

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

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**CRA-AS-48-2022 (O&M)
Date of decision: 05.04.2022**

RAJINDER PAL SINGH

... Appellant

Versus

SANJEEV SHARMA

... Respondent

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

Present : Mr. Aditya Jain, Advocate
for the appellant.

Mr. Rajesh Lamba, Advocate
for the respondent.

VINOD S. BHARDWAJ. J.

The instant appeal has been preferred against the judgment dated 02.07.2013 passed by the Judicial Magistrate Ist Class, Gurugram, whereby respondent-accused has been acquitted of the notice of accusation served upon him.

2. The brief facts leading to the filing of the instant appeal are that the respondent-accused is alleged to have borrowed a sum of Rs.17,45,000/- from the appellant-complainant in the month of July 2010. In order to discharge the said legal liability, the respondent-accused is alleged to have issued a cheque bearing No.540695 dated 13.12.2010 amounting to Rs.17,45,000/- in favour of the appellant-complainant drawn at Punjab National Bank, New Delhi. Upon presentation of the said cheque by the appellant-complainant for encashment with his banker, the same was returned unpaid on 03.03.2011 with the endorsement "refer to drawer". Thereafter, a legal notice dated 17.03.2011 was sent through advocate, however, the same was returned with the endorsement "receiver is not residing at this address." It

is contended that the legal notice was sent through registered post to the address of the respondent-accused as mentioned in the Driving Licence as well as Voter I.D. Card of the respondent-accused. It is also pointed out that the said address is also reflected in a sale deed dated 04.01.2008, which was executed between Rajinder Pal Singh (appellant-complainant herein) and Sanjeev Sharma (respondent-accused herein). It is submitted that the proceedings were instituted against the respondent-accused before the Judicial Magistrate Ist Class, Gurugram, however, vide judgment dated 02.07.2013, the respondent-accused was acquitted of the notice of accusation served upon him. Hence, the present appeal.

3. Learned counsel appearing on behalf of the appellant-complainant has argued that the judgment passed by the Judicial Magistrate Ist Class, Gurugram suffers from infirmity inasmuch as the offence in question stood legally established and that the address in question was duly reflected in various documents of the respondent-accused i.e. Driving Licence and Voter I.D. Card. The address of the respondent-accused is also mentioned in the sale deed executed between the parties. The same address was mentioned in the legal notice as well as in the complaint.

4. Per contra, the learned counsel appearing on behalf of the respondent-accused submits that there is no illegality in the judgment passed by the Judicial Magistrate Ist Class, Gurugram and that the initiation of the proceedings under Section 138 of the Negotiable Instruments Act, 1881 commences after the issuance of the legal notice claiming a demand of payment. The cause of action would accrue in favour of the appellant-complainant to institute a complaint only when a notice is served upon the correct address of the accused. A wrong address was deliberately mentioned in the legal notice, which was never served upon the respondent-accused. Resultantly, no cognizance of the complaint under Negotiable

Instruments Act could have been taken by the Court.

5. I have heard and considered the respective arguments advanced by the learned counsel for the parties.

6. For the purpose of making a case under Section 138 of the Negotiable Instruments Act, 1881, the following ingredients are required to be satisfied:

- (i) A person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;
- (ii) That 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;
- (iii) That cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the 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 the bank;
- (iv) The payee or the holder in due course of the cheque makes a demand for the payment of the said amount or money by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;
- (v) The drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

7. The point in controversy which arises for consideration is as to

whether proceedings initiated under Section 138 of the Negotiable Instruments Act, 1881 would be held to be illegal and liable to be set aside for want of notice to be duly served on the current address upon the accused for commencement of proceedings under Section 138 of the Negotiable Instruments Act, 1881.

8. Reliance can be placed upon the decision of Hon'ble Apex Court in the case titled as **K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another** reported in **AIR 1999 SC 3762**, wherein the Hon'ble Court has inter alia held as under :-

“19. 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 in the correct address.

9. 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.

10. If a strict interpretation is given that the drawer should have actually received the notice, for the period of 15 days to start running without considering that the payee sent the notice on 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 the Court should not adopt in interpretation that which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure.

