

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

C.R.A 130 of 2021

Radhamani India Limited
Vs.
Basukinath Food Processors Limited & Anr.

For the appellant: Mr. Somopriya Roychowdhury,
Mr. Anirban Dutta,
Ms. Priyanka Mukherjee,
Mr. Dwip Raj Basu.

For the Respondents: Mr. Ayan Bhattacharjee,
Mr. Aditya Ratan Tiwary,
Ms. Sutapa Mitro.

Heard on: 07.03.2022 & 17.03.2022.

Judgment on: 09.06.2022.

BIBEK CHAUDHURI, J. : –

1. The judgment and order of acquittal passed in complaint case No. C-16191 of 2013 passed by the learned Metropolitan Magistrate, 3rd Court, Kolkata have been assailed in the instant appeal on the ground that the learned Magistrate erred in law and fact holding, inter alia, that notice under Section 138(b) of the Negotiable Instrument Act, 1981 was not served upon the respondents/accused persons.

2. The factual matrix leading to filing of the instant appeal is that in discharge of legally enforceable liability the respondent No.2 being one of the directors and authorized signatory of the respondent No.1/company issued a cheque amounting to Rs.20 lakhs on 15th March, 2013 drawn on Axis Bank Limited, Barabazar Branch, Kolkata in favour of the complainant/company on 15th March, 2013. The said cheque was deposited for encashment with the banker of the complainant/company, but it was dishonoured on the ground “funds insufficient” on 16th March, 2013. This led the complainant to issue a notice through his learned Advocate on 11th April, 2013 and 16th April, 2013 respectively requesting the respondents to make payment of the said sum of Rs.20 lakhs within a period of 15 days from the date of receipt of the respective notices. The respondents neglected and refused to pay the said sum of Rs.20 lakhs in spite of receipt of demand notice. So was the complaint under Section 138 of the Negotiable Instrument Act was initiated.

3. During trial, authorized representative of the complainant/company was examined. Copy of notice under Section 138(b) of the Negotiable Instrument Act, postal receipt and postal track report in respect of respondent No.1/company were exhibited.

4. The learned Magistrate, on completion of trial dismissed the said complaint case and acquitted the respondents under Section 255(1) of the Code of Criminal Procedure holding, inter alia, that the notice demanding payment of the impugned cheque was not legal, valid and sufficient and it was not duly served upon the accused persons.

5. Assailing the said judgment the complainant has filed the instant appeal under the provision of Section 378(4) of the Code of Criminal Procedure.

6. Learned Advocate for the appellant submits before me that the impugned cheque was issued in discharge of legally enforceable liability by the respondent No.2 on 15th March, 2013. It was presented with the banker of the complainant/company, viz., IndusInd Bank, Upper Wood Street Branch, Kolkata on the very date of receipt of the said cheque. However, the cheque was dishonoured on the ground “funds insufficient” and accordingly the complainant/company issued demand notice upon accused No.1 and accused No.2 on 11th April, 2013 and 16th April, 2013 respectively under registered speed post. From the postal track report it appears that the said notices were served upon the respondents/accused persons on 12th April, 2013 and 17th April, 2013 respectively. From the copy of the notice which was marked as Exhibit-5 it appears that the said notice was issued and sent to the respondents/company in its correct address. The learned Magistrate committed a gross mistake on the basis of postal receipt (Exhibit-5/1) where the name of the complainant/company is recorded as “Basukinath F Pero Limited, Topsia Road, Kolkata, Pin-700046”. According to the learned Advocate for the appellant the postal receipt issued by the postal authority in respect of a registered post is an acknowledgement of the fact that a document is sent to the drawer under registered speed post with AD. It is not in dispute that the address of the respondent No.1/company was correctly recorded

in the copy of the notice dated 11th April, 2013. The notice was sent to the respondents/company in the address mentioned in the notice. In the postal receipt the name and address of the respondent/company was recorded by the concerned clerk of the GPO, Kolkata. In the postal receipt, there may be some mistake while recording the name and address of the respondent/company. The notice was sent in the correct address of the registered office of the respondent/company. From the postal track report it appears that the said notice was duly delivered to the respondent No.1 on 11th April, 2015. The respondent No.1 raised dispute on the address recorded in postal receipt. The learned trial judge wrongly held that no demand notice was served upon the respondent No.1/company.

