MAJESTY LEGAL
Advocates & Solicitors

DEMAND NOTICE VIA EMAILS OR WHATSAPP, VALID UNDER SECTION 138 NI, ACT

RAJENDRA VS. STATE OF U.P. AND ANOTHER

Hon'ble Allahabad High Court, while discussing an issue on whether the law necessitates specifying the date of notice service upon the drawer in complaints under Section 138 of the Negotiable Instruments Act, in the case of ***Rajendra vs. State of U.P. and Another***[1], provided a significant ruling concerning the delivery of demand notices via digital platforms like emails and WhatsApp in our computerized era. Examining various provisions, Court noted that while Proviso (b) of Section 138 of the N.I. Act mandates a written notice, it doesn't prescribe a specific mode of delivery. Section 94 of the N.I. Act allows for oral or written notice, with the written form possibly sent by post, yet it doesn't explicitly limit it to postal delivery. Additionally, Hon'ble Court also invoked Section 4 of the IT Act, which clarifies that notices under Section 138 of the N.I. Act can involve emails or WhatsApp if they can be subsequently referenced. Furthermore, it referred to Section 65(B) of the Indian Evidence Act, 1972, acknowledging the admissibility of electronic records, further affirming the validity of digital communications such as emails and WhatsApp for such notices.

Accordingly, it concluded that a demand notice dispatched to the drawer of a check via 'email or WhatsApp' under Section 138 of the Negotiable Instrument Act for the dishonour of a check is deemed valid. It shall be considered dispatched and served on the same date if it fulfils the criteria outlined in Section 13 of the Information Technology Act.

TEAM MAJESTY LEGAL[2]

OFFICE : B-87, Alaknanda Apartment, G-1, Ganesh Marg/Moti Marg, Bapu Nagar, Jaipur,Rajasthan-302015.
https://maps.app.goo.gl/BsUvY9RWyvUt6JcB9?g_st=iw
CHAMBER : 204, E-Block, Rajasthan High Court, Jaipur.
MOBILE No. : 9785461395
E-MAIL : mahi@majestylegal.in
WEBSITE : www.majestylegal.in

[1] Neutral Citation No. - 2024:AHC:14247

[2] Majesty legal is a LAW FIRM established in 2013 by Ms. Mahi Yadav. Objective of this legal update is to provide insights on law, statutes and is personal in nature, not to be deemed as legal advice.

A.F.R.

Neutral Citation No. - 2024:AHC:14247

Court No. - 93

Case :- APPLICATION U/S 482 No. - 45953 of 2023

Applicant :- Rajendra
Opposite Party :- State of U.P. and Another
Counsel for Applicant :- Sunil Kumar,Chandan Singh,Narendra Singh
Counsel for Opposite Party :- G.A.

Hon'ble Arun Kumar Singh Deshwal,J.

1. Heard learned counsel for the applicant and Sri Padmakar Rai, learned AGA for the State.

2. The present application u/s 482 Cr.P.C. has been filed to quash the summoning order dated 09.11.2022 as well as the entire proceedings of Complaint Case No.3721 of 2022 (Shiv Prakash Tiwari Vs. Rajendra), under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the 'Act, 1881'), Police Station- Nagirabad, District- Kanpur Nagar, pending in the court of learned Metropolitan Magistrate, VIII, Kanpur Nagar.

3. The learned counsel for the applicant contends that the impugned complaint is itself defective as the same was filed before the expiration of 15 days from the date of service of notice. It is further contended by learned counsel for the applicant that after bouncing the cheque on 13.07.2022, legal notice was sent to the applicant by the opposite party no.2 on 23.07.2022 and, thereafter, without mentioning any date for service of notice, the complaint was filed on 31.08.2022. It is further contended by learned counsel for

the applicant that in the absence of any date of service mentioned in the complaint, the presumption of 30 days under Section 27 of the General Clauses Act, 1977, should come into play, and it should have been filed after 45 days of sending a notice. In support of his contention, learned counsel for the applicant has relied upon the judgement of the co-ordinate Bench of this Court passed in **Application u/s 482 No.98 of 2020 (Ali Jan Vs. State of U.P. and Another)** vide order dated 31.01.2020 and another judgement of the co-ordinate Bench of this court in **Application u/s 482 No.29097 of 2023 (Santosh Kumar Shrivastava Vs. State of U.P. and Another)** vide order dated 21.08.2023. Learned counsel for the applicant has also relied upon the judgement of **Yogendra Pratap Singh Vs. Savitri Pandey & Anothers reported in 2014 (10) SCC 713**, as well as the judgement of Jharkhand High Court in **Criminal Revision No.827 of 2012 (Manoj Kumar Nag Vs. State of Jharkhand & Another)** vide order dated 16.07.2021. Lastly, it was contended by learned Counsel for the applicant that in the above judgment, it is clear that if the complaint is filed before the expiry of 15 days from the date of service of notice, then that is no complaint in the eyes of the law.

