HIGH COURT OF ORISSA : CUTTACK

AFR

CRLMC Nos. 3091, 3093 and 3095 of 2012

In the matter of applications under Section 482 of the Code of Criminal Procedure.

CRLMC No.3091 of 2012

Anil Kumar Singh ... ... Petitioner

-Versus-

Jagdish Pandey ... ... Opp. Party

CRLMC No.3093 of 2012

Smt. Meenakhsi Singh ... ... Petitioner

-Versus-

Jagdish Pandey ... ... Opp. Party

CRLMC No.3095 of 2012

M/s.Akamai Construction Pvt.Ltd ... ... Petitioner
Represented by Anil Kumar Singh,
(Managing Director)

-Versus-

Jagdish Pandey ... ... Opp. Party

For Petitioners : M/s. B.P.Pradhan, D.P.Nanda, R.K.Kanungo, S.Das, B.P.Panda & P.Nanda.

For Opposite Party : Mrs.Pami Rath, J. Mohanty, & J.P.Behera

PRESENT :

THE HONOURABLE SHRI JUSTICE S.C. PARIJA

Date of Judgment : 30.7.2014

S.C. Parija, J. These three applications under Section 482 Cr.P.C. have been filed by the two accused persons and the accused Company, challenging the order of cognizance dated 19.1.2012, passed by the learned S.D.J.M., Koraput, in 1.C.C.No.68 of 2011, taking cognizance of the offence under Section 138 of Negotiable Instruments Act ('N.I.Act.' for short).

2. The brief facts of the case is that the complainant-opposite party filed a complaint before the learned S.D.J.M., Koraput, under Section 138 N.I.Act., which was registered as 1.C.C.No.68 of 2011, alleging therein that the complainant and the accused persons (petitioners) are known to each other and the complainant and accused no.1 (petitioner in CRLMC No.3091 of 2012), along with two other friends had started a Company (petitioner in CRLMC No.3095 of 2012), in which, all four of them had equal shares. The accused persons were in total control and charge of the business of the Company and were operating the bank accounts of the said Company. It was alleged that the accused Anil Kumar Singh (petitioner in CRLMC no.3091 of 2012), as the Managing Director of the accused Company had issued a cheque bearing no.670019, dated 05.11.2011, for Rs.1,35,00,000/-(Rupees One crore thirty five lakhs), drawn on ICICI Bank, Gaurav Complex Transport Nagar, Korba, Chattisgarh, in favour of the complainant towards discharge of their debt. It was alleged

that the complainant presented the said cheque to his bank at Semiliguda on 11.11.2011 for collection of the cheque amount. It was further alleged that to his surprise, his bank dishonoured the cheque due to insufficient funds in the account of the accused persons and returned the cheque along with memo dated 12.11.2011. It was alleged by the complainant that he got a demand notice issued to the accused persons through his advocate, in their address by registered post with A.D. on 14.11.2011, calling upon the accused persons to pay the cheque amount within fifteen days of receipt of the notice. It was the case of the complainant that though notices were sent in the correct address of the accused persons, the same were returned by the postal authorities with the endorsement that inspite of repeated visit to their office, the addressees were not available to receive the same. On the allegation that the accused persons who were in charge of and responsible to the Company for conduct of the business of the Company have avoided to receive the notice and have failed to pay the amount covered under the cheque, the complainant filed the complaint under Section 138 N.I.Act.

3. The case of the accused persons is that as no list of witnesses were filed along with complaint, no process could have been issued against the accused persons in violation of Section 204(2) Cr.P.C. It is submitted that as the said provision is mandatory in nature and the complainant having not furnished the list of witnesses, the issue of process against the accused persons is improper and illegal. In this regard, learned counsel for the accused persons has relied upon a decision of the Bombay High Court in ***Bhiku Yeshwant Dhangat and others,*** 2001 CRI.L.J. 295, wherein the Hon'ble Court had held that taking cognizance of the complaint without there being

any disclosure as to the witnesses whom the complainant would be examining is improper.