7. It is further submitted by the learned Advocate for the appellant that notice was also sent to the respondent No.2 who is one of the directors and authorized signatory of the impugned cheque under registered speed post with AD. The said notice was duly served upon the respondent No.2. It is submitted by the learned Advocate for the appellant that the respondent No.2 represented the respondent No.1/company throughout the transaction which is the subject matter of the complaint under Section 138 of the Negotiable Instrument Act. He is one of the directors and authorized signatory of the company. He issued the promissory note in favour of the complainant/company on receipt of a cheque of Rs.20 lakhs on 17th August, 2012. The said promissory note was marked during trial as Exhibit-2. He also issued the dishonoured cheque in favour of the complainant/company. Under such factual

background, the respondent No.2 can be safely assumed to be the alter ego of the company. He is the human agency representing a corporate entity in the transaction which is the subject matter of prosecution. Therefore, notice served upon the respondent No.2 can be attributed to the complainant/company who is the juristic entity as the former is nothing to the alter ego of such corporate entity.

8. Similar question came up for consideration before this Court in **M/s Gena Marketing Private Limited vs. Somnath Guin** reported in (2016) 2 Cal LT 344. A Coordinate Bench of this Court decided the issue in the following paragraphs:-

11. The principle of alter ego and attribution of intent of the human agency, who is the alter ego of the company, upon the body corporate itself was approved and applied in criminal jurisprudence by the Apex Court in Iridium India Telecom Ltd. Vs. Motorola Incorporated & Ors. (2011) 1 SCC 74 as follows:-

“55. ...virtually in all jurisdictions across the world governed by the rule of law, the companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing the necessary mens rea for the commission of criminal offences. The legal position in England and the United States has now crystallised to leave no manner of doubt that a corporation would be liable for crimes of intent.”

“59. The courts in England have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular state of mind. The aforesaid notion has been rejected by adopting the doctrine of attribution and imputation. In other words, the criminal intent of the “alter ego” of the company/body corporate i.e. the person

or group of persons that guide the business of the company, would be imputed to the corporation.”

12. Similarly in **Sunil Bharti Mittal Vs. Central Bureau of Investigation (2015) 4 SCC 609** it has been held:

“40. It is abundantly clear from the above that the principle which is laid down is to the effect that the criminal intent of the “alter ego” of the company, that is the personal group of persons that guide the business of the company, would be imputed to the company/corporation.”

13. Applying the aforesaid principle in the matter of giving notice under section 138(b) of the Act to the drawer, it can be safely construed that a notice addressed to a director/authorised signatory of a cheque who had represented the drawer company in the course of the transaction resulting in the issuance of the dishonoured cheque shall be deemed to be a notice issued upon the company itself inasmuch as the knowledge of the said human agency of the notice may be attributed to the body corporate itself.

14. It has finally been argued that the notice under section 138(b) of the Act must be construed strictly as it forms a part of a penal provision. Traditionally, penal provisions call for strict interpretation but such view is increasingly yielding to a more purposive interpretation in recent times. While interpreting the requirement of sending a notice under section 138(b) of the Act in this perspective the object and intention of the legislature must not be lost sight of and a narrow pedantic approach ought not to be taken so that a defaulter may escape penal consequences. Negotiable Instruments Act is a legislation operating in the commercial field and section 138 thereof was incorporated to give tooth and claw to the legislation so as to ensure greater accountability and creditability in commercial transactions relating to cheques. This legislative intention ought to be the guiding principle while construing the validity of notice issued under the aforesaid provision of law.

15. In *Standard Chartered Bank & Ors. Vs. Directorate of Enforcement & Ors.* (2005) 4 SCC 530, a Constitution Bench while upholding purposive construction of penal statutes, inter alia, held that –

“24. The distinction between a strict construction and a more free one has disappeared in modern times and now mostly the question is “what is true construction of the statute?” A passage in Craies on Statute Law, 7th Edn. reads to the following effect:

“The distinction between a strict and a liberal construction has almost disappeared with regard to all classes of statutes, so that all statutes, whether penal or not, are now construed by substantially the same rules. ‘All modern Acts are framed with regard to equitable as well as legal principles.’ ‘A hundred years ago,’ said the court in Lyons’ case, ‘statutes were required to be perfectly precise and resort was not had to a reasonable construction of the Act, and thereby criminals were often allowed to escape. This is not the present mode of construing Acts of Parliament. They are construed now with reference to the true meaning and real intention of the legislature.”

