

HIGH COURT OF TRIPURA
AGARTALA

Crl. A. No.25 of 2014

Dr. Abhijit Choudhury,
son of late Prangopal Choudhury,
resident of 10/1, Jagannath Bari Road,
P.O. Agartala, P.S. West Agartala,
District – West Tripura, Pin – 799 001

..... **Appellant**

– **Vs** –

1. Sri Chinmoy Sen,
son of late Brajahari Sen,
resident of Bhati Abhoynagar, Paschim Para,
Cantonment Road, P.O. Agartala,
P.S. West Agartala, District – West Tripura,
Pin – 799 001
2. The State of Tripura,
Notice to be served through Public Prosecutor,
High Court of Tripura

..... **Respondents**

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the appellant	:	Mr. A. Sengupta, Advocate
For the respondent No.1:		Mr. S. Lodh, Advocate
For the respondent No.2:		Mr. A. Ghosh, PP
Date of hearing	:	20.01.2015
Date of delivery of Judgment and order	:	26.02.2015
Whether fit for reporting	:	YES

JUDGMENT & ORDER

By this appeal filed under Section 378(4) of the Cr.P.C. the judgment and order of acquittal dated 30.08.2014 delivered in case No.NI 61 of 2013 by the Additional Chief Judicial Magistrate, West Tripura, Agartala has been questioned.

02. The respondent No.1 took a loan from the appellant to the extent of Rs.5,00,000/- (Rupees five lacs) by three cheques and all those cheques were encashed on 14.01.2013 on assurance that the respondent No.1 shall make the payment within the next five days to the appellant. On 18.01.2013 the respondent No.1 gave two cheques bearing No.007736 for Rs.3,00,000/- and No.007735 for Rs.2,00,000/- to the appellant for discharging his liability of loan, but when the complainant deposited those cheques in his account, maintained in the UBI, Kaman Chowmuhan Branch for encashment on 18.02.2013, both the cheques were dishonoured for insufficiency of fund. On 18.03.2013, within the statutory period of the knowledge of such dishonour, the appellant sent the notice, in terms of clause (b) to Section 138 of the NI Act, by the registered post and the wife of the respondent No.1 received the said registered notice in the residence of the respondent No.1 on 19.03.2014. The respondent No.1 did not make any payment and a complaint has been filed against the respondent No.1 for committing offence punishable under Section 138 of the NI Act.

03. In due course, the substance of accusation under Section 251 of the Cr.P.C. was stated to the respondent No.1 but the respondent No.1 denied such accusation on pleading innocence. The appellant herein introduced all the relevant facts in the evidence as PW-1 and also introduced as many as 11 documents in the evidence including the dishonoured cheques, the memorandum dated 08.03.2013 apprising the dishonour of the cheques, the postal receipt dated 18.03.2013, the acknowledgment card containing the signature of the wife of the accused, the demand notice dated

18.03.2013, the second postal receipt dated 18.03.2013, the acknowledgment card having signature of unidentified persons, the savings bank account No.10915323350 maintained in the SBI, Melarmath Branch showing that the respondent No.1 encashed the cheques issued by the appellant and finally the Savings Bank Account maintained in the UBI, Kaman Chowmuhani Branch by the appellant (Exbt.1 to 11). The respondent No.1, the accused in the said criminal proceeding, did not adduce any evidence.

04. After recording the appellant's evidence when the respondent No.1 was examined under Section 313 of the Cr.P.C. he denied those incriminating materials surfaced in the evidence and pleaded his innocence once again. The trial court formulated four points for determination, which are as follows:

- "(i) Whether the cheques vide No.007735 and 007736 were dishonoured when properly presented for encashment;**
- (ii) Whether the payee made a demand for payment of Rs.5,00,000/- to the accused person within 30 days of dishonour of the cheque;**
- (iii) Whether the accused person received demand notice issued by the payee;**
- (iv) Whether the service of demand notice upon accused is compulsory in such a case."**

