

**IN THE HIGH COURT OF BOMBAY AT GOA****CRIMINAL REVISION APPLICATION NO. 33 OF 2019**

Azghar Khan,  
son of Sri Akthar Khan,  
Aged about 40 years,  
Indian National, Proprietor,  
Arashd Exports,  
Behind H.D.F.C.Bank,  
Khan Building,  
V.N. College Road,  
Hospet – 583201, Karnataka.

... Applicant

**Versus**

Shree Mallikarjuna Shipping  
Private Limited  
A Company registered under  
Companies Act 1956, having its  
office at 1<sup>st</sup> Floor,  
Our Lady of Mercies Building,  
Opposite to Kadamba Bus Stand,  
Mundvel, Vasco Da Gama, Goa,  
Represented by its authorised  
Representative Sri Ulhas Salkune.

... Respondent

Shri X. M. Joseph, Advocate for the Applicant.

Shri Gaurish Agni, Advocate for the Respondent.

**Coram:- NUTAN D. SARDESSAI, J.**

**Reserved on: 12<sup>th</sup> February, 2020.**

**Pronounced on: 06<sup>th</sup> March, 2020.**

**ORDER:**

The appellant has taken exception to the judgment and order dated 11.07.2019 passed by the Addl. Sessions Judge, South Goa, Margao and that earlier passed by the Judicial Magistrate, First Class, Vasco da Gama by invoking the jurisdiction of this Court under Section 397 read with Section 482 of Cr.P.C., 1973.

2. Heard Shri X. M. Joseph, learned Advocate for the applicant who submitted that the conviction by the learned Judicial Magistrate, First Class was based on an application of Section 27 of the General Clauses Act and ignoring Section 101, 103, 16 and 114 of the Indian Evidence Act. There was no evidence to show that a demand was made on the applicant or that a notice was issued prepaying and posting by registered post AD as required under Section 27 of the General Clauses Act. He placed reliance in **I.M.S.Ummu Saleema Vs. B.B.Gujaral & anr. {(1981) 3 SCC 317}** and **Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik &**

**anr.,{(2014) 2 SCC 576}** and submitted that the postal acknowledgement card ought to have been produced on record or if lost the postal receipt because the burden was on the respondent to prove their case that the notice was duly served upon the applicant. It was his contention that the postal acknowledgement did not have any presumptive value. He next adverted to Section 79 of the Evidence Act as also Section 16 read with section 106 thereof and placed further reliance in **Amit Kapoor Vs. Ramesh Chander & anr. {(2012) 9 SCC 460}**, **State of Maharashtra Vs. Wasudeo Ramchandra Kaidalwar {(1981) 3 SCC 199}**, **Vijay Pandey Vs State of Uttar Pradesh, {2019 SCC OnLine SC 942}** and **Mithilesh Singh Vs. Union of India & ors., {(2003) 3 SCC 309}** and submitted that the five authorities relied upon by the learned Trial Court and the learned Addl. Sessions Court were not appreciated in **V.Raja Kumari Vs. P. Subbarama Naidu & anr. {(2004) 8 SCC 774}**, **Harihar Banerji & ors. Vs. Ramsashi Roy & ors., {1918 Indian Appeals 222}**, **C.C.Alavi Haji Vs. Palapetty Muhammed & anr. {(2007) 6 SCC 555}**, **M/s Madan & Co. Vs. Wazir Jaivir Chand, {(1989) 1 SCC 264}** and **Gujarat Electricity Board & anr. Vs. Atmaram Sungomal Poshani, {(1989) 2 SCC 602}**. The presumption of service drawn by the learned Trial Court was not proper and therefore, the revision had to be allowed and the impugned judgments were liable to be quashed and set aside.

