

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

Reserved on: 25th September, 2014
Date of Decision: 10th October , 2014

+ CRL.M.C. 3690/2014

SHRI AVINASH RASTOGI Petitioner

Through: Mr.C.L.Gupta and
Mr.Akashdeep Verma,
Advocates.

versus

STATE & ANR ... Respondents

Through: Mr.Vinod Diwakar, APP for State.
Mr.Manish Dua and Mr. Deepak
Sahni, Advocates for R-2.

CORAM:
HON'BLE MR. JUSTICE VED PRAKASH VAISH

JUDGMENT

1. By way of this petition under Section 482 Cr.P.C., the petitioner has assailed order dated 23.07.2014 passed by learned Additional Sessions Judge-03, Central, Tis Hazari Courts, Delhi whereby the criminal revision petition filed by the petitioner was dismissed and order dated 26.06.2014 passed by learned Metropolitan Magistrate (NI Act), Central-01, Tis Hazari Courts, Delhi whereby notice under Section 251 Cr.P.C. was framed against the petitioner.

2. In a nutshell, the facts giving rise to the present petition are that

respondent No.2/complainant filed a complaint under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'NI Act') in respect of cheque Nos.004309 dated 16.08.2013, 004310 dated 01.09.2013, 004311 dated 15.09.2013 and 004312 dated 30.09.2013 amounting to Rs.82,50,000/- each, all drawn on Bank of Maharashtra, Karol Bagh, New Delhi. On presentation, all the said cheques got dishonoured with the remarks 'exceed arrangements'. Thereafter, the respondent No.2 sent statutory notice dated 29.10.2013 through registered AD post as well as courier. Despite service, the petitioner failed to make payment of the amount of cheques.

3. Vide order dated 26.06.2014, learned trial Court found sufficient material on record to frame notice under Section 251 Cr.P.C. and accordingly, notice under Section 251 Cr.P.C. was framed. Against the said order, the petitioner filed Crl. Rev. No.18/14 before learned Additional Sessions Judge, Delhi and same was dismissed vide impugned order dated 23.07.2014.

4. Feeling aggrieved by the said order, the petitioner has preferred the present petition.

5. Learned counsel for the petitioner contended that no notice dated 29.10.2013 was served on the petitioner. He submitted that respondent No.2/ complainant have not mentioned the date of service of notice dated 29.10.2013 and in the absence of date of service of notice, period of limitation as required by Section 142 of NI Act cannot be computed.

6. Learned counsel for the petitioner further submitted that other notice dated 14.11.2013 was served on the petitioner on 16.11.2013 and the complaint was filed on 25.11.2013, which is pre-matured. He

has relied upon the judgment '**Surender Sanganerla vs. Ramesh Rijumal & Anr.**', (2012) 5 RCR (Crl.) 813.

7. Rebutting the contentions raised by the petitioner, respondent No.2/complainant urged that notice dated 29.10.2013 was sent by registered AD post and courier at the correct address of the petitioner. As the notice was not received back, therefore, notice is deemed to have been served on the petitioner. He also submitted that the second notice dated 14.09.2013 was served for filing civil suit for recovery and not the statutory notice as required by Section 138 of the NI Act.

8. I have given my thoughtful consideration to the submissions made by learned counsel for the parties at length and the judgment cited by them.

9. Before advertng to the facts of the present case, it will be appropriate to reproduce relevant provisions of Section 138 of the NI Act:-

“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 provision of this Act, be punished with imprisonment for [a term which may extend 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.”

10. On a bare perusal of aforesaid provisions of Section 138 of the NI Act, it is clear that Section 138 of the Act was enacted to punish unscrupulous drawers of cheques who, though purport to discharge their liability by issuing cheque without having no intention of really doing so. Apart from civil liability, criminal liability is sought to be imposed by the said provision on unscrupulous drawers of the cheques. However, with a view to avert unnecessary prosecution of an honest drawer of the cheque and with a view to give an opportunity to him to make amends, the prosecution under Section 138 of the Act has been made subject to certain conditions. These

conditions are stipulated in the proviso to Section 138 of the NI Act. The Legislature in its wisdom has used words that the drawer or the holder in due course of the cheque as the case may be should have made a demand for the payment of the cheque amount by giving a notice in writing to the drawer of the cheque. It does not stipulate the manner in which the notice should be despatched.

