AFR

Reserved on 24.03.2021

Delivered on 07.06.2021

In chamber

Case :- APPLICATION U/S 482 No. - 14190 of 2014

Applicant :- Anil Kumar Goel
Opposite Party :- State of U.P. and Another
Counsel for Applicant :- Anand Prakash Dubey,Pradeep Kumar Rai,Saurabh Trivedi
Counsel for Opposite Party :- Govt. Advocate,Vikrant Rana

Hon'ble Vivek Varma,J.

The present application under Section 482 Cr.P.C. has been filed to quash the entire proceedings of Complaint Case No. 3972 of 2012 (M/s Pal Milk Product Vs. Anil Kumar Goel), under Section 138 of Negotiable Instruments Act, 1881, pending in the Court of the Ist Additional Chief Judicial Magistrate, Meerut.

The opposite party no.2 filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act') against the applicant in the court of Ist Additional Chief Judicial Magistrate, Meerut with the allegation that Cheque No. 875688 issued by the applicant drawn on State Bank of India for an amount of Rs. 48,96,422/- in favour of M/s Pal Milk Product was presented for encashment at Bank of Baroda, Branch Pallavpuram, District Meerut but it was returned with the remark "fund insufficient" vide memo dated 04.09.2012. On 19.09.2012, a legal notice was sent to the applicant. Neither the said notice nor its acknowledgment due returned. On 02.11.2012, again a legal notice was sent to the applicant. There is a presumption of service of the said notice upon the applicant on 04.11.2012. Despite service of notice, the applicant did not make any payment nor sent any reply.

The complaint was filed on 19.11.2012. The learned Magistrate after recording the statement under Sections 200 and 202 Cr.P.C. summoned the applicant vide order dated 04.10.2013, under Section 138 of the Act.

Learned counsel for the applicant submits that in the complaint the date of service of notice of demand dated 19.09.2012 on the complainant has not been disclosed and as such, no proceedings under Section 138 of the Act could be drawn against the applicant.

Elaborating his submission counsel for the applicant contends that

since the date of service of notice dated 19.09.2012 has not been mentioned, from which date the cause of action arose to the complainant to file the present complaint against the applicant cannot be determined.

Learned counsel for the applicant has placed reliance on a decision of this Court in the case of ***Alijan Vs. State of U.P. and another,*** reported in ***2020 (112)ACC 491***.

It was next contended that even otherwise, the complaint on the basis of the second notice dated 02.11.2012 was also not legally maintainable, under the provisions of the Act.

On the other hand, Sri Vikrant Rana, learned counsel for the opposite party no.2, and Sri Nikhil Chaturvedi, learned AGA for the State, submitted that it is not necessary to mention in the complaint that notice of demand was served on the accused on any given date. It is contended that once it is mentioned in the complaint that notice was dispatched under the registered cover, on the address of the accused which has not been stated to be incorrect, there would be a presumption in law with regard to service of notice. The summoning order passed by the Magistrate is legal and just in the eyes of the law and at this stage, only a prima facie case is to be seen and the complaint cannot be thrown at the threshold.

As regards the contention of learned counsel for the applicant that the complaint on the basis of second notice dated 02.11.2012 is not maintainable, learned counsel Sri Vikrant Rana submitted that the second notice dated 02.11.2012 is only a reminder notice to the drawer of the cheque and as such the said notice could not be construed as an admission of non-service of first notice by the complainant.

Heard Sri Pradeep Kumar Rai, learned counsel for the applicant, Sri Nikhil Chaturvedi, learned AGA for the State and Sri Vikrant Rana, learned counsel for the opposite party no.2.

Before proceeding to consider the respective submissions of learned counsel for the parties, it is useful to extract the provisions of Section 138 of the Act.

Section 138 of the Act is reproduced hereinbelow:-

> ***"138. Dishonor of cheque for insufficiency, etc., of funds in the accounts:***
> *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 honor 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 extend to one year, 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 fifteen 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.
Explanation: For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability."

The said section has been considered by the Apex Court in the case of ***C.C.Alavi Haji Vs. Palapetty Muhammed and another,*** reported in ***(2007) 6 SCC 555***. The Apex Court in the said case has enunciated the presumption under Section 114 of the Evidence Act and Section 27 of the General Clauses Act. The relevant paragraphs of the aforesaid decision are quoted hereinbelow: -

"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 GC Act is a far stronger presumption. Further, while Section 114 of the Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of the GC Act is extracted below:

> *"27. Meaning of service by post.—Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve' or either of the expression '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 v. Natthu Singh [(1992) 1 SCC 647 : AIR 1992 SC 1604] ; State of M.P. v. Hiralal [(1996) 7 SCC 523] and V. Raja Kumari v. P. Subbarama Naidu [(2004) 8 SCC 774: 2005 SCC (Cri) 393].) 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 GC 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 [D. Vinod Shivappa Vs. Nanda Belliappa (2006) 6 SCC 456: (2006) 3 SCC (Cri) 114] this Court observed: (SCC p. 462, para 13)