4. Learned counsel for the accused persons has also relied upon a decision of the Karnataka High Court in ***Fakirappa v. Shiddalingappa and ect.,*** 2002 CRI. L. J. 1926, where the Hon'ble Court has observed that there is a purpose under sub-section (2) of Section 204 Cr.P.C., for insisting on a list of the prosecution witnesses being filed before the summons or warrant is issued against the accused under sub-section (1) thereof. By then, the learned Magistrate would have already found sufficient ground to proceed against the accused. When the accused therefore appears before the learned Magistrate in due compliance with the summons or on being produced in execution of the warrant, not only that he should know what the case against him is, but, also as to who are the witnesses to be examined in support of the case of the prosecution. Otherwise, the field will be wide open for the prosecution to bring in any witness at any time, not only to improve its case from time to time, but, also to nullify the admissions given in cross-examination of the prosecution witnesses. It was accordingly held that Section 204(2) demands absolute compliance.

5. Learned counsel for the accused persons has also assailed the impugned order of cognizance on the ground that no notice of demand had been served on them before initiating the proceeding under Section 138 N.I.Act. In this regard, it is submitted that as no notice has been served on the accused persons as required under clause (c) of the proviso to Section 138 N.I.Act. and as the registered notice, purportedly issued to the accused persons has returned

unserved, as has been admitted in the complaint, the proceeding initiated against them under Section 138 N.I.Act. cannot be sustained.

6. In response, learned counsel for the complainant-opposite party submits that the complainant has named himself as a witness in sl.no.4 of the complaint and therefore it cannot be said that no list of witnesses has been furnished. In this regard, it is submitted that it is not necessary to furnish a separate list of witnesses and the complainant having been named as a witness in the complaint itself, the same is sufficient compliance of the provisions prescribed under Section 204(2) Cr.P.C. It is submitted that as the said provision under Section 204(2) Cr.P.C., regarding furnishing of a list of witness before issue of process to the accused is only a matter of procedure, the same is not mandatory and the same can be complied before commencement of the trial, to avoid any prejudice to the accused persons.

7. It is further submitted that as the accused persons have not filed or challenged the order of the learned Magistrate directing issuance of process against them or the summons issued to them pursuant to such order, the order of cognizance cannot be interfered with on the technical ground of non-compliance of procedural requirement.

8. As regard the plea of the accused persons that no notice of demand has been served on them as provided under clause (c) of the proviso to Section 138 N.I.Act., it is submitted that what is required is that the payee has the statutory obligation to make a demand for payment of the amount covered under the cheque by giving notice. As the complainant has got the notice of demand issued through his advocate by registered post in the same address of the accused persons, as has

been furnished by them in the present applications filed before this Court, which the accused persons avoided to receive, for which, the same had to return unserved, as per the endorsement of the postal authorities, they are not entitled in law to take the plea regarding non-service of the notice of demand. In this regard, learned counsel for the complainant has relied upon a decision of the apex court in ***K. Bhaskaran v. Sankaran Vaidhyan Balan and another,*** AIR 1999 SC 3762, where the notice was returned "unclaimed" and the Hon'ble Court dealing with the question regarding giving of notice by the payee, proceeded to observed as under:-

> *"xx xx xx*
> *17. The more important point to be decided in this case is whether the cause of action has arisen at all as the notice sent by the complainant to the accused was returned as 'unclaimed.' 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(1) of the Act. The said clauses are extracted below :*
>
> *"(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."*
>
> *18. On the part of the payee he has to make a demand by 'giving a notice' in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such 'giving', the travails of the*

prosecution would have been very much lessened. But the legislature says that failure on the part of the drawer to pay the amount should be within 15 days 'of the receipt' of the said notice. It is, therefore, clear that '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 in the correct address.

19. In Black's Law Dictionary, 'giving of notice' is distinguished from 'receiving of the notice.' (vide page 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 in 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.

21. 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 despatched his part is over and the next depends on what the sendee does.

23. Here the notice is returned as unclaimed and not as refused. Will there be any significant difference between the two so far as the presumption of service is concerned? In this connection a reference to Section 27 of the General Clauses Act will be useful. The Section reads thus :

> *"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".*

24. No doubt Section 138 of the Act does not require that the notice should be given only by 'post'. Nonetheless the principle incorporated in Section 27 (quoted above) can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice.