3. Shri Gaurish Agni, learned Advocate for the respondent submitted that the scope of revision was limited and there could be an interference with the findings of the Courts below in case they were perverse, in illegal exercise of jurisdiction and misapplication of law shocking the conscience of the Court. This Court would not embark on fact finding when there were concurrent findings of the two courts below. The objections raised on behalf of the applicant that the registered AD card address was not proper, that no postal slips were produced nor was there any presumption under the Evidence Act were without any basis. Rather, under Section 138 of the Negotiable Instruments Act (Act for short hereinafter) there was a reverse burden of proof on the applicant. Admittedly there was no material on record to deny the presumption under Section 118 of the Act in favour of the respondent/complainant. It was also not the case of the applicant that the cheque was not issued to the complainant. The burden to show that the demand notice was never received had to be discharged by positive evidence. There was an intrinsic presumption under Section 27 of the General Clauses Act in favour of the respondent that the notice as posted was delivered. The burden was on the applicant to prove that the letter/notice was never posted or delivered at the postal address.

4. He next referred to the demand notice where the address of the accused was the same as in the complaint and also the appeal. It was also not the case of the applicant that the address was not correct. The AD card was taken on record after comparing with the original and therefore the onus was on the applicant to show that the documents were doctored. There was due stamp of the Hospet postal authorities and signature of the addressee. He next referred to the statement of the applicant recorded under Section 313 Cr.P.C. and particularly question 8 thereof to show that no plea was taken that the address was not of the accused or that it did not bear his signature. Last but not the least he relied on the judgment of the learned Trial Court where there were clear findings on service of notice on the applicant and also that of the Appellate Court and pressed for the dismissal of the revision with exemplary costs.

5. i would advert to their submissions, the records of the case, the various judgments relied upon (*supra*) and more particularly Section 27 of the General Clauses Act and the presumptions under the Act and decide the revision accordingly.

6. In **Ummu Saleema** (*supra*) it was observed that the certificate of posting might lead to a presumption that a letter addressed to the Assistant Collector of Customs was posted

on August 14, 1980 and in due course reached the addressee. But, that is only a permissible and not an inevitable presumption. Neither Section 16 nor Section 114 of the Evidence Act compels the court to draw a presumption. The presumption may or may not be drawn. On the facts and circumstances of a case, the court may refuse to draw the presumption. On the other hand the presumption may be drawn initially but on a consideration of the evidence the court may hold the presumption rebutted and may arrive at the conclusion that no letter was received by the addressee or that no letter was ever despatched as claimed while dealing with the contention on behalf of the detainee that although he had retracted from his alleged original statement dated 07.08.1980 long before the order of detention was made, the fact of such retraction was not considered by the detaining authority before making the order of detention. According to him as soon as he was released on bail, he had addressed a letter to the Assistant collector of Customs, Cuddalore on 14.08.1980, retracting from his former statement which communication was sent under certificate of posting, when it was observed as before.

7. **Nandalal** (supra) dealing with the legitimacy of a child in terms of Section 112 of the Indian Evidence Act, 1872 relied on behalf of the applicant is not at all applicable in the facts of the present case which deals with the other

presumptions of the Evidence Act apart from those under the Act.

8. Section 16 of the Evidence Act deals with the existence of course of business when relevant and reads thus :- "When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact." One of the Illustrations to it is the question whether a particular letter was despatched. The fact that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that particular letter was put in that place, are relevant. Section 101 deals with the burden of proof and reads thus:-"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person." Section 103 deals with the burden of proof as to particular fact and reads : "The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is proved by any law that the proof of that fact shall lie on any particular person," while Section 114 of the Evidence Act deals with the aspect of the Court which may presume the existence of certain fact and reads thus:-"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.” One illustration which is relevant is that the court may presume that the common course of business has been followed in particular cases with the illustration that the question is whether a letter was received. It was shown to have been posted, but the usual course of the post was interrupted by disturbances. Section 106 of the Indian Evidence Act deals with the burden of proving the fact specially within the knowledge. When any fact is specially within the knowledge of any person, the burden of proving that fact is upon him.

