Delhi High Court Sh. Vinay Kumar Gupta vs Sh. P.K. Jain on 25 September, 2002 Equivalent citations: 2003 CriLJ 1122, 100 (2002) DLT 463, 2003 (66) DRJ 483 Author: M A Khan Bench: M A Khan JUDGMENT Mahmood Ali Khan, J. 1. This criminal revision is filed against the order of a Metropolitan Magistrate dated 11.3.2002 whereby he has dismissed an application of the petitioner accused for discharging him in a criminal complaint filed by the respondent under Section 138 of the Negotiable Instruments Act. 2. As per the allegations made in the complaint the intimation about dishonour of the cheque in question was received by the complainant on 26.4.2000. Thereafter, the notice of demand was sent by him on 4.5.2000 which was received back with the endorsement of the postman that the premises of the addressee were found locked despite repeated attempts. It is also averred that the said notice was received back unserved on 8.6.2000 and thereafter the complainant respondent sent another notice of demand dated 12.6.2000. which was received by the petitioner on 29.6.2000. Counsel for the petitioner has argued that after the first notice dated 4.5.2000 was received back with the endorsement of the postal department that it had been refused by the petitioner the issued of second notice of demand dated 12.6.2000 would not give cause of action to the petitioner to file a criminal complaint. His second contention is that as per averment of the criminal complaint the notice dated 4.5.2000 was received back with the postal remark that the premises were found locked on 8.6.2000 and under Section 27 of the General Clauses Act presumption of due service of the notice on the petitioner arises, therefore, the criminal complaint which has been filed on 29.7.2000 is beyond the period of one month which is prescribed for filing the complaint in accordance with Clause (c) of Section 142 of the Act so the criminal complaint is barred by time. 3. The petitioner filed an application for discharge on the ground that the complaint is filed beyond the period of one month prescribed by Clause (c) of Section 142 of the Act for filing of the criminal complaint for offence under Section 138 of the Act the petitioner is entitled to be discharged. 4. Both the grounds on which the petitioner wants his discharge at this preliminary stage of the criminal proceedings are interconnected. The trial court after hearing the petitioner held that the question raised could be decided after the evidence is recorded and not before that. Therefore, it did not find any ground for discharging the accused at this stage. He accordingly proceeded with the criminal complaint and framed notice under Section 251 of the Cr.PC against the petitioner. 5. The petitioner has felt aggrieved and has challenged this order dated 11.3.2002 in this revision petition. 6. At this stage the allegations made in the complaint and admitted facts and documents will determine whether the complaint disclose cause of action for filing criminal proceedings and whether the complaint is filed within the time prescribed by Section 142(e) or not. Paragraph 16 of the complaint is reproduced as under:- "That the statutory notice have been sent to the accused persons within time after the bouncing of the cheques as the returning memo was received by the complainant on 26.4.2000 and the legal notice was sent to the accused person on 4th of May, 2000 which was received back as the report of the postal department was the premises found lock on repeated visit. The said letter was received back

on 8.6.2000 and another notice was sent on 12.6.2000 which was duly replied by the accused person on 29.6.2000 and the present complaint is filed within prescribed time limit under the Act." 7. A bare reading of the allegations made in paragraph 16 above it is clear that the petitioner had sent a notice dated 4.5.2000 to the complainant, within 15 days of the receipt of the intimation of the dishonoured cheque on 26.4.2000, and that the postal department returned the registered envelope with the remark that the premises were found locked on repeated visits. It was received back on 8.6.2000. The petitioner then sent another notice dated 12.6.2000 which was received by the petitioner on 29.6.2000 so the present complaint was filed in the court on 29.7.2002. 8. The argument of the counsel for the petitioner is that the notice dated 4.5.2000 was sent to the petitioner to his correct address by registered A.D. post and that it was received back with the report that the addressee did not meet despite repeated attempts on 18th, 26th and 3.6.2000. A legal presumption for service of the said notice on the petitioner arises and according to the petitioner the notice was received back on 8.6.2000, therefore, the notice of demand has been served before 8.6.2000. It is contended that the notice dated 4.5.2000 was served in terms of the statutory requirement of Clause (b) of Section 138 of the Act. Thereafter the petitioner had no right to send a second notice dated 12.6.2000 and claim that cause of action had accused for filing the criminal complaint on the basis of the notice dated 12.6.2000. He has cited Sadanandan Bhadran v. Madhavan Sunil Kumar , 1998(2) JCC (SC) 91 wherein it was held that though the payee of the cheque could present the cheque for encashment in the bank a number of times within the period of its limitation or within the period of six months or the validity of the cheque but once the notice of demand required by Clause (b) of Proviso of Section 138 is issued the cause of action for filing the complaint in accordance with Clause (b) of Section 142 arises and that the subsequent notice would not be valid. In paragraph 10 of the judgment the court observed as under:- "Now, the question is how the apparently conflicting provisions of the Act, one enabling the payee to repeatedly present the cheque and the other giving him only one opportunity to file a complaint for its dishonour, and that too within one month from the date the cause of action arises, can be reconciled. Having given our anxious consideration to this question, we are of the opinion that the above two provisions can be harmonised, with the interpretation that one each presentation of the cheque and its dishonour a fresh right and not cause of action-accrues in his favor. He may, therefore, without taking pre-emptory action in exercise of his such right under Clause (b) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque. But once he gives a notice under Clause (b) of Section 138 he forfeits such right for in case of failure of the drawer to pay the money within the stipulated time he would be liable for the offence and the cause of action for filing the complaint will arise. Needless to say, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days. from the date of the receipt of the notice by the drawer, expires." 9. He also referred to Nazim v. State and Ors. , 1996 JCC 207 where it was held that the trial court fell in error

