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

232

CRA-AS-280-2019

Date of decision : 13.09.2023

M/s. Arun Enterprises

..... Appellant

versus

B M Khullar

..... Respondent

CORAM : HON'BLE MR. JUSTICE PANKAJ JAIN

Present: Mr. Avnish Mittal, Advocate
for the appellant.

Mr. R. Kartikeya, Advocate
for the respondent.

PANKAJ JAIN, J. (Oral)

1. Complainant is in appeal against the judgment passed by Additional Sessions Judge, Gurugram dated 03.12.2018, whereby the appeal preferred by the respondent against judgment of conviction passed by JMIC, Gurugram convicted him for offence punishable under Section 138 of the Negotiable Instruments Act has been allowed.

2. Counsel for the appellant submits that the appeal has been accepted merely for the reason that the pleading w.r.t. serving legal notice upon the respondent-accused has not been raised in the complaint, even though the same was part of the affidavit and the legal notice as well as postal receipts were duly exhibited.

3. While assailing the findings recorded by the Appellate Court acquitting the respondent, reliance is being placed upon law laid down by the Apex Court in *C.C. Alavi Haji vs. Palapetty Muhammed and another, reported as 2007(6) SCC 555*, wherein the Apex Court

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while dealing with the issue and interpreting the expression 'giving of notice' as provided under the statute observed as under:-

“xx xx xx

7. The issue with regard to interpretation of the expression 'giving of notice' used in Clause (b) of the proviso is no more res integra. In **K. Bhaskaran v. Sankaran Vaidhyan Balan & Anr., 1999(4) RCR (Criminal) 309 : (1999)7 SCC 510**, the said expression came up for interpretation. Considering the question with particular reference to scheme of Section 138 of the Act, it was held that failure on the part of the drawer to pay the amount should be within fifteen days 'of the receipt' of the said notice. '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 and for the drawer to comply with Clause (c) of the proviso. Emphasising that the provisions contained in Section 138 of the Act required to be construed liberally, it was observed thus :

"If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter 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 Court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as

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that would defeat the very legislative measure.

In Maxwell's Interpretation of Statutes the learned author has emphasised that "provisions relating to giving of notice often receive liberal interpretation," (vide page 99 of the 12th Edn.) The context envisaged in Section 138 of the Act invites a liberal interpretation for the person who has the statutory obligation to give notice because he is presumed to be the loser in the transaction and it is for his interest the very provision is made by the legislature. The words in Clause (b) of the proviso to Section 138 of the Act show that 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 dispatched his part is over and the next depends on what the sendee does."

xx xx xx

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

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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 n the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed. [Vide Jagdish Singh v. Natthu Singh, AIR 1992 Supreme Court 1604 State of M.P. v. Hiralal & Ors., (1996)7 SCC 523 and V. Raja Kumari v. P.Subbarama Naidu & Anr. 2004(4) RCR (Criminal) 933 : 2005(1) Apex Criminal 58 : (2004)8 SCC 774]. 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

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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

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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

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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 Bhaskarans 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."

4. Counsel for the respondent submits that so far as the legal proposition as canvassed in the judgment of the Apex Court is concerned, there cannot be any dispute. However, there were other debatable issues raised by the respondent-accused which have not been considered by the Appellate Court.

5. Having heard counsel for the parties and after going through the records of the case, this Court finds that so far as the issue of receipt of legal notice by the respondent and non mentioning thereof in the complaint is concerned, the same is no more *res integra* and stands concluded by the law laid down by the Apex Court in ***C.C. Alavi Haji's case (supra)*** and thus the present appeal merits acceptance and the impugned order deserves to be set aside. However, at the same time, it is evident from the impugned judgment that the Court itself observed that apart from the solitary issue of the legal notice, it opted not to go in the other issues raised by the appellant.

6. Resultantly, accepting the present appeal and setting aside the impugned judgment of acquittal passed by the Lower Appellate

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Court, this Court deems it appropriate to remand the present matter to Appellate Court to decide it afresh by considering all the pleas raised by the respondent-accused, in accordance with law. However, keeping in view the fact that the present appeal is pending here since 2019, Appellate Court is directed to decide the appeal expeditiously, preferably, within a period of 03 months from the date of receipt of certified copy of the order. Parties are directed to appear before the Lower Appellate Court on **16.10.2023**.

7. Disposed off, accordingly.

(PANKAJ JAIN)
JUDGE

13.09.2023

Dinesh

Whether speaking/reasoned :	Yes
Whether Reportable :	No