

Crl.R.C.No.773/2010

Bail Slip

The Petitioner/Accused Viz., P.Balasubramanian, was directed to be released on bail as per the Order of this Court dated 13.08.2010 in M.P.NO.1 of 2010 in Crl.R.C.No.773/2010.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.04.2015

Coram

THE HONOURABLE MR. JUSTICE B.RAJENDRAN

Criminal Revision Case No.733 of 2010

1. M/s.Jayalakshmi Textiles  
rep.by partner Balasubramanian  
No.9, 4th Pulikuthi Street  
Gugai, Salem.
2. P.Balasubramanian .. Petitioners (Accused)

vs

S.K.Kolandasamy .. Respondent (Complainant)

Criminal Revision case filed under Sections 397 and 401 of Cr.P.C. against the judgment dated 22.04.2010 passed by the learned Additional District and Sessions Judge, (Fast Track Court No.II), Gobichettipalayam in C.A.No.122 of 2008 confirming the judgment dated 21.04.2008 passed by the learned Judicial Magistrate No.II, Gobichettipalayam in C.C.No.247 of 2006.

For Petitioners : Mr.C.K.M.Appaji  
For Respondent : Mr.N.Sudharsan

ORDER

By the judgment dated 21.04.2008 in C.C.No.247 of 2006 passed by the learned Judicial Magistrate No.II, Gobichettipalayam, the petitioner was convicted for the offence punishable under Section 138 of the Negotiable Instruments Act and sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs.5,000/-, in default, to undergo two months simple imprisonment. Aggrieved by the same, the petitioner filed Crl.A.No.122 of 2008 and the same was dismissed by the learned Additional District and Sessions Judge, Fast Track Court No.II, Gobichettipalayam vide order dated 22.04.2010. It is against those concurrent decisions of the court below, the present Criminal Revision Case is filed.

2. The case of the complainant/respondent in brief is as follows:

The first accused is a firm and the second accused is the partner of the said firm. The accused have borrowed a sum of Rs.1,00,000/- from the complainant for development of their business and on such borrowal, a post dated cheque towards repayment of the cheque amount was issued. According to the complainant, inspite of repeated demands, the complainant did not repay the borrowed amount. Ultimately, the accused instructed the complainant to present the cheque for collection. Accordingly, the complainant presented the cheque for clearance, but it was dishonoured on the same day for the reason that Account was closed. Therefore, the complainant/respondent issued a statutory notice dated 03.10.2006 calling upon the petitioner/accused to repay the cheque amount, but there was no response. Hence, the complaint under Section 138 of the Negotiable Instruments Act was filed.

3. The only ground raised by the learned counsel for the petitioner in this criminal revision case is that the petitioner has shifted his residence, hence the statutory notice said to have been issued by the complainant has not been received by him. When the statutory notice has not been received by the accused, as per the judgments of this Court reported in 2008 1 DCR 648 [A.Muthusamy vs. G.Ayyappan] and [2011] 1 MLJ CrL.752 [K.Rajamanickam vs. P.Arumugam], it will amount to insufficient service of notice. He would further submit that this Court has also held that even the postal endorsement "not claimed" cannot be equated to "refused" and when the postal endorsement found on a notice issued to a person is "not claimed", it cannot be concluded that the petitioner/accused had refused to receive the same, when it was sought to be delivered to him.

4. Learned counsel for the petitioner would further rely upon the Hon'ble Supreme Court Judgment reported in 2010 STPL(LE) 43320 SC [M.D.Thomas vs. P.S.Jaleel and another] wherein the Apex Court has held that even the notice received by the family member of the accused will not be enough to prove that service of notice on the accused is completed. Therefore, he would contend that when the notice has not been served, the conviction ordered by the trial Court and confirmed by the first appellate Court is not correct. He would also submit that the petitioner was only a partner of the firm at the relevant point of time and in fact the account itself was closed and consequently, the Over Draft facility available to the firm also has been cancelled. Therefore, the very cheque issued for payment of the amount in the name of the firm will not bind the petitioners in any manner. Accordingly, the learned counsel for the petitioner would pray for setting aside the conviction and sentence imposed on him.

5. Learned counsel appearing for the respondent/complainant categorically stated that as per Ex.D1 notice, the petitioner/accused has stated that he had surrendered all the cheque bearing Nos.891885 to 891900; however, the disputed cheque, viz., Ex.P1 is bearing No.993831. Therefore, even as per the admission of the petitioner/accused the dishonoured cheque was not surrendered. Accordingly, he would submit that the judgments rendered by both the Courts below does not call for any interference.