in concluding that since the acknowledgement due was not filed, therefore, the notice was not served. It was observed that Clause 27 of the General Clauses Act gives rise to a presumption of due service of a notice on the addressee once a registered notice is posted to the correct address unless the presumption of service is rebutted. 10. Clause (b) of proviso to Section 138 requires the payee of the cheque to demand the payment of the cheque by giving a written notice to the drawer of the cheque "within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid" and Clause (c) to the same proviso further provided that in case the drawer of the cheque fails to make payment of the amount of the cheque to the payee "within fifteen days of the receipt of the said notice" the drawer of the cheque subject to the fulfillment of other conditions laid down in the main clause as well as in Clause (4) of proviso to Section 138 an offence punishable under Section 138 would be committed by the drawer of the cheque. It is thus clear that firstly the notice of demand should be served within 15 days of the receipt of the information by the payee or holder in due course of the cheque from the bank about dishonour of the cheque for insufficiency of funds or exceeding the arrangement and secondly the drawer of the cheque should fail to pay the amount of the cheque within 15 days of the receipt of the said notice. According to the petitioner himself the notice of demand dated 4.5.2000 was issued within the time stipulated in Clause (b) above said. But his contention is that the presumption of the service of this notice on the petitioner arises in view of the endorsement made by the postal department of not met despite repeated attempts under Clause 27 of the General Clauses Act and since the registered envelope was returned on 8.6.2000, therefore, filing of the criminal complaint on 29.7.2000 is beyond the period of one month from the date of the period allowed to the drawer of the cheque for making payment in terms of Clause (c) of Proviso to Section 138 read with Section 142 Clause (b). 11. It is not the case of the petitioner that he had received the notice of demand dated 4.5.2000. It is also not a case where the cheque was presented again for encashment after 4.5.2000 or the return of demand notice undelivered on 8.6.2000 and on its dishonour for insufficiency of fund or the amount of cheque exceeding the arrangement in drawer's account a fresh demand notice i.e. notice dated 12.6.2000 was issued by the payee. It is also not an argument of the counsel for the petitioner that the presumption of service of a letter sent by post to the correct address of an addressee which arises under Clause 27 of the General Clauses Act is not rebuttable. May be the petitioner took extra precaution of sending another notice dated 12.6.2000 to the complainant which was received by him on 29.6.2000. The complaint was filed within one month from the date of receipt of this notice. Therefore, the question whether the presumption of deemed service of the notice dated 4.5.2000 arises in terms of Clause 27 of the General Clauses Act would depend upon the evidence which would be produced by the complainant respondent during the hearing of the case. 12. In Sridhar M.A. v. Metalloy N. Steel Corporation it was observed "although in appropriate case deemed service is to be accepted by court as indicate din the decision of this court reported in State of M.P. v. Hiralal , ((1996) 7 SCC 523) but it may also be noted that such presumption

of deemed service is not a matter of course n all cases and deemed service is to be accepted in the facts of each case." In Dalmia Cement (Bharat) Ltd. v. Galaxy Traders and Agencies Ltd. and Ors. , the Supreme Court has held "it is not the giving of the notice which makes the offence but it is the 'receipt' of the notice by the drawer which gives the cause of action to the complainant to file the complaint within the statutory period." Therefore the crucial date is the date on which the demand notice was received by the drawer of the dishonoured cheque and the question whether there is deemed service of demand notice dated 5.6.2000 or whether in the given situation the payee was entitled to issue fresh notice of demand dated 12.6.2000, what is the date of service of demand notice and what is the date of accrual of cause of action are matter of facts and cold be decided only after the evidence is adduced by the parties. It is only then the court will be in a position to determine whether the criminal complaint is within stipulated time or not. The petitioner cannot scuttle the proceedings by alleging that he conceded to the presumption which arose in this case of service of notice dated 4.5.2000 upon him, therefore, the time stipulated should be calculated from that day or from 8.6.2000 when it was received back undelivered. 13. The learned trial court has dismissed the application of the petitioner for discharge observing that this question could be decided only after the parties have lead their respective evidence. I do not find any impropriety or illegality in the order of the learned trial court warranting interference by this court in the order. There is no merit in this petition it is dismissed. It is clarified that none of the observation made in this order shall be construed to be an expression of opinion of this court on any of the question involved in this case before the trial court. The petition is accordingly dismissed in limini.