**SUPREME COURT OF INDIA**

Sarav Investment & Financial Consultants Pvt. Ltd.

Vs.

Llyods Register of Shipping Indian Office Staff Provident Fund

Crl.A.No.1424 of 2007

(S.B. Sinha and Harjit Singh Bedi JJ.)

11.10.2007

**JUDGMENT**

**S.B. SINHA, J**

1. Leave granted.

2. Respondent filed a complaint petition in the 33rd Court of Learned Metropolitan Magistrate at Ballard Pier, Mumbai against the appellant herein alleging, inter alia, that as nine cheques delivered by him having bounced, they have committed an offence under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the Act).

3. It was alleged that a notice was served asking the appellants to pay the amount in question within a period of 15 days from the date of receipt thereof.

4. Cheques were admittedly issued on 16.3.2000. The memo in regard to non-payment of the said cheques was received by the respondent on 16.3.2000. Legal notices were allegedly issued on 30.3.2000 by the respondents Advocate intimating the appellants as regards the dishonour of the said cheques and calling upon them to make payment of the amount of cheque, stating;

4. Our clients presented all the aforesaid cheques for payment on 16th March, 2000 through their bankers, Saraswant Co-op Bank Ltd., Woli Branch, Mumbai 400 018. All the aforesaid cheques were dishonoured and returned to our clients by their bankers, vide advice dated 16th March, 2000, with the remark Funds Insufficient, which was received by our clients on 16/3/2000.

5. Under these circumstances, we hereby give you notice under section 138 of the Negotiable Instruments Act, 1881, as amended to date to make payment of the said sum of Rs. 5,31,47,792/- payable by you to our clients being the aggregate amount of the aforesaid dishonoured cheques, together with interest thereon at the rate of 18% p.a. from 16th March 2000, within fifteen days of receipt of this notice by you, failing which our clients shall be constrained to initiate criminal proceedings against you under section 138 of the Negotiable Instruments Act, 1881 at your entire risk as to costs and consequences.

5. The said notice was not sent under registered cover with acknowledgment due. Even the couriers service was not availed. Employees belonging to M/s. Mulla & Mulla & Craigie Blunt & Caroe, Advocates for the respondents were asked to serve notices. Affidavit of service was filed on 8.5.2000. Ramchandra Damaji Khadpe, one of the employees of the Lawyers Firm affirmed on affidavit in that behalf stating:-

2. I say that I went to 34, Adarsh Nagar Worli, Mumbai, 25 being the address of and furnished by Arvind Naik the Director of M/s Sarav Investment and Financial Consultancy Pvt. Ltd. However the said premises were locked. On making enquiries with the neighbour it was found that they had shifted to Bhatachi Chawl in Worli. I say that I also went to this address, however even there accused. Arvind Naik was not available and after making enquiries from the occupants I understood that Accused Arvind Naik had sold the premises and was no longer available there.

4. In view of the above I say that the said notice has been duly served upon Mr. Arvind Naik Director of M/s. Sarav Investments & Consultancy Pvt. Ltd. the said service upon them has been duly completed in accordance with law.

6. Vilas Salvi, another employee of the firm, in his affidavit stated:-

2. I say that I went to 407, Jayesh Smruti, Near Bhagshala Ground, Dombivili (W), Thane being the address of the registered office of Sarav Investment & Financial consultancy Pvt. Ltd. as furnished by accused No. 2 However, there was no office and the door was answered by a lady who was not for with any information and also refused to accept service of the letter.

4. In view of the above I say that the said notice has been duly served upon Mr. Arvind Naik Accused No. 2 Director of M/s. Sarav Investments & Consultancy Pvt. Ltd. and upon the company Accused No. 1. The said service upon them has been duly completed in accordance with law.

7. The complaint petition was filed on 9.4.2000. In regard to the alleged service of notice, it was stated:-

6. The said notice was sent to Accused Nos. 1 and 2 by Hand Delivery, but to the shock of the representatives of the advocates of the complainant who visited to the premises of the Accused to deliver the said notice to the accused, the premises of the Accused No. 1 were closed and the Accused No. 2 was also not available at that address. I say the accused No. 2 has, deliberately and intentionally, shifted premises of Accused No. 1 to avoid the service of the notice upon him and the accused No. 1 company. The complainant relies upon the affidavit of the representative of the Advocates of the Complainant trust who visited the premises of the Accused No. 1 to serve the statutory notice upon the accused.