At p. 532 of the same book, observations of Sedgwick are quoted as under:

“The more correct version of the doctrine appears to be that statutes of this class are to be fairly construed and faithfully applied according to the intent of the legislature, without unwarrantable severity on the one hand or unjustifiable lenity on the other, in cases of doubt the courts inclining to mercy.”

9. Learned Advocate for the appellant also refers to a decision of the Hon’ble Supreme Court in **K. Bhaskaran vs. Sankaran Vaidhyan Balan & Anr.** reported in **(1999) 7 SCC 510**. In the aforesaid case the Hon’ble Supreme Court had the occasion to deal with the question as to presumption of service of notice under Section 138(b) of the Negotiable

Instrument Act in relation to Section 27 of the General Clauses Act. It is held by the Hon'ble Supreme Court that Section 138 of the Negotiable Instrument Act does not require that the notice should be given only by post. Nonetheless the principle incorporated in Section 27 of the General Clauses Act can profitably be imparted in a case where the sender has dispatched 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. Coming to the instant case it is repeatedly urged by the learned Advocate for the appellant that the notice was sent to the respondents/company in the address written on the copy of the notice (Exhibit-5). The postal track shows that it was duly served upon the respondent/company on 12th April, 2013. Therefore, the service of notice qua the complainant/company cannot be disputed.

10. It is however submitted by the learned Advocate for the appellant that during trial the appellant failed to prove service of notice upon respondent No.2 out of inadvertence. The complainant/company is in possession of the documents to prove that the notice was served upon the respondent No.2. The complainant may be permitted to bring the said fact and documents in evidence and an order of remand with proper direction upon the learned Magistrate may be passed in the instant appeal.

11. Learned Advocate for the respondents, on the other hand, submits that in the instant case no notice was served upon the respondents. The respondent No.1/company is Basukinath Food Processor Limited. Demand notice was sent in the name of one Basukinath F Pero Ltd who is not related with the instant case. Thus, from the face of the documents relied on by the complainant it appears that demand notice was sent to a non-existent entity in a wrong address. Even if the postal track report is considered to be genuine, in such case also, there is no other alternative but to hold that demand notice was not served upon the respondent No.1/company. Demand notice allegedly sent in the name of accused No.2 was not exhibited during trial. Therefore, the appellant cannot be given any liberty under Section 391 of the Code of Criminal Procedure to prove service of notice upon respondent No.2. According to the learned Advocate for the respondents, if notice is not issued under Section 138(b) of the Negotiable Instrument Act upon the accused persons no cause of action is said to be arisen in favour of the complainant to file complaint under Section 138 of the Negotiable Instrument Act. It is further submitted by the learned Advocate for the respondents that in view of the provisions contained in Section 138 and 141 of the Negotiable Instrument Act commission of offence by company is express condition precedent to attract vicarious liability of others. When company can be prosecuted then only persons mentioned in other categories could be vicariously liable for offence subject to leading and prove while prosecuting directors, company must be arraigned as accused. Where the impugned cheque was

issued by the accused as director of company and demand notice was served only on such director a complaint would arraigning the company a accused, prosecution against the accused is not maintainable. In support of his contention the learned Counsel for the respondents refers to a decision of the Hon'ble Supreme Court in the case of **Himanshu vs. B. Shivamurthy & Anr.** reported in **(2019) 3 SCC 797**. The factual matrix involved in the decision of Himanshu is that the complainant filed a complaint under Section 138 of the Negotiable Instrument Act against the director of a company who is the authorized signatory on behalf of the company and issued a cheque in discharge of the liability of the company in favour of the complainant. In the said complaint the company was not arraigned as accused. No demand notice was served upon the company. Under such factual backdrop the Hon'ble Supreme Court held that in the absence of the company being arraigned as accused, prosecution of appellant/accused is not maintainable. As there was no demand notice against company and proceedings under Section 138 of the Negotiable Instrument Act was not applied with, the complaint under Section 138 was quashed by the Supreme Court. It is submitted by the learned Counsel for the appellant that in view of the decision in Himanshu, the decision of a Coordinate Bench of this Court in Gena Marketing Pvt. Ltd. (supra) is no longer a good law.