> *"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 GC 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 case [K.Bhaskaran Vs. Sankaran Vaidhyan Balan (1999) 7 SCC 510: 1999 SCC (Cri)

> *1284] 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."*

The aforesaid judgement in the case of ***C.C.Alavi Haji (supra)*** has been followed by the Apex Court in the case of ***Ajeet Seeds Limited Vs. K. Gopala Krishnaiah*** reported in ***(2014) 12 SCC 685*** and held that absence of averments in the complaint about service of notice upon the accused is the matter of evidence. The paragraphs 11 and 12 of the said judgement are reproduced herein below:-

> *"11. Applying the above conclusions to the facts of this case, it must be held that the High Court clearly erred in quashing the complaint on the ground that there was no recital in the complaint that the notice under Section 138 of the NI Act was served upon the accused. The High Court also erred in quashing the complaint on the ground that there was no proof either that the notice was served or it was returned unserved/unclaimed. That is a matter of evidence. We must mention that in C.C. Alavi Haji [C.C. Alavi Haji v. Palapetty Muhammed, (2007) 6 SCC 555: (2007) 3 SCC (Cri) 236], this Court did not deviate from the view taken in Vinod Shivappa [D. Vinod Shivappa v. Nanda Belliappa, (2006) 6 SCC 456: (2006) 3 SCC (Cri) 114], but reiterated the view expressed therein with certain clarification. We have already quoted the relevant paragraphs from Vinod Shivappa wherein this Court has held that service of notice is a matter of evidence and proof and it would be premature at the stage of issuance of process to move the High Court for quashing of the proceeding under Section 482 CrPC. These observations are squarely attracted to the present case. The High Court's reliance on an order passed by a two-Judge Bench in Shakti Travel & Tours [Shakti Travel & Tours v. State of Bihar, (2002) 9 SCC 415: 2003 SCC (Cri) 1217] is misplaced. The order in Shakti Travel & Tours does not give any idea about the factual matrix of that case. It does not advert to rival submissions. It cannot be said therefore that it lays down any law. In any case in C.C. Alavi Haji, to which we have made a reference, the three-Judge Bench has conclusively decided the issue. In our opinion, the judgment of the two-Judge Bench in Shakti Travel & Tours does not hold the field any more.*
> *12. In the circumstances, the impugned judgment is set aside and the instant complaint is restored. The appeal is allowed."*

In view of the settled legal position, as noticed above, it is clear that the complaint cannot be thrown at the threshold even if it does not make a specific averment with regard to service of notice on the drawer on a given date. The complaint, however, must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque.

Directly relevant to the question raised in the present proceedings, in ***Subodh S. Salaskar Vs. Jayprakash M. Shah and another, 2008 (13)SCC 689,*** it was observed by the Apex Court as under:

> "24. Presumption of service, under the statute, would arise not only when it is sent by registered post in terms of Section 27 of the General Clauses Act but such a presumption may be raised also under Section 114 of the Evidence Act. Even when a notice is received back with an endorsement that the party has refused to accept, still then a presumption can be raised as regards the valid service of notice. Such a notice, as has been held by a Three-Judge Bench of this Court in C.C. Alavi Haji v. Palapetty Muhammed and another [(2007) 6 SCC 555] should be construed liberally, stating: (SCC p.565,para 17)
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> > "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 GC 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 case {K.Bhaskaran Vs. Sankaran Vaidhyan Balan, (1999) 7 SCC 510: 1999 SCC (Cri) 1284} 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."*
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> [Emphasis supplied]
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> 25. The complaint petition admittedly was filed on 20.04.2001. The notice having been sent on 17.01.2001, if the presumption of service of notice within a reasonable time is raised, it should be deemed to have been served at best within a period of thirty days from the date of issuance thereof, i.e., 16.02.2001. The accused was required to make payment in terms of the said notice within fifteen days thereafter, i.e., on or about 2.03.2001. The complaint petition, therefore, should have been filed by 2.04.2001.
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> 26. *** *** ***

27. In Madishetti Bala Ramul v. Land Acquisition Officer [(2007) 9 SCC 650], this Court held as under : (SCC p 656, para 18)

> "18. It is not the case of the appellants that the total amount of compensation stands reduced. If it had not been, we fail to understand as to how Section 25 will have any application in the instant case. Furthermore, Section 25 being a substantive provision will have no retrospective effect. The original award was passed on 8-2-1981: Section 25, as it stands now, may, therefore, not have any application in the instant case."