11. A similar issue regarding interpretation of the expression ‘giving of notice’ used in clause (b) of the proviso to Section 138 of NI Act came up for consideration before the Apex Court in ‘**K. Bhaskaran vs. Sankaran Vaidhyan Balan & Anr.**’, (1999) 7 SCC 510, wherein the Apex Court after considering the provisions of Section 27 of the General Clauses Act observed that since the Negotiable Instruments Act does not require that notice should only be given by ‘post’, in a case where the sender has despatched the notice by post with correct address given on it, Section 27 of the General Clauses Act could be profitably imported and in such a situation, service of notice is deemed to have been effected on the sender unless he proves that it was really not served and that he was not responsible for such non-service. It was observed as under:-

“7. The issue with regard to interpretation of the expression “giving of notice” used in Clause (b) of the proviso is no more res integra. In *K. Bhaskaran v. Sankaran Vaidhyan Balan* [(1999) 7 SCC 510 : 1999 SCC (Cri) 1284] the said expression came up for interpretation. Considering the question with particular reference to scheme of Section 138 of the Act, it was held that failure on the part of the drawer to pay the amount should be within fifteen days ‘of the receipt’

of the said notice. “Giving notice” in the context is not the same as “receipt of notice”. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address and for the drawer to comply with Clause (c) of the proviso. Emphasising that the provisions contained in Section 138 of the Act required to be construed liberally, it was observed thus:

“20. If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that the court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure.”

21. In *Maxwell's Interpretation of Statutes*, the learned author has emphasised that ‘provisions relating to giving of notice often receive liberal interpretation’ (vide p. 99 of the 12th Edn.). The context envisaged in Section 138 of the Act invites a liberal interpretation for the person who has the statutory obligation to give notice because he is presumed to be the loser in the transaction and it is for his interest the very provision is made by the legislature. The words in Clause (b) of the proviso to Section 138 of the Act show that the payee has the statutory obligation to “make a demand” by giving notice. The thrust in the clause is on the need to “make a demand”. It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for

giving the notice. Once it is despatched his part is over and the next depends on what the sendee does.”

12. Further, the Apex Court in ‘**D. Vinod Shivappa vs. Nanda Belliappa**’, (2006) 6 SCC456, laid down:-

“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. Therefore, it would be premature at the stage of issuance of process, to move the High Court for quashing of the proceeding under Section 482 of the Code of Criminal Procedure. The question as to whether the service of notice has been fraudulently refused by unscrupulous means is a question of fact to be decided on the basis of evidence. In such a case the High Court ought not to exercise its jurisdiction under Section 482 of the Code of Criminal Procedure.”

13. In view of the dictum in **K. Bhaskaran's case** (*supra*) and **D. Vinod Shivappa's case** (*supra*), it can be said that since it is nowhere provided that notice should be sent by 'post', rather the presumption is that if a notice is despatched with correct address, the same will be treated as due service unless the addressee proves that it was not actually served. The burden of proving the same is on the addressee.

14. In the instant case, the plea taken by the petitioner that notice dated 29.10.2013 was not served upon him is a matter of evidence and proof. The law does not permit a mini trial at this stage. At this juncture, it would be pre-mature to say that notice dated 29.10.2013 was not served on the petitioner and the proceedings cannot be quashed by invoking inherent powers under Section 482 Cr.P.C.

15. In view of the facts and circumstances of the case, there is no illegality or infirmity in the impugned order. Thus, the petition fails and the same is hereby dismissed.

16. Trial Court record be sent back forthwith.

Crl. M.A. No.12754/2014

The application is dismissed as infructuous.

(VED PRAKASH VAISH)
JUDGE

OCTOBER 10th, 2014/gm