8. Relying on or on the basis of the purported statements made on the complaint petition as also the affidavits of the aforementioned two clerks, cognizance was taken by the learned Metropolitan Magistrate, 33rd Court Ballard Pier, Mumbai on 24.4.2003.

9. Appellants having been summoned, filed an application for recalling of the processes served on them inter alia on the premise that the requirements to comply with proviso (c) appended to Section 138 of the Act having not been complied with, issuance of summons was illegal.

10. By an order dated 24.4.2003, the said plea was rejected by the learned Magistrate stating:

10. The second point raised by the accused is that the statutory notice under section 138 was not served on the accused. In this regard it is to be noted that the service was effected by hand delivery. It is also contended in the complaint that it was at the hands of one Ramchandra Khadpe and one Vilas Salvi.

Affidavit of those two process servers were filed along with the complainant and statement on oath of Vilas Salvi and Khadpe was recorded in the respective cases. Thereafter on satisfaction the process was issued upon relying the fact that on the given address of the accused no. 1 in Dombivali the notices were tendered and a lady who opened the door of that tenement did not accept the notice and closed the door. This much statement made by them was sufficient to show prima facie attempt for service of the statutory notice was done by the complainant.

11. A Criminal Revision Application was filed thereagainst before the learned Sessions Judge, Bombay on 29.5.2003. By an Order dated 1.4.2004, the learned Sessions Judge, Greater Bombay on consideration of the facts and circumstances of the case, inter alia allowed the said revision application opining:-

16. The legal position is therefore as above and what follows from it is that the deemed service may only be considered when it is by post and only then all the observations in the above argument can become relevant. The ratio of this judgment cannot be made applicable to a case where a service is not by post. When the service is alleged to be by hand delivery then it is a question of fact and not a question of law. On facts the position is as mentioned above. What is already discussed above indicates that factually, there is no material on record neither in the complaint nor in whatever evidence that was produced by the complainant to satisfy the condition of service of notice within 15 days of the receipt of information of dishonour. This was not at all verified or examined by the Ld. Magistrate. Had it been done the abovementioned glaring defects were there for anyone to see. Suffice is to say relying upon abovementioned observations of the Honble Supreme Court that the service of notice within the period is a sine quo non. There is no alternative but to say that whatever material was before the Ld. Magistrate it did not satisfy this condition at all. Even before me now after considering all these aspects the only conclusion can be that the said condition satisfied. This position as discussed above does not depend upon any contentions raised by the accused but they follow from the material that was produced or made available to the trial Court by the complainant themselves. The question here is not of believing or disbelieving the evidence that is produced by the complainant though one may say that the so called evidence of attempt of service is far from being free from doubt. But I am not passing this order on that ground. I have considered only the complainant before the trial court. On examination of only that material and the complainants case it has to be held that since the most important aspect was not even part of the complainants case in the trial court as discussed above the process could not have been issued in the first instance and at least after the application for recall was made it had to be recalled. In the result the revision applications must succeed. I therefore pass the following order.

12. The High Court on the second revision filed by the respondent herein, however, passed the impugned order stating;

To my mind, the averments made in the complaint together with affidavit of the advocate and the evidence and the document and the verification etc. clearly mention that the service of the notice

was by hand delivery, would be sufficient for issuance of process against the respondents

13. Mr. K. Radhakrishnan, learned senior counsel appearing on behalf of the appellant, inter alia, would submit that keeping in view the provisions contained in clauses (b) and (c) of the proviso appended to Section 138 of the Negotiable Instruments Act, the impugned judgment of the High Court is not sustainable.

14. Ms. Sunita Dutt, learned counsel appearing on behalf of the respondent, on the other hand, would submit that the very fact that the appellants have changed their office as a result whereof service of notice could not be effected, the learned Magistrate has rightly taken cognizance of the offence. The learned counsel would contended that affidavits have been affirmed by the clerks working with the advocates of the respondents and they were competent to serve notices upon the appellants herein which sub- serve the requirements of law. Non-availability of the appellants at their respective addresses, it was urged, would give rise to a presumption that they had been evading service of notice. It was furthermore contended that while determining the issue this Court should take into consideration the quantum of the amount payable by the appellants to the respondents as also their conduct that they were defaulters to third parties and on that premise the impugned judgment may not be interfered with.

