FKITEM NO.1 COURT NO.7 SECTION II

S U P R E M E C O U R T O F I N D I A

RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Crl) No(s).3910/2006

(From the judgement and order dated 27/03/2006 in CRLMC No. 4630/2003 & CRLMC No.

4669/2003 of The HIGH COURT OF KERALA AT ERNAKULAM)

C.C.ALAVI HAJI Petitioner(s)

VERSUS

PALAPETTY MUHAMMED & ANR Respondent(s)

(With appln(s) for exemption from filing O.T., permission to file additional documents and off
ice

report)

Date: 14/02/2007 This Petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE S.B. SINHA

HON'BLE MR. JUSTICE MARKANDEY KATJU

For Petitioner(s)

Mr. K. Rajeev,Adv.

For Respondent(s)

Mr. A. Raghunath,Adv.

Mr. G. Prakash ,Adv

UPON hearing counsel the Court made the following

O R D E R

One of the questions which arises for consideration is as to

whether service of notice in terms of the proviso (b) appended to Section 138 of the Negotiable Instruments Act, 1881 is mandatory. It is not disputed that service of notice is an ingredient of the offence. In this case, the complainant-respondent accepted the fact that the notice could not be served upon the petitioner and it was returned unserved with an endorsement of the postal peon "Out of Station". The complainant in the complaint petition does not allege that the service of notice was deliberately avoided by the petitioner

..2/-



or the postal endorsement of the postal peon on the envelope was wrongly obtained. The question which arises for consideration is as to whether in a situation of this nature, the Court could take cognizance of the offence under Section 138 of the Negotiable Instruments Act on the basis of the averments made in the complaint petition.

The learned counsel appearing on behalf of the respondent has drawn our attention to a decision of this Court's in D. Vinod Shivappa vs. Nanda Belliappa (2006) 6 SCC 456, wherein a Division Bench of this Court held:

"If a notice is issued and served upon the drawer of the

cheque, no controversy arises. Similarly, if the notice is refused by the addressee, it may be presumed to have been served. This is also not disputed. This leaves us with the third situation where the notice could not be served on the addressee for one or the other reson, such as his non-availability at the time of delivery, or premises remaining locked on account of his having gone elsewhere, etc. etc. If in a each such case the law is understodd to mean that there has been no service of notice, it would completely defeat the very purpose of the Act. It would then be very easy for an unscrupulous and dishonest drawer of a cheque to make himself scarce for some time after issuing the cheque so that the requisite statutory notice can never be served upon





him and consequently he can never be prosecuted. There is good authority to support the proposition that once the complainant, the payee of the cheque, issues notice to the drawer of the cheque, the cause of action to file a complaint arises on the expiry of the period

prescribed for payment by the drawer of the cheque. If he does not file a complaint within one month of the date on which the cause of action arises under clause © of the proviso to Section 138 of the Act, his complaint gets barred by time. Thus, a person who can dodge the postman for about a month or two, or a person who can get a fake endorsement made regarding his non-availability can successfully avoid his prosecution because the payee is bound to issue notice to him within a period of 30 days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. He is, therefore, bound to issue the legal notice which may be returned with an endorsement that the addressee is not available on the given address.

We cannot also lose sight of the fact that the drawer may by dubious means manage to get an incorrect endorsement made on the envelope that the premises has been found locked or that the addressee was not available at the time when postman went for delivery of the letter. It may be that the address is corect and even the addressee is available, but a

wrong endorsement is manipulated by the addressee. In such a

..4/-



case, if the facts are proved, it may amount to refusal of the notice. If the complainant is able to prove that the drawer of the cheque know about the notice and deliberately evaded service and got a false endorsement made only to defeat the process of law, the court shall presume service of notice. This, however, is a matter of evidence and proof. Thus even in a case where the notice is returned with the endorsement that the premises has always been found locked or the addressee was not available at the time of postal delivery, it will be open to the complainant to prove at the trial by evidence that the endorsement is not correct and that the addressee, namely, the drawer of the cheque, with knowledge of the notice had deliberately avoided to receive notice. Therefore, it would be premature at the stage of issuance of process, to move the High Court for quashing of the proceeding under Section 482 of the Code of Criminal Procedure. The question as to whether the service of

notice has been fraudulently refused by unscrupulous means is a question of fact to be decided on the basis of evidence. In such a case the High Court ought not to exercise its jurisdicton under Section 482 of the Code of Criminal Procedure."

However, in the said decision, this Court has not taken into consideration the presumption arising out of an official act as provided under Section 114 of the Evidence Act. The presumption raised under Section 114 of the Evidence Act is

..5/-



undoubtedly a "rebuttal presumption", but for the purpose of rebuttal of such a presumption, necessary averments must be made in the complaint petition. The question which, therefore, in our opinion, arises for consideration, is whether in absence of any averments in the complaint petition, that the accused had a role to play in the matter of such endorsement; the same could have been entertained keeping in view the decision of this Court in Vinod Shivappa's case (supra). We are of the opinion that the Division Bench having not considered that aspect of the matter, the same cannot be said to be an authoritative pronouncement on the said question; as even in such a case, the Court

shall have to proceed to try the accused for commission of an offence under Section 138 of the Negotiable Instruments Act; although, on the face of the complaint petition, no offence can be said to have been made out. We, therefore, are of the opinion that the matter should be considered by a larger Bench.

Let the matter be placed before Hon'ble the Chief Justice of India for appropriate orders.

(MEERA HEMANT) (NEERU VIJ)

Assistant Registrar COURT MASTER