

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

+ CrI.M.C.1841/2009

% Date of Decision: 17th February, 2010

GOPAL MISHRA Petitioner
! Through: Mr.Harsh Khanna, Adv.

versus

\$ THE STATE & ANOTHER Respondents
^ Through: Mr.Pawan Behl, APP
Mr.Sanjeev Singh for R-2.

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

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

: **V.K. JAIN, J.**(Oral)

1. This is a petition under Section 482 of the Code of Criminal Procedure for quashing the complaint filed against him under Section 138 of the Negotiable Instruments Act. The petitioner is seeking quashing of the complaint and the order of the learned Metropolitan Magistrate dated 1.6.2009, whereby he was summoned, on the ground that Delhi Court

has no jurisdiction to entertain and try the complaint filed against him.

2. There are five essential ingredients of offence under Section 138 of the Negotiable Instruments Act, as held by the Supreme Court in the case of “**K.Bhaskaran Vs. Sankaran VAidhyan Balan & Another**”, (1999) 7 SCC 510, (i) drawing of the cheque, (ii) presentation of the cheque to the bank of the payee, (iii) return of the cheque unpaid by the drawee bank, (iv) giving of notice to the drawer of the cheque demanding payment of the cheque amount and (v) failure of the drawer to make payment within 15 days of the receipt of the notice.

3. This is not the case of the complainant that cheque in question was issued and delivered to it in Delhi. There is no such allegation to this effect in the complaint and during the course of arguments also no such stand was taken by the learned counsel for the complainant. It is an admitted case that the petitioner is a resident of Jaipur and does not have either a residence or a place of work in Delhi. It is an admitted case that cheque in question was drawn on a bank in Jaipur and was dishonoured by that bank at Jaipur. It is

also an admitted position that the notice of demand though issued from Delhi was sent to the petitioner at Jaipur. This is nowhere the case of the complainant that the notice of demand was served upon the petitioner in Delhi.

4. The learned counsel for the complainant/respondent No.2 claims jurisdiction of Delhi Court on the ground that the notice of demand was issued from Delhi and issue of notice of demand being an essential ingredient of the offence punishable under Section 138 of Negotiable Instruments Act, part of the offence under Section 138 of Negotiable Instruments Act took place in Delhi.

5. The submission made by the learned counsel came up for consideration before the Hon'ble Supreme Court in '**Harman Electronics Private Limited and Anr. v. National Panasonic India Private Limited**', (2009) 1 SCC 720. In that case, the appellant was carrying business at Chandigarh. The complainant had its head office at Delhi and a branch office at Chandigarh. The cheque in question was issued, presented and dishonoured at Chandigarh. The respondent/complainant issued notice to the appellant from Delhi. The notice was served upon the appellant at

Chandigarh. On failure of the appellant to pay the amount of the cheque, a complaint was filed at Delhi. An application filed by the appellant questioning jurisdiction of the court at New Delhi was dismissed on the ground that since the notice was sent by the complainant from Delhi, the appellant had failed to make payment at Delhi and the respondent was carrying out business at Delhi, the Delhi court had jurisdiction to entertain the complaint.

6. As regard, issue of notice from Delhi, Hon'ble Supreme Court held that issuance of notice would not by itself give rise to a cause of action but communication of notice would give. The Hon'ble Court was of the view that for constituting offence u/s 138 of Negotiable Instruments Act, the notice must be received by the accused, though it may be deemed to have been received in certain situations. The Hon'ble Supreme Court also referred to its own decision in '**Mosaraf Hossain Khan v. Bhagheeratha Engg. Ltd.**' (2006) 3 SCC 658. In that case respondent No.1 issued certain cheques to the appellant from Ernakulam, which were deposited by him with Suri Branch of the Bank. The respondent was also having an office at Ernakulam. On return of the cheques,

demand notice was sent by the appellant to the respondents. On non-payment, criminal complaint was filed by the appellant in the court of the Chief Judicial Magistrate, Bir Bhum at Suri. It was observed that sending of cheques from the Ernakulam or the respondent having an offence at that place did not form an integral part of the cause of action for which a complaint petition was filed by the appellant and cognizance of the offence u/s 138 of Negotiable Instruments Act was taken by the Chief Judicial Magistrate, Suri. It was noted that while issuance of notice by the holder of Negotiable Instrument is necessary, service thereof is also imperative and only after service of such notice and failure on the part of the accused to pay the demanded amount, within a period of 15 days thereafter, the commission of an offence completes and, therefore, giving of notice cannot have precedence over the service. The Hon'ble Court declined to apply the civil law Principle that the debtor must seek the creditor, to a criminal case. Holding that jurisdiction in a criminal case is governed by the provisions of Criminal Procedure Code and not on common law principle, it was held that Delhi Court had no jurisdiction to try the case.

7. The following observations made by the Hon'ble Supreme Court in this case are pertinent:

“A distinction must also be borne in mind between the ingredient of an offence and commission of a part of the offence. While issuance of a notice by the holder of a negotiable instrument is necessary, service thereof is also imperative. Only on a service of such notice and failure on the part of the accused to pay the demanded amount within a period of 15 days thereafter, the commission of an offence completes.”

