SUPREME COURT OF INDIA

C.C. ALAVI HAJI

Vs.

PALAPETTY MUHAMMED & ANR.

Appeal (crl.) 767 of 2007

(CJI K.G. BALAKRISHNAN, R.V. RAVEENDRAN & D.K. JAIN)

18/05/2007

JUDGEMENT

D.K. JAIN, J.:

1. Leave granted.

2 The matter has been placed before the three Judge Bench in view of a Reference made by a two-Judge Bench of this Court, pertaining to the question of service of notice in terms of Clause (b) of proviso to Section 138 of the Negotiable Instruments Act, 1881 (in short The Act). Observing that while rendering the decision in D. Vinod Shivappa Vs. Nanda Belliappa , this Court has not taken into consideration the presumption in respect of an official act as provided under Section 114 of the Indian Evidence Act, 1872,

the following question has been referred for consideration of the larger Bench:Whether in absence of any averments in the complaint to the effect that the accused had a role to play in the matter of non-receipt of legal notice; or that the accused deliberately avoided service of notice, the same could have been entertained keeping in view the decision of this Court in Vinod Shivappas case (supra)?

3. As it hardly needs emphasis that necessary averments in regard to the mode and the manner of compliance with the mandatory requirements of Section 138 of the Act are required to be made in the complaint, from the format of the question, the scope of controversy appears to lie in a narrow compass but bearing in mind the fact that the issue raised has wider implication with regard to the very maintainability of the complaint itself, we deem it necessary to deal with the issue in little more detail.

4. Chapter XVII of the Act originally containing Sections 138 to 142 was inserted in the Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 with the object of promoting and inculcating faith in the efficacy of banking system and its operations and giving credibility to negotiable instruments in business transaction. The introduction of the said Chapter was intended to create an atmosphere of faith and reliance on banking system by discouraging people from not honouring their commitments by way of payment through cheques. Section 138 of the Act was enacted to punish those unscrupulous persons who purported to discharge their liability by issuing cheques without really intending to do so. To make the provisions contained in the said Chapter more effective, some more Sections were inserted in the Chapter and some amendments in the existing provisions were made. Though, in this reference, we are not directly concerned with these amendments but they do indicate the anxiety of the Legislature to make the provisions more result oriented. Therefore, while construing the provision, the object of the legislation has to be borne in mind.

5. As noted above, the controversy arises in the context of service of notice in terms of Section 138 of the Act. The conditions pertaining to the notice to be given to the drawer, have been formulated and incorporated in Clauses (b) and (c) of the proviso to Section 138 of the Act, which read as follows:Provided that nothing contained in this section shall apply unless

(a)

(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, 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.

6. As noted hereinbefore, Section 138 of the Act was enacted to punish unscrupulous drawers of cheques who, though purport to discharge their liability by issuing cheque, have no intention of really doing so. Apart from civil liability, criminal liability is sought to be imposed by the said provision on such unscrupulous drawers of cheques. However, with a view to avert unnecessary prosecution of an honest drawer of the cheque and with a view to give an opportunity to him to make amends, the rosecution under Section 138 of the Act has been made subject to certain conditions. These onditions are stipulated in the proviso to Section 138 of the Act, extracted above. Under Clause (b) of the proviso, the payee or the holder of the cheque in due course is required to give a written notice to the drawer of the cheque within a period of thirty days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. Under Clause (c), the drawer is given fifteen days time from the date of receipt of the notice to make the payment and only if he fails to make the payment, a complaint may be filed against him. As noted above, the object of the proviso is to avoid unnecessary hardship to an honest drawer. Therefore, the observance of stipulations in quoted Clause (b) and its aftermath in Clause (c) being a pre-condition for invoking Section 138 of the Act, giving a notice to the drawer before iling complaint under Section 138 of the Act is a mandatory requirement.

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 Vs. Sankaran Vaidhyan Balan & Anr. , 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. Emphasizing 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 that would defeat the very legislative measure.In Maxwell's Interpretation of Statues the learned author has emphasized 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.

8. Since in Bhaskarans case (supra), the notice issued in terms of Clause (b) had been returned 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? 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 dispatched the notice by post with correct address written on it, the principle incorporated in Section 27 of the General Clauses Act, 1897 (for short G.C. Act) could profitably be imported in such a case. It was held that in this 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.

9. All these aspects have been highlighted and reiterated by this Court recently in Vinod Shivappas case (supra). Elaborately dealing with the situation where the notice could not be served on the addressee for one or the other reason, such as his non availability at the time of delivery, or premises remaining locked on account of his having gone elsewhere etc; it was observed that if in each such case, the law is understood to mean that there has been no service of notice, it would completely defeat the very purpose of the Act. It would then be very easy for an unscrupulous and dishonest drawer of a cheque to make himself scarce for sometime after issuing the cheque so that the requisite statutory notice can never be served upon him and consequently he can never be prosecuted. It was further observed that once the payee of the cheque issues notice to the drawer of the cheque, the cause of action to file a complaint arises on the expiry of the period prescribed for payment by the drawer of the cheque. If he does not file a complaint within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138 of the Act, his complaint gets barred by time. Thus, a person who can dodge the postman for about a month or two, or a person who can get a fake endorsement made regarding his non availability, can successfully avoid his prosecution because the payee is bound to issue notice to him within a period of 30 days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. He is, therefore, bound to issue the notice, which may be returned with an endorsement that the addressee is not available on the given address. This Court held:We cannot also lose sight of the fact that the drawer may by dubious means manage to get an incorrect endorsement made on the envelope that the premises has been found locked or that the addressee was not available at the time when postman went for delivery of the letter. It may be that the address is correct and even the addressee is available but a wrong endorsement is manipulated by the addressee. In such a case, if the facts are proved, it may amount to refusal of the notice. If the complainant is able to prove that the drawer of the cheque knew about the notice and deliberately evaded service and got a false endorsement made only to defeat the process of law, the Court shall presume service of notice. This, however, is a matter of evidence and proof. Thus even in a case where the notice is returned with the endorsement that the premises has always been found locked or the addressee was not available at the time of postal delivery, it will be open to the complainant to prove at the trial by evidence that the endorsement is not correct and that the addressee, name lythe drawer of the cheque, with knowledge of the notice had deliberately avoided to receive notice. Therefore, it would be pre-mature at the stage of issuance of process, to move the High Court for quashing of the proceeding under Section 482 of the Code of Criminal Procedure. The question as to whether the service of otice has been fraudulently refused by unscrupulous means is a question of fact to be decided on the basis of evidence. In such a case the High Court ought not to exercise its jurisdiction under Section 482 of the Code of Criminal Procedure

10. It is, thus, trite to say that where the payee dispatches the notice by registered post with correct address of the drawer of the cheque, the principle incorporated in Section 27 of the G.C. Act would be attracted; the requirement of Clause (b) of proviso to Section 138 of the Act stands complied with and cause of action to file a complaint arises on the expiry of the period prescribed in Clause (c) of the said proviso for payment by the drawer of the cheque. Nevertheless, it would be without prejudice to the right of the drawer to show that he had no knowledge that the notice was brought to his address.

11. However, the Referring Bench was of the view that this Court in Vinod Shivappas case (supra) did not take note of Section 114 of Evidence Act in its proper perspective. It felt that the presumption under Section 114 of the Evidence Act being a rebuttable presumption, the complaint should contain necessary averments to raise the presumption of service of notice; that it was not sufficient for a complainant to state that a notice was sent by registered post and that the notice was returned with the endorsement out of station; and that there should be a further averment that the addressee-drawer had deliberately avoided receiving the notice or that the addressee had knowledge of the notice, for raising a presumption under Section 114 of Evidence Act.12. Therefore, the moot question requiring consideration is in regard to the implication of Section 114 of the Indian Evidence Act, 1872 insofar as the service of notice under the said proviso is concerned. Section 114 of the Indian Evidence Act, 1872 reads as follows:Section 114 - Court may presume existence of certain facts.- 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.Illustrations The Court may presume (f) That the common course of business has been followed in particular cases;

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 affected 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 aforenoted 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 haskarans 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.

18. In the instant case, the averment made in the complaint in this regard is: Though the complainant issued lawyers notice intimating the dishonour of cheque and emanded payment on 4.8.2001, the same was returned on 10.8.2001 saying that the accused was out of station. True, there was no averment to the effect that the notice was sent at the correct address of the drawer of the cheque by registered post acknowledgement due. But the returned envelope was annexed to the complaint and it thus, formed a part of the complaint which showed that the notice was sent by registered post acknowledgement due to the correct address and was returned with an endorsement that the addressee was abroad. We are of the view that on facts in hand the requirements of Section 138 of the Act had been sufficiently complied with and the decision of the High Court does not call for interference.

19 .In the final analysis, with the clarification indicated hereinabove, we reiterate the view expressed by this Court in K. Bhaskaran and Vinod Shivappas cases (supra).

20. For the reasons aforementioned, we do not find any merit in this appeal. It is dismissed accordingly but with no order as to costs in the circumstances of the case.