Delhi High Court Prakash Jewellers vs A.K. Jewellers on 15 May, 2002 Equivalent citations: 99 (2002) DLT 244, 2002 (63) DRJ 712 Author: Khan Bench: B Khan, V Aggarwal JUDGMENT Khan, J. 1. The short question that falls for determination is whether petitioner's demand notice was served on respondent and whether trial court had wrongly or rightly dismissed his complaint under Section 138 of Negotiable Instrument Act for non-service of this notice. 2. Petitioner filed a complaint No. 13/99 before ACMM under Section 138 of Negotiable Instrument Act complaining of dishonouring of cheque No. 538722 dated 7.8.1996 for Rs. 1.54 lacs executed by respondent. Side-tracking other issues, trial court converged on the issue of service of demand notice and held that the requisite notice was not served on the respondent and dismissed petitioner's complaint for this. It held:- "CW-3 in his examination in chief has stated to the following effect with respect to service aspect:"The said notice sent through Speed Post, Regd. Post and UPC..... In cross-examination, this witness stated as follows: "I did not receive any AD card or information regarding service of notice upon Mr. Ashwani Kumar from my counsel Sh. Moitra in the form of any document including AD card." From the above statement, it can be safely inferred that it was not the complainant who had posted the notice through speed post, regd. post as well as UPC and hence, service of notice has not been proved. It was the bounden duty of the complainant to examine either the counsel Mr. Moitra or his clerk who was the best witness to prove the service aspect. It has not been so done and so the constructive presumption in favor of the complainant regarding service having been effected upon the accused, cannot be drawn. Complainant has neither stated nor he could have stated to the effect that what was the fate of the regd. letter, speed post or UPC. Had it been proved on record that the regd. letter, speed post, UPC Envelope were not received back then the presumption regarding service of notice might have been drawn in favor of the complainant. In view of the above facts, possibility of the notice not even being posted or being sent at the address other mentioned of the accused, cannot be ruled out. Another reason which goes against the complainant is that accused has disputed the service of notice. It is well settled that the presumption regarding service in case of postal articles stated to have been sent by the complainant, is a rebuttable presumption. In case, the accused disputes the service of notice, onus shifts on the complainant to examine the postal officials or the person who posted the letters. In this case, it has not been do done." 3. Petitioner assails the trial court judgment/findings on the ground that demand notice of respondent was served through registered post and postal certificate, original receipts whereof were placed on record and formed Ex.AW-1/10, AW-1/11 and AW-1/12. But trial court had overlooked and discarded all these clutching to petitioner's statement that he had not received the AD card from the office of his counsel. The adverse presumption drawn, therefore, is said to be untenable and the trial court finding contrary to record. 4. Reliance in support is placed on two Supreme Court judgments in K. Bhaskaran v. Sankaran Vaidyan Balan 1999 VIII AD (SC) 417 and Dalmia Cement (Bharat) Ltd. v. Galaxy Traders & Agencies Ltd. 2001 (1) AD (SC) 409 and a judgment of this court in Jain Associates v. Deepak Chaudhary &

