

IN THE HIGH COURT OF DELHI AT NEW DELHI

Crl REV P No. 296/2009

HDFC BANK LIMITED Petitioner
Through Mr. Sanjeev Sagar, Advocate

versus

AMIT KUMAR SINGH Respondent

CORAM:

HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

ORDER
22.05.2009

Crl M A No. 5937/2009

Exemption allowed subject to all just exceptions.

The application is disposed of.

Crl Rev P No. 296/2009

1. This petition is directed against the order dated 21st March 2009 passed by the learned Metropolitan Magistrate ('MM') dismissing CC No. 4167 of 2009 titled ***HDFC Bank Limited v. Amit Kumar Singh*** under Section 138 of the Negotiable Instruments Act 1881 ('NI Act').

2. The short question that arises for consideration is whether the learned MM, while entertaining a complaint under Section 138 NI Act, at the pre-

summoning stage, can insist upon the complainant producing some proof of despatch of the notice in terms of NI Act sent to the drawer of the dishonoured cheque.

3. The aforementioned complaint was filed in respect of dishonour of a cheque No. 763884 drawn on Punjab & Sind Bank, Jangpura Extension, New Delhi dated 5th December 2008 for Rs.19,083/- drawn by the Respondent in favour of the Petitioner HDFC Bank Limited ('Bank'). The cheque when presented for payment was dishonored with the remarks "Funds insufficient". It was stated in the complaint filed by the Bank under Section 138 NI Act that upon receipt of intimation from the Bank to which the cheque was presented that it was dishonored, a legal notice was sent to the drawer at the address available in the records of the Bank. The complainant stated that the said notice "was sent/posted to the accused on 14th January 2009, by registered A/D post at his above-stated address as the same was duly provided time and again". The cover was not received back. It was claimed that "thus the said notice has been duly served upon the accused. But in spite of the service of the said notice on the accused as aforesaid, the accused intentionally failed to show the positive response and also failed to make the payment of the aforesaid dishonored cheques to the complainant within the stipulated time".

4. The question that arose before the learned MM was whether it could be

said that the legal notice issued to the drawer of the dishonored cheque, was in fact served on the drawer. The question arose in the clauses of the precise wording of Section 138(c) NI Act where one of the conditions for the offence to be attracted is that the drawer the cheque should fail to make the payment to the payee “within fifteen days of the receipt of the said notice”. Therefore, the receipt of the notice by the payee is an essential condition which must be fulfilled followed by the failure of the drawee to make payment within 15 days thereafter. Although Section 138 (b) NI Act states that “the payee has to only give a notice in writing to the drawer”. Can it be said that by merely giving such notice, the subsequent stage of receipt of such notice by the drawer is automatically to be presumed?

5. It was urged before the learned MM by the petitioner that since the notice was sent by registered post, Section 27 of the General Clauses Act, 1897 (GC Act) can be invoked and a presumption drawn that service has been effected. Reliance was placed *inter alia* on the judgments of the Supreme Court in ***K. Bhaskaran v. Sankaran Vaidhyan Balan AIR 1999 SC 3782*** and ***C.C. Alavi Haji v. Palapetty Muhammed (2007) 6 SCC 555***. Reliance was also placed in Section 94 NI Act to contend that once the notice of dishonor has been given by post then it would satisfy the requirement even of Section 138 (b) read with Section 138(c) NI Act. Importantly, the learned MM noted at the outset that the counsel for the

complainant had argued that there was no need to file any delivery report or the acknowledgement due card or proof of delivery of the demand notice sent by Speed Post/Registered Post.

6. The learned MM discussed the provisions of Section 27 GC Act with Section 114 Indian Evidence Act (EA). It is held that the presumption of service of notice cannot be automatically drawn unless the petitioner was able to show to the Court a delivery report, or a signed acknowledgement due card or the Internet generated report or any such proof of delivery.

7. After discussing the case law, the learned MM concluded that the provision of deemed service would be attracted only where, despite addressing the notice to the correct address, the accused is shown to have refused service of the demand notice. Further the presumption could be raised only where the complainant/petitioner files an affidavit stating that the accused is in fact residing at the same address to which the notice was sent. Without such an affidavit being filed, it would be unsafe for the Court to presume service of the notice. Cognizance of the offence under Section 138 NI Act could not be taken on the basis of presumption. Merely because, as in the instant case, after having sent the notice by registered post, the complainant has not received any intimation whatsoever and has not received the notice back unserved, a presumption could not be drawn that it had been duly served on the drawer/addressee.