12. It is further submitted by the learned Counsel for the respondent placing reliance of **Yogendra Pratap Singh vs Savitri Pandey & Anr.** reported in **(2014) 10 SCC 713**. It is submitted by the learned Advocate

for the respondents that an offence under Section 138 of the Negotiable Instrument Act cannot be said to have been committed when the period provided in Clause (c) of the proviso to Section 138 has not expired. A bare reading of clause (c) of the proviso makes it clear that no complaint can be filed for an offence under Section 138 of the NI Act unless the period of 15 days has elapsed. Any complaint made before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint at all in the eye of law. It is not the question of prematurity of the complaint where it is filed before expiry of 15 days from the date on which notice has been served on him, it is no complaint at all under law. As a matter of fact, Section 142 of the NI Act, inter alia, creates a legal bar on the Court from taking cognizance of an offence under Section 138 except upon a written complaint. Since a complaint filed under Section 138 of the NI Act before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint in the eye of law, obviously, no cognizance of an offence can be taken on the basis of such complaint.

13. In the instant case, no notice was at all served upon the respondent No.1/company. Therefore, the written complaint is premature and cognizance on the basis of such complaint was bad. In support of his contention, he also refers to another decision of the Apex Court in the case of **M/S. Rahul Builders vs. M/S. Arihant Fertilizers & Anr.** reported in **(2008) 2 SCC 321**. In the said decision, it is held by the Hon'ble Supreme Court that service of notice is imperative in character for

maintaining a complaint. It creates a legal fiction. Operation of Section 138 of the Act is limited by the proviso. When the proviso applies, the main Section would not. Unless a notice is served in conformity with Proviso (b) appended to Section 138 of the Act, the complaint petition would not be maintainable. The statute envisages application of the penal provision. A penal provisions should be construed strictly; the condition precedent where for his service of notice.

14. The learned Advocate for the respondent also refers to a decision of the Division Bench of Orissa High Court in **Kailash Chandra Mishra vs. Ajitsinh Ulhasrao Babar & Ors.** reported in **MANU/OR/0484/2011 = 2014 (1) OLR 211**. In the said case the registered envelope containing demand notice was returned to the complainant with the postal endorsement, “the addressee was always found absent”. It was contended on behalf of the complainant that the demand notice ought to be held to be a deemed service upon the accused in view of the decision of the Supreme Court in the case of **K. Vaskaran** (Supra). The Division Bench of the Orissa High Court rejected such contention holding, inter alia, that such submission was wholly untenable in law and cannot be accepted at all in the reason that notice must be served upon the addressee as per the mandatory requirement to constitute an offence under Section 138 of the Negotiable Instrument Act. Merely because of an endorsement on the unserved cover containing the noting that “the addressee was absent and the notice was returned unserved” cannot be a ground to constitute that there is a deemed service of notice upon the petitioner.

15. It is further submitted by the learned Advocate for the respondents that in respect of a penal provision, before a penalty can be levied, the procedures laid down therein must be complied with. For construction of a penal provision, it is trite, the golden rule of literal interpretation should be applied. The difficulty which may be faced by the complainant is of no consequence. In support of his contention learned Counsel for the respondents refers to the following decisions:-

- (i) Commissioner, Central Excise and Customs Mumbai & Ors vs. ITC Ltd & Ors. reported in (2007) 1 SCC 62.**
- (ii) SSS Loha Marketing Private Limited and Bibby Financial Services India Private Limited : 2013 SCC Online Cal 2027.**
- (iii) Opto Circuit India Limited vs. Axis Bank & Ors : (2021) 6 SCC 707.**
- (iv) Taylor vs. Taylor & Taylor vs. Keily : (1875) 1 ChD 426.**
- (v) S.L Kapoor vs. Jagmohan & Ors : (1980) 4 SCC 379.**
- (vi) Harilal Shaw vs. State of West Bengal : 89 CWN 557.**
- (vii) Martin burn Ltd vs. The Corporation of Kolkata : AIR 1966 SC 529.**
- (viii) Ahmedabad Municipal Corporation vs. Ahmedabad Green Belt Khedut Mandal : (2014) 7 SCC 357.**

16. Section 138 of the Negotiable Instrument Act is a penal provision 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 different or other liability and the said cheque is dishonoured or returned by the bank unpaid due to insufficient fund. The Section is subject to the following proviso:-

“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,²⁰ [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.”

17. Section 141 deals with the provision in respect of the offences under Section 138 by companies. Section 141 runs thus:-

141 Offences by companies. —

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any person liable to punishment if he

*proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:*²² *[Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]*

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation.— For the purposes of this section,—

(a) “company” means any body corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.]