9. In **Amit Kumar** (supra) the question of law which arose was that of the extent and scope of the power exercisable by the High Court under Section 397 independently or read with Section 482 Cr.P.C., 1973. In that context, the Hon'ble Apex Court observed that the jurisdiction of the court under Section 397 can be exercised so as to examine the correctness, legality or propriety of an order passed by the trial court or the inferior court, as the case may be. Though Section 397 Cr.P.C. does not specifically use the expression “prevent abuse of process of any court or otherwise to secure the ends of justice”, the jurisdiction under Section 397 Cr.P.C. is a very limited one. The legality, propriety or correctness of an order passed by a court is the

very foundation of exercise of jurisdiction under Section 397 Cr.P.C. but ultimately it also requires justice to be done. The jurisdiction could be exercised where there is a palpable error, non compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily

10. In **State of Maharashtra** (supra) the Hon'ble Apex Court considered Section 106 of the Evidence Act and observed that the "phrase 'burden of proof'" is clearly used in the secondary sense, namely, the duty of introducing evidence. The nature and extent of the burden cast on the accused is well settled. The accused is not bound to prove his innocence beyond all reasonable doubt. All that he need do is to bring out a preponderance of probability. Such being the law, the question whether or not the respondent had established a preponderance of probability is a matter relating to appreciation of evidence. **Vijay Pandey** (supra), was assailing his conviction and sentence under Sections 8 and 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 for 15 years alongwith the fine under Section 31 of the Act. One of the grounds raised on his behalf was that the prosecution failed to prove that the sample produced in the Court was the same as seized from the appellant. This judgment can have no bearing on the case at hand hence the respectful departure.

11. **Mithilesh Singh** (supra) challenged his punishment of removal from service as awarded by the disciplinary authority in the appeal which was maintained by the Division Bench of the Guwahati High Court. In this case, a reference was made to the observation of the Hon'ble Apex Court on the expression proper stress being laid on it. It meant appropriate in the required manner fit, suitable apt. The mere making a request of leave was not a proper intimation. It cannot be said that the said word is a surplusage, the intention of the legislature is primarily to be gathered from the language used and as a consequence a construction which results in rejection of words as meaningless has to be avoided. This judgment too does not have any bearing on the case of the applicant at hand.

12. In **V. Rajkumari** (supra) the Apex Court held that the question whether the notice as required under Section 138 of the Act had been served had to be decided during trial and the complaint ought not to be dismissed at the threshold on the purported ground that there was no proper service of notice. In the complaint it was stated that the legal notice was returned with an endorsement that the door of the house of the accused was locked. Subsequently, the amount was not paid by the accused resulting in the complaint. The question was the important point to be decided in this case was

whether the cause of action had arisen at all as the notice sent by the complainant to the accused was returned with the endorsement "house been locked" the conditions pertaining to the notice to be given to the drawer have been formulated and incorporated in clauses (b) to (c) of the proviso to Section 138 of the Act. 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 and it is for the payee to perform the former process by sending the notice to the drawer at the correct address. The words in clause (b) of the proviso to Section 138 of the Act show that the 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. It was further observed that it is well settled that a notice refused to be accepted by the addressee can be presumed to have been served on him. It had considered Section 27 of the General Clauses Act which reads thus:-

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

either of the expression '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, prepaying 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."

13. In **V. Raja Kumari** (Supra) Their Lordships considered the position in the matter of service of notice by post in **K. Bhaskaran Vs Sankaran Vaidhyan Balan {(1999) 7 SCC 510}** and observed that the object of notice was to give a chance to the drawer of the cheque to rectify his omission and also to protect a honest drawer. Service of notice of demand in clause (b) of the proviso to Section 138 is a condition precedent for filing a complaint under Section 138 of the Act. In that appeal there was no dispute that notice was in writing and which was sent within fifteen days of receipt of information by the appellant Bank regarding return of cheques as unpaid. Therefore, the only question to be examined was whether in the notice there was a demand for payment.

