

27.02.2024
Ct. No.32
Item No.34
SA

**In the High Court at Calcutta
Criminal Revisional Jurisdiction
Appellate Side**

CRR 1708 of 2021

Gijo T George Malappuram Thekkemuriyl
.....Petitioner
Vs.

Reliance General Insurance Co. Ltd.
.....Opposite Party

Nobody appears on behalf of either of the parties on call.
Even on earlier occasion no one represented for the petitioner. No
accommodation sought for.

The instant case record is taken up for the purpose of
disposal on merits to avoid further delay since the matter pending
since 2021.

The petitioner/accused person filed this application under
Section 482 of the Code of Criminal Procedure, 1973 seeking
quashing of a Complaint Case being No. CS 18865/2021 dated
23.03.2021 pending before the learned Metropolitan Magistrate,
8th Court at Calcutta.

The brief facts of the instant case are that the opposite
party/complainant has filed an application under Section 138 of

the Negotiable Instruments Act, 1881 before the learned Chief Metropolitan Magistrate at Calcutta and subsequently same was transferred to the learned Metropolitan Magistrate, 8th Court at Calcutta. After taking cognizance, the learned Magistrate has issued a summon upon the petitioner. After receiving the said summon, the petitioner filed this revisional application contending therein that the allegation levelled against the petitioner is general in nature and does not speak specifically about the legal debt and liabilities for issuing the Cheque Nos. 429583 and 429588 dated 10th January, 2021. Claim of the claimant that the cheque was dishonoured. The complainant has neither filed any postal receipt nor any Acknowledgement Due Card showing dispatch and service of statutory notice upon the petitioner under Section 138 of the Negotiable Instruments Act, 1881. As such the continuation of the impugned proceeding is illegal in absence of postal receipt and acknowledgment due card showing dispatch and service of statutory notice under Section 138 of the Negotiable Instruments Act, 1881.

The main contention of the petitioner is that the complainant could not show, by producing any evidence that in fact the notice was served on him, therefore, the essential condition for taking cognizance, as provided under Section 138 clause (c) read with section 142(1)(b) of the NI Act was not fulfilled.

In the above facts and circumstances, the case came for disposal.

Upon perusal of the application along with annexure thereto, this Court finds the issue raised by the petitioner is that whether non-filing of track report or acknowledgement due card would illegal to proceed with the case filed under Section 138 of the Negotiable Instruments Act, 1881 or not?

Before deciding the aforesaid issue, this Court would like to peruse the complaint filed by the complainant/ opposite party. It appears that the accused person/petitioner issued the Cheque Nos. 429583 and 429588 dated 10th January, 2021 drawn on South Indian Bank Limited to the tune of Rs.1,50,579/- and Rs. 50,337/- towards full and/or part relinquishment of his legal debts and liability. The said cheque was placed for encashment through its banker, namely, HDFC Bank Limited but the said cheque was dishonoured and returned by the drawee bank for insufficient funds on 17.01.2021. On receipt of such information, the complainant issued and sent a demand notice on 28.01.2021 to the address of the accused person in terms of Section 138(b) of the Negotiable Instruments Act, 1881 and amendment thereto asking the accused person to pay the said amount within a period of 15 days from the date of receipt of the said notice. But the

accused person has failed and neglected to pay the said amount covered by the said cheques and when he failed to pay the payment of the same amount covered by the aforesaid cheques, the complainant filed this case on 16th March, 2021.

In the above facts and circumstances of the case, it appears from the complaint itself the requirements as provided under Section 138 of the Negotiable Instruments Act, 1881 have been fulfilled by the complainant.

So far as the issue raised by the petitioner that no postal track report has been filed by the petitioner to show actual service of notice under Section 138 of Negotiable Instruments Act, 1881. The complainant has issued a demand notice to the correct address of the accused person. No envelope returned back to the claimant. So it seems notice is properly served. In several decisions, the Hon'ble Supreme Court of India held that when the notice is served upon the actual or proper address of the addressee, it shall be deemed to be properly served unless contrary is proved.

The Supreme Court in ***Ajeet Seeds Limited vs. K. Gopala Krishnaiah; (2014) 12 SCC 685***, specifically dealt with the absence of averments in a complaint about service of notice upon

accused. In the aforesaid case, the Supreme Court agreed with the view taken in ***C.C. Alavi Haji vs. Palapetty Muhammed (supra)***. The court explained the nature of presumptions which can be drawn under section 114 of the Evidence Act and under 27 of the General Clauses Act. It was held as below:-

“9. This Court then explained the nature of presumptions under Section 114 of the Evidence Act and under Section 27 of the GC Act and pointed out how these two presumptions are to be employed while considering the question of service of notice under Section 138 of the NI Act. The relevant paragraphs read as under:

“13. According to Section 114 of the Act, read with Illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to 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. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to

communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the G.C. Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Act is extracted below:

“27. Meaning of service by post.-

Where any Central Act or regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression ‘serve’ or either of the expressions ‘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, pre-paying 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”.

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 (1992) 1 SCC 647; State of M.P. Vs. Hiralal & Ors. (1996) 7 SCC 523 and V.Raja Kumari Vs. P.Subbarama Naidu & Anr. (2004) 8 SCC 74] 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.”

10. It is thus clear that Section 114 of the Evidence Act enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. Section 27 of the GC Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. It is not necessary to 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.”

In the light of aforesaid discussion and view taken by the Hon'ble Supreme Court, in the instant case, the trial Court seems to have drawn a presumption of law with regards to service of demand notice. Furthermore, onus lies upon the claimant to prove his case at the time of trial. At the same time, accused person also gets opportunity to contest the same during trial.

Under the above circumstances, this Court does not find any illegality or infirmity in taking cognizance by the learned

Magistrate and issue summon upon the accused person.

Accordingly, **CRR 1708 of 2021** is devoid on merit and required to be dismissed.

Consequently, **CRR 1708 of 2021** is thus, dismissed without any order as to costs.

Let a copy of this order be communicated to the learned lower court for information.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties as expeditiously as possible taking all legal formalities.

(Ajay Kumar Gupta, J.)

