

C. Case No-547 of 2015

Order dated: 05.12.2018.

The complainant is present and has been duly represented by his ld lawyer.

Nobody has appeared today on behalf of the person arrayed as accused person.

Track report from the India Post Official website has been submitted by the ld lawyer for the complainant which goes to show that the attempt was made for service of the notice but it could be served as the door was locked and it has been returned back.

Ld lawyer for the complainant submitted that the petition praying for condonation of delay that has occasioned may be heard and disposed off as the accused person is intentionally avoiding the proceeding of this case.

At the outset I must hasten to articulate that this is a case instituted under section 138 of the Negotiable Instrument Act. Sections 143 to 147 have been inserted in the said Act by Amendment with effect from 06-02-2003. Section 144 of the Negotiable Instrument Act (as amended) provides mode of service of summons in cases of this nature. The section runs in the following lines.

“144. Mode of service of summons

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974) and for the purposes of this Chapter, a Magistrate issuing a summons to an accused or a witness may direct a copy of summons to be served at the place where such accused or witness ordinarily resides or carries on business or personally works for gain, by speed post or by such courier services as are approved by a Court of Session.

(2) Where an acknowledgment purporting to be signed by the accused or the witness or an endorsement purported to be made by any person authorised by the postal department or the courier services that the accused or the witness refused to take delivery of summons has been received, the Court issuing the summons may declare that the summons has been duly served.”

Therefore from the bare reading of the section it is clear that this court is empowered to issue a copy of summons upon the accused person by speed post. Here in this case a postal receipt has been filed as well as the track reports. It must be mentioned here that the mode of service of summon as provided by Section 144 of the Negotiable Instruments Act, 1881 is a different from section 62 of the Criminal Procedure Code 1973 and by the use of the word “Notwithstanding” the Negotiable Instruments Act 1881 has provided for an alternative mode of service. Therefore section 62 of the Criminal Procedure Code would not be attracted for the purpose of cases like this. Any other interpretation would not hoist the cause of speedy disposal of cases of this nature and that would obviously transgress the clear intention of the legislature.

Perused the case record. I must hasten to articulate that the Hon'ble Supreme Court in ***K. Bhaskaran vs. Sankaran Vaidhyan Balan and Anr.*** has held that a notice

returned as unclaimed has to be presumed to have been served. Paragraphs 22, 23 and 24 of the judgment read as under:-

"22. It is 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 of 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."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 dispatched 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."

Being pioneered by the observation of the Hon'ble Supreme Court, I do concur with the ld lawyer for the complainant and hold the service to be satisfactory. Moreover the complainant cannot be saddled with the duty when indeed summons were sent in the right address and the presumption under section 27 of the General Clauses Act militates against the other side.

On repeated calls none appears and none moves for the person arrayed as accused in the written complaint. It is now 01.20 PM. Hence the petition filed under section 142 of the Negotiable Instruments Act be heard in absence of the other side.

Fix **25-02-2019** for hearing of the petition under section 142 of the Negotiable Instruments Act.

Typed by me;

Additional Chief Judicial Magistrate
Bidhannagar