4. Per contra, learned AGA has contended that it is an established legal position of law that date of service of notice sent by the complainant upon the drawer of the cheque is not required to be mentioned in the complaint and the defence whether notice has been served or not upon the drawer of the cheque can be considered during the trial, and that cannot be a case for quashing the proceeding of a

complaint under the Act of 1881.

5. After hearing the parties, the following questions arise for consideration;

i. Whether the impugned complaint is defective under Clause (c) of the proviso to Section 138 of the Negotiable Instrument Act, being filed before the expiry of Fifteen days from the date of service of notice.?

ii. Whether the law requires to mention the date of service of notice upon drawer in the complaint filed against him under Section 138 N.I. Act ?

6. from the perusal of the record, it appears that after the bouncing of the cheque on 13.07.2022 legal notice was sent by opposite party no.2 through registered post on 23.07.2022, though no date of service was mentioned in the complaint, and the same was filed on 31.08.2022.

7. Hon'ble Apex Court in **C. C. Alavi Haji vs Palapetty Muhammed and another; 2007 (6) SCC 555** observed that in case of notice through registered post on the correct address of the drawer, the presumption of service upon drawer can be made under Section 27 of General Clause Act by taking into consideration the time for service of notice in the ordinary course of business. The Hon'ble Apex Court further observed that in that case, apart from the Section 27 of General Clause Act presumption under Section 114 of Evidence Act is available to presume the service upon the drawer in the common course of business. Paras 13, 14, 15 and 17 of the judgement **C. C. Alavi Haji (supra)** are being

quoted hereinbelow;

"13. According to Section 114 of the Act, read with Illustration (f) thereunder, when it appears to the courtthat the common course of business renders it probable that a thing would happen, the court may draw a 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 GC Act is a far stronger presumption. Further, while Section 114 of the Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of the GC Act is extracted below:

"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 expression '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 v. Natthu Singh; State of M.P. v. Hiralal and V. Raja Kumari v. P. Subbarama Naidu.) 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 the 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 emphasise that the complaint 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 aforenoted 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 on 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.

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 2 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."

8. From the observation of the Apex Court mentioned above in **C. C. Alavi Haji (supra)**, it is a clear case that if the complainant sends notice to the drawer through registered post though no date of service is mentioned, even then, the court can presume under Section 114 of the Evidence Act as well as Section 27 of the General Clause Act that the notice has been served in time when a letter sent through the registered post would have been delivered in the ordinary course of business. The question arises: what would be the time the court may presume delivery of the registered letter in the ordinary course of business because no such time is mentioned in Section 114 of the Evidence Act or Section 27 of the General Clause Act. For reference, Section 114 of the Evidence Act, as well as Section 27 of the General Clause Act are being quoted hereinbelow respectively ;

"Section 114- The Court may 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."

Section 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 expression 'give' or 'send' or any other expression is used, then, unless a the different intention appears, the service shall be deemed to be effected by properly addressing, prepaying 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."

9. Hon'ble Apex Court in the case of **Subodh S. Salaskar vs Jayprakash M. Shah and another (2008) 13 SCC 689** after considering Section 27 of General Clause Act and Order 5 Rule 9(5) of the Code of Civil Procedure, 1908, observed that ordinarily 30 days must be held to be sufficient for service of notice if same is sent through registered post and with further observation that if service of notice is effected through speed post, ordinarily the service takes place within a few days. Para 23 of the judgement of **Subodh S. Salaskar's (supra)** case is being quoted hereinbelow;

"23. Thirty days ordinarily must be held to be sufficient for service of notice. In fact, when the service of notice is sought to be effected by speed post, ordinarily the service takes place within a few days. Even under Order 5 Rule 9 (5) of the Code of Civil Procedure, 1908, summons is presumed to be served if it does not come back within thirty days. In a situation of this nature, there was no occasion for the Court to hold that service of notice could not be effected within thirty days."

10. The above judgement of the Hon'ble Supreme Court was delivered in the year 2008 considering the efficiency of service of the post office at that time. Even Hon'ble Apex Court has not presumed that 30 days will always be counted for service of notice if the same is sent through registered post and is not returned. Now, almost 15 years have passed, much water has flown under the bridge and delivery of letters through the postal department has become so fast

that presuming 30 days for service delivery for the registered post does not appear correct. Even the Order 5 Rule 9(5) of C.P.C. provides presumption for delivery of service of summons through registered post, if not received back within 30 days from the date of issuance of summons cannot be equated with the present service of notice under N.I. Act because giving of notice cannot be equated with the service of notice under N.I. Act, and if such pleas are allowed, then dishonest drawer of the cheque may get an unnecessary advantage, especially when drawer of the cheque did not denied the receiving of statutory notice.