11. Another judgment of Hon'ble Supreme Court in the case titled as **D. Vinod Shivappa Vs. Nanda Belliappa** reported in **AIR 2006 SC 2179**, clears the mist, where the Hon'ble Apex Court has inter alia held as under:-

*“14.This Court noticed the position well settled in law that the notice refused to be accepted by the drawer can be presumed to have been served on him. In that case the notice was returned as "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?" **Their Lordships referred to Section 27 of the General Clauses Act and observed that the principle incorporated therein could profitably be imported in a case where the sender had 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.** This Court dismissed the appeal preferred by the drawer holding that where the notice is returned by the addressee as unclaimed such date of return to the sender would be the commencing date in reckoning the period of 15 days contemplated in clause (c) to the proviso of Section 138 of the Act. This would be without prejudice to the right of the drawer of the cheque to show that he had no knowledge that the notice was brought to his address. Since the appellant did not attempt to discharge the burden to rebut the aforesaid presumption, the appeal was dismissed by this Court. The aforesaid decision is significant for two reasons. Firstly it was held that the principle incorporated in Section 27 of the General Clauses Act would apply in a case where the sender despatched the notice by post with the correct address written on it, but that would*

be without prejudice to the right of the drawer of the cheque to show that he had no knowledge that the notice was brought to his address.

12. The Hon'ble Court in the above case has inter alia further held as under:-

“20. Learned counsel for the appellant submitted that there may be unscrupulous complainants, who may manage to get a false postal endorsement of "refusal" or "unclaimed" or "party not available" and then prosecute an innocent or bona fide drawer. We do not think that the drawer is without remedy. He can also establish by evidence that said endorsement of "refusal" or "unclaimed" or "not found" during delivery time to be false. Alternatively, he may pay the amount due and compound the matter. Be that it may.”

13. That the present issue had also come before the Hon'ble High Court of Delhi where they dealt with a similar question in the matter of **V.K. Jain Vs. Sharad Jagtiani, I (2007) BC 285, (2007) 145 PLR 29** and relied upon the judgment of the Division Bench of the Delhi High Court in the matter of **Parkash Jewellers Vs. A.K. Jewellers (2002) B.C. 404 (D.B.) : 2002(2) J.C.C. 1171**, noted as under:

“3. Since all these judgments raise same issue, it is not necessary to discuss all the judgments in detail. Our purpose would be served by referring to the judgment of Division Bench of this Court in the case of Parkash Jewellers v. A.K. Jewellers (supra), which being a judgment of Division Bench is binding on this Court. In the said case the Division Bench specifically opined that the notice under Section 138 can be served either through Registered Post or through U.P.C. It is also held that if notice is even dispatched by U.P.C. with correct address of the drawer written on it, presumption of the service of the said notice arises. Relevant discussion is contained in para 10 and 11 of the judgment which are reproduced below:

10. As it is, Section 138 does not prescribe any mode for

giving of demand notice by the payee or holder of the cheque. But where such notice is served by post through registered post or postal certificate, etc. with the correct address of the drawer written on it, it would raise a presumption of service unless the drawer proves that it was not received by him in fact and that he was not responsible for such non-service. This is in tune with the principle embodied in Section 27 of the General Clauses Act or even Rule 19A of Order 5, C.P.C.

11. Section 27 of General Clauses Act deals with the presumption of service of notice, sent by post and provides that service of such notice shall be deemed to have been affected unless the contrary is proved. This principle is equally applicable to the service of notice for purpose of Section 138 of the Negotiable Instruments Act also. The same could be said about the provision of Rule 19A of Order 5, C.P.C. which requires a Court to make a declaration of summons having been duly served and dispatched through registered post notwithstanding that AD card had been lost or misplaced or not received back within 30 days for some other reason. The relevant proviso provides:

14. Provided that where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgement due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgement having been lost or mislaid, or for other reason, has not been received by the Court within thirty days from the date of issue of the summons.

15. Further more, the defence of the accused that he did not receive the statutory demand notice is no longer tenable in the light of **C.C. Alavi Haji Vs. Palapetty Muhammed and Anr**, reported in **(2007) 6 SCC 555**, wherein the three Judge Bench of the Hon'ble Supreme Court of India has noted 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 in spite 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 & Ors. and V.Raja Kumari Vs. P.Subbarama Naidu & Anr.] 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 emphasise 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 aforementioned 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.

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's 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. Now in so far as the question regarding who can rebut the said presumption is concerned, reference is made to the Division Bench Judgment of the Delhi High Court in the matter of **Parkash Jewellers Vs. A.K. Jewellers (2002) B.C. 404 (D.B.) : 2002(2) J.C.C. 1171** wherein their lordships have stated that:

“10. As it is, [Section 138](#) does not prescribe any mode for giving of demand notice by the payee or holder of the cheque. But where such notice is served by post through registered post or postal certificate, etc. with the correct address of the drawer written on it, it would raise a presumption of service unless the drawer proves that it was not received by him in fact and that he was not responsible for such non-service. This is in tune with the principle embodied in Section 27 of the General Clauses Act or even Rule 19-A of Order 5, C.P.C.”

