bhuj Goel; (2009) 6 SCC 194, Sneh Gupta v. Devi Sarup & Ors.***)

(ii) *Order XXIII Rule 3 of the CPC casts an obligation on the court to be satisfied that the settlement agreement is lawful and is in writing and signed by the parties or by their counsels.*
***(Ref. : (1978) 2 SCC 179, Suleman Noormohamed & Ors. v. Umarbhai Janubhai; (2006) 1 SCC 148, Amteshwar Anand v. Virender Mohan Singh & Ors.).***

(iii) *An obligation is cast on the court under Order XXIII Rule 3 of the CPC to order the agreement to be recorded and pass a decree in accordance thereof.*
***(Ref. : (2006) 1 SCC 148, Amteshwar Anand v. Virender Mohan Singh & Ors. (paras 26 and 27)).***

(iv) *A consent decree is really a contract between the parties with the seal of the court superadded to it.*
(***Ref. : (1969) 2 SCC 201, Baldevdas Shivlal & Anr. v. Filmistan Distributors (India) P. Ltd. & Ors.; (2002) 100 DLT 278, Hindustan Motors Ltd. v Amritpal Singh Nayar & Anr.; (2007) 14 SCC 318, Parayya Allayya Hittalamani v. Sri Parayya Gurulingayya Poojari & Ors.***).

(v) *A consent decree may operate as an estoppel as well.*
[***Ref. : AIR 1956 SC 346, Raja Sri Sailendra Narayan Bhanja Deo v. State of Orissa; (2007) 14 SCC 318, Parayya Allayya Hittalamani v. Sri Parayya Gurulingayya Poojari & Ors. (para 15)***].

102. The practice followed by the civil court before whom the settlement in writing, duly signed by the parties, is placed, is to record the statements of parties confirming that the settlement was entered into voluntarily, without any force, pressure or undue influence; that it contained the actual terms of the settlement; and undertakings of the parties to remain bound by the terms thereof. Upon being satisfied that the settlement was voluntary and lawful, the civil court takes it on record accepting the undertaking and passing a decree in terms thereof.

103. In the pronouncement of the Allahabad High Court reported at ***AIR 1930 All 409 : 1929 SCC OnLine All 140, Emperor v. Jhangtoo Barai & Anr.,*** the court was considering whether there was in fact a composition of the offence or not? It was observed that the best possible evidence was that of the document signed by the parties which was in the handwriting of the complainant himself that the composition was correct. In para 6, it was also observed that if all the parties were present in court, it was entirely unnecessary for any verification of such composition. The court noted that "*The complainant was literate. He signed the document in his own writing. It must presumed, unless it is proved to the contrary, that the complainant well understood the one small paragraph that appeared in the document. In any case, the only verification that was required was a simple question to the parties whether they signed the document and whether they understood its contents. There can be no doubt that on that day there was a valid composition within the meaning of*

*section 345 of the Code of Criminal Procedure before the court. It was therefore the duty of the Magistrate upon that day, and without any unnecessary delay, to have pronounced an acquittal. I am clear that it is incompetent for any person, once having entered into a valid composition, to withdraw from it."*

104. Binding the parties to a settlement agreement entered into through a formal mediation process and being held accountable for honouring the same is really enforcing the legislative mandate in enacting Sections 138 and 147 of the NI Act i.e. to ensure an expeditious time bound remedy for recovery of the cheque amounts. Breach of a lawful entered agreement would not only frustrate the parties to the mediation, but would be opposed to the spirit, intendment and purpose of Section 138 of the NI Act and would defeat the ends of justice. The courts cannot permit use of mediation as a tool to abuse judicial process.