18. Section 142 lays down the circumstances when court can take cognizance of offence under Section 138 of the Negotiable Instruments Act. According to Section 142 (1) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque. Clause (b) of sub-Section 1 of Section 142 states that such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138. Thus, cause of action for lodging a complaint under Section 138 of the Negotiable Instruments Act arises when the drawer of cheque fails to make payment

of the said amount of money to the payee within 15 days of the receipt of said notice.

19. I have already stated the factual background involved in the instant appeal. According to the complainant respondent No.2 being the authorized signatory on behalf of the respondent No.1/company issued cheque for a sum of Rs.20 lakhs in favour of the complainant/company and the said cheque was presented for encashment by the complainant/company on 15th March, 2013. On 16th March, 2013 the complainant/company was informed by its banker that the said cheque was dishonoured on the ground "insufficiency of fund". It is contended by the complainant that the demand notice was issued to the respondent/company and to one of its director who is the authorized signatory of the cheque on behalf of the respondent/company on 11th April, 2013 and 12th April, 2013. The said two notices were received by the respondent/company and respondent No.2 on 12th April, 2013 and 17th April, 2013 respectively.

20. During trial, the complainant proved the copy of notice, postal receipt and postal track report in respect of respondent No.1/company. On perusal of the copy of notice (Exhibit-5) it appears that the name and address of the respondent/company were correctly written on it. The postal track report shows that the said notice was duly served upon the respondent No.1/company on 12th April, 2013. The respondents have disputed service of notice on the strength of the name and address of some other company was recorded in the postal receipt issued by the

postal authority to the sender of the notice. On careful perusal of the postal receipt it appears that in the postal receipt the name of the respondent/company was typed as Basukinath F Pero Ltd, Topsia Road, KOL-700046. It is needless to mention that postal receipt is not the document to ascertain whether the notice was served in the correct address of the respondent No.1/company or not. It is the postal envelope on which the address of respondent No.1/company is recorded is the relevant document to ascertain the fact as to whether notice was duly sent in the proper address of the respondent No.1/company or not. Nowhere it is urged by the respondents that the registered envelope contained wrong name and address of respondent No.1/company. From the postal track report it is ascertained that the notice sent in the name of respondent/company was duly served upon the respondent. In such view of the matter the learned Magistrate ought not to have held that no notice was served upon the respondent No.1/company. It is contended on behalf of the appellant that a copy of demand notice was also sent to the accused No.2 under registered speed post with acknowledgement. The accused No.2 duly received the said notice. However, during trial the copy of the said notice and the postal report were not brought in evidence by the complainant. Therefore, the learned Advocate for the appellant has prayed for remanding the case for fresh trial giving opportunity to the complainant to prove service of notice upon accused No.2.

21. Learned Advocate for the appellant refers to a series of judgments where the Hon'ble Supreme Court held that any complaint filed before

expiry of 15 days as mentioned in proviso (c) of Section 138 is held to be nonest. In the instant case, the respondent never urged that a premature complaint was filed by the complainant. On the other hand, on facts it is found that impugned cheque was issued on 15th April, 2013. The said cheque was dishonoured due to insufficient fund in the account of the drawer of the cheque and the complainant received such information on 16th March, 2013. Demand notice was issued on 11th April, 2013. According to the complainant the accused received the said notice on 12th April, 2013. The petition of complaint was lodged on 11th May, 2013, i.e., after the expiry of 15 days from the date of receipt of the alleged notice. Therefore, the petition of complaint per se is not premature. Therefore, the contention of the learned Counsel for the respondents that the petition of complaint is premature and nonest does not hold good.

22. Only point for consideration in the instant appeal is as to whether the learned trial judge was correct in holding that the demand notice was not served upon the complainant.

23. Learned Advocate for the respondents submits that reference to series of decisions by the Hon'ble Supreme Court as well the Chancery Division of England that the penal provision contained in a statute and per condition thereof is to be strictly construed.