05. On appreciating the evidence the trial court has unequivocally decided that the cheques bearing No.007735 and 007736, Exbt.2 and Exbt.1 respectively, *"were indeed dishonoured when presented for encashment"*. The trial court has also observed that *"Therefore, on appreciation of evidence on record it appears that the complainant sent demand notice to the address of accused person."* But while deciding whether the accused person, the

respondent No.1 herein, received the demand notice issued by the appellant, it has been observed that *"I find that the accused person sent demand notice to the accused person both in his official as well as on his residential address. **The notice sent to residential address was received by wife of the accused person.** The other notice was received by an unidentified person, and the identity of the said receiver was never disclosed by the complainant. The accused has clearly denied receiving any demand notice. **Therefore it is clear that the accused himself did not receive the notice and the same was admittedly served upon the wife of the accused. This point is accordingly determined.**"*

06. While determining another ancillary issue, though it appears from the records that no such point was raised by either of the parties, the trial court has answered the point that whether the service of demand notice upon the accused is compulsory in such a case, it has been held that *"Proviso to Section 138 specifies the conditions which are required to be satisfied before a person can be convicted for an offence enumerated in the substantive part of the Section. Clause (b) of the proviso to Section 138 cast on the payee or the holder in due course of the cheque, as the case may be, a duty to make a demand for 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."* Thereafter, it has been held that *"it is clear that service of notice on the accused person's wife cannot be treated as compliance with the mandate of law"* and the said observation has been made relying on a decision

of the apex court in ***M. D. Thomas vs. P. S. Jaleel and another*** reported in ***(2009)14 SCC 398***.

07. As a solitary question of law as regards the service of notice, as contemplated under clause (b) to Section 138 of the NI Act is in the focus of this appeal, this Court has taken this appeal for final hearing.

08. Mr. A. Sengupta, learned counsel appearing for the appellant submits that the other relevant decisions as relied by the appellant in the course of the argument and as reflected in the order dated 06.08.2014 delivered in NI No.61 of 2013 have not been considered by the trial court at the time of passing the impugned judgment. It appears from the order dated 06.08.2014 that for the complainant the following reports were relied on.

- (i) (1999)7 SCC 510,**
- (ii) (2007)7 SCC 555,**
- (iii) AIR(1964)Punjab 235,**
- (iv) 2008 AIR SCW 182,**
- (v) (2009)14 SCC 398.**

09. In the ordinary course, if the court finds that the decisions cited does not have any relevance, it may or may not consider the said decision. But when the decisions as cited do have substantive bearing, the court is under obligation to give its reasons for not following the principles laid down in such decisions. It appears from perusal of the impugned judgment and order of acquittal that it is entirely based on the finding that the accused 'himself did not receive the notice' and the service of the notice on his wife who is residing in the same address is not service within the meaning of clause (b) of Section 138 of the NI Act. Such finding has

been culled out on ***M.D. Thomas vs. P.S. Jaleel and another*** wherein the apex court has held as under:

"In the present case, the notice of demand was served upon the wife of the appellant and not the appellant. Therefore, there is no escape from the conclusion that the respondent complainant had not complied with the requirement of giving notice in terms of clause (b) of proviso to Section 138 of the Act. Unfortunately, the High Court overlooked this important lacuna in the complainant's case. Therefore, the conviction of the appellant cannot be sustained."

10. Mr. A. Sengupta, learned counsel has referred the relevant decisions as cited by the complainant and not appreciated by the trial court while passing the impugned judgment. In the context of the case, Mr. Sengupta, learned counsel appearing for the appellant has relied on the decision of the apex court in ***K. Bhaskaran vs. Sankaran Vaidhyan Balan and another*** reported in ***(1999) 7 SCC 510*** wherein the apex court has observed as under:

"24. No doubt Section 138 of the Act does not require that the notice should be given only by 'post'. Nonetheless the principle incorporated in Section 27 (quoted above) can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice."

25. Thus, when a notice is returned by the sendee as unclaimed such date would be the commencing date in reckoning the period of 15 days contemplated in Clause (c) to the proviso of Section 138 of the Act. Of course such reckoning would be without prejudice to the right of the drawer of the cheque to show that he had no knowledge that the notice was brought to his address. In the present case the accused did not even attempt to discharge the burden to rebut the aforesaid presumption."