105. There is no legal prohibition upon a criminal court seized of such complaint, to whom a mediated settlement is reported, from adopting the above procedure. Application of the above enunciation of law to a mediation arising out of a criminal case manifests that a settlement agreement would require to be in writing and signed by the parties or their counsels. The same has to be placed before the court which has to be satisfied that the agreement was lawful and consent of the parties was voluntary and not obtained because of any force, pressure or undue influence. Therefore, the court would record the statement of the parties or their authorized agents on oath affirming

the settlement, its voluntariness and their undertaking to abide by it in the manner followed by the civil court when considering a settlement placed before it under Order XXIII Rule 3 of the CPC. The court would thereafter pass an appropriate order accepting the agreement, incorporating the terms of the settlement regarding payment under Section 147 of the NI Act and the undertakings of the parties. The court taking on record the settlement stands empowered to make the consequential and further direction to the respondent to pay the money in terms of the mediated settlement and also direct that the parties would remain bound by the terms thereof.

106. In having so proceeded, there is a satisfaction of the voluntariness and legality of the terms of the settlement of the court and acceptance of the terms thereof as well as a specific order in terms thereof. Consequently, the amount payable under the settlement, would become an amount payable under an order of the criminal court.

107. So far as the disputes beyond the subject matter of the litigation is concerned, upon the settlement receiving *imprimatur* of the court, such settlement would remain binding upon the parties and if so ordered, would be subject to the orders of the court.

## *XIV. Breach of such settlement accepted by the court – consequences?*

108. The instant reference has resulted because of the failure of the court to have recorded the settlement and undertakings binding the accused person in the complaint under Section 138 of the NI Act to

abide by the settlement arrived at during mediation. There can be no manner of doubt that once a settlement is reported to the court and made the basis of seeking the court's indulgence, the parties ought not to be able to resile from such a position. So what is the remedy available to a complainant if the respondent commits breach of the mediation settlement and defaults in making the agreed payments?

109. Let us examine as to whether the legislature has provided any mechanism in the Cr.P.C. for recovery of monetary amounts.

110. We have extracted Section 421 of the Cr.P.C. above which provides the mechanism to recover fines, by issuing a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender and/or by issuing a warrant authorizing the realization of amounts as arrears of land revenue from movable and immovable property of the defaulter.

111. In the event of either party resiling from the agreed upon settlement which has received the *imprimatur* of the court, the party attempting to breach the settlement and undertaking cannot be permitted to avoid making the payment. Such party also should not be allowed to violate such undertaking given to the opposite side as well as the court.

112. In ***(2009) 6 SCC 652, Vijayan v. Sadanandan K. & Anr.,*** it was held that Section 431 read with Section 421 of the Cr.P.C. is applicable to recovery of compensation ordered under Section 357(5).

113. Section 431 Cr.P.C., also extracted above, provides if any money, other than a fine, is payable by virtue of any order made under the Cr.P.C., the method of recovery whereof is not expressly provided for, shall be recoverable in terms of Section 421 Cr.P.C.

114. In the event that a criminal court passes order accepting the mediated settlement between the parties and directs the accused to make payment in terms thereof, the settlement amount becomes payable under the order of the court. Such order having been passed in proceedings under Section 138 of the NI Act, would be an order under Section 147 of the NI Act and Section 320 of the Cr.P.C.

115. In proceedings where settlement is permitted under Section 320 of the Cr.P.C., it would be an order thereunder.

116. Where proceedings are disposed on settlement terms by the High Court, it would be an order passed in exercise of jurisdiction under Section 482 of the Cr.P.C. Upon breach of such order and non-payment of the agreed amounts, the same may be recoverable in terms of Section 431 read with Section 421 Cr.P.C.

117. In addition, if the party has tendered an undertaking to abide by the terms of the agreement, which stands accepted by the court, in the event of breach of the undertaking, action and consequences under the Contempt of Courts Act could also follow.

## *XV. Reference answered*

118. In view of the above, the reference made by the ld. Metropolitan Magistrate by the order dated 13th January, 2016 (extracted in para 1 above) is answered thus :

***Question I : What is the legality of referral of a criminal compoundable case (such as on u/s 138 of the NI Act) to mediation?***

It is legal to refer a criminal compoundable case as one under Section 138 of the NI Act to mediation.

