
(2014) 04 AHC CK 0010
In the Allahabad High Court
Case No : Application No. 22259 of 2012

Reshma Afzal

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 03-04-2014

Acts Referred:

Evidence Act, 1872 — Section 114 — General Clauses Act, 1897 - Section 27 —
Negotiable Instruments Act, 1881 - Section 138, 139

Citation : (2015) 3 ALJ 417

Hon'ble Judges : Manoj Misra, J.

Bench : Single Bench

Advocate : N.S. Chahar, for the Appellant; Arvind Srivastava, for the Respondent

Final Decision : Allowed

Judgement

Manoj Misra, J.?Heard learned counsel for the applicant, Sri Sanjay Singh for the opposite party No. 2 and the learned A.G.A. for the State. By the present application, the applicant has sought quashing of the complaint as well as the summoning order dated 02.11.2011 in Case No. 356 of 2011 pending in the Court of Additional Chief Judicial Magistrate, Court No. 3, Agra, under Section 138 of the Negotiable Instruments Act.

2. A perusal of the record reveals that the opposite party No. 2 filed complaint against the applicant alleging therein that in respect of sale of one half share by the complainant in favour of the applicant, a cheque of Rs. 18,52,000/- dated 01.01.2011 was given by the applicant to the complainant, which was presented for encashment at Punjab and Sindh Bank, Purani Mandi, Taj Ganj, Agra on 28.04.2011. The same returned unpaid for insufficient funds in the drawer's account. It has been alleged that a notice of demand was given by the complainant through her Advocate on 20.05.2011 and that despite service of the notice, the accused (the applicant herein) did not make payment of the cheque amount. Consequently, on 24.06.2011, the complaint was filed.

3. The complaint allegations were supported by affidavit of the complainant. She produced original of the cheque, which returned unpaid, bank memo showing that the cheque returned unpaid for insufficient funds in the drawer's account, copy of the notice of demand, postal receipt showing dispatch of notice by registered post and copy of the agreement under which the aforesaid payment was made.

4. The court of Additional Chief Judicial Magistrate, Court No. 3, Agra found that a prima facie case was made out to proceed against the applicant under Section 138 of the N.I. Act, accordingly, summoned the applicant vide order dated 02.11.2011.

5. Challenging the summoning order as well as the consequential proceeding, the learned counsel for the applicant submitted that in the complaint, no date of service of the notice of demand has been mentioned, which is a necessary ingredient for drawing proceedings under Section 138 of the N.I. Act. It has also been submitted that the disputed cheque was given by way of security and, in fact, the applicant had already made payment of the cheque amount to the complainant, in cash, therefore, the cheque was not in discharge of liability and, as such, the proceedings, under Section 138 of the N.I. Act, are nothing but abuse of the process of Court. It has further been submitted that there were other cheques also given to the complainant, which were returned by the complainant to the applicant because money was paid to the complainant in cash.

6. The learned counsel for the opposite party No. 2 denied the claim of the applicant that the cheque was not issued for discharge of liability and submitted that under Section 139 of the N.I. Act, the law raises a presumption that the cheque concerned was issued for discharge of liability. It has, thus, been submitted that since the law would raise a presumption with regards to the issuance of cheque for discharge of liability, the proceedings of the court below cannot be quashed at the threshold on the ground that the cheque was not issued for discharge of liability. It has been submitted that whether the cheque has been issued for discharge of liability or was without consideration, is a matter of defence which the applicant has to raise and establish before the trial court.

7. With regards to non mention of the date of service of notice of demand is concerned, it was submitted that the same cannot be a ground to quash the proceeding at the threshold, inasmuch as, the manner and the mode by which the notice of demand was given to the accused (the applicant herein) was disclosed by the complaint and the material produced in support thereof before the court below. It has been submitted that the written notice of demand was dispatched by registered post to the accused. The postal receipt of dispatch was produced before the court concerned and a copy of the written notice of demand was filed by the complainant disclosing the address of the applicant, the correctness of which has not been denied. It has, thus, been submitted that since the notice of demand was sent by registered post/A.D., there would be a

presumption with regards to its service. It has also been submitted, by placing reliance on the averments made in the counter-affidavit, that the applicant was duly served with the notice of demand and, in fact, the counsel for the applicant had submitted a reply to the notice of demand, a copy of which has been enclosed along with counter-affidavit as Annexure C.A. 3 thereof. It has been submitted that since the factum of service of notice has been given in the complaint and the material in support thereof clearly disclosed the manner and the mode of giving of notice of demand, the proceeding cannot be quashed at the threshold.