8. In '**Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd.**' (2001) 3 SCC 609, the Hon'ble Supreme Court inter-alia, held that “The bank” referred to in clause (a) to the proviso of Section 138 of the Act would mean the drawee bank on which the cheque is drawn and not all the banks where the cheque is presented for collection including the bank of the payee, in whose favour the cheque is issued.”

It was further observed that *“the payee of the cheque has the option to present the cheque in any bank including the collecting bank where he has his account but to attract the criminal liability of the drawer of the cheque such collecting bank is obliged to present the cheque in the drawee or Payee bank on which the cheque is drawn within the period of six*

months from the date on which it is shown to have been issued.”

In para 10 of the judgment the Hon’ble Supreme Court further observed that “Sections 3, 72 and 138 of the Act would leave no doubt in our mind that the law mandates the cheque to be presented at the bank on which it is drawn if the drawer is to be held criminally liable.”

9. The ratio of the above referred judgment of the Hon’ble Supreme Court is that a cheque is deemed to have been presented to the banker of the drawer irrespective of the fact whether it is deposited by the payee in his own bank. The banker of the payee, after receiving the cheque from him, is required to present it to the banker of the drawer and therefore if the cheque issued from a bank outside Delhi is deposited in Delhi, the bank in which it is deposited in Delhi, is required to present it to the bank outside Delhi, for the purpose of encashment.

10. This issue has been examined by me in a number of cases, including the WP.(CrI.).861/09, 884/09 & 885/09 decided on 8th February, 2010. After referring to the decision

of the Hon'ble Supreme Court in the case of Herman Electronics (supra), this Court, inter alia, held as under:

“Proviso (b) to Section 138 of Negotiable Instruments Act requires payee of the cheque or its holder in due course, as the case may be, to make a demand of the amount of the cheque by giving a written notice to the drawer of the cheque. The question which arises for consideration is as to whether the demand is made at the place where the drawer of the cheque resides or works for gain or it is made at the place from where the notice of demand is dispatched to the drawer of the cheque. Since the requirement of the proviso will not be fulfilled without service of notice upon the drawer and considering the decision of the Hon'ble Supreme Court in the case of **Harman Electronics** (supra) holding therein that civil law principle that the debtor must seek the creditor does not apply to a criminal case, the demand shall be deemed to have been made at the place where the notice is served upon the drawer and not at the place from where it is dispatched to him. In fact in view of the decision in the case of **Harman Electronics** (supra), the notice shall be deemed to have been given at the place where it is served upon the addressee and not at the place from where it was dispatched.”

11. The learned counsel for the complainant has relied upon the decision of the Hon'ble Supreme Court in “**C.C.Alavi Vs. Palapetty Muhammed & Another**” , (2007) 6 SCC 555, in support of his contention that Delhi Court

would have jurisdiction if the notice of demand to the drawer of the cheque is issued from Delhi. In my view, reliance on the above referred decision of the Hon'ble Supreme Court is totally misplaced. In that case, the matter was referred to a Three Judges Bench for consideration of the following issue:

“Whether in absence of any averments in the complaint to the effect that the accused had a role to play in the matter of non-receipt of legal notice, or that the accused deliberately avoided service of notice, the same could have been entertained keeping in view the decision of this Court in Vinod Shivappa's case?”

12. The Hon'ble Supreme Court after considering the scope of Section 114 of Evidence Act and Section 27 of General Clauses Act and its earlier decisions in the case of “**D.Vinod Shivappa Vs. Nanda Belliappa**” and in the case of K.Bhaskaran(supra), inter alia, held as under:

“.....When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the G.C. Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference.....

Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post in view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement 'refused' or 'not available in the house' or 'house locked' or 'shop closed' or 'addressee not in station' due service has to be presumed.....
.....It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

Insofar as the question of disclosure of necessary particulars with regard to the issue of notice in terms of proviso (b) of Section 138 of the Act, in order to enable the Court to draw presumption or inference either under Section 27 of the G.C.Act or Section 114 of the Evidence Act is concerned, there is no material difference between the two provisions. In our opinion, therefore, when the notice is sent by registered post by correctly addressing the drawer of the

cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with.....

It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of Criminal Law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the G.C.Act and Section 114 of the Evidence Act.....”

13. Nowhere has the Hon’ble Supreme Court held in the above referred cases that issue of notice of demand from a particular place by itself would give jurisdiction to the Court at that place to hear and try a complaint filed under Section 138 of Negotiable Instruments Act on account of non-compliance of the notice.

14. For the reasons given in the preceding paragraphs, I am of the view that Delhi Court has no jurisdiction to entertain and try this complaint. It is, therefore, directed that the complaint filed by respondent No.2 be returned to it within four weeks for presenting it before a competent court having jurisdiction in the matter.

(V.K.JAIN)
JUDGE

FEBRUARY 17, 2010
RS/