14. In **Harihar Banerji** (supra) the only questions before Their Lordships were the notice to quit was sufficiently and properly served. It was found therein that the defendant nos.

5, 6 and 7 were members of a joint Hindu Family and that of the defendant no. 5 was duly served with a duplicate of the notice to quit. For these notices he received receipts on the registration of them. The peon of the post office, who the defendants only witness admitted, knew all their houses, got from all of them receipts for the letters when delivered. These receipts were produced. The receipts, examined in detail, purported in some cases to be signed by the addressee, and in some by some person on his behalf. The munsif held there was no proof of the service of the notice to quit on any of the defendants other than those numbered 1, 4 and 5. He seemed to be of the opinion that a registered letter must be presumed to have been delivered to the person who signed on behalf of the addressee the receipt for it, but not to the addressee himself in the first instance or at all, and that as there was no proof that the persons other than the addressees who so signed were the duly authorised agents of the addressees to receive these notices the proof of service was defective.

15. In **C. C. Alavi Haji** (supra) reference was made to the judgment in **Bhaskaran's** case wherein the notice in terms of Clause (b) had been returned unclaimed and not as refused and the Court posed the question: "Will there be any significant difference between the two so far as the presumption of service is concerned?" It 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 despatched the notice by post with correct address written on it, the principle incorporated in Section 27 of the General Clauses Act, 1897 could profitably be imported in such a case. It was held that in such a 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.

16. **M/s Madan** (supra), the notice also terminated the tenacy and called upon the petitioner to vacate the demised premises on or before December 31, 1976. This notice was first sent by post. The postman called at the address on December 7, 1976 and December 8, 1976 but, having failed to find there either the addressee or any person authorised to receive the notice on its behalf, returned it with the endorsement "left without address, returned to sender". Thereupon, the respondent caused a copy of the notice to be affixed to one of the doors of the premises in question in the presence of two inhabitants of the locality on December 9, 1976. No payment of rent was made subsequently by the petitioner. The respondent, therefore, filed a suit on June 16, 1977 seeking ejectment of the petitioner on the ground that he had committed three defaults, each in payment of two months rent, within a period of 18 months. This plea was accepted, and eviction of the petitioner decreed, by the sub-

judge. This was affirmed by the District Judge, A second appeal to the High Court was also unsuccessful. Hence this appeal by special leave. Their Lordships found that the service of notice by affixture at the instance of the postal authority was travelling outside the statute. Where the statute does not specify any such additional or alternative mode of service on the lines of the provisions of the C.P.C. and therefore observed that they would not like to hold that a 'substituted' service as the one effected by the landlord in the present case is a necessary or permissible requirement of the statute.

17. In **Gujarat Electricity Board** (supra) a controversy was raised before the High court as to whether the registered letter dated 24.04.1974 addressed by the superintending engineer to the respondent was received by him or not. The registered cover containing the letter dated 24.04.1974 was returned back by the postal authorities with an endorsement that the addressee refused to accept the same. The respondent's case was that no such registered letter was tendered to him by the postman or he ever refused to accept the same. The Division Bench held that the letter dated 24.04.1974 which contained a warning had not been served on the respondent and since the Board had failed to raise the question before the learned Single Judge it could not do so in the Letters Patent Appeal. The Division Bench further held that since the letter dated 24.04.1974 was not served on the

respondent, there was no material to show that any warning had been issued to the respondent before he was discharged from service. This view did not find favour with the Hon'ble Apex Court on the premise that firstly even if the letter dated 24.04.1974 was not served on the respondent there was no dispute that the Superintending Engineer's letter dated 18.04.1974 had been served on him. By that letter warning as contemplated by Regulation 113 had been issued to the respondent. Therefore even if the letter dated 24.04.1974 was not served on the respondent, the order of discharge as contemplated by Regulation 113 is sustainable in law. Even otherwise the Division Bench committed an error in holding that the Board had raised the question of service of the letter dated 24.04.1974 for the first time before the Division Bench in the Letters Patent Appeal. It was further observed that there was presumption of service of a letter sent under registered cover, if the same is returned back with a postal endorsement that the addressee refused to accept the same. No doubt the presumption is rebuttable and it is open to the party concerned to place evidence before the court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities never tendered the registered letter to him or that there was no occasion for him to refuse the same. The burden to rebut the presumption lay on the party challenging the factum of service.