Co. 80 (1999) DLT 654. 5. The stand of respondent, on the other hand, is that presumption drawable on service of notice by registered post was rebuttable one and once he had denied the receipt of notice, it was for the petitioner to prove it on all force. But since he had failed to do so, trial court had rightly dismissed his complaint for non-service of notice and its order was justified. 6. Section 138 of the Act makes it an offence where any cheque drawn by a person on any account maintained by him in a bank for payment of any amount to other person is returned for payment of any amount to other person is returned unpaid by the bank for insufficiency of the deposit or for the amount payable exceeding such deposit. The components of offence under this provision are (a) drawing of the cheque for some amount, (b) presentation of the cheque to the banker, (c) return of the cheque unpaid by the drawee bank, (d) giving of notice by the holder of the cheque or payee to drawer of the cheque demanding payment of cheque amount, (e) failure of drawer to make payment within 15 days of receipt of such notice. 7. The requirement of giving of notice by the payee or the holder of the cheque is contained in Clause (b) and (c) of proviso to Section 138 which reads thus:- "(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice." 8. There is no dispute with the proposition that a statutory obligation is cast on the holder of the cheque or the payee to give notice of demand to the drawer of the cheque asking him to make a payment of the amount covered by the cheque. It is a mandatory requirement to be satisfied for constituting an offence under Section 138. 9. It is also settled that it is not the giving of the notice which makes out an offence but its receipt which furnishes a cause of action to the complainant to file the complaint within statutory period. 10. As it is, Section 138 does not prescribe any mode for giving of demand notice by the payee or holder of the cheque. But where such notice is served by post through registered post or postal certificate, etc. with the correct address of the drawer written on it, it would raise a presumption of service unless the drawer proves that it was not received by him in fact and that he was not responsible for such non-service. This is in tune with the principle embodied in Section 27 of the General Clauses Act or even Rule 19-A of Order V CPC. 11. Section 27 of General Clauses Act deals with the presumption of service of notice sent by post and provides that service of such notice shall be deemed to have been affected unless the contrary is proved. This principles is equally applicable to the service of notice for purpose of Section 138 of Negotiable Instrument Act also. The same could be said about the provision of Rule 19-A or Order V CPC which requires a court to make a declaration of summons having been duly served and dispatched through registered post notwithstanding that AD Card had been lost or misplaced or not received back within 30 days for some other reason. The relevant proviso provides:- "Provided that where the summons was properly ad-

dressed, prepaid and duly sent by registered post, acknowledgement due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgement having been lost or mislaid, or for other reason, has not been received by the Court within thirty days from the date of the issue of the summons." 12. Proceeding on this premise and going by this logic, we find no hitch in taking the view that payee or the holder of a cheque was as much entitled to claim the benefit of presumption of service once he had dispatched the demand notice through registered post or postal certificate on the correct address of the sendee written on it and where he had proved such dispatch through original receipts. It becomes inconsequential whether sender had not received back the AD card or that he could not produce or prove it for having misplaced it or for some other reason. 13. We are conscious that presumption of service by post under Section 27 of General Clauses Act is rebuttable. But such rebuttal does not assume finality merely because of the sendee's denial to receive the notice. It would be so only where the sendee proves that he had not in fact received the notice and that he was not responsible for such non-service. His resort to tactics and strategy to avoid service of notice and consequential liability would not do. Any contrary view or interpretation would defeat the very purpose and object of Section 138 and would let loose the drawer of a cheque and grant him license to adopt various strategies to get out of liability. After all the purpose of demand notice is only to afford him a chance to make the due payment and not to dispute or avoid the liability and, therefore, this requirement can't be allowed to be over-stretched to wash off the liability itself. This is how the Supreme Court also viewed the issue in K. Bhaskaran's case holding thus:- "The principle incorporated in Section 27 of General Clauses Act can be profitably imported in a case where the sender has dispatched the notice by post with correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it has 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 cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice." 14. Tested thus, we find that trial court had adopted a novel method of dealing with the issue and had proceeded on a recommendatory reasoning indicating do's and don'ts for the complainant (petitioner). It was not the court's demain at all to embark on such course. Once there was no dispute that petitioner had dispatched the demand notice by registered post and under postal certificate also which was supported by original receipts on record (Ex.AW-1/10, AW-1/11 and AW-1/12) and once there was nothing contrary proved to rebut all this, trial court had no occasion to disbelieve service of notice merely because respondent had denied its receipt or because petitioner had stated that he had not received the AD card from his Advocate's office. It appears to us that trial court had over-stretched the issue to draw an untenable conclusion about the non-service of notice by catching at straws so to say and going whole-hog by respondent's refusal to have received the notice. 15. The impugned trial court judgment, therefore, becomes unsustainable on this parity of reasons and is set aside. Complaint No. 13/99 filed by petitioner shall accordingly revive for being

disposed of under law. Addl. Chief Metropolitan Magistrate is directed to do so on the merits of the complaint within three months from receipt of this order. Parties to appear before him on 30th May, 2002.