8. In the circumstances, since no affidavit was also filed by the complainant stating that the accused was in fact residing at the address given in the notice, it was held that the essential condition for taking cognizance of the offence under Section 138 NI Act was not satisfied. The complaint was accordingly dismissed. It may also be mentioned that on the basis of the impugned order, fourteen other similar complaints filed by the petitioner were also dismissed.

9. Counsel for the petitioner urges that the learned MM erred in not drawing the presumption under Section 27 of the GC Act. He submitted that at the pre-summoning stage, it was not mandatory to prove delivery of notice sent by registered post to the accused and the presumption should be in favour of the complainant. Otherwise, several unscrupulous drawers who would easily escape liability without making payment after giving a wrong address. The very object of introducing the penal provision would be defeated.

10. He referred to the observations of the Supreme Court in *K. Bhaskaran v. Sankaran Vaidya Balan* as well as *C.C. Alavi Haji v. Palapetty Muhammed*. As long as the complaint contained the basic fact regarding the mode and manner of issuance of notice to the drawer of cheque, the court should hold that the requirement of Section 138 NI Act

was satisfied and consequently cognizance should be taken of the offence. He referred to Sections 94, 118, 138 and 139 NI Act as well as Section 3, 114 of the EA read with Section 27 of GC Act to contend that the presumption of service of notice should be drawn since the legal notice was sent by registered post to the drawer at the address of the drawer as available in the records of the complainant. The contention of the petitioner is that since the legal notice was sent by properly addressing the drawer at the address available in the records of the complainant, the complainant had discharged its part in terms of Section 138 (b) NI Act. Counsel for the petitioner referred to Section 94 NI Act and submitted that once the notice was sent by post, it would amount to a notice of dishonor in terms of Section 138 NI Act as well. It is submitted that the learned MM urged in holding that Section 94 applies only in a situation where civil liability is sought to be enforced.

11. Counsel then refers to Section 144 NI Act which states that the summons to the accused or to a witness could be sent by Speed Post or by such courier service approved by the Court and when an acknowledgement purported to be signed by the accused has been received, the Court can declare the summons duly served. It is submitted that the stage of Section 144 NI Act would be reached only at the time of the issuance of summons to the accused and cannot apply to the earlier stage of service of a legal notice by the complainant upon the drawer.

12. Finally, it was submitted that if the learned MM was of the view that the complainant should file an affidavit stating that the accused was residing at the given address, one more opportunity should have been given to the complainant to place such an affidavit on record and thereafter cognizance ought to have been taken.

13. In order to appreciate the submissions of the learned counsel for the petitioner, the provisions of the law may first be noticed.

14. Section 138 (b) NI Act is unambiguous in requiring a demand in writing to be made by the payee by “giving a notice in writing to the drawer of the cheque within 30 days of receipt of intimation that the cheque has dishonored.” The expression “giving of notice” has to be read in the context of Section 27 of the GC Act. In terms of the said provision whenever a statute uses the words “served” or “give” or “sent” unless a different intention appears, service would be presumed “properly” addressing, numbering and posting by registered post a letter containing the document. Unless the contrary is proved, service would be deemed to have been effected at that time at which the letter would be delivered in the ordinary course.

15. There can be no doubt that Section 138 has been introduced into the

NI Act as a penal provision. The NI Act was otherwise not a criminal law statute. Chapter XVII NI Act was introduced to make the dishonor of the cheque for insufficiency of funds a punishable offence. The object of the introduction of Chapter XVII was no doubt to have a deterrent effect on unscrupulous drawers of cheques who were issuing cheques thus without any intention of making payment. Sections 138 to 147 NI Act are criminal law provisions and have, therefore, to be strictly construed. At the outset, this Court therefore, rejects the plea that the principles informing Section 94 NI Act regarding notice of dishonour of a cheque should be incorporated *pro tanto* into Sections 138 to 147 NI Act.