24. In **Standard Chartered Bank vs. Directorate of Enforcement** reported in **(2005) 4 SCC 530**, a Constitute Bench while upholding purposive construction of penal statues, inter alia, held that-

“24. The distinction between a strict construction and a more free one has disappeared in modern times and now mostly the question is ‘what is true construction of the statute?’ A passage in Craies on Statute Law, 7th Edn. reads to the following effect:

“The distinction between a strict and a liberal construction has almost disappeared with regard to all classes of statutes, so that all statutes, whether penal or not, are now construed by substantially the same rules. ‘All modern Acts are framed with regard to equitable as well as legal principles.’ ‘A hundred years ago,’ said the court in Lyons’ case, ‘statutes were required to be perfectly precise and resort was not had to a reasonable construction of the Act, and thereby criminals were often allowed to escape. This is not the present mode of construing Acts of Parliament. They are construed now with reference to the true meaning and real intention of the legislature.’”

At p. 532 of the same book, observations of Sedgwick are quoted as under:

“The more correct version of the doctrine appears to be that statutes of this class are to be fairly construed and faithfully applied according to the intent of the legislature, without unwarrantable severity on the one hand or unjustifiable lenity on the other, in cases of doubt the courts inclining to mercy.”

25. Hon’ble Supreme Court further held that even in interpretation of penal statutes the mischief Rule or Heydon’s Rule may be resorted to:-

“36. The rule of interpretation requiring strict construction of penal statutes does not warrant a narrow and pedantic construction of a provision so as to leave loopholes for the offender to escape (see Murlidhar Meghraj Loya v. State of Maharashtra). A penal statute has to also be so construed as to avoid a lacuna and to suppress mischief and to advance a remedy in the light of the rule in Heydon’s case. A common-sense approach for solving a question of applicability of a penal statute is not ruled out by the rule of strict construction. (See State of A.P. v. Bathu Prakasa Rao and also G.P. Singh on Principles of Statutory Interpretation, 9th Edn., 2004, Chapter 11, Synopsis 3 at pp. 754 to 756.)”

26. The issue as to whether a notice issued upon the director/authorized signatory of the company can be deemed to be a valid notice under Section 138(b) of the Negotiable Instruments Act fell for consideration in **Bilakchand Gyanchand Co. Vs. A. Chinnaswami** reported in **(1999) 5 SCC 693** and **Rajneesh Aggarwal Vs. Amit J. Bhalla** reported in **(2001)1 SCC 631**. In *Bilakchand* (supra), notice issued upon the Managing Director/signatory was held to be a valid notice under Section 138(b) of the Act. In *Rajneesh* (supra) the Apex Court observed as follows:-

*“The object of issuing notice indicating the factum of dishonour of the cheques is to give an opportunity to the drawer to make the payment within 15 days, so that it will not be necessary for the payee to proceed against in any criminal action, even though the bank dishonoured the cheques. It is Amit Bhalla, who had signed the cheques as the Director of M/s. Bhalla Techtran Industries Ltd. When the notice was issued to said Shri Amit Bhalla, M/s Bhalla Techtran Industries Ltd., it was incumbent upon Shri Bhalla to see that the payments are made within the stipulated period of 15 days. It is not disputed (sic alleged) that Shri Bhalla has not signed the cheques, nor is it disputed (sic alleged) that Shri Bhalla was not the Director of the company. Bearing in mind the object of issuance of such notice, it must be held that the notices cannot be construed in a narrow technical way without examining the substance of the matter. We really fail to understand as to why the judgment of this Court in *Bilakchand Gyanchand Co.* will have no application. In that case also criminal proceedings had been initiated against A. Chinnaswami, who was the Managing Director of the company and the cheques in question had been signed by him. In the aforesaid premises, we have no hesitation to come to the conclusion that the High Court committed error in recording a finding that there was no notice to the drawer of the cheque, as required under Section 138 of*

the Negotiable Instruments Act. In our opinion, after the cheques were dishonoured by the bank the payee had served due notice and yet there was failure on the part of the accused to pay the money, who had signed the cheques, as the Director of the company.”

27. It is humbly recorded that in the case of Himanshu (supra), Bilakchand Gayachand (supra) and Rajneesh Aggarwal (supra) were not considered. In Himanshu the Hon’ble Supreme Court followed the ratio laid down in **Aneeta Hada vs. Godfather Travel & Tours Pvt. Ltd : (2012) 5 SCC 661** and **Ms. Leathers vs. S. Palaniappan: (2013) 1 SCC 177**. In Aneeta Hada the Apex Court was pleased to consider the question as to whether prosecution of a director could be maintained in the absence of prosecution of the accused/company. The Apex Court held that the prosecution of an accused/company was sine qua non for prosecution of a director save and except where prosecution of the company is a legal impossibility.