6. As regards service of notice, the learned counsel for the respondent/complainant would submit that the statutory notice was posted only to the correct and proper address of the petitioner/accused. However, the submission made by the petitioners that the residence was shifted has to be proved only by them. The onus lies on the petitioners who avers as regards the shifting of the residence, but they have not proved it in a manner known to law. He would also contend that as per Section 139 of the Act, when the accused has not even rebutted that there is no legally enforceable liability on his part, then the presumption is that the cheque has been issued for a legally enforceable debt or liability. The learned counsel would further contend that as per the decision rendered by the Full Bench of the Hon'ble Supreme Court in the case of C.C.Alavi Haji vs. Palapetty Muhammed and another in Appeal (Crl.) No.767 of 2007 dated 18.05.2007, it was held that when the notice was sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issuance of notice in terms of Clause (b) of Proviso to Section 138 of the Act stands complied with, since the notice is issued to enable the drawer of the cheque to make payment within 15 days, i.e., either he can pay the cheque amount or raise his defence rebutting any liability on his part. It was further held that even if notice is not served, the drawer of the cheque can still pay the amount and discharge his liability. Therefore, what is required under the Act is that the notice has to be sent to the correct address as contemplated under Section 27 of the General Clauses Act, 1897. When there is compliance of Section 27 of the General Clauses Act, 1897, merely because of non delivery of the statutory notice, for any reason whatsoever, especially when it is proved that it was sent to the proper and correct address, then the burden shifts on the person to prove that he was deliberately not served the statutory notice.

7. The learned counsel for the respondent would also rely upon the Supreme Court judgment rendered in the case of K.Bhaskaran vs. Sankaran Vaidhyan Balan in Criminal Appeal No.1015 of 1999 dated 29.09.1999 for the proposition that in the case of dishonoured cheque, notice of demand sent to drawer but received back with postal endorsement 'refused' or 'unclaimed', it is presumed that service is completed unless the addressee shows that it was not really served and that he was not responsible for such non-service. Therefore, he would contend that merely because of non-service of the statutory notice, the conviction rendered against the petitioners cannot be set aside. Accordingly, he would pray for the dismissal of the Criminal Revision Case.

8. Heard both sides. By consent, the main revision itself is taken up for final disposal.

9. An interesting question of law arises for consideration in this case as to whether in a proceedings under Section 138 of the Negotiable Instrument Act, if the statutory notice is sent to the proper and correct address and returned unclaimed or unserved, or if it is not served on the accused for any other reason, whether that by itself would vitiate the complaint filed by the complainant under the said Act.

10. In this case, the first petitioner/accused is a firm in which the second petitioner is a partner. The disputed cheque was issued in the name of the firm towards repayment of the borrowed amount. Thereafter, it is stated that the petitioner firm was closed and the second petitioner also shifted his residence elsewhere. While invoking the provisions contained under Section 138 of the Negotiable Instrument Act, the complainant/ respondent sent a statutory notice to the petitioners to the known address of the firm. Since the Office itself has been closed, the notice could not be served. In such circumstance, the petitioner/accused contend that the notice was sent to his erstwhile address from where, he has shifted therefore, notice was not served on him and it would vitiate the complaint. He would further contend that he came to know about the proceedings initiated by the respondent under Section 138 of the Negotiable Instruments Act through third parties. It is an admitted fact that there were many proceedings under Section 138 of the Negotiable Instruments Act initiated against the petitioner firm and when the second petitioner appeared for one such case, it came to his knowledge that notice in this case has been served. Therefore the learned counsel for the petitioners contend that neither the notice under section 138 of the Act nor summons were served on him. Both the courts below failed to appreciate this fact which led to the conviction of the petitioners. Therefore, the learned counsel for the respondent prayed that non service of statutory notice is not fatal to the case as has been held by this Court in the decisions reported in 2008 1 DCR 648 and [2011] 1 MLJ Cr1.752 which are mentioned supra.

