

**(2011) 02 KAR CK 0103**  
**In the Karnataka High Court**  
**Case No : Criminal Appeal No. 189 of 2008**

|                                      |            |
|--------------------------------------|------------|
| Shri. Suresh Balakrishna Ambinabhavi | APPELLANT  |
| Vs                                   |            |
| Shri. Mahadev Ningappa Piragi        | RESPONDENT |

**Date of Decision :** 25-02-2011

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 357 (3)  
General Clauses Act, 1897 — Section 27  
Negotiable Instruments Act, 1881 (NI) — Section 138, 139, 94

**Citation :** (2013) 2 Crimes 389 : (2013) 1 KCCR 313

**Hon'ble Judges :** Anand Byrareddy, J

**Bench :** Single Bench

**Advocate :** Sunitha P. Kalasoor and Shri. Yogesh L. Hiremath, for the Appellant;  
Raviraj C. Patil, for the Respondent

**Final Decision :** Allowed

## Judgement

Anand Byrareddy, J.—Heard the learned counsel for the appellant and the learned counsel for the respondent. The facts are that the appellant herein was the complainant, who had alleged that the respondent and he were friends and the respondent was carrying on business as a Civil Contractor along with his brother at Raibag and Gokak Taluks. The respondent who was said to be in need of funds for his business, had approached the complainant for Financial help. The accused had therefore requested for a loan of Rs. 50,000/-. The complainant is said to have arranged a loan of Rs. 48,000/- and the same was given to the respondent in May 2000. The accused while accepting the same, had assured repayment within four months and to secure due repayment, had issued a post-dated cheque dated 4.8.2000 for the said sum of Rs. 48,000/-. The same was drawn on Corporation Bank, Gokak Branch. Since the cheque was type-written and the complainant, in order to ascertain the correctness of the signature of the respondent, had cross-checked the same with the banker of the respondent and it is thereafter that the cheque was presented for encashment. However, the same had been returned with an endorsement that the funds were insufficient in

the account. This was intimated to the appellant under a letter dated 4.12.2000. The appellant had thereafter issued a legal notice to the accused dated 11.12.2000. The same was served at the address of the accused on 28.12.2000.

Thereafter, inspite of service, the respondent not having complied with the demand for payment of the amount covered under the cheque, the complainant - appellant herein had initiated proceedings by filing a private complaint, for an offence punishable u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the Act" for brevity).

The said complaint was resisted by the respondent, who entered appearance on summons being issued and contested the proceedings. At the trial, the Court of the Magistrate has held that insofar as the service of notice of demand, which is prescribed as a pre-condition u/s 138 of the Act is concerned, the court found that the notice was received by one Ningappa Piragi and the acknowledgement does not bear the signature of the accused insofar as such service is concerned and when the accused had categorically denied having received the said notice, though a presumption would arise that the notice was sent through registered post and was received by the addressee, in view of the categorical denial, it was the complainant who ought to have proved to the satisfaction of the court that the accused had actually received the notice and in that view of the matter, since the notice was found to have been received by the aforesaid person and not by the accused, the court held that the complainant had not discharged the burden of establishing due service, by examining the post-man, who had actually delivered the registered letter and since the complainant was not aware of the signature of the accused, it was all the more necessary for the complainant to have established the said circumstance and has held the same against the complainant and has found that the pre-condition for initiating criminal proceedings was not complied with. The court has further held that even if it was to be assumed that the complainant had met this requirement, the main ingredient of the offence punishable u/s 138 of the Act was that the accused had, in order to discharge a legal liability, had issued the cheque, which was alleged to have been dishonoured and has addressed the transaction that was alleged between the parties and has accepted the contention put-forward by the respondent that he was not a businessman nor was he engaged as a Civil Contractor, but was a student studying at Belgaum Homeopathic Medical College and in that view of the matter, the entire transaction was denied. The court has held that when there is a denial of the very legal liability, the burden was on the complainant to establish that the money had been lent to the accused and it is in discharge of the said loan transaction that the cheque had been issued was required to be proved prima facie, by the appellant and on those two grounds, the Court has held that the appellant had failed and has accordingly dismissed the complaint. It is that which is sought to be challenged in the present petition.