11. Mr. Sengupta, learned counsel for the appellant has further referred to a larger Bench decision of the apex court in **C.C. Alavi Haji vs. Palapetty Muhammed and another** reported in **(2007) 6 SCC 555**. In that case, the apex court has elaborately dealt with the aspect of presumption of service by interpreting the provisions of Section 27 of the General Clauses Act, 1897 and Section 114 of the Indian Evidence Act, 1872. In **C.C. Alavi Haji**, the apex court while appreciating the controversy, in the context of the service of notice, has held that:

"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 Act, extracted above. Under Clause (b) of the proviso, the payee or the holder of the cheque in due course is required to give a written notice to the drawer of the cheque within a period of thirty days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. Under Clause (c), the drawer is given fifteen days time from the date of receipt of the notice to make the payment and only if he fails to make the payment, a complaint may be filed against him. As noted above, the object of the proviso is to avoid unnecessary hardship to an honest drawer. Therefore, the observance of stipulations in quoted Clause (b) and its aftermath in Clause (c) being a pre-condition for invoking Section 138 of the Act, giving a notice to the drawer before filing complaint under Section 138 of the Act is a mandatory requirement."

12. In **C.C. Alavi Haji** the apex court has also reconsidered **D. Vinod Shivappa v. Nanda Belliappa** reported in **(2006)6SCC 456** and finds certain inadequacy in the said decision which enunciated that the question as to whether the service of the notice has been fraudulently refused by unscrupulous means is a question of fact to be decided on the basis of evidence. It has been held in **C.C. Alavi Haji** 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 General Clauses Act would be attracted. By the deeming fiction, the requirement of Clause (b) of Section 138 of the Act stands complied with and the cause to file a complaint arises on the expiry of the period prescribed in Clause (c) of the said Section 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. In **C.C. Alavi Haji** it has been held further that:

"11. However, the referring Bench was of the view that this Court in Vinod Shivappas case (supra) did not take note of Section 114 of Evidence Act in its proper perspective. It feels that the presumption under Section 114 of the Evidence Act being a rebuttable presumption, the complaint should contain necessary averments to raise the presumption of service of notice; that it was not sufficient for a complainant to state that a notice was sent by registered post and that the notice was returned with the endorsement out of station; and that there should be a further averment that the addressee-drawer had deliberately avoided receiving the notice or that the addressee had knowledge of the notice, for raising a presumption under Section 114 of Evidence Act.

12. Therefore, the moot question requiring consideration is in regard to the implication of Section 114 of the Indian Evidence Act, 1872 insofar as the service of notice under the said proviso is concerned. Section 114 of the Indian Evidence Act, 1872 reads as follows:

Section 114 - Court may presume existence of certain facts - The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume -

(f) That the common course of business has been followed in particular cases.

13. According to Section 114 of the Act, read with illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. 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 of G.C. Act is extracted below:

27. Meaning of service by post -

Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression served by post, whether the expression serve or either of the expressions 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.

15. 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 needless to emphasis that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque. It is well settled that at the time of taking cognizance of the complaint under Section 138 of the Act, the Court is required to be prima facie satisfied that a case under the said Section is made out and the aforementioned mandatory statutory procedural

requirements have been complied with. It is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect. In our opinion, this interpretation of the provision would effectuate the object and purpose for which proviso to Section 138 was enacted, namely, to avoid unnecessary hardship to an honest drawer of a cheque and to provide him an opportunity to make amends.

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 Bhaskarans 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."

13. Mr. Sengupta, learned counsel for the appellant therefore urges that the apex court in the subsequent decision in **M.D. Thomas** had no occasion to take care of the ratio as laid down by the apex court in **C.C. Alavi Haji**. As such, in **M.D. Thomas vs. P. S. Jaleel and another** that aspect of presumption on existence of fact relating to service of the notice, subject to the right to the accused to advance rebuttal evidence having not been considered created a contrasting phenomenon.

14. From the other side, Mr. S. Lodh, learned counsel appearing for the respondent No.1 has placed his reliance on **M.D. Thomas** and has contended that the case in hand is similarly situated and the notice has been served on the wife of the respondent No.1, not on the respondent No.1. Therefore, it cannot be treated as the proper notice in terms of Clause (b) of Section 138 of the Act. Hence, there is no infirmity in the impugned order.