The question is now covered by a judgment of this Court in Anil Kumar Goel v. Kishan Chand Kaura [(2007) 13 SCC 492); 2008 AIR SCW 295] holding: (SCC p.495, paras 9-10)

> "9. '17. All laws that affect substantive rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations, unless the legislative intent is clear and compulsive. Such retrospective effect may be given where there are express words giving retrospective effect or where the language used necessarily implies that such retrospective operation is intended. Hence the question whether a statutory provision has retrospective effect or not depends primarily on the language in which it is couched. If the language is clear and unambiguous, effect will have to be given to the provision is question in accordance with its tenor. If the language is not clear then the court has to decide whether, in the light of the surrounding circumstances, retrospective effect should be given to it or not.' (See: Punjab Tin Supply Co. v. Central Govt.,(1984) 1 SCC 206, AIR 1984 SC 87).
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> 10. There is nothing in the amendment made to Section 142 (b) by Act 55 of 2002 that the same was intended to operate retrospectively. In fact that was not even the stand of the respondent. Obviously, when the complaint was filed on 28.11.1998, the respondent could not have foreseen that in future any amendment providing for extending the period of limitation on sufficient cause being shown would be enacted."

Coming to the facts of the present case, the notice having been sent on 19.09.2012, if the presumption of service of notice within a reasonable time is raised, shall be deemed to have been served, at best within a period of 30 days from the date of issuance thereof i.e. 19.09.2012. The applicant was required to make payment in terms of the said notice within 15 days thereafter i.e. on or about 3.11.2012. The complaint, therefore, should have been filed by 03.12.12, Admittedly, the complaint was filed on 19.11.2012 and therefore, at this stage, it cannot be said that no proceedings under Section

138 of the Act could be drawn against the applicant. The Magistrate at the stage of summoning has only to see whether a prima facie case is made out or not.

The factum of disputed service of notice requires adjudication on the basis of evidence and the same can only be done and appreciated by the trial court and not by this Court under the jurisdiction conferred by Section 482 Cr.P.C.

The judgement of this Court in the case of ***Alijan (supra)*** cited by the learned counsel for the applicant in support of his argument is not good law in view of the judgements of the Supreme Court in ***C.C.Alavi Haji and (supra)***, ***Ajeet Seeds Limited (supra) and Subodh S. Salaskar (supra).***

The second contention raised by learned counsel for the applicant that the complaint on the basis of second notice dated 02.11.2012 was not maintainable, also cannot be accepted for the reason that the cause of action to file the complaint in question arose under clause (c) of the proviso to Section 138 of the Act from sending of the first notice dated 19.09.2012 and not from the notice dated 02.11.2012, as the second notice dated 02.11.2012 is only a reminder notice to the drawer of the cheque and as such, it cannot be construed as an admission of non-service of first notice by the complainant. The Apex Court in the case of ***N. Parameswaran Unni Vs. G. Kannan and another, AIR 2017 Supreme Court 1681,*** has held in paragraph nos. 15 and 16 that second notice has no relevance at all, the second notice would be construed as a reminder of respondent's obligation to discharge his liability. Paragraph nos. 15 and 16 of the said judgment are as under:

> *"15. This Court in catena of cases has held that when a notice is sent by registered post and is returned with 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. Though in process of interpretation right of an honest lender cannot be defeated as has happened in this case. From the perusal of relevant sections it is clear that generally there is no bar under the N.I.Act to send a reminder notice to the drawer of the cheque and usually such notice cannot be construed as an admission of non-service of the first notice by the appellant as has happened in this case.*
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> *16. Moreover the first notice sent by appellant on 12.04.1991 was effective and notice was deemed to have been served on the first respondent. Further, it is clear that the second notice has no relevance at all in this case at hand. Second notice could be*

> *construed as a reminder of respondent's obligation to discharge his liability. As the complaint, was filed within the stipulated time contemplated under Clause (b) of Section 142 of the N.I.Act, therefore Section 138 r/w 142 of N.I.Act is attracted. In view of the matter, we set aside the impugned judgement of the High Court."*

Hence, in view of the foregoing discussions both the submissions raised by the learned counsel for the applicants are not found to be cogent enough to dislodge the proceedings of Complaint Case No. 3972 of 2012, P.S. Kankarkheda, District-Meerut. The present application under Section 482 Cr.P.C. is devoid of merit and it is, accordingly, dismissed.

However, since the complaint case, giving rise to the present application, has been pending since the year 2014, as per the mandate of the Act the proceedings under 138 of the Act ought to be concluded within six months. Accordingly, the Court below is directed to expedite the hearing of the complaint case by fixing short dates and without granting any unnecessary adjournment to either of the parties.

Order Date :- 07.06.2021
Lbm/-