Karnataka High Court Fakirappa vs Shiddalingappa And Anr. on 7 November, 2001 Equivalent citations: 2002 CriLJ 1926, ILR 2002 KAR 181, 2002 (1) KarLJ 119 Bench: G P Goud ORDER The Court 1. The petitioner in these two cases is facing prosecution for an offence under Section 138 of the Negotiable Instruments Act, 1881 ('N.I. Act' for short), on the complaint under Section 200 of the Cr. P.C. filed by the respondents-complainants. The petitioner is aggrieved by the order of the learned Magistrate directing issuing of process against him. 2. On the complaint being presented, the learned Magistrate took cognizance, recorded the sworn statements of the complainants, found sufficient ground to proceed, and accordingly directed issuing of summons for the offence under Section 138 of the N.I. Act. Sri Basavaraj Sabarad, learned Counsel for the petitioner-accused would urge two grounds in support of his plea seeking quashing of the proceeding. 3. The first ground is that, the petitioner-accused had no notice of the fact of dishonouring of the cheque allegedly issued by him, and that, there was no notice as contemplated under Clause (b) of the proviso to Section 138 of the N.I. Act. It is to be found that while Section 138 of the N.I. Act speaks of commission of an offence under the said provision where a cheque comes to be dishonoured, still that is subject to Clauses (a) to (c) of the proviso to Section 138 of the N.I. Act, and the offence under Section 138 of the N.I. Act shall not be taken as having been committed if a notice of demand under Clause (b) of the proviso has been issued and if the drawer of the cheque pays the amount of the cheque within fifteen days after the receipt of notice. It is, therefore, essential that the drawer of the cheque should receive notice of demand under Clause (b) of the proviso to Section 138 of the N.I. Act. At times, service is deemed sufficient In this particular case, what has happened is that the notice issued has been returned with the endorsement "left, not known". In the ordinary course, such an endorsement would lead to the conclusion that the drawer of the cheque had no notice of demand issued under Clause (b) of the proviso to Section 138 of the N.I. Act, and therefore, had no opportu- nity of paying the amount within fifteen days in order to avoid prosecution. But, what the Supreme Court has said in State of Madhya Pradesh v. Hiralal and Ors., is that, even in respect of endorsements "not available in the house", "house locked" and "shop closed", the notice must be deemed to have been served. Though Sri Basavaraj Sabarad, learned Counsel for the petitioner-accused submits that the endorsement concerned herein viz., "left, not known" has to stand on a different footing, I am of the opinion that, as rightly urged by Sri Basavaraj Bannur, learned Counsel for the respondents-complainants, the said endorsement is no different from other endorsements that the Supreme Court was considering in the above said case of Hiralal. That being the position, it has to be taken as deemed service. Another decision of the Supreme Court in M.A. Sridhar v. Metallay N. Steel Corporation, however is pressed into service to urge that each case has to be decided on the facts of that particular case even with regard to this deemed service. In the said latter decision, the Supreme Court pointed out that, although in appropriate case, deemed service is to be accepted by the Court as indicated in the earlier decision of the Supreme Court in Hi-ralal's case referred to earlier, it may also be noted that such presumption

of deemed service is not a matter of course in all the cases, and the deemed service is to be accepted in the facts of each case. It is as held by the Supreme Court in its latter decision that I said earlier that facts of each case have to be seen before concluding as regards deemed service of notice under Clause (b) of the proviso to Section 138 of the N.I. Act. The question is as to when does that stage come. Sri Basavaraj Sabarad, learned Counsel for the petitioner submits that, right at the initial stage on the basis of the averments in the complaint and in the sworn statement, this question needs to be decided. I would disagree with this. Even in the latter decision viz., in Sridhar's case, supra, the Supreme Court was considering whether or not it could be taken as deemed service on the basis of the evidence that had already been led, and in respect of which, there were decisions of the Trial Judge and the High Court. It is, therefore, in my opinion, appropriate that a decision in this regard viz., whether or not service of notice under Clause (b) of the proviso to Section 138 of the N.I. Act should be deemed to be sufficient, should be taken only after the evidence is led and on appreciation of the evidence concerned, and not at the initial stage. Therefore, the petitioner is at liberty to urge this contention after the evidence is led in this regard by both the parties, and it is for the learned Trial Judge to decide upon this aspect ultimately when he is disposing of the case on merits. 4, The next contention of Sri Basavaraj Sabarad, learned Counsel for the petitioner is that, there is violation of Section 204(2) of the Cr. P.C. I find that there is such a violation. Section 204(2) of the Cr. P.C. mandates that no summons or warrant shall be issued against the accused under Sub-section (1) of Section 204 until a list of prosecution witnesses had been filed. In this case there is no such list of witnesses nor is there any statement by the complainant that he is the only witness and he is not examining any other witnesses. In that view of the matter, there is no compliance with Section 204(2) of the Cr. P.C. In such a situation, a learned Single Judge of this Court Hon'ble Mr. Justice K.B. Navadgi in Keshava Murthy, H.L. and Anr. v. H. Veeraiah, held that, Section 204(2) of the Cr. P.C. is mandatory in nature commanding absolute compliance. Of course, another decision of another learned Single Judge of this Court in T.M. Jakkanna alias Tippanna Mallappa Jakkannavar and Anr. v. Rajalaxmi Traders, has been pressed into service by Sri Basavaraj Bannur, learned Counsel for the respondents-complainants to urge that, this fact of non-compliance of Section 204(2) is curable under Section 465 of the Cr. P.C. With great respect to the learned Single Judge who has decided this latter decision in T.M. Jakkanna's case, supra, I am of the opinion that the said decision has been rendered per incuriam, in the sense, that the mandatory nature of the provisions contained in Section 204(2) of the Cr. P.C. requiring absolute compliance, is not noticed. There is a purpose insisting, under Sub-section (2) of Section 204 of the Cr. P.C., on a list of the prosecution witnesses being filed before summons or warrant is issued against the accused under Sub-section (1) thereof. By then, the learned Magistrate would have already found sufficient ground to proceed against the accused. When the accused therefore appears before the learned Magistrate in due compliance with the summons or on being produced in execution of the warrant, not only that he should know what the

case against him is, but, also as to who are the witnesses to be examined in support of the case of the prosecution. Otherwise, the field will be wide open for the prosecution to bring in any witness at any time, not only to improve its case from time to time, but, also to nullify the admissions given in the cross-examination of the prosecution witnesses. It is therefore that the list of witnesses is insisted upon at the very outset, and it is only in exceptional circumstances that any fresh witness can be examined in the circumstances contemplated under Section 311 of the Cr. P.C. It is therefore that the law laid down in Keshava Murtky's case, supra, has held the field for over a decade. This being the position, I am of the opinion that, following Keshava Murthy's decision, supra, wherein it is held that Section 204(2) of the Cr. P.C. demands absolute compliance, I have to agree with the learned Counsel for the petitioner-accused Sri Basavaraj Sabarad that there is non-compliance with Section 204(2) of the Cr. P.C. In that view of the matter, the impugned order of the learned Magistrate with regard to issuing of summons is set aside. Taking of cognizance by the learned Magistrate, recording of sworn statement and even the conclusion of the learned Magistrate that there is sufficient ground to proceed against the petitioner-accused for an offence under Section 138 of the N.I. Act, is left intact. The matter stands remitted to the learned Magistrate. It is for the complainant to file list of witnesses or if he has no other witnesses, then, he has to file a memo to the effect that he is the only witness and no other witnesses are to be examined. On such a list or memo being filed, the learned Magistrate may direct issuing of summons. 5. Petitions disposed of accordingly.