2. The learned counsel for the appellant would submit that it is not denied that the demand notice sent by the complainant was addressed to the accused

through the banker of the accused and the notice was sent to the said address. The same having been acknowledged by Ningappa Piragi, the father of the accused, the learned counsel would submit that, there is ample authority to support the contention that once the notice has been despatched by registered post, it is out of the hands of the petitioner and if acknowledgement is received as to the same having been delivered at the address to which it had been despatched, the requirement of service of notice is duly discharged. It does not lie in the mouth of the accused to then contend that since it was not served on him personally, the notice was not duly served and therefore, the pre-condition of instituting proceedings u/s 138 of the Act was not met. In this regard, the learned counsel places reliance on a decision of this court in A. Sathyanarayana Vs. C. Nagaraj, In the said case, the complainant had instituted proceedings and the question was whether the notice issued immediately preceding the institution of the proceedings u/s 138 of the Negotiable Instruments Act was duly served on the accused. In that case, a notice issued had been returned with an endorsement by the postal authorities that the "addressee not found". The question that arose was whether there was sufficient service of notice on the accused. In this regard, this court while relying upon a decision in Sridhar M.A. Vs. Metalloy N. Steel Corporation, has followed the dictum of the Supreme Court wherein it is laid down as follows:-

"Presumption of Deemed Service" - in State of Madhya Pradesh vs. Hiralal and others, it was held that if a service is through post and if there is an endorsement "Not Available in the House". "House Locked" and "Shop Closed", in these circumstances it has to be held that notice is deemed to have been served on the accused. Supreme Court explained this earlier decision by observing that "although in appropriate cases "Deemed Service" is to be accepted as indicated in JT Smt. Kamalabai Jageshwar Joshi and others Vs. State of Maharashtra and others, , but it may be noted that such "Presumption of deemed service" is to be accepted depending on the facts of each case.

Insofar as the case on hand is concerned, this court had held that the endorsement not found would only mean that the respondent was not available in the house. So the presumption of deemed service of notice on the respondent could be drawn since it is found that the address on the exhibit was the correct address furnished by the respondent himself and has found that he was residing in the said address in the year 1996, with reference to the other documents produced in the suit. This court had held that the dictum of the Supreme Court could be safely applied in holding that there was adequate service and therefore, the learned counsel would submit that the said decision would indicate that when the notice addressed to the accused is the known address furnished through his banker and the same having been duly served as proof of acknowledgement produced at Exhibit P.6, the trial court was entirely in error in holding that the service of notice ought to have been on the accused personally and further, that the complainant was also required to establish that the same was served at the very address of the accused, by examining the post-man etc., is a reasoning of

the trial court which is not supported by any authority.

The further circumstance that the complainant was not familiar with the signature of the accused was also taken as a reason by the trial court to hold that the initial burden of establishing that there was a business transaction between the complainant and the accused was required to be demonstrated in the face of a categorical denial of the accused that he was a civil contractor who had need for such funds and that he had borrowed money and in due discharge of the legal liability, he had issued the cheque.

The learned counsel would point out that from a plain reading of Section 139 of the Act, the presumption is always in favour of the holder of a cheque, as to the same having been issued in discharge of a legal liability or a legally recoverable debt, unless it is proved otherwise, meaning thereby that if the accused seeks to take a contention that the cheque was not issued in discharge of a legal liability or in respect of a legally recoverable debt, the burden of proof is on him. Therefore, the trial court had committed a cardinal error in dismissing the complaint on those two grounds. Hence, the learned counsel would submit that having regard to the established circumstance that the cheque was indeed issued on the banker of the accused and the bank having returned the cheque with an endorsement to the effect that the funds in the account were insufficient and not having disputed the account holder as being the accused, would amply establish the offence punishable u/s 138 of the Act and therefore, would seek that the judgment be reversed and the complaint held proved as against the accused.

3. The learned counsel for the respondent, on the other hand, would vehemently oppose the appeal. He would firstly point out that the service of notice on the accused was a mandatory requirement and a pre-condition, which required to be established at the threshold before the proceedings could be addressed on merits. The very fact that the notice alleged to have been issued by the complainant was received by Ningappa Piragi of Kankanwadi Village and since to the knowledge of the accused, there are several members of the Piragi family in the said village and the notice having been served on Ningappa Piragi would not raise a presumption that it had indeed been served on the father of the accused and hence, he would submit that the trial court has rightly held that in the absence of the complainant having discharged the burden of establishing that the notice was duly served on the accused, it could not be said that the pre-condition, as prescribed u/s 138 of the Act, of service of statutory notice was duly discharged. He would next contend that insofar as the liability is concerned, notwithstanding that the presumption u/s 139 of the Act is in favour of the holder of an instrument, the fact remains that the respondent was a student. To this extent, the respondent had established and since the said fact was admitted by the complainant in his cross-examination, it was possible for the accused to take up the defence that the presumption was rebutted and hence, the burden shifted on the complainant to establish that the cheque was indeed issued in discharge of a legal liability and this is exactly the finding of the lower court and