8. Having considered the rival submissions of the learned counsel for the parties and on perusal of record, this Court is of the view that the complaint allegations and the material produced in support thereof do, clearly, disclose the mode and manner by which the notice of demand was given to the applicant (the accused). In paragraph 4 of the complaint, it has been specifically stated that despite service of notice of demand, the accused has not made payment. In the case of *Vinay Patni v. State of U.P. and others* (Criminal Revision No. 3154 of 2012, decided on 19.10.2012), this court had the occasion to decide a question as to whether non mention of the date of service of notice of demand in the complaint would be fatal to the prosecution, under Section 138 of the N.I. Act, or not. This court, in paragraph 13 of the report, had observed as follows:

"13. What is, therefore, required to be seen is whether from the aforesaid material a prima facie case was made out for proceeding against the accused-revisionist. In that regard, the submission of the learned counsel for the revisionist is that in absence of a specific averment with regard to the service of notice of demand it cannot be said that a prima facie case was made out. To the contrary, the submission of the learned counsel for the complainant is that once it is alleged in the complaint that the notice of demand was sent under registered cover to the drawer, and the copy of the notice produced on record discloses the address of the accused, whereas the postal receipt on record discloses dispatch under registered speed post, a presumption, though rebuttable, would be raised that the notice reached its destination, under section 27 of the General Clauses Act as well as under illustration (f) to Section 114 of the Indian Evidence Act, 1872. With regards to the necessity of making averment in the complaint that the notice of demand was served on the drawer, the apex court in the case of *C.C. Alavi Haji* (supra), in paragraphs 14 and 15 of the judgment, observed as follows:

"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 a 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. ...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 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 emphasize that the complainant 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 aforementioned 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 in 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."

In the case of *Indo Automobiles Vs. Jai Durga Enterprises and Others*, (supra), the Apex Court, after noticing the judgments in the cases of *K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another*, (supra) as well as *V. Raja Kumari Vs. P. Subbarama Naidu and Another*, (supra), observed: "It is also well settled that once notice has been sent by registered post with acknowledgment due to correct address, it must be presumed that the service has been made effective."

From the observations of the Apex Court in the decisions noticed above, it is now clear that the complaint cannot be thrown out 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. If the complaint and the documents in support thereof disclose that the notice was dispatched at the address of the drawer, then the law would raise a presumption, though rebuttable, that the notice has been served on the addressee in due course. The complaint, however, must contain basic facts

regarding the mode and manner of the issuance of notice to the drawer of the cheque."

9. In view of the decision of this Court in the Vinay Patni's case (*supra*), since, in the instant case, the mode and the manner by which the notice of demand was given is *prima facie* established from the complaint as well as the material produced in support thereof, the complaint and the consequential proceedings cannot be quashed on ground that in the complaint, the complainant has failed to mention the date on which the notice of demand has been served on the accused.

10. So far as the submission of the learned counsel for the applicant that the cheque was not issued in discharge of liability is concerned, suffice it to say that under Section 139 of the N.I. Act, the law would raise a presumption with regards to the issuance of cheque in discharge of liability. Since a presumption is raised by a provision of law, the burden is on the accused to plead and prove before the trial court that the said cheque was not issued to discharge liability. Therefore, this ground cannot be made basis for quashing of the proceedings at the threshold.

11. In view of the discussions made hereinabove, the application is liable to be dismissed and is, accordingly, dismissed.

12. Interim order, if any, stands discharged.

13. At this stage, the learned counsel for the applicant has prayed that a direction may be given to the court concerned to consider the bail application of the applicant on the same day that the applicant surrenders before the court concerned. In view of the above prayer, it is observed that since an offence punishable under Section 138 of the Negotiable Instruments Act is a bailable offence, it is expected that the bail application of the applicant will be decided, in accordance with law, therefore, no specific direction need be issued.