15. Section 138 of the Negotiable Instruments Act reads as under:- 138. Dishonour of cheque for insufficiency, etc., of funds in the account 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 debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that 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 that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

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, 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.

16. Section 138 of the Act contains a penal provision. It is a special statute. It creates a vicarious liability. Even the burden of proof to some extent is on the accused. Having regard to the purport of the said provision as also in view of the fact that it provides for a severe penalty, the provision warrants a strict construction. Proviso appended to Section 138 contains a non-obstante clause. It

provides that nothing contained in the main provision shall apply unless the requirements prescribed therein are complied with. Service of notice is one of the statutory requirements for initiation of a criminal proceeding. Such notice is required to be given within 30 days of the receipt of the information by the complainant from the bank regarding the cheque as unpaid. Clause (c) provides that the holder of the cheque must be given an opportunity to pay the amount in question within 15 days of the receipt of the said notice. Complaint Petition, thus, can be filed for commission of an offence by a drawee of a cheque only 15 days after service of the notice. What are the requirements of service of a notice is no longer res-integra in view of the recent decision of this Court in C.C. Alavi Haji Vs. Palapetty Muhammed & Anr. [JT 2007(7) SC 498].

17. Service of notice in this case was not sought to be effected under registered cover with acknowledgment due. It was sought to be done by the agent of the complainant itself. The agent of the complainant sought to serve the said notice through their own employees.

18. The notice, was only required to be dispatched. Its contents were required to be communicated. Communication to the appellant about the fact of dishonouring of the cheques and calling upon him to pay the amount within 15 days is imperative in character. It is not a case, where, actual communication was not necessary. Service of notice is a part of cause of action for lodging the complaint.

19. In K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Anr. [(1999) 7 SCC 510], importance of service of notice has been pointed out stating:- 19. In Blacks Law Dictionary giving of notice is distinguished from receiving of the notice (vide p. 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.

20. 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 the court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure.

21. In Maxwells Interpretation of Statutes, the learned author has emphasized that provisions relating to giving of notice often receive liberal interpretation (vide p. 99 of the 12th Ed.). 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 the payee has the statutory obligation to make a demand by giving notice. The thrust in the clause is one 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.

20. See also C.C. Alavi Haji (supra). Reference may also be made to Municipal Corporation of Delhi Vs. Qimate Rai Gupta & Ors. [JT 2007 (9) SC 496].

21. Appellant No. 2 is a Director of Appellant No. 1 - Company. He is merely vicariously liable for the acts of the company. He could be prosecuted only if the ingredients laid down in Section 141 of the Act are satisfied.. See K. Srikanth Singh Vs. M/s. North East Securities Ltd. & Anr. [(2007) 9 SCALE 371]

22. We may consider the effect of the nature of service of notice effected by the employees of the Law Firm. Paragraph 2 of the affidavit affirmed by Ramchandra Damaji Khadpe does not disclose as to when he had gone to serve notice upon the appellant at 34, Adarsh Nagar, Worli, Mumbai. It was stated that he having been told by the neighbour of the appellant Arvind Naik that he had shifted to Bhatachi Chawl in Worli, went there also. He did not disclose as to what was the new address. He did not furthermore state when did he visit that place.

23. Affidavit of Shri Vilas Salvi is almost on the same terms. He also did not say when he had gone to serve the notice on the company. According to him, and, as has been noticed by the learned Sessions Judge himself, some affidavit was taken from him on 7th May. It was affirmed on 8th May. Apart from the fact that their exists a doubt as to whether the said affidavit was affirmed before the competent authority or not, it has in our opinion rightly been observed by the learned Sessions Judge that the same even if taken to be correct in its entirety, it has to be informed. The notice was sought to be served only on 7th May, 2000. The complaint petition filed by the respondent on 9th May, 2000 was therefore, totally pre-mature.

24. Submission of the learned counsel for the respondent in regard to the conduct of the appellant is besides the point. The allegations made in the complaint petition, if did not subserve the requirements of law was not maintainable and, thus, the same could not have been entertained. Proper application of mind was necessary in that behalf by the learned Magistrate. The learned Magistrate proceeded on the basis that the service of notice upon the company at its registered office would subserve the requirements of law. But, in this case, point taken by the appellant is a different one.

25. Conduct of the appellant, in our opinion, is not material for determining the issue. Even no presumption can be raised in regard to the service of notice as the same has not been effected in terms of the statute.

26. We, therefore, are of the opinion that impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed.