

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

% Decided on: 13th January, 2017

+ **CRL.M.C. 2626/2011**

GAJENDER SHARMA Petitioner

Represented by: Mr. Bijender Singh, Ms.
Vidushi, Advs.

versus

SREE GOKULAM CHIT & FINANCE PVT LTD Respondent

Represented by: None

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. A complaint under Section 138 of the Negotiable Instruments Act (in short NI Act) was filed by the respondent against the petitioner as proprietor of Vashisht Transport Company being criminal complaint No.384/2006. In the complaint respondent alleged that the petitioner subscribed to a chit fund group and took payment for a bid through cheque after deducting the bid amount. After some payments in installments were made the petitioner became irregular in making the payments of the installments towards the chit fund. In order to discharge his liability, the petitioner issued cheque bearing No.645580 dated 14th September, 2006 for ₹5,47,740/- drawn on Indian Overseas Bank in favour of the complainant with the assurance that the same would be honoured on presentation. When the cheque was presented the same was dishonored with the remark 'account closed' vide memo dated 21st

September, 2006. Thus the respondent issued a legal notice dated 16th October, 2006 under Registered AD and UPC. The notice sent through UPC had been duly served on the petitioner, however notice sent through registered AD has not been received back. Despite service of notice since the petitioner did not pay the amount nor replied, he had committed offence punishable under Section 138 NI Act.

2. The case of the petitioner is that no summons were served on him and that no legal notice was served on him as the same was sent on a fictitious and non-existent address at C-16, Amushi Industrial Area, Nandur Gant, Lucknow, UP. Thus the ingredients of offence punishable under Section 138 NI Act not being fulfilling the complaint was liable to be quashed.

3. On 2nd January, 2007 summons were issued to the petitioner on the allegations of the respondent as aforesaid. On 18th November, 2007 the process server HC Bhag Mal Singh submitted his report that there was no property with the number C-16 in the Amushi Industrial Area, Lucknow, UP, and summons could not be served. Thus the learned Metropolitan Magistrate on 21st November, 2007 directed the respondent to furnish fresh address and issued fresh summons. On the next date i.e. 2nd June, 2008 the learned Trial Court noted that the respondent had not complied with the order, however the order sheet noted presence of the accused. Learned counsel for the petitioner submits that someone was brought to impersonate as an accused to mislead the Court. Neither the vakalatnama of the alleged Advocate was placed on record nor who appeared is clear. On 2nd May, 2009 the learned PO was on leave. Thus the learned Link Magistrate fixed the matter for consideration on the issue of territorial jurisdiction for 22nd May, 2009 as both the cheque and the accused arrayed were not of Delhi.

On 3rd June, 2009 the learned Metropolitan Magistrate proceeded to issue non-bailable warrants against the petitioner returnable for 15th November, 2010. The petitioner discovered that two other complaints were pending titled as '*Sri Ram Investment and Finance Company Vs. Gajender Sharma*'. However, no files could be located as the same were transferred. The petitioner had no knowledge of the case, however an application for inspection of the judicial file was moved when it was revealed that the address of the petitioner provided in the notice and the complaint were fictitious.

4. Challenging the order dated 2nd January, 2007 summoning the petitioner and the order dated 3rd June, 2009 issuing non-bailable warrants against the petitioner and also seeking quashing of the proceedings in the above-noted complaint under Section 138 NI Act, the petitioner filed a revision petition before the learned ASJ which was decided by the impugned order dated 12th October, 2010.

5. Vide the impugned order though the learned Additional Sessions Judge set aside the non-bailable warrants issued against the petitioner, however declined to set aside the summoning order and quash the complaint. Relevant portion of the impugned order is as under:

“6. Any how coming to the other part of the order directing issuance of NBW, the plea of the accused is that his address in the demand notice as well as in the complaint was wrongly mentioned as C -18 Amushi Industrial Area, Nandur Gant, Lucknow, UP which was found to be non-existing address as per report on summons for 21.11.2007. Accused was marked present with counsel Shri Sushil Singh, Advocate due to mistake, by ld.Link MM on 02.06.2008. Vakaltname of said counsel is not available on record, accused had not been served for that date. The accused came to know of the case when he

went to the Court of Ld.MM on 03.06.2009 for finding out other case titled as Shri Ram Investment and Finance Company Vs. Gajender Sharma.