15. A very interesting question arises in this appeal which may be framed as under:

Whether the proposition as laid down in **M.D. Thomas** has created the binding precedent having regard that **M.D. Thomas** has not considered the larger Bench decision of the apex court in **C.C. Alavi Haji** where it has been held that when Section 114 of the Evidence Act, 1872 may be applied to ascertain the delivery of the notice sent by the registered post? It enables the court to presume that in the common course of natural events, the notice would be delivered or similarly the deeming fiction that is raised under Section 27 of the General Clauses Act can have the leverage to hold that the service is deemed to have been made, unless it is rebutted by the accused. No doubt the trial court has not embarked on such exercise for obvious reasons but the trial court has not discharged its duty as expected while it brushed aside the said decision of the apex court in **C.C. Alavi Haji** which has been relied on by the complainant. Interpretation may vary but not the duty. It is expected that such convenient approach be avoided in future. The apex court in **Hiten P. Dalal vs. Bratindranath Banerjee** reported in **(2001)6 SCC16** while dealing with presumption under Section 139 for purpose of

presuming the liability has observed on approving the ***State of Madras vs. A. Vaidyanatha Iyer*** reported in ***AIR 1958 SC 61*** that it is obligatory on the court to raise the presumption in every case where the factual basis for raising the presumption had been established.

"22. It is a presumption of law and therefore it is obligatory on the court to raise this presumption in every case brought under s. 4 of the Prevention of Corruption Act because unlike the case of presumptions of fact, presumptions of law constitute a branch of jurisprudence. While giving the finding quoted above the learned Judge seems to have disregarded the special rule of burden of proof under s. 4 and therefore his approach in this case has been erroneous lines.

23. The judgment also shows that certain salient pieces of evidence were missed or were not properly appreciated.

24. At the time when the penalty notice was issued under s. 28 of the Income-tax Act the respondent was not the Income-tax Officer at Coimbatore but by June 6, he had been posted at Coimbatore and the note on the Penalty File dated June 6, 1951 :

"put up proposal to I.A.C. for levy of standard penalty,""

16. There cannot be any amount of doubt that the proposition of law as enunciated by ***C.C. Alavi Haji*** is entirely consistent to what has been expounded in ***Hiten P. Dalal***. But neither ***Hiten P. Dalal*** nor the decision of the three Judges Bench of the apex court in ***C.C. Alavi Haji*** has been considered in the subsequent decision of the two Judges Bench of the apex court while delivering their decision in ***M.D. Thomas***. Even, it is not clear from the said decision of ***M.D. Thomas*** whether the wife was living with the husband in the same residence or not. Such element of fact is a vital piece to be considered for drawing any presumption in the matter of service, particularly in the context as emerged in the case in hand.

17. In **C.C. Alavi Haji**, inadequacy of **D.Vinod Shivappa** where the tool of presumption has not been considered having regard to the object of Section 138 of the NI Act, which is no doubt has been promulgated for protecting the drawee from the unscrupulous persons to avoid liability has been sought to be addressed for unclogging the process of justice. Even before **C.C. Alavi Haji vs. Palapetty Muhammed and another**, the apex court in **M.S. Narayana Menon @ Mani vs. State of Kerala and Anr.** reported in **(2006)6 SCC 39** having considered **Hiten P. Dalal vs. Bratindranath Banerjee** held that:

"28. What would be the effect of the expressions 'May Presume', 'Shall Presume' and 'Conclusive Proof' has been considered by this Court in Union of India (UOI) v. Pramod Gupta (D) by L.Rs. and Ors. : (2005)12SCC1 in the following terms:

"It is true that the legislature used two different phraseologies "shall be presumed" and "may be presumed" in Section 42 of the Punjab Land Revenue Act and furthermore although provided for the mode and manner of rebuttal of such presumption as regards the right to mines and minerals said to be vested in the Government vis-à-vis the absence thereof in relation to the lands presumed to be retained by the landowners but the same would not mean that the words "shall presume" would be conclusive. The meaning of the expressions "may presume" and "shall presume" have been explained in Section 4 of the Evidence Act, 1872, from a perusal whereof it would be evident that whenever it is directed that the court shall presume a fact it shall regard such fact as proved unless disproved. In terms of the said provision, thus, the expression "shall presume" cannot be held to be synonymous with "conclusive proof."

29. In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words 'proved' and 'disproved' have been defined in Section 3 of the Evidence Act (the interpretation clause) to mean:

Proved - A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the

circumstances of the particular case, to act upon the supposition that it exists.

Disproved - A fact is said to be disproved when, after considering the matters before it the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

37. What would be the effect of a presumption and the nature thereof fell for consideration before a Full Bench of the Andhra Pradesh High Court in G. Vasu v. Syed Yaseen Sifuddin Quadri : AIR1987AP139. In an instructive judgment, Rao, J. (as His Lordship then was) speaking for the Full Bench noticed various provisions of the Evidence Act as also a large number of case laws and authorities in opining:(AIR p.147, para 30)

"30. From the aforesaid authorities, we hold that once the defendant adduces evidence to the satisfaction of the Court that on a preponderance of probabilities there is no consideration in the manner pleaded in the plaint or suit notice or the plaintiff's evidence, the burden shifts to the plaintiff and the presumption 'disappears' and does not haunt the defendant any longer."

It was further held (AIR pp.148-49, para 32)

"32. For the aforesaid reasons, we are of the view that where, in a suit on a promissory note, the case of the defendant as to the circumstances under which the promissory note was executed is not accepted, it is open to the defendant to prove that the case set up by the plaintiff on the basis of the recitals in the promissory note, or the case set up in suit notice or in the plaint is not true and rebut the presumption under Section 118 by showing a preponderance of probabilities in his favour and against the plaintiff. He need not lead evidence on all conceivable modes of consideration for establishing that the promissory note is not supported by any consideration whatsoever. The words 'until the contrary is proved' in Section 118 do not mean that the defendant must necessarily show that the document is not supported by any form of consideration but the defendant has the option to ask the Court to consider the non-existence of consideration so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that consideration did not exist. Though the evidential burden is initially placed on the defendant by virtue of Section 118 it can be rebutted by the defendant by showing a preponderance of probabilities that such consideration as stated in the pronote, or in the suit notice or in the plaint does not exist and once the presumption is so rebutted, the said presumption 'disappears'. For the purpose of rebutting the initial evidential burden, the defendant can rely on direct evidence or circumstantial evidence or on presumptions of law or fact. Once such

convincing rebuttal evidence is adduced and accepted by the Court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the plaintiff who has also the legal burden. Thereafter, the presumption under Section 118 does not again come to the plaintiff's rescue. Once both parties have adduced evidence, the Court has to consider the same and the burden of proof loses all its importance.

38. If for the purpose of a civil litigation, the defendant may not adduce any evidence to discharge the initial burden placed on him, a 'fortiori' even an accused need not enter into the witness box and examine other witnesses in support of his defence. He, it will bear repetition to state, need not disprove the prosecution case in its entirety as has been held by the High Court.

39. A presumption is a legal or factual assumption drawn from the existence of certain facts.

40. In P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd edition, at page 3697, the term 'presumption' has been defined as under:

"A presumption is an inference as to the existence of a fact not actually known arising from its connection with another which is known.

A presumption is a conclusion drawn from the proof of facts or circumstances and stands as establishing facts until overcome by contrary proof.

A presumption is a probable consequence drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged but of which there is no direct proof. It follows, therefore that a presumption of any fact is an inference of that fact from others that are known". (per ABBOTT, C.J., R. v. Burdett, (4 B. & Ald, 95, 161)

The word 'Presumption' inherently imports an act of reasoning - a conclusion of the judgment; and it is applied to denote such facts or moral phenomena, as from experience we known to be invariably, or commonly, connected with some other related facts. (Wills on Circumstantial Evidence)

A presumption is a probable inference which common sense draws from circumstances usually occurring in such cases. The slightest presumption is of the nature of probability, and there are almost infinite shades from slight probability to the highest moral certainty. A presumption, strictly speaking, results from a previously known and ascertained connection between the presumed fact and the fact from which the inference is made.

Having noticed the effect of presumption which was required to be raised in terms of Section 118(a) of the

Act, we may also notice a decision of this Court in regard to 'presumption' under Section 139 thereof.

41. In *Hiten P. Dalal v. Bratindranath Banerjee* : (2001)6SCC16, a 3- Judge Bench of this Court held that although by reason of Sections 138 and 139 of the Act, the presumption of law as distinguished from presumption of fact is drawn, the court has no other option but to draw the same in every case where the factual basis of raising the presumption is established. Pal, J. speaking for a 3-Judge Bench, however, opined: (SCC pp.24-25, paras 22-23)

"22. ...Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when,

'after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists'.

Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "prudent man".

42. The court, however, in the fact situation obtaining therein, was not required to go into the question as to whether an accused can discharge the onus placed on him even from the materials brought on records by the complainant himself. Evidently in law he is entitled to do so.

43. In *Goaplast (P) Ltd. v. Chico Ursula D'Souza and Anr.* : (2003)3SCC232, upon which reliance was placed by the learned Counsel, this Court held that the presumption arising under Section 139 of the Act can be rebutted by adducing evidence and the burden of proof is on the person who want to rebut the presumption. The question which arose for consideration therein was as to whether closure of accounts or stoppage of payment is sufficient defence to escape from the penal liability under Section 138 of the Act. The answer to the

question was rendered in the negative. Such a question does not arise in the instant case.

44. In Kundan Lal Rallaram v. Custodian, Evacuee Property, : AIR 1961 SC 1316, Subba Rao, J., as the learned Chief Justice then was, held that while considering the question as to whether burden of proof in terms of Section 118 had been discharged or not, relevant evidence cannot be permitted to be withheld. If a relevant evidence is withheld, the court may draw a presumption to the effect that if the same was produced might have gone unfavourable to the plaintiff. Such a presumption was itself held to be sufficient to rebut the presumption arising under Section 118 of the Act stating: (AIR p.1319, para 5)

"Briefly stated, the burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact. We are not concerned here with irrebuttable presumptions of law".

18. Even though in ***M.S. Narayana Menon @ Mani*** the controversy fell in the gamut of presumption relating to Section 139 read with Section 118 but the general principles of presumption would remain the same inasmuch as in ***C.C. Alavi Haji*** the supreme court in unequivocal terms held that the provisions of law as enunciated under Section 114 of the Evidence Act and Section 27 of the General Clauses Act would be applicable for purpose of drawing presumption as to the service of the notice. In subsequent decision in ***Vijay vs. Laxman and Anr.*** reported in ***(2013)3SCC86***, the apex court has taken care of the general presumption having regard to the statutory presumption under Section 139 of the NI Act read with Section 118(a) of the NI Act where one of the two Judges who authored the said judgment (T.S. Thakur, J) while supplementing has approvingly quoted what is the proposition of ***M.S. Narayana Menon @ Mani***. In ***M/s. Ajeet Seeds Ltd. vs. K. Gopala Krishnaiah*** reported in ***AIR 2014 SC 3057*** the apex court further revisited and expressed its approval of ***C.C. Alavi Haji*** as under:

"8. This Court then referred to Vinod Shivappa's case, where the above aspects have been highlighted. This Court quoted the following paragraph from Vinod Shivappa with approval.

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.

9. This Court then explained the nature of presumptions Under Section 114 of the Evidence Act and Under Section 27 of the GC Act and pointed out how these two presumptions are to be employed while considering the question of service of notice Under Section 138 of the NI Act. The relevant paragraphs read as under:

13. According to Section 114 of the Act, read with Illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. 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 of G.C. Act is extracted below:

27. Meaning of service by post.-Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve' or either of the expressions '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.

14. 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. [Vide Jagdish Singh v. Natthu Singh : (1992) 1 SCC 647; State of M.P. v. Hiralal and Ors. : (1996) 7 SCC 523 and V. Raja Kumari v. P. Subbarama Naidu and Anr.: (2004) 8 SCC 74] 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.

10. It is thus clear that Section 114 of the Evidence Act 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. Section 27 of the GC Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. It is not necessary to 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.

