

HIGH COURT OF CHHATTISGARH, BILASPURCr.M.P.No.26 of 2017

Vijay Kumar Barman S/o-Dujeram Barman, aged – 38 years, R/o-
House No.146, S.B.P. Travel Agency, Hasaud Road, Parsada, Tahsil-
Jaijaipur, Dist-Janjgir-Champa (CG)

---- Petitioner

Versus

Balkrishna Bhandari S/o-Devichand Bhandari, aged-65 Years, R/o-
New Amapara, Behind Dr.Vandana Gupta Nursing Home, Ambedkar
Marg, Durg, Tahsil and Dist-Durg (CG)

---- Respondent

Cr.M.P.No.344 of 2017

1. Smt. Pushpa Barman W/o-Vijay Barman, aged-35 years,
 2. Vijay Kumar Barman S/o-Shri Dujeram Barman (wrongly mentioned as J.R. Barman), aged – 38 years.
- Both are R/o-Parsada, P.S. Hasaud, Tahsil-Jaijaipur, Dist-Janjgir-Champa (CG)

---- Petitioners

Versus

Sunil Kumar Singh S/o-Apsar Singh aged 33 years, R/o-House No.27
Ward No.24, Santoshi Para, Camp-2 Bhilai, P.S.-Chawani, Tah.& Dist-
Durg (CG)

---- Respondent

Cr.M.P.No.345 of 2017

1. Smt. Pushpa Barman W/o-Vijay Barman, aged-36 years (age not mentioned in tilte of Impugned order)
 2. Vijay Kumar Barman S/o-Shri Dujeram Barman, aged – 39 years, (age not mentioned in tilte of Impugned order)
- Both are R/o- House No.176, S.V.T. Travels Agency, Hasaud Road, Parsada, Tahsil-Jaijaipur, Dist-Janjgir-Champa, Pin-495661 (CG)

---- Petitioners

Versus

Prakash Kumar Chaudhary S/o-Bhikhari Chaudhary R/o-Camp-1,
Bhagat Cycle Stores, Ward No.19, House No.-50 Bhilai, P.S.-Chawni,
Tahsil and Dist-Durg (CG)

---- Respondent

Cr.M.P.No.346 of 2017

1. Smt. Pushpa Barman W/o-Vijay Barman, aged-35 years

2. Vijay Kumar Barman S/o-Shri Dujeram Barman (wrongly mentioned as J.R. Barman) aged – 39 years
Both are R/o-Parsada, P.S. Hasaud, Tahsil-Jaijaipur, Dist-Janjgir-Champa (CG)

---- Petitioners

Versus

Rajesh Chauhan S/o-Late Rajbali Chauhan, aged 35 years, R/o-Ward No.24 Santoshi Para, Camp-Bhilai Tahsil and Dist-Durg (CG)

---- Respondent

And

Cr.M.P.No.810 of 2017

1. Smt. Pushpa Barman W/o-Vijay Barman, aged-35 years
2. Vijay Kumar Barman S/o-Shri Dujeram Barman, aged – 39 years
Both are R/o- House No.176, S.V.T. Travels Agency, Hasaud Road, Parsada, Tahsil-Jaijaipur, Dist-Janjgir-Champa, Pin-495661 (CG)

---- Petitioners

Versus

Bhikhari Prasad S/o-Munna Prasad, aged 46 R/o-Baikunthdham, Camp-2, Ward No.5, Poll No.-40, P.S.Chawani, Bhilai, Dist-Durg (CG)

---- Respondent

For Petitioners:-

Mr.V.C.Ottalwar, Advocate

For Respondent:-

Mr.Vipin Tiwari, Mr.Atan Ghosh and
Mr.Lavkush Kumar Sahu, Advocates

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

07/05/2019

1. Since common question of law and fact is involved in this batch of petitions, they are heard analogously and are being disposed of by this common order.
2. In this batch of petitions, the petitioners, who are husband and wife, are standing trial for offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter called as “the Act of 1881”) on complaints filed by the respective respondents herein and questioning

the orders taking cognizance for offence under Section 138 of the Act of 1881 against them on 22.4.2016, 3.8.2016, 3.8.2016, 3.8.2016 and 2.8.2016 respectively by the Judicial Magistrate First Class, Durg in Complaint Case Nos.3136/16, 6742/16, 6740/16, 6741/16 & 6705/16.