7. I do not think it necessary to enter into this controversy whether address of the accused was correct or not. The same would be decided by the Id.Trial Court after recording evidence during trial. At present, it is sufficient that since accused was not served for 02.06.2008, the vakaltnama in favour of Sh.Sushil Singh Advocate is not available on the file of trial court, the bail bond of the accused was not taken, it can be presumed that he was wrongly marked present.

8. But that is not the end of the matter. Now the accused has come to know of the case. It will be in the fitness of things to direct him to appear before Ld. MM without waiting for fresh service of summons on the address of 37B, Bhawani Pur, Kanpur, UP given by him in the revision. Accordingly, it is directed that issuance of NBW is set aside. The accused is directed to appear before Ld. MM on 19.10.2010.”

6. Learned counsel for the petitioner submits that the learned ASJ failed to decide the very maintainability of the complaint case for if no legal notice was served on the petitioner as required under Section 138 of the NI Act, the complaint was not maintainable. Admittedly even as per the Trial Court Record the address on which legal notice was issued to the petitioner i.e. C-16, Amushi Industrial Area, Nandur Gant, Lucknow, UP was a non-existent address.

7. When the matter came up before this Court on 10th August, 2011 this Court was pleased to stay the proceedings before the learned Trial Court till the next date of hearing which order continued. Despite service none appeared for the respondent except on few dates when the CrI.M.C.2626/2011 was dismissed for non-prosecution on 11th December, 2013. An application for restoration of the main petition being CrI.M.A.

219/2014 was filed wherein notice was issued to the respondent which was duly served and learned counsel for the respondent Mr. Gaurav Kumar appeared when the Crl.M.C. 2626/2011 was restored to its original position on 2nd April, 2014. Thereafter none is appearing for the respondent despite repeated adjournment except that on one date a proxy counsel appeared. Since learned counsel for the respondent was not appearing despite service, this Court summoned the Trial Court Record on July 12, 2016 on which a report was received that the Trial Court Record had been weeded out. Thus this Court sought for an explanation.

8. A report has been received from the District and Sessions Judge office, Headquarter according to which two persons responsible for the weeding of the record were Shri B.S. Rawat and Ms. Raj Kumari who were required to take necessary precaution for preservation of the record in compliance of the order of this Court, however they have since passed away, thus no action can be taken against them. Thus this Court has proceeded to hear the matter on the basis of records available before this Court.

9. There is no challenge to the finding of the learned Metropolitan Magistrate that the address C-16, Amushi Industrial Area, Nandur Gant, Lucknow, UP was a non-existent address. This was upheld by the revisional Court vide the impugned order dated 12th October, 2010. As per the complaint legal notice as required under Section 138 of the NI Act was issued to the petitioner at the address C-16, Amushi Industrial Area, Nandur Gant, Lucknow, UP. According to the complaint notice through UPC was duly served i.e. deemed to be served and registered AD was not received, hence it was deemed service. However, there can be no deemed service on a

non-existent address. Thus, essential ingredient of Section 138 NI Act which reads as under has not been complied with.

“138. Dishonour of cheque for insufficiency, etc., of funds in the account. —Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.”

10. Thus, there is merit in the contention of learned counsel for the petitioner and since no notice of legal demand was served on the petitioner/accused complaint case No. 384/2006 titled as ‘*M/s. Sree Gokulam Chit & Finance Co. Pvt. Ltd. Vs. Shri Gajender Sharma*’ is quashed. Since this

Court has quashed the complaint, there is no need for directions to reconstruct the record.

11. Petition is disposed of. Order dasti.

(MUKTA GUPTA)
JUDGE

JANUARY 13, 2017
‘ga’