(Emphasis added)

11. Applying the above conclusions to the facts of this case, it must be held that the High Court clearly erred in quashing the complaint on the ground that there was no recital in the complaint that the notice Under Section 138 of the NI Act was served upon the accused. The High Court also erred in quashing the complaint on the ground that there was no proof either that the notice was served or it was returned unserved/unclaimed. That is a matter of evidence. We must mention that in C.C. Alavi Haji, this Court did not deviate from the view taken in Vinod Shivappa, but reiterated the view expressed therein with certain clarification. We have already quoted the relevant paragraphs from Vinod Shivappa where this Court has held that service of notice is a matter of evidence and proof and 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. These observations are squarely attracted to the present case. The High Court's reliance on an order passed by a two-Judge Bench in Shakti Travel & Tours is misplaced. The order in Shakti Travel & Tours does not give any idea about the factual matrix of that case. It does not advert to rival submissions. It cannot be said therefore that it lays down any law. In any case in C.C. Alavi Haji, to which we have made a reference, the three-Judge Bench has conclusively decided the issue. In our opinion, the judgment of the two-Judge Bench in Shakti Travel & Tours does not hold the field any more."

19. There cannot be any amount of doubt that there is no provision of drawing the statutory presumption on service of notice under the NI Act as is available in respect of the liability of the drawer under Section 139 and Section 118(a) of the NI Act. But Section 27 of the General Clauses Act authorises the court to draw a statutory presumption if certain conditions are proved and remained un-rebutted. Similarly the apex court has developed the law over the years importing the provisions of Section 114 of the Evidence Act as the essential tool to presume certain facts based on the facts proved in the evidence. It appears that there had been no occasion for the

Supreme Court to deal with the proposition as laid down by **M.D. Thomas**. There cannot be any amount of ambiguity that **M.D. Thomas**, even from a very narrow context, has followed the principles of **D. Vinod Shivappa v. Nanda Belliappa** which has been distinguished and clarified by the Supreme Court in **C.C. Alavi Haji** but that aspect of the matter was not at all considered in **M.D. Thomas**. In **C.C. Alavi Haji**, the apex court in unequivocal term has held that when Section 114 of the Evidence Act, 1872 is applied to the incidence of delivery of the communication/notice sent by the post, it enables the court to presume that in the common course of natural events, the communication/notice have been delivered at the address of the addressee. What is deemed under Section 27 of the General Clauses Act 1897, can equally be inferred by presumption under Section 114 of the Evidence Act. Section 27 of the G. C. Act, 1897 provides for deeming the certain act in regard to the service. Since the law as developed by a larger Bench of the apex court in **C.C. Alavi Haji** has not at all been considered in **M.D. Thomas** and the proposition is in stark contrast with the proposition advanced in **C.C. Alavi Haji**, that cannot be accepted as a binding precedent as the larger Bench decision of the apex court would hold the field in such conflict phenomenon.

20. On examination of the records and the judgment as questioned in this appeal, it appears that it has been established by the complainant by adducing adequate evidence that the notice sent by the registered post to comply the provisions of Clause (b) of Section 138 of the NI Act was delivered in the address of the respondent No.1, the accused and that was received by his wife.

Thus, the trial court ought to have held by importing the provisions of Section 27 of the General Clauses Act that the notice has been properly served. Even on applying the general principles as provided under Section 114 of the Evidence Act, it has to be presumed that since the wife has received the registered notice it has definitely been brought to the notice of the respondent No.1, unless, of course, the respondent No.1 has rebutted such presumption by adducing evidence. It is apparent from the records that the respondent did not adduce or advance any evidence for rebutting the presumption. Thus, it has to be presumed on the fact as established that the registered letter received by the wife of the respondent No.1 has been delivered or brought to the notice of the respondent No.1 on the day when the said notice was served on his residential address. Thus, the finding of the trial court that "*Since the accused himself did not receive the notice and the same was received by his wife it cannot be held that the notice has been properly served*" cannot stand scrutiny of law and accordingly is interfered with.

21. Having held so, this court further proposes that the matter shall be remitted back to the trial court for passing the fresh judgment having regard to the law as interpreted by this Court. For purpose of that exercise the impugned judgment and order is set aside to the extent so far it holds that notice was not properly served. The trial court shall pass the judgment within eight weeks from the date of receipt of the copy of this judgment and order. On receipt of the copy of the judgment and order the trial court shall

only fix the date of hearing and thereafter pass the judgment and order in accordance with law.

In the result, this appeal stands allowed to the extent as indicated above.

JUDGE

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