

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

+ **Crl. L.P. No. 89/2005**

% Judgment delivered on: 01.09.2009

The National Small Industrira Corporation Ltd.

..... Appellant

Through: Mr. Ajay Gupta, Advocate

versus

M/s ASA Rubber Industries Pvt. Ltd. & others

..... Respondent

Through: Mr. Gagan Gupta, Advocate

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

KAILASH GAMBHIR, J. (Oral)

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1 . By way of the present appeal filed under S. 378 (4) of the Code of Criminal Procedure, appellant company seeks setting aside of

the acquittal order dated 17/3/2005 passed by the Ld. Metropolitan Magistrate, New Delhi under S. 138 N.I. Act, 1881.

2 . Brief facts of the case, relevant for deciding the present appeal are as under:

The respondent No.1 had availed financial assistance under the Raw Material Assistance scheme of the appellant to the tune of Rs.20, lakhs in the year 1996-97 and in part payment of their liabilities the respondent No.1 company had issued four cheques duly signed by respondent No.2 bearing cheque Nos. 687085, 687086, 687087 and 687088 dated 30.3.97, 6.5.97, 5.5.97 for Rs.3,00,000/- Rs.5,00,000/-, Rs.5,00,000/- and Rs.5,00,000/- respectively. It is further alleged that both the respondent Nos.2 and No.3 are the Directors of respondent No.1 and were the incharge and responsible for conduct of respondent No.1. It is further alleged that above mentioned cheques on presentation on 7.5.1997 were dishonoured due to reason of "insufficient funds" and thereafter the appellant sent a legal notice dated 17.5.1997 vide Regd. A.D. Post to the respondents. It is further alleged that the respondents manipulated the postal authorities due to which the petitioner neither received

back the A.D. Card nor the returned envelope. It is further alleged that the appellant again presented the said cheques on 13.9.97 which were again dishonoured for the reason "insufficient funds". Thereafter again a demand notice dated 22.9.1997 was sent through Regd. Post speed post, and through special messenger and notice could be served on the accused through special messenger on 25.9.97 and accordingly, a complaint U/s 138 Negotiable Instrument Act, 1881 was filed on 7.11.1997. After considering the material on record all the respondents were summoned on 27.8.1998 and the respondents appeared in the Court on 2.12.1998 and were admitted to bail. Thereafter, notice U/s 251 Cr.P.C. was framed against them on 29.10.2002 to which the respondent pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined five witnesses. After hearing both the counsel for the parties the Ld. M.M. came to the conclusion that the prosecution has failed to prove on record that the complaint was filed within a period of one month from the date of cause of action i.e. 8.6.1997 therefore he did not find the respondents guilty of offence punishable under Section 138

N.I. Act. Aggrieved with the said order the appellant has preferred the present appeal.

3 . Mr. Ajay Gupta, counsel for the appellant assails the order dated 17/3/2005 passed by the Ld. Metropolitan Magistrate, New Delhi under S. 138 N.I. Act, 1881 on the ground that the same has been passed in total disregard of the facts of the case and the prevailing law. The counsel urges that the trial court erred in not considering that in the application for dismissal of complaint filed by the respondents, it had been mentioned therein that the legal notice dated 17/5/1997 was never served upon the respondents and thus, the trial court erred in drawing presumption under S. 27 of General Clauses Act. The counsel also submits that PW1 Satinder Kumar, AR of the complainant, also deposed on oath that the said legal notice dated 17/5/1997 was never served upon the respondents. The counsel further submits that it is only upon the service of demand notice the cause of action will arise, therefore, no cause of action could have arisen in favour of the appellant due to non-service of the legal notice dated 17/5/1997. The counsel avers that the trial court erred in holding that the appellant failed to prove the non-service of

the said legal notice dated 17/5/1997 as PW1 Satinder Kumar, AR of the complainant, had deposed on oath about the same before the court. The counsel submits that it was only after the second demand notice dated 22/9/1997 which was duly served on the respondents on 25/9/1997 the cause of action arose and thus the complaint dated 7/11/1997 was well within the period of limitation.