11. In the **K. Bhaskaran Vs. Sankaran Vaidhyan Balan; (1999) 2 SCC 510**, Hon'ble Apex Court Observed, "it must be born 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."

12. Proviso (b) of Section 138 N. I. Act provides giving a notice in writing, but no mode of sending notice is provided in Section 138 N.I. Act but Section 94 of N.I. Act provides that notice of dishonour may be given oral or written and may, if written, be sent by post. But this section does not mandatorily provide that written notice should be sent only by post.

13. Section 4 of the Information Technology Act, 2000 (hereinafter referred to as 'I.T. Act') provides where any law provides the information shall be in writing or in typewritten or printed form then, notwithstanding anything contained in such law, such requirement shall be deemed to have been

satisfied if such information is given in electronic form and accessible so as to be usable for subsequent reference. Section 4 of I. T. Act is being reproduced hereinbelow;

"4. Legal recognition of electronic records.- Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is-

(a) rendered or made available in an electronic form and

(b) accessible so as to be usable for a subsequent reference."

14. Therefore, Section 4 of the I.T. Act very clearly provides that notwithstanding anything contained in such law which provides notice in written form then written will also include the notice rendered or made available in electronic form, which should be available for subsequent reference. The word 'electronic form' is defined in Section 2(1)(r) of I.T. Act, which provides any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device. Therefore, it is clear from the provision the notice mentioned in Section 138 N.I. Act will also include email or WhatsApp if the same remains available for subsequent reference.

15. Section 65(B) of the Indian Evidence Act, 1972 also accepts the admissibility of electronic records. Section 12 of the I.T. Act also provides the procedure for acknowledgement of receipt of notice in electronic form. Similarly, Section 13 of the I.T. Act also provides the time and place of dispatch of electronic records.

16. As per Section 13 of the I.T. Act, as soon as the notice in electronic form is entered, a computer resource outside the

control of the originator, it is deemed to be dispatched and as soon as the notice in electronic form is entered, the designated computer resource or enters the computer resources of the addressee, and then it is deemed to be served. Sections 12 and 13 of I.T. Act are being quoted as below;

"12. Acknowledgement of receipt. *- (1) Where the originator has not [stipulated] that the acknowledgement of receipt of electronic record be given in a particular form or by a particular method, an acknowledgement may be given by-*

(a) any communication by the addressee, automated or otherwise; or

(b) any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.

(2) Where the originator has stipulated that the electronic record shall be binding only on receipt of an acknowledgement of such electronic record by him, then, unless acknowledgement has been so received, the electronic record shall be deemed to have been never sent by the originator.

(3) Where the originator has not stipulated that the electronic record shall be binding only on receipt of such acknowledgement, and the acknowledgement has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed to within a reasonable time, then, the originator may give notice to the addressee stating that no acknowledgement has been received by him and specifying a reasonable time by which the acknowledgement must be received by him and if no acknowledgement is received within the aforesaid time limit he may after giving notice to the addressee, treat the electronic record as though it has never been sent.

13. Time and place of dispatch and receipt of electronic record*.- (1) Save as otherwise agreed to between the originator and the addressee, the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator.*

(2) Save as otherwise agreed between the originator and the addressee, the time of receipt of an electronic record shall be determined as follows, namely :—

(a) if the addressee has designated a computer resource for the purpose of receiving electronic records,—

(i) receipt occurs at the time when the electronic, record enters the designated computer resource; or

(ii) if the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee;

(b) if the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.

(3) Save as otherwise agreed to between the originator and the addressee, an electronic record is deemed to be dispatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business.

(4) The provisions of sub-section (2) shall apply notwithstanding that the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under sub-section (3).

(5) For the purposes of this section, — (a) if the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business;

(b) if the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;

(c) "usual place of residence", in relation to a body corporate, means the place where it is registered."

17. From the above analysis, it is clear that notice sent through 'email or WhatsApp' shall be deemed to be dispatched and served on the same date, if it fulfill the above requirement of Section 13 of I.T. Act, 2000.