3. Mr.V.C.Ottalwar, learned counsel for the petitioners/accused, would raise a solitary submission that Shri Vijay Kumar Barman, one of the petitioners, who has signed the cheque, was issued with legal notice which was either served or served as refused or not available in the house/out of station on 25.1.2016, 30.3.2016, 30.3.2016, 30.3.2016 and 30.3.2016 respectively and on that basis, cognizance of offence under Section 138 of the Act of 1881 was taken, whereas he was languishing in jail from 27.7.2015 to 4.7.2016, as such, notices were never served to petitioner-Vijay Kumar Barman and acknowledgment was managed, as such, no notice in writing demanding the alleged sum was served to him, therefore, cause of action is not complete as per Section 138 of the Act of 1881 and complaints were not maintainable and are liable to be set aside.
4. Mr.Vipin Tiwari, Mr.Atanu Ghosh and Mr.Lavkush Kumar Sahu, learned counsel for the respective respondent, would submit that postal acknowledgment clearly reveals that accused persons refused to accept postal article issued by respective respondent and accordingly endorsement has been recorded, which is due service of notice and even in one case, though he was available but he has been stated to be out of station and in view of the judgment of the Supreme Court in the matter of V. Raja Kumari v. P. Subbarama Naidu and

another¹, notices have been served to the accused, as such, the petitions deserve to be dismissed.

5. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.
6. Following chart would show the date of issuance of notice and date of refusal of notice or not available in the house/out of station were endorsed:-

Case No.	Date of Issuance of legal notice	Date of service of notice/refusal
CrMP No.26/2017	20.1.2016	25.1.2016
CrMP No.344/2017	19.3.2016	30.3.2016
CrMP No.345/2017	21.3.2016	30.3.2016
CrMP No.346/2017	21.3.2016	30.3.2016
CrMP No.810/2017	21.3.2016	30.3.2016

7. Now, the question is whether the complainants have made demand for payment of the amount in question by giving notice in writing under second proviso to Section 138 of the Act of 1881 ?
8. The Supreme Court in the matter of V. Raja Kumari (supra) has held that burden to show that the accused drawee had managed to get an incorrect postal endorsement lies on the complainant and effects thereof have to be considered during the trial on the background facts of the case. It was observed as under:-

1 (2004) 8 SCC 774

“17. At this juncture it is relevant to take note of order passed by this Court in State of M.P. v. Hiralal². It was, inter alia, noted as follows: (SCC p. 524, para 1)

“1. In view of the office report, it would be clear that the respondents obviously managed to have the notice returned with postal remarks 'not available in the house', 'house locked' and 'shop closed' respectively. In that view, it must be deemed that the notices have been served on the respondents.”

9. In the instant case, postal acknowledgment clearly reveals that the petitioners/accused-Vijay Kumar Barman and Smt.Pushua Barman have refused to accept notices in two cases and in one case, Vijay Kumar Barman was found to be not available in house/out of station. Undisputedly, the cheque was issued by accused Vijay Kumar Barman though bank account was joint account of Vijay Kumar Barman and his wife Smt.Pushpa Barman, which is apparent on the face of record. The Hon'ble Supreme Court in Criminal Appeal No.560 of 2016 (Vijay Kumar Barman v. State of Chhattisgarh) while granting bail to Shri Vijay Kumar Barman recorded that co-accused i.e. Vijay Kumar Barman remained in jail since 27.7.2015 to 4.7.2016. It has been recorded in the order of the Supreme Court that he was in jail since 27.7.2015 and he was granted bail on 4.7.2016, whereas notices were said to be refused on 30.3.2016 and one of the case, he was shown to be out of station on 25.1.2016.
10. Admittedly, accused-Vijay Kumar Barman was in jail since 27.7.2015 to 4.7.2016, whereas in the orders taking cognizance learned trial Magistrate clearly recorded that he was served with notice on 25.1.2016 & 30.3.2016 and finding cause of action, cognizance was taken by the trial Court against the petitioners under Section 138

2 (1996) 7 SCC 523

of the Act of 1881.

11. The Supreme Court in the matter of V. Raja Kumari (supra) has clearly held that demand of the amount in question has to be made in terms of Section 138(b) of the Act of 1881. It was observed as under:-

“8. On the part of the payee he has to make a demand by "giving a notice" in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such "giving", the travails of the prosecution would have been very much lessened. But the legislature says that failure on the part of the drawer to pay the amount should be within 15 days "of the receipt" of the said notice. It is, therefore, clear that "giving notice" in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address. ”

12. Applying the principle of law laid down by the Supreme Court in V. Raja Kumari (supra) to the facts of the present case, it is quite vivid that notices are said to have been issued to co-accused Vijay Kumar Barman demanding amount in question, who has issued cheque to the complainants, but he was not available for service of notice being languishing in jail, therefore, in the light of judgment of the Supreme Court in V. Raja Kumari (supra), it cannot be held that valid demand has been made by giving notice in writing though address mentioned in the notice was correct, but since he was languishing in jail during that period, endorsement made in the acknowledgment may not be correct, but this aspects have not been considered by the trial Court.

13. In view of above, the orders taking cognizance against the petitioners are hereby set-aside. The matters are remitted to the trial

Court to consider afresh and pass afresh orders after considering the material available on record as to whether there is material and ground for taking cognizance against the petitioners under Section 138 of the Act of 1881.

14. The CrMP's are allowed to the extent indicated hereinabove. It is made clear that this Court has not expressed any opinion on merits of the case. Records of the trial Court be sent back forthwith.

Sd/-

(Sanjay K. Agrawal)
Judge

B/-