25. Thus, when a notice is returned by the sendee as unclaimed such date would be the commencing date in reckoning the period of 15 days contemplated in clause (d) to the proviso of Section 138 of the Act. Of course such reckoning would be without prejudice to the right of the drawer of the cheque to show that he had no knowledge that the notice was brought to his address. In

> *the present case the accused did not even attempt to discharge the burden to rebut the aforesaid presumption."*

9. Learned counsel for the claimant has also relied upon the decision of the apex Court in ***V.Raja Kumari v. P.Subbarama Naidu and another,*** AIR 2005 SC 109, where the Hon'ble Court while dealing with a case where the notice could not be served on account of the fact that the door of the house of the drawer was found locked, held that the principle incorporated in Section 27 of the General Clauses Act will apply to a notice sent by post, and it would be for the drawer to prove that it was not really served and that he was not responsible for such non-service. Hon'ble Court reiterated the principle laid down in K. Bhaskaran (supra) and while dismissing the appeal concluded :-

> *"Burden is on the complainant to show that the accused has managed to get an incorrect postal endorsement made. What is the effect of it has to be considered during trial, as the statutory scheme unmistakably shows that the burden is on the complainant to show the service of notice. Therefore, where material is brought to show that there was false endorsement about the non-availability of noticee, the inference that is to be drawn has to be judged on the background facts of each case."*

10. Learned counsel for the complainant has further relied upon the decision of the apex Court in ***Subodh S. Salaskar v. Jayprakash M. Shah and another,*** AIR 2008 SC 3086, wherein the Hon'ble Court while dealing with service of notice under clause (c) of the proviso to Section 138 N.I.Act., has observed as under:

> *"22. 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 :

> *"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 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."*

11. It is accordingly submitted by learned counsel for the complainant that as the complainant has fulfilled his statutory obligation of sending the notice of demand to accused persons in their correct address, as has been furnished by them in the present

applications filed before this Court, it is deemed to have been served upon them, unless they prove otherwise.

12. It is further submitted that in any case, the question regarding service of notice of demand on the accused persons is a question of fact which can only be established on the basis of evidence during trial and the same cannot be a ground to quash the complaint or the order of cognizance passed therein.

13. Coming to the question regarding compliance of the provision of Section 204 (2) Cr.P.C., regarding furnishing of list of witnesses before issue of process to the accused, the object of the said provision was to give sufficient notice to the accused of the allegations which are made against him on which he is sought to be prosecuted and also of the nature of the evidence which the prosecution proposes to adduce against the accused. The jurisdiction of the Magistrate under Section 204(1) Cr.P.C. to issue a summons or a warrant in the first instance, as the case may be, if he is satisfied that there was sufficient ground for proceeding cannot be taken away by the failure on the part of the complainant to file a list of prosecution witnesses. Section 204(2) Cr.P.C. does not override Section 254(1) Cr.P.C., which imposes a duty on the Magistrate to take all such evidence as may be produced in support of the prosecution. Moreover, sub-section (2) of Section 254 of the Code empowers the Magistrate, on the application of the prosecution, to issue summons to any witness. Section 254 Cr.P.C. does not contemplate that the witness to be examined would be only those witnesses who were cited in the list filed by the complainant in terms of Section 204(2) Cr.P.C. Therefore, the provision regarding submission of a list of witnesses in Section 204(2) Cr.P.C. cannot be considered as mandatory in nature so as to control

the jurisdiction of the Magistrate to proceed with the trial of the accused and record his plea. Unless clear prejudice is shown to have been caused to the accused by late submission of the list of prosecution witnesses, the order issuing a summons to him cannot be said to be vitiated. Though the provisions of Section 204(2) Cr.P.C. are directory, it is the duty of the Magistrate to secure compliance with the requirement of Section 204(2) of the Code at the earliest possible stage of the proceeding to avoid any prejudice to the accused, if for some reason he did not insist on the list of a witnesses to be filed along with the complaint.(See-AIR 1964 SC 286)

14. The Bombay High Court in ***Pramila Mahesh Shah v. Employees State Insurance and another,*** 2002 CRI.L.J.2454, after taking note of the law laid down by the various Courts on the subject, has come to hold that the view expressed in Bhiku Yeshwant Dhangat (supra) is per incuriam. Hon'ble Court has proceeded to hold as under:

> *" xx xx xx*
> *29. Coming to Section 204(2) of Cr.P.C., I must say that the non-compliance of this provision does not affect the jurisdiction of the Magistrate either to issue process or to try the case. This view has been taken by the Apex Court in Noorkhan v. State of Rajasthan, (1964 (1) Cri.L.J. 167); Madhaorao Pandurang v. Yeshwant (1969 Mah. L.J. (NOC) 21); Abdullah Bhat v. Ghulam Mohd. Wani (1972 Cri.L.J.277) (J and K) (FB); and Shashi Nair v. R.C. Mehta (1982 (1) Bom CR 358) (Supra). The procedural laws are hand made of justice and the question of prejudice is of paramount consideration in respect of breach of procedural provisions. Therefore, even if it was to be held that the provisions of Section 204(2) are mandatory, that, by itself, would not vitiate the issue of process or the jurisdiction of the Court and where the matter is at the initial stage, directions can be given to furnish the copy of list of witnesses, if any, before the*