18. In the present time of digitalization and computerisation, delivery of post has become so fast that the court can presume that a correctly addressed registered post has been served upon the addressee within a maximum period of 10 days if the date of service is not mentioned in the complaint. After the initiation of the online post tracking system, it is too easy to know the date of delivery of the registered post. In the ordinary course of business, the

registered letter is delivered within 3 to 10 days if correctly addressed. **Therefore, this Court holds that if no date of service has been mentioned in the complaint, then the court can presume under Section 114 of the Evidence Act and Section 27 of the General Clause Act that notice would have been served within ten days from the date of its dispatch. Though it is always open to the drawer of the cheque to take the plea during trial, the notice was never served upon him.**

19. In the cases relied upon by the applicant in **Ali Jan (supra)**, **Santosh Kumar Shrivastava (supra)** and **Yogendra Pratap Singh (supra)**, High Court as well as the Hon'ble Supreme Court observed that complaint beyond the expiry of 15 days from the date of service is no complaint in the eyes of the law that legal position is not disputed. However in none of the judgement, the court observed that 30 days is required to be presumed for service of notice from the date of dispatch through registered post if date of service is not mentioned in the complaint.

20. In the present case, as per the complaint, notice was dispatched by the complainant to opposite party no.2 on 23.07.2022; therefore, after presuming ten days of service of notice upon the applicant, 15 days will be counted from 2nd August 2022 within which applicant was required to pay the cheque amount as demanded by the notice. After that, a complaint can be filed after 17.08.2022. In the present case, the complaint was filed on 31.08.2022. Therefore, the complaint was not defective under Clause (c) of the proviso of Section 138 as well as Section 142(1)(b) of N.I. Act.

21. So far as the second question is concerned, whether the date of service of notice upon drawer is required to be mentioned in the complaint itself.

22. The Apex Court in **C.C. Alavi Haji (supra)** case observed that while interpreting the Section 138 N.I. Act regarding service of notice it must be borne in mind the court should not adopt an interpretation that helps the dishonest drawer of the cheque to evade and trap the honest payee, and it should be incorporated liberally in favour of the honest payee. The court further observed that as soon as the payee dispatched the registered post with the correct address of drawer, the presumption of service as under Section 27 of the General Clause Act would be attracted. Para 10 of the **C.C. Alavi Haji (supra)** case is being quoted hereinbelow;

"10. It is, thus, trite to say that where the payee dispatches the notice by registered post with the correct address of the drawer of the cheque, the principle incorporated in Section 27 of the GC Act would be attracted; the requirement of Clause (b) of the proviso to Section 138 of the Act stands complied with and cause of action to file a complaint arises on the expiry of the period prescribed in Clause (c) of the said proviso for payment by the drawer of the cheque. Nevertheless, it would be without prejudice to the right of the drawer to show that he had no knowledge that the notice was brought to his address."

23. In the case of **Vinod Shivappa vs Nandabelliappa; 2006 (6) SCC 456**, the Hon'ble Apex Court observed that while interpreting the statute, the court must adopt construction, which suppress the mischief and advance the remedy as per the rule laid down in Heydon's case which is known as purposive construction or mischief rule. Para 12 of the **Vinod Shivapapa (supra)** case is quoted hereinbelow;

"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 also known as the rule of purposive construction or mischief rule."

24. In the judgement of **M/s Ajeet Seeds vs K. Gopal Krishnaiah; 2014 (12) SCC 685**, the Hon'ble Apex Court observed that it is 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 addressee have knowledge of the notice because the same is a matter of evidence, and there is presumption of service of the registered post under Section 27 of the Evidence Act.

25. Therefore, this Court holds that there is no legal requirement to mention the date of service of notice upon the drawer of the cheque in the complaint itself, if the notice was sent through registered post, then presumption under Section 27 of the General Clause The act will automatically come into the picture.

26. In view of above analysis and the legal position discussed above, this Court is of the view that in the present case, the complaint was filed after the expiry of 15 days of service of notice upon the applicant. Therefore, there is no defect in the complaint. Hence, there is no illegality in the summoning order.

27. This Court also feels it appropriate to issue following directions to all learned Magistrates/Courts:-

(i) Where complaint under N.I. Act is filed, then the concerned Magistrate/ Court will emphasis for filing the post tracking report along with the complaint, if sent through Registered Post, so as to leave no scope for the dishonest

drawer of cheque from taking the plea of non-service of statutory notice of 15 days.

(ii). Notice sent through **'email or WhatsApp'** , if it fulfils the requirement of Section 13 of I.T. Act will also be a valid notice under Section 138 N.I. Act to the drawer of cheque, and same will be deemed to be served on the date of dispatch, itself.

28. Accordingly, the present application is **dismissed**. However, the applicant is free to raise the issue of service during the trial of the complaint in question.

29. Registrar (Compliance) is directed to circulate a copy of this order to all learned District Judges of the state of Uttar Pradesh, for further appraisal to concerned Magistrate/Court.

Order Date :- 25.1.2024
A.Kr./Subham