11. Before dealing further in the matter, it is pertinent to point out here that in the judgment reported in 2008(1) DCR 648 and [2011] 1 MLJ Cr1.752 [cited supra] unfortunately, my learned Brother was not appraised of the Full Bench judgment of the Hon'ble Apex Court in the case of C.C.Alavi Haji vs. Palapetty Muhammed and another [cited supra] by the learned Counsel on either side. In fact, even in the Supreme Court judgment, which has been relied upon on by the counsel for petitioner's reported in 2010 STPL(LE)43320 SC delivered on 13.04.2009, the Full Bench judgment of the Apex Court in the case of C.C.Alavi Haji vs. Palapetty Muhammed and another [cited supra], which was delivered much earlier to the said judgment, viz., on 18.05.2007 was not brought to the notice of the Hon'ble Apex Court. Relying upon the said judgment this Court has passed the judgments reported in 2008 (1) DCR 648 and [2011] 1 MLJ Cr1.752 [cited supra] by holding that if the statutory notice is not properly served, then it is fatal to the case.

12. When the matter is taken up today for hearing, the learned Counsel for the respondent/complainant brought to the notice of this Court the Full Bench judgment of the Supreme Court dated 18.05.2007. In the said case reference was made by a Division Bench of the Apex Court regarding the service of notice. A reference was also made to the earlier judgment of the Apex Court in the case of D.Vinod Shivappa vs. Nanda Belliappa. There the question arose is as to whether the accused has got any defence to contend that the statutory notice was not served on him or the complainant deliberately avoided the service of the notice. The Supreme Court after elaborate

discussion, referring to Bhaskaran's case [cited supra] held as follows:

"8. Since in Bhaskaran's case (supra), the notice issued in terms of clause (b) had been returned unclaimed and not as refused, the Court posed the question: Will there be any significant difference between the two so far as the presumption of service is concerned? It is was observed that though Section 138 of the Act does not require that the notice should be given only by post, yet in a case where the sender has dispatched the notice by post with correct address written on it, the principle incorporated in Section 27 of the General Clauses Act, 1897 [for short G.C.Act], could profitably be imported in such a case. It was held that in this situation service of notice is deemed to have been effected on the sendee unless he proves that it was not really served and that he was not responsible for such non-service",

13. It is evident from the above decision that even if a notice is sent and it is returned unclaimed, if it is clearly proved that it was sent to the correct and proper address, then it can be construed that service of notice is proper. The Honourable Supreme Court also relied on the decision in the case of D.Vinod Shivappa vs. Nanda Belliappa held that even if there has been no service of notice then the unscrupulous person after issuing the cheque would evade the service of notice as the same has to be served within a stipulated time especially when if such notice is not served in time, he can never be prosecuted. In this connection, the Apex Court held as follows:

"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 issue 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 clauses (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 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: 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."

14. In this decision, the Apex Court held that the decision rendered in Vinod Shivappa's case did not take into consideration Section 114 of the Indian Evidence Act and Section 27 of the General Clauses Act. It was further held as follows:-

"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 inspite 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 vs. Natthu Singh; State of M.P. vs. Hiralal and Ors. and V.Rajakumari vs. P.Subbarama Naidu and another]. 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.

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 emphasize 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 afore-noted 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.

16. As noticed above, the entire purpose of requiring a notice is to give an opportunity to the drawer to pay the cheque amount within 15 days of service of notice and thereby free himself from the penal consequences of Section 138. In Vinod Shivappa (supra), this Court observed: One can also conceive of cases where a well intentioned drawer may have inadvertently missed to make necessary arrangements for reasons beyond his control, even though he genuinely intended to honour the cheque drawn by him. The law treats such lapses induced by inadvertence or negligence to be pardonable, provided the drawer after notice makes amends and pays the amount within the prescribed period. It is for this reason that Clause (c) of proviso to Section 138 provides that the Section shall not apply unless the drawer

of the cheque fails to make the payment within 15 days of the receipt of the said notice. To repeat, the proviso is meant to protect honest drawers whose cheques may have been dishonoured for the fault of others, or who may have genuinely wanted to fulfil their promise but on account of inadvertence or negligence failed to make necessary arrangements for the payment of the cheque. The proviso is not meant to protect unscrupulous drawers who never intended to honour the cheques issued by them, it being a part of their modus operandi to cheat unsuspecting persons."