17. That the aforementioned question has clearly been answered in favour of the complainant by the decision of the Hon'ble Supreme Court in the matter

titled as **M/s. Indo Automobiles Vs. M/s. Jain Durga Enterprises & Ors.**, dated 15th July, 2008, where the Hon'ble Supreme Court has inter alia held as under:

*“8. Admittedly, notice under Section 138B of the Negotiable Instruments Act was sent to the respondents through registered post and under a certificate of posting on their correct address of the respondents. The High Court had quashed proceeding on the ground that although notice through registered post and also under certificate of posting were sent by the appellant/ complainant to the respondents but because of the endorsement of the postal peon, the service could not be said to have been effected. In our view, the High Court was not justified in holding that service of notice could not be found to be valid. In **K.Bhaskaran vs. Sankaran Vaidhyan Balan & Anr. [1999 (7) SCC 510]**, it has been held that the context of section 138B of the Negotiable Instruments Act invites a liberal interpretation favouring the person who has the statutory obligation to give notice under the Act because he must be presumed to be the loser in the transaction and provision itself has been made in his interest and if a strict interpretation is asked for that would give a handle to the trickster cheque drawer. It is also well settled that once notice has been sent by registered post with acknowledgment due in a correct address, it must be presumed that the service has been made effective. We do not find from the endorsement of the postal peon that the postal peon was at all examined. In **V. Raja Kumari vs. P. Subbarama Naidu & Anr. [2004 (8) SCC 774]**, again this Court reiterated the same principle and held that the statutory notice under Sections 138 and 142 of the Negotiable Instruments Act, 1881 sent to the correct address of the drawer but returning with the endorsement must be presumed to be served to the drawer and the burden to show that the accused drawee had managed to get an incorrect postal endorsement letter on the complainant and affixed thereof have to be considered during trial on the background facts of the case.*

9. That being the position, we are unable to sustain the order of the High Court and impugned order is set aside.....”

In view of the judgments discussed hereinabove, it is very much clear that two conditions are required to be fulfilled for the rebuttal of the presumption of the notice:

- a) The drawer proves that the notice was not received by him in fact,*
- b) The drawer was not responsible for such non-service,*

18. Undisputedly, the respondent-accused had entered appearance before the trial Court and as such, he could have offered to make good the payment as noticed in the cheque and complaint within a period of 30 days of having entered appearance. He has, however, chosen not to make good the offer.

19. Invariably, the respondent-accused has not been discharged on account of failure on the part of the appellant-complainant to establish existence of pre-existing liability or a legally enforceable debt, rather, the judgment of acquittal is based solely on the alleged failure to serve legal notice. The same, thus, does not disprove existence of a liability and the issuance of the cheque in discharge of such liability by the drawer. The accused cannot be permitted to take benefit of such a proposed interpretation and if the said suggestion is accepted, the same would defeat the very object of the statute and the right of the complainant to seek speedy justice would be denied. It would be easy for any accused to issue a cheque and to thereafter change his address and take advantage to claim that the proceedings should be rendered as the notice was not served upon him.

20. Even otherwise, it is not in dispute that the respondent-accused had never resided at the address at which the notice was sent and that the said address was duly recorded on various documents of the respondent-accused. The said address features in the voter identification card issued by the Election Commission of India as well as in the Driving License in the name of respondent-accused. It cannot be said that the appellant-complainant had given a wrong address to derive any benefit or to mislead the Court in giving a false/wrong address on purpose. As

a matter of fact, the appellant-complainant is himself suffering on account of such delay. However, once the respondent-accused has already entered appearance in the proceedings before the Court and had every occasion to rebut the acquisitions against him and to create a probable defence that either the cheque was not issued by him or that it was not in discharge of a pre-existing liability or legally enforceable debt, it cannot be inferred that the respondent-accused has suffered any real and material prejudice.

21. In view of the facts and the judgments noticed above, I find that the judgment passed by the Judicial Magistrate First Class, Gurugram is perverse and suffers from legal infirmity and is not in consonance with the authoritative pronouncements of the Hon'ble Supreme Court. The present appeal is accordingly allowed and the judgment dated 02.07.2013 is set aside. The matter is remitted to the trial Court for fresh adjudication and determination on merits. The parties are directed to appear before Illaqa Magistrate on **11.07.2022** or any such other date as may be convenient for Illaqa Magistrate for initiation of the appropriate proceedings.

(VINOD S. BHARDWAJ)
JUDGE

April 05, 2022
rajender/vishal

<i>Whether speaking/reasoned</i>	:	<i>Yes/No</i>
<i>Whether reportable</i>	:	<i>Yes/No</i>