28. In the instant appeal, however, it is not the question to be decided as to whether service of notice upon the director and authorized signatory of the company is sufficient to bind the company for liability under Section 138 of the Negotiable Instrument Act. Unlike Himanshu (supra) the appellant/complainant issued notices to both the respondent/company and accused No.2 being the authorized signatory on behalf of the respondent/company. The respondent during trial of the case failed to prove service of notice upon accused No.2. So far as accused No.1 is concerned, it is found from the copy of the notice that the name

and address of accused No.1/company was correctly recorded in the demand notice. The postal track report shows that it was served upon the accused No.1/company. During trial of the case the defacto complainant has proved the copy of notice, postal receipt and the postal track report. The postal track shows that the demand notice was served upon the accused No.1/company on 12th April, 2013. During examination under Section 313 of the Cr.P.C the accused No.2 did not state that the demand notice in the name of the accused No.1/company was sent in the wrong address. On the other hand, the accused pleaded that neither the company nor he received any notice demanding payment of the check amount. During examination under Section 313 of the Cr.P.C the accused stated that he will lead evidence in support of his defence. The accused however did not examine any witness to rebut the presumption of due service of notice under Section 27 of the General Clauses Act. In the instant case it is found from the copy of the notice that it was addressed respondent No.1/company in its correct address. The postal track report shows that it was duly served upon the respondent No.1/company. Therefore, the court is free to presume that the notice was duly served upon the accused No.1/company under the provision of Section 27 of the General Clauses Act. The decision of the Apex Court in K. Bhaskaran supports the court's observation in this regard.

29. At this stage, I am constrained to record that the decision by the Orissa High Court in Kailash Chandra Mishre (supra) is not applicable under the facts and circumstances of the present case. If the ratio laid

down by the Division Bench of the Orissa High Court in Kailash Chandra Mishre (supra) is accepted to be a valid enunciation of the proposition of law, then the court would not be in a position to accept the law of presumption under Section 27 of the General Clauses Act coupled with the principle laid down in K. Bhaskaran (supra) by the Hon'ble Supreme Court.

30. In fine, this court on due consideration of the materials on record, submission made by the learned Counsels for the appellant and the respondents and on careful perusal of the relevant statute as well as the pronouncement of the Apex Court and the High Court finds that the learned Magistrate committed error in holding that no notice was served upon the accused No.1/company for the reason that the name of the accused No.1/company and its address was recorded in the postal receipt issued by the post office to the sender of the notice. The postal receipt (Exhibit-5/1) only proves that a notice was sent under registered speed post with AD. The question as to whether it was sent to the accused/company or that it was served or not in correct address is a question of fact to be determined from the copy of the notice and the postal track report. The copy of the notice, it is recorded hereinabove contains correct address of the accused No.1/company. The postal track report shows that it was duly served upon the accused/company.

31. Therefore, I have no alternative but to hold that the demand notice was duly served on 12th April, 2013 to the accused No.1/company.

32. In view of the service of demand notice upon accused No.1/company, it is not necessary to find out as to whether demand notice was actually served upon accused No.2 or not. The accused person who is in charge of the affairs of the company and running its affair must naturally be aware of notice of demand under Section 138 of the Act issued to such company. It is precisely for the reason that no notice is additionally contemplated to be given to directors of the company. The decision of the Hon'ble Supreme Court in Krishna **Texport and & Capital Markets Ltd. vs. Ila Agrawal** reported in **(2015) 8 SCC 28** may be relied on in support of my observation and decision.

33. In view of what has been stated above the impugned judgment and order of acquittal passed by the learned Metropolitan Magistrate, 3rd Court, Kolkata in complaint case No.C16191 of 2013 is liable to be set aside.

34. Accordingly, the instant appeal is allowed on contest.

35. The judgment and order of acquittal passed in favour of respondents No.1 and 2 is set aside.

36. The lower court record of complaint case No.C16191 of 2013 be sent to the 3rd Court of the Metropolitan Magistrate, Kolkata along a copy of this judgment to record conviction and order of sentence against the respondents.

37. The department is directed to sent down the lower court record along with a copy of this judgment immediately to the court below.

38. The learned Magistrate in trial court is directed to record conviction and sentence against accused persons within three weeks from the date of communication of the instant judgment and receipt of the lower court record.

(Bibek Chaudhuri, J.)