A D. VINOD SHIVAPPA

v.

NANDA BELLIAPPA

MAY 25, 2006

B [B.P. SINGH AND R.V. RAVEENDRAN, JJ.]

Negotiable Instruments Act, 1881—Section 138—Dishonour of cheque—Legal Notice by post—Refused due to non-availability of addressee—Whether can be presumed to be service—Held: The presumption of service C *of notice in such cases depends on facts of each case—The question whether there was deemed service in the sense that the endorsement made on the envelope was manipulated or was a false endorsement, is a question of fact and must be considered in the light of the evidence—If in such cases it is understood that there has been no service, it would defeat the purpose of* D *the Act.*

Code of Criminal Procedure, 1973—S. 482—Jurisdiction under—Scope of—Dishonour of cheque—Legal notice—Returned due to non-availability of addressee—Complaint—Process issued—Application under Section 482—Held: The question whether service of notice has been E *fraudulently avoided, is a question of fact to be decided on the basis of evidence—In such case High Court should not exercise its jurisdiction under the provision—Negotiable Instruments Act, 1881—Section 138.*

Interpretation of Statutes—In interpreting a statute, the Court must F *adopt that construction, which suppresses the mischief and advances the remedy.*

Principles—Rule of purposive construction or mischief rule.

In the present cases, the legal notice was returned due to non- G **availability of the addressee. On complaint, criminal case was registered and process was issued. Appellant's application under Section 482 Cr.P.C. was dismissed by High Court. Hence the present appeals.**

The question for consideration in the present appeals was whether H **in a case 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 Negotiable Instruments Act, 1881. A

Dismissing the appeals, the Court B

HELD: 1.1. The question 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 Negotiable Instruments Act, 1881, 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. [1013-H, 1014-A-B] C D

1.2. In each such case 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 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. [1015-C-E] E

1.3. The question as to whether there was deemed service of notice, in the sense that the endorsement made on the returned envelope was a manipulated and false endorsement, is essentially a question of fact, and that must be considered in the light of the evidence on record. It would be premature at the stage of issuance of process, to move the High Court for quashing of the proceeding under Section 482 Cr.P.C. The High Court was thus right in rejecting the petitions filed by the appellant under Section 482 Cr.P.C. [1020-A-B] F G

K. Bhaskaran v. *Sankaran Vaidhya Balan and Anr.*, [1999] 7 SCC 510; *Dalmia Cement (Bharat) Ltd.* v. *Galaxy Traders and Agencies Ltd. and Ors.*, [2001] 6 SCC 463; *V. Raja Kumari* v. *P. Subbarama Naidu and Anr.*, H

A **[2004] 8 SCC 874; *Prem Chand Vijay Kumar* v. *Yashpal Singh and Anr.*, [2005] 4 SCC 417 and *Sadanandan Bhadran* v. *Madhavan Sunil Kumar*, [1998] 6 SCC 514, relied on.**

2. In interpreting a statute the court must adopt that construction
B **which suppresses the mischief and advances the remedy. [1014-B-C]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1255 of 2004.

From the Judgment and Order dated 19.7.2004 of the High Court of
C Karnataka at Bangalore in Crl. Appeal No. 2091/2004.

Kailah Vasdev, Sr. Adv., Girish Ananthamurty and T.N. Rao, Advs., with him for the Appellant.

D Ms. Kiran Suri, Adv., for the Respondent.

The Judgment of the Court was delivered by

B.P. SINGH, J. : These seven appeals arise out of seven separate
E orders passed by a learned Single Judge of the Karnataka High Court on July 19, 2004 dismissing seven criminal petitions filed under Section 482 of the Code of Criminal Procedure for setting aside the orders of the JMFC Medikeri issuing process against the appellant on the complaints filed by the respondent under Section 138 of the Negotiable Instruments Act, 1881 (for short 'Act').

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The facts of the cases are similar and the same question arises for consideration in each of the appeals. The only distinction is that whereas in Criminal Appeal Nos. 1256 and 1257 of 2004 the notices sent to the appellant were returned with the endorsement "addressee always absent during
G delivery time. Hence returned to sender", in the remaining five cases the notices were returned with the endorsement "party not in station. Arrival not known."