15. Admittedly, there are several complaints pending against the petitioners firm which were filed under Section 138 of the Negotiable Instruments Act and all the cases are pending before one and the same Court. Even the second petitioner admits that he came to know about the present proceedings initiated by the respondent when he went to the Court to some other case and also entered appearance through a lawyer. However, conveniently the petitioners avoided the service of notice. Can these persons be shown any leniency? Definitely not. When a person adopted deceitful modes to avoid service of notice and then takes a defence that notice was not served on him, the Court cannot give any protection to him as contemplated under Section 138 of the Act. In fact, the Supreme Court goes one step further and held that summons or notice is being served in a proceedings under Section 138 of the Act only to give a chance to the drawer of the cheque to make the payment and if the cheque amount is paid within 15 days, he will be absolved from the crime. Further, even after receipt of the summons in the calendar case, the drawer of the cheque is given another 15 days time to make out the payment. If the payment is made, then also the offence is not made out. In this context, the Honourable Supreme Court in the above said decision held as follows:-

"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' 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.

16. In the case reported in C.C.Alavi Haji's case [cited supra] before the Hon'ble Supreme Court, notice was served on the accused on 04.08.2001, but it was returned on 10.08.2001 with an endorsement that the accused was out of station. In such circumstances, it was held that notice was sent to the proper and correct address. In the above stated circumstances, it was held that non delivery of notice cannot be a ground to set aside the conviction and sentence imposed on the drawer of the cheque.

17. In this connection, the learned counsel for the respondent/ complainant also referred to the judgment of the Hon'ble Supreme Court in K.Bhaskaran's case [cited supra] which has been referred to by the Full Bench of the Hon'ble Supreme Court in C.C.Alavi Haji's case [cited supra]. In that case, notice has been sent to the drawer but returned back with the postal endorsement, viz., "refused" or "unclaimed". In such circumstances, it was held that service of notice is presumed to be completed unless the addressee shows that it was not really served and that he was not responsible for such non-service.

18. In the case on hand, the petitioner/accused had closed the company and also shifted the residence, however, the notice was in fact served to the correct and proper address. In this context, useful reference can be made to K.Bhaskaran's case [cited supra], wherein reference is made to Black's Dictionary regarding the meaning for 'giving of notice'.

"19. In Black's Law Dictionary, "giving of notice" is distinguished from "receiving of the notice" (vide page 621). "A person notifies or gives notice to another by taking such steps as may be reasonably required to inform the other in the ordinary course, whether or not such other actually comes to know of it." A person "receives" a notice when it is duly delivered to him or at the place of his business.

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 in 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 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 emphasized that "provisions relating to giving of notice often receive liberal interpretation." (vide page 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 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.

22. It is well settled that a notice refused to be accepted by the addressee can be presumed to have been served on him, [vide Harchan singh vs. Smt. Shivarani and Ors., 1981(2) SCC 535 and Jagdish Singh v. Natthu Singh, 1992(1) SCC 647].

23. Here the notice is returned as unclaimed and not as refused. Will there be any significant difference between the two so far as the presumption of service is concerned? In this connection a reference to Section 27 of the General Clauses Act will be useful. The Section reads thus:

"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."

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."

19. In this case, notice was sent to the company address to which the second petitioner/accused is a partner. The address which is indicated in the statutory notice is correct and the service is deemed to be effected. Though the petitioner claims he has shifted his place of residence, the same was never informed to the respondent/complainant. However, he has admitted in his evidence that he came to know about the service of notice when he appeared

before the trial court in connection with some other case of similar nature. Therefore, I hold that the statutory notice has been duly served on the petitioner/accused in compliance with the provisions of the Negotiable Instruments Act and it will not vitiate the complaint preferred by the complainant in any manner. Under such circumstance, the plea of the petitioners that they were not served with the summons or statutory notice cannot be accepted. Consequently, the contention raised by the petitioner/accused that the conviction and sentenced ordered by the trial court has to be set aside is rejected as has been held by the Full Bench judgment of the Hon'ble Apex Court in C.C.Alavi Haji's case [cited supra].

20. For all the above stated reasons, I do not find any ground to interfere with the reasoned order passed by both the Courts below.

21. In the result, the Criminal Revision Case is dismissed. In view of the dismissal of the Criminal revision case, the trial court is directed to take necessary steps as are necessary to secure the presence of the second petitioner/accused for undergoing the remaining period of sentence. It is needless to say that the sentence already undergone by the second petitioner can be given set off as contemplated under Section 428 of Cr.P.C.

Sd/-  
Assistant Registrar

True Copy

Sub Assistant Registrar

vj2

To

1. The Additional District and Sessions Judge  
(Fast Track Court No.II), Gobichettipalayam
2. The Judicial Magistrate No.II, Gobichettipalayam
- 3.-do- through Chief Judicial Magistrate, Erode District.

Cr1.RC.No.733 of 2010

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