> *proceedings actually commenced. The stage of the proceedings is relevant to determine the prejudice, if any, caused to the accused. In the case under consideration, the substantive proceedings had not yet started. Therefore, in the circumstances, directions to the complainant to supply copy of witnesses, if any, within a period of four weeks from the receipt of the copy of the order by the trial Court would be considered as sufficient compliance of Section 204(2) of Cr.P.C., 1973."*

15. The question whether the complainant having not furnished the list of witnesses, as contemplated under Section 204 (2) Cr.P.C., is precluded from examining any other witnesses again came up for consideration before the Bombay High Court, in ***Sunil Vassudev Pednekar v. Bicholim Urban Co-operative Bank Ltd.,*** 2006 CRI.L.J.3114. The Hon'ble Court while referring to Section 254 Cr.P.C. has held as follows:

> *"xx xx xx*
> *12. Section 254(1) of the Code give ample discretion to a J.M.F.C., to take 'all such evidence as may be produced in support of the prosecution and not only that it also gives discretion to a J.M.F.C. to issue summons to any witness directing him to attend' and to give his evidence. In case, the provisions of Section 254 were subject to the compliance of the provisions of Section 204(2), then Section 254 of the Code, which comes later, would have expressly provided so. In my view, in order to exercise the powers under Section 254(1), it is not a condition precedent that a list of witnesses had to be filed under Section 204(2) of the Code. Likewise, Section 254 also does not contemplate that the witnesses to be examined would be only those witnesses who were cited on behalf of the Complainant, earlier in the list filed, in terms of sub-section (2) of Section 204 of the Code. There is no doubt that sub-section (2) of Section 204 of the Code is meant to safeguard the interest of the accused persons against undue harassment at the hands of unscrupulous litigants. The insistence on filing a list of prosecution witnesses before the issue of process to the accused is*

mainly for that purpose. In other words, the intention is to assure that no person is summoned to stand his trial without the Court first satisfying itself that there is sufficient ground to issue a summons or a warrant, as the case may be, against accused persons and about the witnesses to be produced in support of the case of the Complainant. In a proper case, the Complainant would be entitled to file even an additional list of witnesses. There is nothing in Section 204 of the Code, which says or indicates that if no list of prosecution witnesses is filed before process is issued to the accused, then none can be filed later. This does not mean that the salutary provision in sub-section (2) of Section 204 of the Code can be vitiated with impunity. In this context, reference could also be made to page 2396 of Sohoni's Code of Criminal Procedure, wherein it is stated that the provisions of sub-section (2) of Section 204 of the Code can be vitiated with impunity. In this context, reference could also be made to page 2396 of Sohoni's Code of Criminal Procedure, wherein it is stated that the provisions of Sub-section (2) of Section 204 of the Code does not mean and imply that in no circumstances can a person who is not included in a list be permitted to be examined in the course of the trial. If that was the real intention, one would expect a clearer and firmer expression of the view of the Legislature, then what is to be found in sub-section (2). Moreover, if this extreme contention was to prevail, it would have the effect of abolishing Section 254(1) of the Code. This Section does not say that the evidence must be evidence of only those persons whose names appear in the list of witnesses filed under Section 204(2) of the Code. Sub-section (2) of Section 204 of the Code does not override Section 254(1) of the Code which imposes a duty on the Magistrate to take evidence as may be produced in support of the prosecution. In my view, although the learned J.M.F.C. has cited a wrong provisions of law by referring to Section 311 of the Code, as the power enabling her to permit the Complainant to lead evidence of the said witness, whose name was not cited, the power to examine other witnesses could be traced to Section 254(1) of the Code and viewed thus, the Order of the learned J.M.F.C., dated 16-12-04, could not be faulted. The controversy appears to have been

settled with the decisions of this Court in Madharao Pandurang (supra), which was followed in Shashi Nair (supra), which have my respectful concurrence, for other reasons as well stated hereinabove."