The representative facts are taken from Criminal Appeal No. 1255 of
H 2004.

The case of the complainant-respondent is that the appellant had issued a cheque in his favour for a sum of Rs.1,25,000/- on November 7, 2003. The cheque was presented to the bank for encashment but the same was returned on March 6, 2004 with the endorsement "funds insufficient". The respondent issued a legal notice to the appellant calling upon him to make the payment. The said notice was sent on March 17, 2004 by registered post but the same was returned unserved on March 25, 2004 with an endorsement "party not in station arrival not known". The respondent thereafter filed a complaint under Section 138 of the Act on May 4, 2004. By order dated June 2, 2004 the learned Magistrate passed orders under Section 204 of the Code of Criminal Procedure registering a criminal case and issuing process against the appellant.

The appellant filed an application under Section 482 of the Code of Criminal Procedure before the High Court which has been dismissed by the impugned order. From the judgment of the High Court it appears that the only point argued before the High Court was the question of limitation. However, before us other legal submissions have been advanced but not the question of limitation.

Learned counsel for the appellant submitted that in the instant case there was no service of notice. It is pointed out that the respondent himself admitted in his complaint that the notice had been returned unserved. It is contended that the cause of action arises only after service of notice on the drawer of a cheque, and in the absence of service of notice, no cause of action arose and, therefore, the Magistrate was not justified in taking cognizance and issuing process. Reliance was placed on the statements contained in the complaint, the relevant part whereof is as follows :-

> "6. The Complainant got issued a legal notice on 17.3.2004 asking the accused to pay the cheque amount of Rs.1,25,000/- within 15 days from the date of receipt of notice failing which he would take legal action against the accused.
>
> 7. The legal notice was issued to address of the accused at No.4, Lavalle Road, Bangalore 560001.
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> 8. But the legal notice has been returned unserved on 25.3.2004 with the following endorsement "Party not in station arrival not

A known".

9. The legal notice has been issued to the same address of the accused as the notices which were issued to the accused in CC No.2173/2003, 2174/2003, 2175/2003 and 2208/2003 filed before this Court. On those occasions the accused has received the notices. Hence the complainant states that the address of the accused is correct and the notice has been sent to the last known place of residence of accused.

10. Under the circumstances it is prayed that this Hon'ble Court be pleased to consider that the notice issued by the complainant as sufficient and it be deemed served."

We do not agree with the counsel for the appellant that the complainant has admitted in the complaint that notice had not been served within the meaning of Section 138 of the Act. What has been stated in paragraph 8 of the complaint is the factum of the legal notice having been returned unserved on March 25, 2004 with an endorsement. This was a fact the complainant could not deny. But in paragraph 10 of the complaint the complainant has stated that notice may be deemed to have been served. The reasons for deeming service, are stated in the earlier paragraphs of the complaint. The question which, therefore, arises is whether in these circumstances the appellant could pray for quashing of the proceedings under Section 482 of the Code of Criminal Procedure.

Under Section 138 of the Act, where a cheque issued by the drawer in the discharge of any debt or any other liability is returned by the bank unpaid, because the amount standing to the credit of that account is insufficient to honour the cheque, the said person is deemed to have committed an offence. This is subject to proviso to Section 138 which provides that the cheque should have been presented to the bank within the period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. The payee must also make a demand for the payment of the said amount by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of the information by him from the bank regarding the return of the cheque unpaid. If despite this demand, the drawer fails to make the payment within fifteen days of the receipt of the notice, a cause of action arises for prosecuting him for the offence

punishable under Section 138 of the Act. Section 142 provides that the court shall take cognizance of an offence punishable under Section 138 of the Act upon receipt of a complaint in writing made by the payee or, as the case may be, the holder in due course of the cheque. Such complaint must be made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138. However, discretion is given to the court to take cognizance of the complaint even after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making the complaint within such period.

It is not disputed that the drawer of the cheque makes himself liable for prosecution under Section 138 of the Act if he fails to make the payment within fifteen days of the receipt of the notice given by the drawee. His failure to make the payment within the stipulated period gives rise to a cause of action to the complainant to prosecute the drawer under Section 138 of the Act.

Mr. Kailash Vasdev, learned senior counsel appearing for the appellant, vehemently contended before us that proviso (c) of Section 138 of the Act leaves no room for doubt that the cause of action arises only if the drawer of the cheque fails to make the payment within 15 days "of the receipt of the said notice". According to him, therefore, it must be established on record that notice issued by the payee was in fact received by him. He conceded that if the drawer of the cheque refuses to accept the notice, the court may presume service of notice, but in a case where the notice is not served for any other reason, it cannot be said to be deemed service of notice giving rise to a cause of action. He submitted, that apart from the seven notices in these seven cases, several other notices were issued to the appellant on the same address which he accepted, and where due, paid the amount also. He, therefore, submitted that the appellant has settled all those disputes where the claim of the respondent was justified, but he is not willing to pay the amount claimed by the respondent unjustifiably. It is a queer co-incidence that the appellant received all those notices where the demand was justified, and all the notices which could not be served upon him on account of his absence from his residence are those where the demand of the respondent is, according to the appellant, not justified. We need not make any further comment on this aspect of the matter.

The question is whether in a case of this nature, where the postal

A 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.

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.

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 dis-honour 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 in-justice 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.

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.

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

A 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 B 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 C knowledge of the notice had deliberately avoided to receive notice. Therefore, it would be pre-mature at the stage of issuance of process, to move the High Court for quashing of the proceeding under Section 482 of the Code of Criminal Procedure. The question as to whether the service of notice has been fraudulently refused by unscrupulous means is a question of fact to be D 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.

We may now consider some of the authorities cited at the Bar.

E In [1999] 7 SCC 510 : *K. Bhaskaran* v. *Sankaran Vaidhyan Balan and Another*, the drawee had presented a cheque issued by the drawer but the same was dishonoured. A notice was sent by registered post but the same was returned with the endorsement that the addressee was found absent on 3rd , 4th and 5th February, 1993 and intimation was served on addressee's F house on 6th February, 2003. Thereafter the postal article remained unclaimed till 15th February, 1993 and it was returned to the sender with a further endorsement "unclaimed". The complaint filed by the drawee was dismissed on the ground of territorial jurisdiction as also on the ground that since the notice had not been received by the drawer, there was no cause of action for filing the complaint. On appeal, the High Court reversed the order of G acquittal. The appellant approached this Court by special leave. This Court held in favour of the respondent on the question of territorial jurisdiction. On the question of notice this Court considered the scheme of Section 138 of the Act by particular reference to clauses (b) and (c) of the proviso thereof. In view of the legislative scheme it was held, the failure on the part of the H drawer to pay the amount should be within 15 days "of the receipt" of the

said notice. It was clear that the "giving of notice" in the context was not the same as the receipt of notice. "Giving" was the process of which the "receipt" was the accomplishment. This Court then observed :

> "If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that Court should not adopt in interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure."

This Court noticed the position well settled in law that the notice refused to be accepted by the drawer can be presumed to have been served on him. In that case the notice was returned as "unclaimed" and not as refused. The Court posed the question "Will there be any significant difference between the two so far as the presumption of service is concerned?" Their Lordships referred to Section 27 of the General Clauses Act and observed that the principle incorporated therein could profitably be imported in a case where the sender had 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. This Court dismissed the appeal preferred by the drawer holding that where the notice is returned by the addressee as unclaimed such date of return to the sender would be the commencing date in reckoning the period of 15 days contemplated in clause (c) to the proviso of Section 138 of the Act. This 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. Since the appellant did not attempt to discharge the burden to rebut the aforesaid presumption, the appeal was dismissed by this Court. The aforesaid decision is significant for two reasons. Firstly it was held that the principle incorporated in Section 27 of the General Clauses Act would apply in a case where the sender despatched the notice by post with the correct address written on it, but that 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.

A In [2001] 6 SCC 463 : *Dalmia Cement (Bharat) Ltd.* v. *Galaxy Traders & Agencies Ltd. and Others*, the facts were that a cheque given by the respondent to the appellant was dishonoured on May 28, 1998 of which intimation was received by the appellant on June 2, 1998. On June 13, 1998 the appellant issued to the respondent and one of its partners the statutory notice under Section 138 of Act and received the postal acknowledgement B of the notice on June 15, 1998 which was the last date of limitation on the basis of the said notice. However, the appellant again presented the cheque on July 1, 1998 which was again dishonoured on July 2, 1998. The appellant sent a second notice of dishonour of the cheque but the respondent having received the notice on July 27, 1998 did not make the payment. On C September 9, 1998 the appellant filed a complaint. The respondent moved a petition before the High Court for quashing of the complaint under Section 482 of the Code of Criminal Procedure on the ground that it was time barred since acknowledgement of the first notice was received by the complainant on June 15, 1998 and the complaint was filed after July 15, 1998. The D appellant on the other hand contended that the respondent's having denied receipt of the first notice, the only course open to the appellant was to present the cheque again. The High Court quashed the complaint as time barred. This Court allowed the appeal of the appellant after considering the authorities cited at the bar and observed :-

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> "Section 27 of the General Clauses Act deals with the presumption of service of a letter sent by post. The despatcher of a notice has, therefore, a right to insist upon and claim the benefit of such a presumption. But as the presumption is rebuttable one, he has two options before him. One is to concede to the stand of the sendee F that as a matter of fact he did not receive the notice, and the other is to contest the sendee's stand and take the risk for proving that he in fact received the notice. It is open to the despatcher to adopt either of the options. If he opts the former, he can afford to take appropriate steps for the effective service of notice upon the addressee. Such a course appears to have been adopted by the G appellant-company in this case and the complaint filed, admittedly, within limitation from the date of the notice of service conceded to have been served upon the respondents."

This Court also held that though the payee may successively re-present H a dischonoured cheque but once a notice under Section 138 of the Act was

received by the drawer of the cheque, the payee or the holder of the cheque forfeits his right to again present the cheque, since the cause of action had accrued when there was failure to pay the amount within the prescribed period.

Counsel for the appellant relied on paragraph 6 of the report wherein it was observed that it is not the "giving" of the notice but it is the failure to pay after "receipt" of the notice by the drawer which gives the cause of action to the complainant to file the complaint within the statutory period. It is no doubt true that the receipt of the notice has to be proved, but as held by this Court consistently, refusal of notice amounts to service of notice. Similarly in a case where notice is not claimed even though sent by registered post, with the aid of Section 27 of the General Clauses Act, the drawer of the cheque may be called upon to rebut the presumption which arises in favour of service of notice.

In [2004] 8 SCC 774 : *V. Raja Kumari* v. *P. Subbarama Naidu and Another,* 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, this Court 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. This Court reiterated the principle laid down in *K. Bhaskaran* v. *Sankaran Vaidhyan Balan and Another* case (supra). This Court 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 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."

In [2005] 4 SCC 417 : *Prem Chand Vijay Kuamr* v. *Yashpal Singh and Another*, the Court relied upon the principle laid down in (1998) 6 SCC 514 : *Sadanandan Bhadran* v. *Madhavan Sunil Kumar* which was followed in *Dalmia Cement (Bharat) Ltd.* v. *Galaxy Traders & Agencies Ltd. and Others*

A (supra).

None of the decisions considered above take a view different from the view we have taken. The question as to whether there was deemed service of notice, in the sense that the endorsement made on the returned envelope was a manipulated and false endorsement, is essentially a question of fact, B and that must be considered in the light of the evidence on record. The High Court was thus right in rejecting the petitions filed by the appellant under Section 482 of the Code of Criminal Procedure.

Learned counsel for the appellant submitted that there may be C unscrupulous complainants, who may manage to get a false postal endorsement of "refusal" or "unclaimed" or "party not available" and then prosecute an innocent or *bona fide* drawer. We do not think that the drawer is without remedy. He can also establish by evidence that said endorsement of "refusal" or "unclaimed" or "not found" during delivery time to be false. Alternatively, D he may pay the amount due and compound the matter. Be that it may.

These appeals are, therefore, dismissed. The trial court is directed to proceed with the complaint cases in accordance with law. Nothing stated above shall be construed as expression of an opinion on the merit of the matters.

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K.K.T. Appeals dismissed.