16. The above legal position is consistent with the legislative intent of the Parliament in enacting Section 144 NI Act. Although this provision talks of the mode of service of summons to either a witness or an accused under the NI Act, this Court finds no reason why the same standard should not be insisted upon for service of legal notice upon the accused by the complainant prior to the filing of the complaint. The reason for this is that whenever a summoning order is passed and summons are sent to the accused, it would be sent at the same address shown for the accused in the complaint. This address ought not to be any different from the address in the legal notice. It is therefore a continuous chain of events. First there is a dishonor of the cheque. Next is the legal notice to be sent to the drawer within 30 days of the payee receiving an intimation

from the Bank of the dishonor of the cheque. Such legal notice in writing has to be addressed to the drawer at the address of the drawer available with the complainant such notice. Such notice has to be received by the drawer and he should fail to make payment within 15 days after receipt of such notice. This chain thereafter continues into the next stage following the failure to make the payment. The complainant or the drawee then approaches the criminal court with a complaint in which he will implead as the accused, the drawer of the cheque, with the address being shown as the same to which the legal notice was sent. The summon, therefore, goes to the same address.

17. In a situation where there is no proof of delivery submitted before the Court to show that the legal notice has in fact been received by the accused if a presumption is to be drawn and after taking cognizance summons are issued to the accused at the same address, it would either not be received back at all or received back with the remarks that the accused is not available at the address. Thereafter no further progress can be made in the criminal complaint. This is an outcome that ought to be avoided. Therefore, the appropriate course to be adopted, which is also the more practical one, is to insist on the same standard of proof of service of the legal notice as that envisaged under Section 144 NI Act in the context of summons.

18. Section 144 NI Act reads as under :-

“144. Mode of service of summons.__(1)

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), and for the purposes of this Chapter, a Magistrate issuing a summons to an accused or a witness may direct a copy of summons to be served at the place where such accused or witness ordinarily resides or carries on business or personally works; for gain, by speed post or by such courier services as are approved by a Court of Session.

(2) Where an acknowledgment purporting to be signed by the accused or the witness or an endorsement purported to be made by any person authorised by the postal department or the courier services that the accused or the witness refused to take delivery of summons has been received, the Court issuing the summons may declare that the summons has been duly served.”

19. It will be seen from the above provision that it is a hybrid of Sections 62 and 69 CrPC. Under Section 62 CrPC summons have to be served upon the accused personally. Section 144 NI Act in that sense carves out an exception to Section 62 CrPC since it permits service of summons to both the accused and the witness by registered post. Under Section 62 CrPC, the Courts have consistently held that summons to an accused cannot be sent by registered post but must be to be delivered personally. The relevant decisions in this regard are *Guthikonda Sri Hari Prasada*

Rao v. Guthikonda Lakshmi Rajyma 1990 CriLJ 1594, S. Bhupinder

Singh Makkar v. Narinder Kaur 1990 CriLJ 2265 and *Meenaz Moloobhay v. State of Maharashtra* 2000 CriLJ 3998. It is only under Section 69 CrPC that summons to a witness can be sent by registered post. The language of Sections 144 (2) and 69 (2) NI Act are identical. It is plain from Section 144(2) that summons to a person, who is arraigned as an accused in a complaint under Section 138 NI Act, when sent by registered A/D post has to be followed by placing before the Court either the signed acknowledgement due card purported to be signed by the addressee, or an endorsement by the postal department or the courier service that the accused refused to take delivery of the summons. In the absence of such acknowledgement or endorsement of the postal authority or the courier services, the Court will not draw a presumption that such summons have been duly served. In the concerned view of this Court therefore, the learned MM was in the instant case perfectly justified in insisting that the complainant should show to the Court either the acknowledgement due card signed by the addressee or the postal endorsement to the effect that the accused refused to take delivery of the notice. This will be minimum requirement in terms of the Section 138(b) that must be satisfied by the complainant to show that the notice was in fact sent to the accused at the correct address.

20. In *K. Bhaskaran*, the Supreme Court was dealing with a case where notice had been returned unclaimed. It was in that context that the Court

had posed a question: whether there was difference between a notice which has been returned unclaimed or a notice that has been returned after having been refused by the accused? In that context, it was stated that the principle incorporated in Section 27 of the GC Act can “profitably be imported in such a case”. It was held that in that situation the deeming provision of Section 27 of the GC Act would be attracted and it would be for the drawer (noticee) to prove that it was not really served and that he was not responsible for such non-service. The key factor is to be noted in *Bhaskaran’s* case that the court had before it the returned registered postal cover. In the instant case, however, nothing has been heard by the complainant after sending the notice by registered post. The notice has not been returned unserved. No proof of delivery report has been filed. There is no postal endorsement or certificate by the courier service agency to the effect that the noticee refused service.