there is no infirmity in the same. He would therefore, submit that the appeal be dismissed as the judgment is amply supported by cogent reasoning on these two aspects and therefore, the very liability having been denied and the signature of the accused not having been established by any other evidence other than the say of the complainant, who was not even familiar with the signature of the accused, would render the cheque a doubtful document on which the complainant could not have succeeded. The learned counsel would also seek to draw sustenance from a judgment reported in the case of K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another, One of the issues that was raised in the said judgment was whether the notice of demand prescribed u/s 138 of the Act, immediately preceding the complaint was duly served on the respondent-accused therein. In addressing the point, when the notice issued to the accused was returned as unclaimed, whether there was deemed service of notice was the point for consideration. The reasoning of the apex court is as follows:-

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) to (c) of the proviso to Section 138 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 at the correct address.

19. In Black's Law Dictionary "giving of notice" is distinguished from "receiving of the notice" (vide p.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 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.

21. In Maxwell's Interpretation of Statutes, the learned author has emphasised that "provisions relating to giving of notice often receive liberal interpretation" (vide p.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 the payee has the statutory obligation 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.

22. It is well settled that a notice refused to be accepted by the addressee can be presumed to have been served on him (vide *Harcharan Singh v. Shivrani and Jagdish Singh v. Natthu Singh*).

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 authorises 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.

And held in favour of the complainant that there was due discharge of the burden of establishing that the notice was served as follows:-

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 (c) 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.

This judgment unfortunately would not support the respondent but, on the other hand, would fortify the argument put-forward by the complainant that the notice was duly served on the accused when it was sent to the known address of the accused, which the complainant had obtained from the banker of the accused. Insofar as the contention that the complainant is yet not absolved of establishing that there was a transaction notwithstanding that section 139 lays down the presumption in favour of a holder of a cheque to the effect that it was issued in discharge of a legal liability or a legally recoverable debt, unless otherwise proved, is concerned, it would yet require the complainant to establish that the same was on account of a transaction between the complainant and the accused and this position would draw support from a judgment of the Supreme Court in the case of Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, But that judgment has been soundly over-ruled in a later judgment of the Supreme Court in the case of Rangappa Vs. Sri Mohan, where the position is reaffirmed that Section 139 places the burden clearly on the accused to establish that the cheque was not issued in discharge of a legal liability or for a legally recoverable debt and the burden is entirely on the accused though it is possible in some circumstances that even without tendering the evidence, the accused may with reference to the evidence produced by the complainant alone, may be in a position to discharge that burden. This is besides the point. In the instant case, the complainant had not tendered any evidence nor could the respondent establish from the evidence produced by the complainant that the cheque was not issued in respect of a legal liability. The incidental circumstance that he may have been a student of Homeopathy would not negate a transaction, for it is always possible that he was earlier a civil contractor and later was a student of Homeopathy. That is wholly besides the scope of the present appeal and is an incidental contention which is referred to. Further Section 94 of the Negotiable Instruments Act itself spells out the mode in which a notice may be given. Section 94 reads as follows:-

94. Mode in which notice may be given. - Notice of dishonour may be given to a duly authorised agent of the person to whom it is required to be given, or, where he has died, to his legal representative, or where he has been declared an insolvent, his assignee; may be oral or written; may, if written, be sent by post; and may be in any form; but it must inform the party to whom it is given either

in express terms or by reasonable intendment, that the instrument has been dishonoured, and in what way, and that he will be held liable thereon; and it must be given within a reasonable time after dishonour, at the place of business or (in case such party has no place of business) at the residence of the party for whom it is intended.

If the notice is duly directed and sent by post and miscarries, such miscarriage does not render the notice invalid.

Having regard to the authoritative decision of the apex court referred to hereinabove, there is no difficulty in holding that the trial court was grossly in error in dismissing the complainant on the aforesaid two grounds and hence, the present appeal is allowed. The judgment of the trial court is set aside, it is found that the complainant, on the basis of the material on record, has established beyond all reasonable doubt that the respondent has committed an offence punishable u/s 138 of the Act and therefore is liable to be punished in terms thereof. Therefore, the petitioner shall pay twice the amount of the cheque as fine and out of which, the complainant shall be entitled to Rs. 95,000/- as compensation u/s 357(3) of the Code of Criminal Procedure and in default of payment of fine, the respondent shall undergo Simple Imprisonment for six months.