

GAHC020005182023



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL
PRADESH)
KOHIMA BENCH**

Case No. : Crl. Pet./26/2023

M/S PAARTH PROJECTS AND 2 ORS
THROUGH ITS PARTNERS,
AT,471, SECTOR 14, GURUGRAM,
HARYANA - 122001 2: MAJOR VIKAS CHHILLAR (RETD.)
PARTNER
M/S PAARTH PROJECTS

AT A-702
ANNEX SOCIETY
MAGARPATTA CITY
PUNE
MAHARASTRA CITY
PUNE

MAHARASHTRA - 411036

ALSO AT -

H/NO. 471
NEAR COMMUNITY CENTER

SECTOR - 14
GURUGRAM
HARYANA - 112001

3: SONAM SINGH

W/O MAJOR VIKAS CHHILLAR(RETD.)

THROUGH SPA HOLDER)

PARTNER
M/S PAARTH PROJECTS

A-20
SAI APARTMENT
SECTOR - 13
ROHINI
OPPOSITE DD CLUB
NEW DELHI - 110085

ALSO AT -

H/NO.471
NEAR COMMUNITY CENTER

SECTOR - 14
GURUGRAM
HARYANA - 12200

VERSUS

M/S BALAJI ENTERPRISES
THROUGH ITS PROPRIETOR, MR. KUMAR RAJESH, OFFICE AT - 1/21, DUJ
APARTMENT, SECTOR - 14 EXTENSION, ROHINI,
DELHI - 110085.

For the Petitioner(s) : Mr. Sarif Ahmed, Advocate

For the Respondent(s) : Mr. Moa Jamir, Advocate

BEFORE
HON'BLE MR. JUSTICE DEVASHIS BARUAH

ORDER

13.12.2023

Heard Dr. Farrukh Khan, the learned counsel for the petitioners and Mr. Arun Sharma, learned counsel for the respondent.

2. The instant proceedings have been filed under Section 482 of the Code of Criminal Procedure, 1973 (for short, 'The Code') for setting aside and quashing the order dated 17.05.2023, along with criminal proceedings arising out of Case No. 02/2023 filed under Section 138, read with 141 of the Negotiable Instruments

Act, 1881 (for short 'the Act of 1881), pending before the court of the learned Chief Judicial Magistrate, Peren.

3. From the materials on record, and more particularly, the complaint so enclosed to the present petition, it reveals that in discharge of certain alleged debt, the petitioners herein, who are the accused had issued four cheques to the complainant. Out of those four cheques, one cheque bearing Cheque No. 291328 dated 04.02.2023 for Rupees Forty Lakhs, was presented by the complainant in his bank account maintained in the Jalukie Branch of the State Bank of India. The complainant, thereupon, came to learn that the said cheque was dishonoured and returned unpaid with the remark "Payment stopped by the drawer", by Return Memo No. 000725/002002/430 dated 08.02.2023.

4. It is also seen from the complaint that thereupon, a statutory Legal Notice dated 02.03.2023 was issued to the petitioners herein, calling upon the petitioners to pay the said amount of Rupees Forty Lakhs in respect to the cheque in question, within 15 (fifteen) days from the date of receipt of the said Notice. The said Legal Notice was sent by Speed Post. It was specifically mentioned in Paragraph-17 of the complaint that despite mentioning the last known address of the accused persons (the petitioners herein) in that said Legal Notice, the same was returned on account of the addresses being inaccurate. It was also mentioned that even after the best endeavours by the complainant, the current address of the petitioners could not be traced, and it is under such circumstances the complainant had filed the complaint.

