

Court No. - 81

Case :- MATTERS UNDER ARTICLE 227 No. - 7011 of 2023

Petitioner :- Top Filling Point Proprietor Rakesh Agrawal

Respondent :- State of U.P. and Another

Counsel for Petitioner :- Amrendra Nath Rai, Sanjay Singh

Counsel for Respondent :- G.A., Abhishek Tiwari, Mahendra Pratap Singh, Rohit Singh

Hon'ble Mrs. Jyotsna Sharma, J.

1. Heard Sri Sanajy Singh, learned counsel for the petitioner, Sri Mahendra Pratap Singh, learned counsel for respondent no. 2 and learned AGA for the State.

2. This petition under Article 227 of the Constitution has been filed with a prayer to set aside the order dated 19.07.2022, whereby the petitioner was summoned under section 138 of the Negotiable Instruments Act, 1881 in complaint case no. 80 of 2019 and the order dated 01.06.2023 passed by the revisional court in Criminal Revision No. 305 of 2022, by which the summoning order was affirmed.

3. The relevant facts are as below:-

The complainant filed a complaint case under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the NI Act") against the accused. He produced evidence under section 200 Cr.P.C. and also papers. The learned court below heard the complainant and summoned the accused under section 138 of the NI Act. The papers which were produced included a cheque of Rs. 2,75,000/-, which was returned by the Bank on 02.04.2019 with a remark of "funds insufficient", the return memo and the demand notice dated 22.02.2019. The revisional court agreed with the order of the trial court and dismissed the revision.

4. The main contention of the petitioner is that the complainant could not show, by producing any evidence that in fact the notice was served on him, therefore, the essential condition for taking cognizance, as provided under section 138 clause (c) read with section 142(1)(b) of the NI Act was not fulfilled.

5. The contention of the respondent is that though there is no mention of the date on which the demand notice was actually received by the accused in the order passed by the learned trial court, however, the revisional court referred to the track consignment report of the Postal Department (paper no. 9Ka/2), hence the order of the trial court cannot be faulted.

6. From perusal of the order passed in revision, it is noticed that the learned court of revision took up the above contention and observed that indeed there was no mention of any specific date, as regard service of demand notice, however it was found that there was track consignment, paper on record, which belied the submission of the revisionist.

7. The petitioner has referred to a judgment of Allahabad High Court in *Deepak Kumar and Another vs. State of U.P. and Another; 2007 (2) Civil Court Cases 467 (Allahabad)*. I went through the judgment. In para no. 7, the High Court enumerated essentials which should have been fulfilled before the court could take cognizance of the offence under section 138 of the N.I. Act. It said that in the event of absence of any of the necessary requirements, the offence shall not be made out. The relevant portion of para no. 7 is as below:-

"Thus, for making out an offence under Section 138, NI Act, four dates are very relevant to be mentioned in the complaint or at least they should be clear from the papers filed along with the filing of the complaint itself. These dates are (I) date mentioned on the cheque; (ii) date of its deposit in the bank for encashment (for knowing its period of validity), the date on which the notice/memo's advise from the bank was received by the drawee/payee or holder of the cheque regarding its bouncing because of insufficiency of funds by using any phraseology for the same (for determining the period of notice, which is one month, from such a date), the date of notice given by the drawee/payee to the drawer/payer of the cheque (to determine fifteenth day so as to bring "cause of action" to life, in case the cheque money is not paid during this period), the date on which the said notice is received or served to the drawer/payer of the cheque (to determine the date on which the offence is made out, in case the cheque money is not paid within fifteen days of the service of the notice) and lastly, the date of filing of the complaint (for determining the jurisdiction of the Court to entertain the complaint within the prescribed period of limitation and complaint not being time-barred). If these dates are not perceptible from the complaint or papers accompanying it then the Magistrate has not jurisdiction to entertain the complaint for offense under Section 138, NI Act."

8. From the above observation, this much is clear that the date of the receipt of notice is very much important but it is not necessary that any particular date as regard receipt of demand notice should mandatorily be mentioned in the complaint itself. The day of receipt of demand notice can very well be inferred from the documents/evidence on record.

9. The petitioner also referred to a judgment of the Supreme Court in *Dashrathbhai Trikambhai Patel vs. Hitesh Mahendrabhai Patel and Another; 2022 (4) Civil Court Cases 279 (S.C.)*. The Supreme Court in *Ajeet Seeds Limited vs. K. Gopala Krishnaiah; (2014) 12 SCC 685*, specifically dealt with the absence of averments in a complaint about service of notice upon accused. In the aforesaid case, the Supreme Court agreed with the view taken in *C.C. Alavi Haji vs. Palapetty Muhammed (supra)*. The court explained the nature of presumptions which can be drawn under section 114 of the Evidence Act and under 27 of the General Clauses Act. It was held as below:-

"9. This Court then explained the nature of presumptions under Section 114 of the Evidence Act and under Section 27 of the GC Act and pointed out how these two presumptions are to be employed while considering the question of service of notice under Section 138 of the NI Act. The relevant paragraphs read as under:

"13. According to Section 114 of the Act, read with Illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless

there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the G.C. Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Act is extracted below:

"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".

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 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. [Vide Jagdish Singh Vs. Natthu Singh (1992) 1 SCC 647; State of M.P. Vs. Hiralal & Ors. (1996) 7 SCC 523 and V.Raja Kumari Vs. P.Subbarama Naidu & Anr. (2004) 8 SCC 74] 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."

10. It is thus clear that Section 114 of the Evidence Act enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. Section 27 of the GC Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. It is not necessary to 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."

From the above judgment of the Supreme Court, the controversy which has been raised by the petitioner is set at rest.

10. In the instant case the trial court seems to have drawn a presumption of law as regard service of demand notice. In my opinion, even if the track consignment report is not filed, the court may presume service of notice in ordinary course of business, if it was shown that the same was sent by registered post on correct address.

11. In view of the above, I do not find any infirmity, illegality or irregularity in the summoning order dated 19.07.2022 as well as the order dated 01.06.2023. Therefore, the petition lacks merit and is hereby **dismissed**.

Order Date :- 13.10.2023

#Vikram/-RKM