***Question II : Can the Mediation and Conciliation Rules, 2004 formulated in exercise of powers under the CPC, be imported and applied in criminal cases? If not, how to fill the legal vacuum? Is there a need for separate rules framed in this regard (possibly u/s 477 of the CrPC)?***

The Delhi Mediation and Conciliation Rules, 2004 issued in exercise of the rule making power under Part-10 and Clause (d) of sub-section (ii) of Section 89 as well as all other powers enabling the High Court of Delhi to make such rules, applies to mediation arising out of civil as well as criminal cases.

***Question III : In cases where the dispute has already been referred to mediation – What is the procedure to be followed thereafter? Is the matter to be disposed of taking the very mediated settlement agreement to be evidence of compounding of the case and dispose of the case, or the same is to be kept pending, awaiting compliance thereof (for example, when the payments are spread over a long period of time, as is usually the case in such settlement agreements)?***

In the context of reference of the parties, in a case arising under Section 138 of the NI Act, to mediation is concerned, the following procedure is required to be followed :

III (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.

III (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 (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.

III (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.

III (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.

III (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.

III (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.

*Contents of the settlement*

III (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 enure 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.

III (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.

*Proceedings before the court*

III (x) 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.

III (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.

III (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.

III (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.

III (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. (***Ref.:(2005) CriLJ 431, Rameshbhai Somabhai Patel v. Dineshbhai Achalanand Rathi***)

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.

III (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.

III (xvii) The magistrate should ensure strict compliance with the guidelines and principles laid down by the Supreme Court in the pronouncement reported at ***(2010) 5 SCC 663, Damodar S. Prabhu v. Sayed Babalal H*** and so far as the settlement at the later stage is concerned in ***(2014) 10 SCC 690 Madhya Pradesh State Legal Services Authority v. Prateek Jain.***

III (xvii) We may also refer to a criminal case wherein there is an underlying civil dispute. While the parties may not be either permitted in law to compound the criminal case or may not be willing to

compound the criminal case, they may be willing to explore the possibility of a negotiated settlement of their civil disputes. There is no legal prohibition to the parties seeking mediation so far as the underlying civil dispute is concerned. In case a settlement is reached, the principles laid down by us would apply to settlement of such underlying civil disputes as well.

In case reference in a criminal case is restricted to only an underlying civil dispute and a settlement is reached in mediation, the referring court could require the mediator to place such settlement in the civil litigation between the parties which would proceed in the matter in accordance with prescribed procedure.

***Question IV : If the settlement in Mediation is not complied with – is the court required to proceed with the case for a trial on merits, or hold such a settlement agreement to be executable as a decree?***

In case the mediation settlement accepted by the court as above is not complied with, the following procedure is required to be followed :

IV (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.

IV (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.

***Question V : If the Mediated Settlement Agreement, by itself, is taken to be tantamount to a decree, then, how the same is to be executed? Is the complainant to be relegated to file an application for execution in a civil court? And if yes, what should be the appropriate orders with respect to the criminal complaint case at hand. What would be the effect of such a mediated settlement vis-à-vis the complaint case?***

V (i) The settlement reached in mediation arising out of a criminal case does not tantamount to a decree by a civil court and cannot be executed in a civil court.

However, a settlement in mediation arising out of referral in a civil case by a civil court, can result in a decree upon compliance with the procedure under Order XXIII of the C.P.C. This can never be so in a mediation settlement arising out of a criminal case.

## *XVI. Result*

119. The present reference, under Section 395(2) of the CrPC, is answered in the above terms.

120. We place on record our deep appreciation for the *amici curiae:* Mr. J.P. Sengh, Senior Advocate; Ms. Veena Ralli, Advocate and Mr. Siddharth Agarwal, Advocate, who have rendered indispensable and worthy assistance to us, in this matter.

121. Let the record of Complaint Case Nos.519662/2016 and 519664/2016 be forthwith returned to the trial court, which shall proceed in the matter, in accordance with law.

**ACTING CHIEF JUSTICE**

**ANU MALHOTRA, J.**

**OCTOBER 17, 2017**/aj