5. It is further seen from the documents so enclosed to the complaint that the complainant enclosed the copy of the bank statement of the complainant, the original cheque No. 291328

drawn on State Bank of India, the original Return Memo dated 08.02.2023, copy of the Legal Notice dated 02.03.2023 and the original Speed Post receipt dated 03.03.2023 along with its tracking report. Further to that, in the list of witnesses, the name of the complainant was mentioned and it was further stated that any other witnesses with the permission of the court. It is also relevant to mention that along with the complaint, an affidavit was filed by the complainant affirming what has been stated in the complaint. Paragraph-14 of the said evidence of affidavit is *pari materia* to Paragraph-17 of the complaint.

6. The record further reveals that the said complaint was filed on 11.04.2023. It has been brought to the attention of this Court that on 17.04.2023, the said complaint was taken up by the court of the Chief Judicial Magistrate, Peren. The learned counsel appearing on behalf of the complainant/respondent, Mr. Arun Sharma, have placed the order dated 17.04.2023, which is kept on record and marked with the letter-'X'. A perusal of the said order reveals that as the complainant was absent with steps, the complainant was directed to be present on the next date of hearing for recording his examination under Section 200 of the Code and thereby the matter was fixed on 17.05.2023 for recording of initial deposition. It further reveals that on 17.05.2023, the learned Trial Court, though observed that there was a requirement to cause an enquiry under Section 202(1) of the Code, before issuance of process against the accused persons, but on the very same date, on the ground that the complainant produced one Mr. K. Samuel Medaliang as a witness of the case, the Trial Court issued process upon the accused persons fixing 22.05.2023 for appearance of the accused persons, *i.e.* the petitioners herein.

7. The record reveals that on 26.09.2023, the instant petition was filed before this Court. *Vide* an order dated 17.10.2023, the petitioner herein was permitted to make certain amendments and further directions were issued that the petitioners herein may be permitted to appear before the learned Trial Court, through their appointed counsel and the Trial Court shall allowed the prayer for dispensing the personal appearance until the next date fixed. Accordingly, the matter was fixed on 02.11.2023. It further reveals that on 02.11.2023, notice was issued making it returnable by 4 (four) weeks.

8. In the backdrop of the above, let this Court take note of the submissions made by the learned counsels for the parties.

9. Dr. Farrukh Khan, the learned counsel appearing on behalf of the petitioner submitted that the filing of the proceedings at the Court at Peren is a complete abuse of the process of the court in as much as all transactions alleged to have taken place were within the NCR region and the cheques in question were allegedly issued from Delhi. He further submitted that amongst the 4 (four) cheques which have been mentioned in the complaint, one of such cheques was presented at Delhi. Further to that, the learned counsel submitted that the notice which was issued was never received by the petitioners at all, and the reason being that the addresses which have been mentioned in the said Notices, more particularly in respect to the Noticee Nos. 2 and 3, who happen to be the petitioner Nos. 2 and 3, herein were incorrect addresses. He further submitted that as regards the Noticee No. 1 in the Notice dated 02.03.2023, and the address of the petitioner No. 1, though may be the same, but a perusal of the track consignment note, which have been enclosed to the complaint petition would clearly show that the delivery was not made on account of

insufficient address. He further referring to the documents, which have been enclosed, which formed a part of the complaint as well as the evidence on affidavit submitted that on the basis of such documents, the Trial Court could not have issued process taking into account Paragraph-17 of the complaint as well as Paragraph-14 of the evidence of the affidavit. The learned counsel for the petitioner have referred to the judgment of the Supreme Court in the case of **C.C. Alavi Haji –Versus- Palapetty Muhammed & Anr**, reported in (2007) 6 SCC 555 and submitted that in view of the categorical statement made in the complaint at Paragraph-17 and the evidence of affidavit at Paragraph-14, the Trial Court could not have issued process without taking into account as to whether the address on the envelope was the correct address. In that regard, he referred to Paragraph-18 of the judgment of the Supreme Court in *C.C. Alavi Haji* (supra). Likewise the learned counsel submitted that a similar issue arose before the Jammu & Kashmir High Court in the case of **Engineering Control – Versus- Banday Infratech Pvt. Ltd.** reported in 2022 SCC Online J&K 540. In addition to the above, Dr. Khan submitted that the mechanical manner in which the learned Trial Court had done away with the mandatory requirement under Section 202(1) is apparent from a perusal of the order dated 17.05.2023, which categorically shows that on the very same day, the enquiry was done and the order was passed.

