

INDRAJIT MAHANTY, J.

CRLMC. NO.2829 OF 2010(Decided on 25.02.2011)

MOHAMMED JABIR @ DHANA

.....Petitioner

.Vrs.

MANOJ KUMAR BEHERA

.....Opp.Party.

NEGOTIABLE INSTRUMENT ACT, 1985 (ACT NO.61 OF 1985) – S.138.

For Petitioner - M/s. N.Vaheed, P.K.Mohapatra
S.Ahamed & A.A.Sagufta.

For Opp.Party - None.

I.MAHANTY, J. This application under Section 482 Cr.P.C. has been filed seeking to challenge the order dated 7.8.2010 passed in ICC Case No.987 of 2006 whereby the learned S.D.J.M.,Sadar, Cuttack rejected the application filed by the petitioner for recalling the order of cognizance.

2. From the impugned order it appears that the application was filed by the petitioner on 19.5.2010 to recall the order of cognizance on various grounds taken in the said petition which came to be rejected on the ground that the court has no power to call its own order.

3. Learned counsel for the petitioner submits that the order of cognizance ought not to have been passed by the learned S.D.J.M. in view of non-compliance of Proviso (b) of Section 138 of the N.I. Act. He further asserts that it is mandatory that all the provisions contained under Provisos (a), (b) and (c) need to be complied with before the occasion arises for initiating a compliant under Section 138 N.I.Act.

In this respect, reliance is placed on a decision of the Hon'ble Supreme Court in the case of **M/s. Harman Electronics (P) Ltd. Vrs. M/s. National Panasonic India Ltd.**, AIR 2009 SC 1168. Learned counsel for the petitioner has placed stress on paragraph-14 of the said judgment and states that for the purpose of proving its case that the accused had committed an offence under Section 138 of the N.I. Act, the ingredients thereof are required to be proved. What would constitute an offence under Section 138 of the N.I. Act is stated in the main provision and the proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken.. It is further stated therein that receipt of notice by the accused would ultimately give rise to cause of action for filing the complaint.

4. Learned counsel for the petitioner submits that no notice was received by the accused-petitioner and hence, the order of cognizance should have been quashed. He

submits that although the petitioner had issued the registered notice to the accused-petitioner, but the same was not received by him since he was absent from the house.

5. This aspect of the matter regarding compliance of Section 138 (b) of the N.I. Act came to be considered by a three Judges Bench of the Hon'ble Supreme Court in the case of **C.C.AlaVi Haji Vrs. Palapetty Muhammed & Another**, (2007) 38 OCR (SC) 58, in which, the Hon'ble Supreme Court dealt with the scope and ambit of Section 138(b) of the N.I. Act, and came to hold in paragraph-15, that in so far 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 is concerned, 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, there is no material difference between the two provisions. It was held that when a 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 well settled that at the time of taking cognizance of the complaint under Section 138 of the N.I. Act, the court is required to be prima facie satisfied that a case under the said Section is made out and the procedural requirements are complied with. It is then for the drawer to rebut

6. 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.

7. In the instant case, as admitted by the learned counsel for the petitioner, the complainant had issued registered notice intimating dishonour of cheque and the same was returned back to the complainant with the report that the accused-petitioner was absent. There is no averment in the present application that the notice was not sent in the correct address and the said envelope forms part of the complaint. In the aforesaid case the Hon'ble Supreme Court came to conclude that in the facts and situation of the said case, the requirement of Section 138 of the N.I. Act had been complied with.

8. In view of the aforesaid judgment of the Hon'ble Supreme Court, the present case has no merit and the same stands rejected.

Application dismissed.