16. From the discussions made above the legal position that emerges is that the object of requiring the complainant to furnish a list of witnesses before issue of process to the accused, as contemplated under Section 204(2) Cr.P.C., appears to be to enable the accused persons to prepare themselves for their cross-examination. It would really mean filing of such a list at the time of lodging the complaint, as there will be no suitable opportunities afterwards, for if the Magistrate decides to issue process, service will be delayed for want of the list. But it cannot mean that in no case shall process be issued against the accused without the list of witnesses, for it may be that the complainant is the only witness in the case. There is nothing in section 204 Cr.P.C., which says or indicates that if no list of prosecution witnesses is filed before the process is issued to the accused, then none can be filed later. Section 204 (2) Cr.P.C. is meant only to safeguard the interest of the accused against undue harassment at the hands of unscrupulous litigants and not to circumscribe the power of the Magistrate to issue summons to any witness, on the application of the prosecution, as provided under Section 254 (2) Cr.P.C.

17. Moreover, Section 145 N.I.Act, which is pari materia to Section 254(2) Cr.P.C., also empowers the Magistrate to issue summons and examine any witness, on the application of the prosecution. The same is not confined only to the witnesses enlisted in the complaint or furnished by way of a separate list.

18. Further, even if it is held that the provisions of Section 204(2) Cr.P.C. are mandatory, that by itself, would not vitiate the issue of process or the jurisdiction of the Court. The Court can direct copy of list of witnesses to be furnished, if any, before the proceeding is actually commenced.

19. At this stage it would be appropriate to refer to a recent decision of the apex Court in ***A.C.Narayanan v. State of Maharastra,*** AIR 2014 SC 630, where one of the question which came up for consideration was whether the proceedings contemplated under Section 200 of the Code can be dispensed with in the light of Section 145 of the N.I.Act, which was introduced by an amendment in the year 2002.

20. The Hon'ble Court while referring to Section 138, 142 and 145 of the N.I.Act as well as Section 200 Cr.P.C., has come to hold as follows:

> *"xx xx xx*
> *22. From a conjoint reading of Sections 138, 142 and 145 of the N.I. Act as well as Section 200 of the Code, it is clear that it is open to the Magistrate to issue process on the basis of the contents of the complaint, documents in support thereof and the affidavit submitted by the complainant in support of the complaint. Once the complainant files an affidavit in support of the complaint before issuance of the process under Section 200 of the Code, it is thereafter open to the Magistrate, if he thinks fit, to call upon the complainant to remain present and to examine him as to the facts contained in the affidavit submitted by the complainant in support of his complaint. However, it is a matter of discretion and the Magistrate is not bound to call upon the complainant to remain present before the Court and to examine him upon oath for taking decision whether or not to issue process on the complaint under Section 138 of the N.I. Act. For the purpose of issuing process under Section 200 of the Code, it is open*

to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the N.I. Act. It is only if and where the Magistrate, after considering the complaint under Section 138 of the N.I. Act, documents produced in support thereof and the verification in the form of affidavit of the complainant, is of the view that examination of the complainant or his witness(s) is required, the Magistrate may call upon the complainant to remain present before the Court and examine the complainant and/or his witness upon oath for taking a decision whether or not to issue process on the complaint under Section 138 of the N.I. Act."

21. In the present case, the accused persons have not filed or challenged the order of the learned Magistrate, directing issuance of process to them or the summons issued pursuant to such order. Obviously, the order of the learned Magistrate taking cognizance of the offence under Section 138 N.I.Act cannot be interfered with for alleged non-compliance of procedural requirements. Moreover, the complaint reveals that the complainant is a witness to the said complaint filed under Section 138 N.I.Act and the complainant may file list of other witnesses, if any, before commencement of the trial or file an application to summon and examine any person in support of the complaint, as provided under Section 145 (2) of the N.I.Act. Therefore, the plea of the accused persons that the entire proceeding under Section 138 N.I.Act stands vitiated due to the complainant not furnishing the list of witnesses, as required under Section 204(2) Cr.P.C., cannot be sustained.

22. Coming to the plea of the accused persons regarding non-service of notice of demand, it is seen that the complainant has specifically stated in the complaint that the notices were sent to the accused persons by registered post in their present correct address

and the same has been received back with postal endorsement that inspite of repeated visit to their office, the addressees were not available to receive the same. The address of the accused persons given in the complaint and the envelopes containing the demand notice, which have been returned unserved with the endorsement of the postal authority and the address given in the present applications filed before this Court are the same. Moreover, learned counsel for the accused persons does not dispute the correctness of the address given on the unserved envelopes.