10. On the other hand, Mr. Arun Sharma, the learned counsel appearing on behalf of the respondent/the complainant submitted that these questions which have been agitated by the learned counsel for the petitioner cannot be agitated in the proceedings under Section 482 of the Code, in as much as these are questions of facts and the complainant still have the opportunity to adduce

the necessary documents if there is any denial on the part of the accused that they have not received the Notice. In that regard, he also relied upon the judgment of the Supreme Court in the case of *C.C. Alavi Haji* (supra) and more particularly to Paragraphs-9, 10 and 14. Mr. Arun Sharma, the learned counsel appearing on behalf of the respondent/complainant further submitted that from a perusal of the order dated 17.05.2023, it would be apparent that the learned Trial Court have duly taken note of the provisions of Section 202(1) of the Code and upon enquiry and being satisfied, have issued process.

11. Upon hearing the learned counsels for the parties, and on perusal of the materials on record, two questions arise before this Court.

1) Whether the learned Trial Court was justified in issuance of process in view of the categorical statement made in Paragraph-17 of the complaint and Paragraph-14 of the evidence of affidavit, that too without perusing the envelope in question?

2) Whether the learned Trial Court had exercised the powers under Section 202 in the manner envisaged under law?

12. For the purpose of deciding the first question, this Court finds it relevant to take note of the documents which are a part of the complaint petition. The Legal Notice dated 02.03.2023 provides the address of the accused persons. This Court has also perused the addresses of the petitioners. There seems to be certain discrepancy as regards the addresses of the petitioner Nos. 2 and 3 with that of the Notices under 2 and 3. However, the address of the petitioner No. 1 as well as the Noticee No. 1 is one and the same. This Court also further takes note of that the debt in question as alleged in the complaint was the alleged debt of the partnership firm, and as such it is the opinion of this Court

that even if the addresses of the petitioner Nos. 2 and 3 have been incorrectly given in the Notices would not make a difference, more so, when the address of the petitioner No. 1 with that of the Noticee No. 1 is the same. But in the present case, taking into consideration the statements made in Paragraph-17 of the complaint, a question arises as to whether the address given in the envelope of the Notice/petitioner No. 1 was the same address as stated in the Notice?

13. It is also very pertinent at this stage to take note of the judgment of the Supreme Court in the case of **C.C. Alavi Haji** (supra). In the said judgment, the question referred to the three Judges Bench of the Supreme Court was "Whether in absence of any averments in the complaint to the effect that accused had a role to play in the matter non-receipt of a 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 (supras) case?"

14. The Supreme Court had in Paragraph-9 of the said judgment had duly taken into account that an unscrupulous and dishonest drawer of a cheque, may make himself scarce for sometime after issuing the cheque so that the requisite statutory notice can never be served upon him and consequently he can never be prosecuted. It was further observed that once the payee of the cheque issues notice to the drawer of the cheque the cause of action arises to file the complaint within the time stipulated. However, the payee of the cheque may dodge the notice by unscrupulous means and thereby render the object of the provision of Section 138 unworkable. In the said judgment, the Supreme Court took note of Paragraph-15 of the judgment in the case of **D. Vinod Shivappa Vs. Nanda Belliappa**, reported in

(2006) 6SCC 456 and observed that a drawer may by dubious means manage to get an incorrect endorsement made on the envelope that the premises was found locked or that the addressee was not available at the time when the postman went for delivery of the letter. It may be that the address was correct and even the addressee was available but the wrong endorsement was manipulated by the addressee. Under such circumstances, if the facts are proved, it may amount to refusal of the notice. The Supreme Court further observed that in such circumstances the complainant would have the liberty 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 and in such circumstances the Court shall presume service of notice. The Supreme Court further observed that the question as regards whether the service was duly meted on the grounds of the addressee being not available at the time when the postman went for delivery of the letter cannot be decided in the proceedings under Section 482 in as much as the said question is a question of fact to be decided on the basis of evidence.

15. This Court also finds it relevant to take note of Paragraph-18 of the said judgment, the case of **C.C. Alavi Haji** (supra), wherein the Supreme Court categorically observed that although there was no averment to the fact that the notice was sent to the correct address of the drawer of the cheque by Registered post with acknowledgement due but the returned envelope was enclosed to the complainant and it therefore, formed a part of the complaint which showed that notice was sent by the Registered Post acknowledgement due to the correct address and was returned with an endorsement that the addressee was abroad.

This Court, taking into account the specific issue involved herein, finds it therefore relevant to reproduce Paragraphs- 9, 10, 17 and 18 of the judgment in the case of **C.C. Alavi Haji** (supra).

"9. All these aspects have been highlighted and reiterated by this Court recently in Vinod Shivappa's case (supra). Elaborately dealing with the 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; it was observed that 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 sometime after issuing the cheque so that the requisite statutory notice can never be served upon him and consequently he can never be prosecuted. It was further observed that once 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 notice, which may be returned with an endorsement that the addressee is not available on the given address. This Court held:

"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 pre-mature 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."

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.*

17. *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. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskaran's case (supra), if the "giving of notice" in the context of Clause (b) of the proviso was the same as the "receipt of notice" a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act.*

18. *In the instant case, the averment made in the complaint in this regard is:*

"Though the complainant issued lawyer's notice intimating the dishonour of cheque and demanded payment on 4.8.2001, the same was returned on 10.8.2001 saying that the accused was 'out of station'."

True, there was no averment to the effect that the notice was sent at the correct address of the drawer of the cheque by "registered post acknowledgement due". But the returned envelope was annexed to the complaint and it thus, formed a part of the complaint which showed that the notice was sent by registered post acknowledgement due to the correct address and was returned with an endorsement that "the addressee was abroad." We are of the view that on facts in hand the requirements of Section 138 of the Act had been sufficiently complied with and the decision of the High Court does not call for interference."

16. This Court further finds it also relevant to take note of that

the Supreme Court had in the case of **C.C. Alavi Haji** (supra) was dealing with the aspect of service of notice where the service could not be meted on account of being fraudulently refused by unscrupulous means, meaning thereby the question of there being manipulation in the endorsements as regards the availability of the addressee for delivery of the notice. This Court, however, finds it relevant that from the postal track consignments which were a part of the complaint, as well as the categorical statements made in Paragraph-17 of the complaint and Paragraph-14 of the evidence on affidavit, that the instant case do not fall within the ambit of the Notice being refused or the person being not available in the house or the house is locked or the shop is closed or the addressee is not in station, for which the service could have been presumed. It being an admitted fact in Paragraph-17 of the evidence of the complaint as well as in Paragraph-14 of the evidence on affidavit, that on account of inaccurate particulars being furnished, the service of notice could not be affected, the question, therefore, arises is as to whether the envelope, which admittedly was returned to the complainant by the postal department, contained the same address of the petitioner No. 1. Surprisingly, the said envelope was not a part of the complaint on the list of documents placed by the complainant during the time of initial deposition. Under such circumstances, from the material on record, it reveals that the learned Trial Court, while passing the order dated 17.05.2023 for issuance of process did not take into consideration Paragraph-17 of the complaint as well as Paragraph-14 of the evidence on affidavit in the proper perspective and mechanically issued process. Therefore, the said order by which the process was issued on 17.05.2023 appears to suffer from non application of mind.