18. Coming to the facts of the case, the learned Judicial Magistrate, First Class had come to a clear finding that the legal demand notice was produced by the complainant alongwith the registered AD cards send to both the accused which were duly served on both. The learned Judicial Magistrate, First Class did not find favour with the contention on behalf of the applicant/accused that he was not served with the legal notice since in his assessment a perusal of the acknowledgement cards of both the accused produced on record indicated that they were duly served and in view of Section 27 of the General Clauses Act the presumption lay in favour of the complainant, that the demand notice was served on the accused. This was besides the fact that there was a clear finding that the accused was also served by way of publication in the newspaper and that it was incumbent upon the accused to rebut the presumption that he was not served with the legal demand notice. The learned Judicial Magistrate First Class had properly placed reliance in **V. Raja Kumari** (supra) and **Harihar Banerji** (supra), **C.C.Alavi Haji** (supra), **M/s Madan and Co.** (supra) and **Gujarat Electricity Board** (supra) and had duly considered the concept of burden of proof as provided under Section 101 of the Indian Evidence Act. The learned Judicial Magistrate, First Class for that matter that there was a legally enforceable debt and that the presumption under Section 139 in the matter of existence of a

legally enforceable debt was accruing in favour of the complainant/respondent and that there was failure by the applicant/ accused to rebut the same.

19. The learned Addl. Sessions Judge on his part had also considered the import of Section 27 of the General Clauses Act, the contention on behalf of the applicant that there was sticker that was placed on the address of the applicant which was capable of being manipulated by the respondent but did not find favour with the contention of the applicant that no receipt towards posting was produced by the complainant. At the outset, and as rightly pointed out by Shri G. Agni, learned Advocate for the respondent, there was no dispute about the fact that the address of the applicant was the same in the complaint filed before the trial Court and before the First Appellate Court and now the address which is indicated in the Revision Application on behalf of the applicant. The presumption under Section 118 and 139 of the Act arose in favour of the respondent and that there was a reverse burden of proof on the applicant to prove that there was no legally enforceable debt. It was also not the case of the applicant that the cheque was not issued to the complainant. It was also incumbent on the applicant to show that the demand notice was never received by the applicant and which had to be discharged by positive evidence.

20. A reading of Section 27 of the General Clauses Act clearly revealed that there was an intrinsic presumption that the notice was delivered as required and the burden was on the applicant to prove that the letter/notice was never posted or delivered to the postal address. It was nowhere the case of the applicant that the address indicated in the complaint filed before the Magistrate or the appeal before the First Appellate Court or in this Revision was incorrect. Rather the AD card which was the bone of contention at the instance of the applicant had been shown to have been taken on record after comparing with the original and therefore the onus was on the applicant to show that the said document was manipulated or doctored when it clearly bore the stamp of Hospet Postal authorities and the signature of the addressee. Besides, as rightly submitted by Shri G. Agni learned Advocate for the respondent, the applicant had also not denied in his statement recorded under Section 313 Cr.P.C. that the address was not correct or that the AD card did not bear his signature.

21. The applicant has failed clearly to show that the findings of the Courts below on the service upon the applicant was not proper and or that it vitiated the entire proceedings before the Judicial Magistrate First class and subsequently the appeal before the First Appellate Court. The applicant has failed to show that the findings of the court were perverse, in illegal exercise of jurisdiction and misapplication of law so as

to shock the conscience of the Court.

22. In the circumstances there is no merit in the application which is hereby dismissed with no order as to costs.

NUTAN D. SARDESSAI, J

MF/-