21. In *D. Vinod Shivappa v. Nanda Belliappa (2006) 6 SCC 456* the Supreme Court discussed in detail the rationale behind the provision and envisaged three possible situations (SCC, p.462):

“If a notice is issued and served upon the drawer of the cheque, no controversy arises. Similarly if the notice is refused by the addressee, it may be presumed to have been served. This is also not disputed. This leaves us with the third situation **where the notice could not be served on the addressee for one or the other reason, such as his non-availability at the time of delivery, or**

premises remaining locked on account of his having gone elsewhere, etc. etc. If in each such case the law is understood to mean that there has been no service of notice, it would completely defeat the very purpose of the Act. It would then be very easy for an unscrupulous and dishonest drawer of a cheque to make himself scarce for some time after issuing the cheque so that the requisite statutory notice can never be served upon him and consequently he can never be prosecuted. There is good authority to support the proposition that once the complainant, the payee of the cheque, issues notice to the drawer of the cheque, the cause of action to file a complaint arises on the expiry of the period prescribed for payment by the drawer of the cheque. If he does not file a complaint within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138 of the Act, his complaint gets barred by time. Thus, **a person who can dodge the postman for about a month or two, or a person who can get a fake endorsement made regarding his non-availability can successfully avoid his prosecution because the payee is bound to issue notice to him within a period of 30 days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. He is, therefore, bound to issue the legal notice which may be returned with an endorsement that the addressee is not available on the given address.**

15. We cannot also lose sight of the fact that the drawer may by dubious means manage to get an incorrect endorsement made on the envelope that the premises has been found locked or that the addressee was not available at the time when postman went for delivery of the letter. **It may be that the address is correct and even the addressee is available but a wrong endorsement is**

manipulated by the addressee. In such a case, if the facts are proved, it may amount to refusal of the notice. If the complainant is able to prove that the drawer of the cheque knew about the notice and deliberately evaded service and got a false endorsement made only to defeat the process of law, the court shall presume service of notice. This, however, is a matter of evidence and proof. Thus even in a case where the notice is returned with the endorsement that the premises has always been found locked or the addressee was not available at the time of postal delivery, it will be open to the complainant to prove at the trial by evidence that the endorsement is not correct and that the addressee, namely, the drawer of the cheque, with knowledge of the notice had deliberately avoided to receive notice.” (emphasis supplied)

22. The important aspect to note in the above discussion as far as the present case is concerned is the insistence by the Court that there must be some endorsement on the postal cover of the noticee having left, or not being found or refusing service of notice. The facts in *D. Vinod Shivappa* were that the legal notice sent to the drawer of the dishonoured cheque by registered post was returned unserved with an endorsement “Party not in station, arrival not known”. That was again not a case where nothing had been heard from the postal department after the notice was dispatched. It was in those circumstances that the Supreme Court held that Section 27 GCA could be invoked to presume service of notice.

23. We then turn to the case of *C.C. Alavi Hazi*. In para 18 of the said

judgment, the facts are narrated. There the complainant issued a lawyer's notice which was returned with the endorsement that the accused was out of station. Therefore, that was again a case where the notice was returned with some endorsement or remark. It is plain from the above decisions that there has to be some feedback in the form of a postal endorsement that the notice was refused or not taken delivery of or that the noticee has left. Further, in such cases, it will be for the Court to draw an inference that service must be presumed. This is not an automatic conclusion to be drawn but an assessment to be made by the court keeping in view the facts of the case.

24. At this juncture, this Court would also like to emphasize that even under Section 27 GC Act, the requirement is that the notice must be "properly" addressed. The word "properly" obviously envisages the notice being sent to the correct present address of the noticee. The complainant will not be able to demonstrate before the Court that it had "properly" addressed the noticee unless it is able to produce the proof of delivery in the form of a postal endorsement or certificate of the courier agency or an internet generated delivery report or some other proof of delivery.

25. These days it is not difficult for a person sending a notice by registered post or by courier or by Speed Post to obtain a certificate of

delivery from the postal department or the courier service agency. That certificate will indicate the status of the delivery: whether the noticee did receive the notice, or refused or that the noticee has left the address, or is not available. It would be for the Court to be satisfied whether this would amount to service of notice. It must be remembered that it is to the same address that the Court's summons will be sent. After the decision in *Adalat Prasad v. Rooplal Jindal (2004) 7 SCC 338*, the summoning order cannot be recalled any more by the learned MM once summons are sent to the address of the respondent as shown in the complaint which would correspond to the to address which the legal notice was sent. If the summons is returned with the remarks 'left' or that 'address not known' that then it is impossible for the summons ever to be served on the accused thereafter. It is also not possible to draw a presumption of service at that stage since Section 144 NI Act does not permit such a presumption to be drawn in the absence of a signed acknowledgment due card or a postal endorsement on the returned cover or a proof of delivery certificate. The result is that a meaningless exercise of summons having to be sent to the same address knowing fully well that the accused is not available there, has to be undertaken. It is a disseminated fact verifiable from the records that in the courts of the learned MMs in Delhi there are over 2 lakh such complaints pending without any progress being made since summons are unable to be served upon the accused. If it was the object of the legislature, in introducing the penal provisions in the NI Act