23. In the case of ***D. Vinod Shivappa v. Nanda Belliappa,*** AIR 2006 SC 2179***,*** where in a similar case, the notice of demand had been returned unserved with the postal endorsement "party not in station, arrival not known", the Hon'ble Court has proceeded to hold as under:

> *"xx xx xx*
> *11. The question is whether in a case of this nature, where the postal endorsement shows that the notice could not be served on account of the non-availability of the addressee, a cause of action may still arise for prosecution of the drawer of the cheque on the basis of deemed service of notice under clause (c) of proviso to Section 138 of the Act. In our view this question has to be answered by reference to the facts of each case and no rule of universal application can be laid down that in all cases where notice is not served on account of non-availability of the addressee, the court must presume service of notice.*
>
> *12. It is well settled that in interpreting a statute the court must adopt that construction which suppresses the mischief and advances the remedy. This is a rule laid down in Heydon's case (76 ER 637) also known as the rule of purposive construction or mischief rule.*
>
> *13. 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, which was demonstrated by the fact that there was no sufficient balance in the account to discharge the liability. Apart from civil liability, a criminal liability was imposed on such unscrupulous drawers of cheques. The prosecution, however, was made subject to certain conditions. With a view to avoid unnecessary prosecution of an honest drawer of a cheque, or to give an opportunity to the drawer to make amends, the proviso to Section 138 provides that after dishonour of the cheque, the payee or the holder of the cheque in due course must give a written notice to the drawer to make good the payment. The drawer is given 15 days time from date of receipt of notice to make the payment, and only if he fails to make the payment he may be prosecuted. The object which the proviso seeks to achieve is quite obvious. It may be that on account of mistake of the bank, a cheque may be returned despite the fact that there is sufficient balance in the account from which the amount is to be paid. In such a case if the drawer of the cheque is prosecuted without notice, it would result in great injustice and hardship to an honest drawer. 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.

14. If a notice is issued and served upon the drawer of the cheque, no controversy arises. Similarly if the notice is refused by the addressee, it may be presumed to have been served. This is also not disputed. This leaves us with the third 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. etc. 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. There is good authority to support the proposition that once the complainant, 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 legal notice which may be returned with an endorsement that the addressee is not available on the given address.

15. 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, namely the drawer of the cheque, with knowledge of the notice had deliberately avoided to receive notice. Therefore, it would be premature 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 notice 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."

24. In ***C.C.Alavi Haji v. Palapetty Muhammed and another*** (2007) 6 SCC 555, the Hon'ble Court while reiterating the view expressed in K. Bhaskaran and D. Vinod Shivappa (supra), has observed as under:

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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 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 Bhaskaran case 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 lawyer's notice intimating the dishonour of cheque and demanded 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."

25. To reiterate, the conclusion is irresistible that 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. 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. 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 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 despatched his part is over and next depends on what the sendee does.

26. In clause (c) of the proviso to Section 138 N.I.Act, the drawer of the cheque is given fifteen days from the date "of receipt of said notice" for making payment. This affords clear indication that "giving notice" in the context is not the same as receipt of notice. Giving is the process of which receipt is the accomplishment. The payee has to perform the former process by sending the notice to the drawer in his correct address. If receipt or even tender of notice is indispensable for giving the notice in the context envisaged in clause (b), an evader would successfully keep the postal article at bay at least till the period of fifteen days expires. Law shall not help the wrong doer to take advantage of his tactics. Hence, the realistic interpretation for the expression "giving notice" in the present context is that, if the payee has dispatched notice in the correct address of drawer reasonably ahead of the expiry of fifteen days, it can be

regarded that he made the demand by giving notice within the statutory period. Any other interpretations is likely to frustrate the purpose for providing such a notice.

27. In the present case, as has already been held above, the complainant having got the notice of demand sent to the accused persons in their correct address by registered post acknowledgement due, which has returned unserved with the postal endorsement that inspite of repeated visit to their office, the addressees were not available to receive the same, there is sufficient compliance of Section 138 N.I.Act.

28. For the reasons as aforestated, no impropriety or illegality can be said to have been committed by the learned Magistrate in taking cognizance of the offence under Section 138 N.I.Act, so as to warrant any interference.

All the three CRLMCs being devoid of merits, the same are accordingly dismissed. No cost.

(S.C.PARIJA, J.)

ORISSA HIGH COURT : CUTTACK.
Dated the 30th July, 2014/MPanda