4 . Per Contra, Mr. Gagan Gupta counsel for the respondents submits that the Ld. Metropolitan Magistrate, New Delhi, after properly appreciating facts of the case passed the acquittal order. The counsel further submits that the present appeal is baseless being without any merits and should be dismissed forthwith.

5 . I have heard Id. counsel for the parties and perused the record.

6. Before delving on the rival contentions of the parties, it would be relevant to reproduce Section 138 of the Act, which reads 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.

7. On a bare perusal of the aforesaid provision, it is manifest that to constitute an offence under Section 138 of the Act, the following ingredients are required to be fulfilled:

- (i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account;
- (ii) The cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;
- (iii) that 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;
- (iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the 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 the bank;
- (v) the payee or the holder in due course of the cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice;

8. Being cumulative, it is only when all the afore-mentioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have committed an offence under Section 138 of the Act.

9. It would also be relevant to reproduce S. 142, N.I. Act for better appreciation of the controversy between the parties and the same is reproduced as under:

142. Cognizance of offences

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974).-

- (a) No court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;
- (b) Such complaint is made within one month of the date on which the cause of action arises under clause (C) of the proviso to section 138:

["Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.]

(c) No court inferior to that of a Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138].

11. It would be seen from above that a complaint in view of Clause (b) of Section 142 of the Act can be filed within one month from the date on which the cause of action arises in terms of Clause (c) of the proviso to Section 138 of the Act which stipulates that "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".

10. In terms of the provisions of the General Clauses Act, a notice must be deemed to have been served in the ordinary course subject to the fulfillment of the conditions laid down therein. Section 27 of the General Clauses Act reads as under:

27. Meaning of service by post.--Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve' or either of the expression 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

11. Presumption of service, would not arise only when the notice is sent by registered post in terms of Section 27 of the General Clauses Act but such a presumption can also be raised under Section 114 of the Evidence Act. Even when a notice is received back with an endorsement that the party has refused to accept, still a presumption can be raised as regards the valid service of notice. In this regard, the Hon'ble Apex Court in **Subodh S. Salaskar Vs. Jayprakash M. Shah and Anr. AIR 2008 SC 3086**, after placing reliance on the earlier decision by a Three-Judge Bench of the Hon'ble Apex Court in **C.C. Alavi Haji v. Palapetty Muhammed and Anr. (2007) 6 SCC 555**, observed that such a notice, should be construed liberally, and held :

10. It is, thus, trite to say that where the payee dispatches the notice by registered post with correct address of the drawer of the cheque, the principle incorporated in Section 27 of the G.C. Act would be attracted; the requirement of Clause (b) of proviso to Section 138 of the Act stands complied with and cause of action to file a complaint arises on the expiry of the period prescribed in Clause (c) of the said proviso for payment by the drawer of the cheque. Nevertheless, it would be without prejudice to the right of the drawer to show that he had no knowledge that the notice was brought to his address.

12. In the instant case, it is admitted by the appellant that the notice dated 17/5/1997 was sent by registered post and clearly from the

aforesaid decision in **C.C. Alavi Haji's case (Supra)**, and the presumption raised under S. 27, General Clauses Act and S. 114 of the Evidence Act, a notice sent by registered post at the correct address even if the same is not received back, would raise a presumption of service in favour of the sender.

13. Since, a demand notice in the present case was sent by registered post at the correct address to the drawer of the cheque, the mandatory requirement of raising demand through a notice as envisaged under Section 138 of the Negotiable Instruments Act stands complied with, therefore, the period of limitation started running from the date of service of the said notice dated 17/5/1997. The complaint under Section 138 of the -;N.I. Act was filed by the appellant on 7/11/1997 and the same was clearly beyond the period of 30 days as prescribed under S. 142 N.I. Act as discussed above.

14. In view of the above discussion, there is no merit in the present appeal and the same is hereby dismissed.

September 01, 2009

KAILASH GAMBHIR, J