17. The second issue, in the opinion of this Court is intrinsically linked with the first issue, *i.e.* as regards the compliance to Section 202 of the Code, more particularly when the accused persons are resident outside the jurisdiction of the Court. From the facts delineated above, it transpires that the complaint was taken up on 17.04.2023, but on the said day, the learned Court did not take any steps taking into account that without the initial deposition of the complainant, no further steps could have been taken. Accordingly, the case was fixed on 17.05.2023 for initial deposition of the complainant. This Court has duly perused the order dated 17.05.2023 and is surprised to take note of that though in the said order the learned Court had mentioned that the process needs to be postponed in view of the mandatory requirement of enquiry to be carried out under Section 202(1) of the Code, but surprisingly on the very same day, the process was issued. It also further surprises this Court that the learned Trial Court knew very well that all the accused were outside the jurisdiction of not only the said court but were residents of the National Capital Region but fixed the matter on 22.05.2023, *i.e.* 5 days thereafter.

18. It is a well settled principle of law that the enquiry which is required to be done under Section 202(1) is a very important step in putting the criminal process into motion and as such, Section 202(1) is a necessary safeguard as against unnecessary and abusive criminal proceedings being initiated. Therefore, while conducting an enquiry under Section 202, the learned court is required to apply its mind. The court is required to apply its mind to the materials on record including the initial deposition and thereupon either make enquiry by itself or send the matter for investigation. The settled principles of law clearly show that the

requirement of Section 202(1) of the Code is mandatory.

19. Now, reverting to the facts, it would reveal that the learned Court below had exercised its power in terms with Section 202(1) of the Code in the most mechanical manner and the same is writ large from the fact that the learned Trial Court seems to have not at all taken into consideration the contents of Paragraph-17 of the complaint and Paragraph-14 of the evidence on affidavit. It is trite that receipt of the Notice of demand is a *sine qua non* for initiation of proceedings under Section 138 of the Act of 1881. The receipt of the Notice can be presumed in terms with Section 27 of the General Clauses Act, 1897 and the judgments of the Supreme Court in the cases of **C.C. Alavi Haji** (supra) and **D. Vinod Shivappa** (supra) are clear pronouncements in that respect. However, for the purpose of presumption, the necessary elements have to be satisfied. In the instant case, the contents of Paragraph-17 of the complaint as well as Paragraph-14 of the evidence on affidavit coupled with the fact that admittedly, the returned envelope was not placed before the learned Trial Court shows that the process was mechanically issued and had the learned Trial Court made the necessary enquiry, the learned Trial Court would have sought the further details as regards service of notice before issuance of process. Therefore, it is the opinion of this Court that as the mandatory enquiry under Section 202(1) of the Code was mechanically done, the issuance of process is required to be interfered with.

20. Accordingly, this Court, therefore, interferes with the order dated 17.05.2023 passed by the learned Chief Judicial Magistrate, Peren in Case No. 02/2023.

21. This Court also finds it relevant to observe that in the judgment of the Supreme Court rendered in the case of **D. Vinod**

Shivappa (supra), and more particularly at Paragraph-15, it was observed the complainant would have an opportunity to prove the fact that the Notice was sent to the proper address. The facts discerned herein shows, that the address of the petitioner No. 1 and the address of the Notice No. 1 in the Notice dated 02.03.2023 is the same. Therefore, as this Court had interfered but not quashed the complaint, the respondent/complainant herein would be at liberty to file additional documents to satisfy that the Notice was sent at the address mentioned in the Notice dated 02.03.2023, in so far as the petitioner No. 1 is concerned.

22. This Court directs the learned Trial Court that in the eventuality such steps are taken by the complainant, the learned court below shall proceed with the matter in accordance with law taking into consideration the observations made in the instant judgment.

23. It is made clear that as this Court had set aside the order dated 17.05.2023, all consequential orders passed thereafter in C.R. Case No. 02/2023, pending in the Court of the Chief Judicial Magistrate, Peren are also set aside and quashed.

24. With the above, the petition stands disposed of.

Sd/-
JUDGE

Comparing Assistant