that they should serve as a deterrent to unscrupulous drawers of cheques, then the said object is not achieved by the non-service of such summons resulting in the complaints remaining pending for several years.

26. What is happening is that without the complainant being put to any trouble in finding out the correct address of the complainant, the burden is shifted to the court. Our Magistrates are stuck with several such complaints which they are unable to dismiss and are yet unable to proceed with because the accused has not been served. This was perhaps not the intention of the legislature when it introduced penal provisions into the NI Act. While on the one hand a penal statute should be strictly construed, at the same time the construction to be placed on the statute, and in particular Section 138 (b) and (c) should be that which advances the cause of justice keeping in view the object of the provision. The construction that commends itself to be adopted is that the Court must at the pre-summoning stage insist on the complainant showing to it some proof of delivery of notice in the form of the returned cover with the endorsement, or an internet generated delivery report or a delivery certificate stating inter alia that the drawer refused or has left or is not available. Anything short of this it would be unsafe for the Court to accept and proceed on a presumption of deemed service in terms of Section 27 GC Act.

27. In its recent judgment in *Harman Electronics (P) Ltd. v. National Panasonic 2008 (16) SCALE 317*, the Supreme Court emphasized the importance of service of notice on the drawer as contrasted with mere dispatch of notice. In para 14 it was observed as under:

“14. It is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of a cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence under Section 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in the provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would.”

28. In *Harman Electronics* the Supreme Court also referred to its earlier

judgment in *Dalmia Cement (Bharat) Ltd. v. Galaxy Traders & Agencies Ltd.* (2001) 6 SCC 463, *State of Punjab v. Amar Singh Harika* AIR 1966 SC 1313 and *State of Punjab v. Khemi Ram* (1969) 3 SCC 28.

It was held that “for constitution of an offence under Section 138 of the Act, notice must be received by the accused. It may be deemed to have been received in certain situation. The word ‘undertook’ *inter alia* means ‘to make known, informed or convey etc.’ ”

29. This Court is unable to accept the proposition that by merely filing an affidavit stating that the drawer resides at the address given in the legal notice, the complainant can satisfy the requirement of having to satisfy the Court that notice was in fact was delivered to the drawer. In the considered view of this Court, such an affidavit can be accepted only if the deponent states that he either went personally and found that the accused was residing at the address or is able to produce some postal certificate or an endorsement by a courier service agency that the accused is in fact residing at the address and yet refusing to accept the notice. If the affidavit merely states that the accused is residing at the address without giving any further documentary proof in support thereof such an affidavit cannot be accepted as satisfying the requirement of Section 138 (b) read with Section 138 (c) of the NI Act.

30. To recapitulate, a complainant in a case under Section 138 NI Act has

at the pre-summoning stage to satisfy the learned MM that the legal notice in terms of the Section 138 (b) NI Act was in fact “served” on the drawer of the dishonored cheque. If some proof of delivery, or an internet generated or postal delivery report or a signed acknowledgement due card of the drawer, or the unserved cover with the postal endorsement is produced before the learned MM, it will be in the discretion of the learned MM to form an opinion if a presumption of service should be drawn. If the complainant chooses to file an affidavit, the deponent should state that he either went personally and found that the accused was residing at the address or is able to produce some postal certificate or an endorsement by a courier service agency that the accused is in fact residing at the address and yet refusing to accept the notice. If the affidavit merely states that the accused is residing at the address without giving any further documentary proof in support thereof such an affidavit cannot be accepted as satisfying the requirement of Section 138 (b) read with Section 138 (c) of the NI Act

31. For the aforementioned reasons, it is held that no error was committed by the learned MM in rejecting the complaint in the instant case.

32. For the aforementioned reasons, there is no merit in this petition and it is dismissed as such but in the circumstances with no orders as to costs.

S.MURALIDHAR, J

MAY 22, 2009

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