this Court dated 26.11.2012. But unfortunately the said draft was not encashed, as in the meantime the case record was sent to the High Court in connection with the present revision petition. The aforesaid aspect has been reflected in the order sheet of the trial Court also.

17. Of-course the said amount was deposited as per direction of this Court but the same could not be encashed as by the time the complainant could not be intimated, in the meantime, the case record was sent to this Court. The accused/petitioner has already delayed such payment to the complainant/respondent by his conduct but considering the age of the accused petitioner and the submission made by the learned counsel for the petitioner, while maintaining the conviction, the sentence is converted to the fine. He is sentenced to pay fine twice the cheques amount i.e. Rs.9 lacs, in default simple imprisonment for one year. The amount of fine be paid to the complainant/respondent, as a compensation and the said amount be deposited before the trial Court within a period of three months from the date of order and the learned trial Court will return the draft, already deposited by the petitioner to him and the petitioner may proceed for re-validate the draft with the concerned Bank.

18. With the above, the petition stands disposed.

19. Return the LCR immediately along with the copy of the judgment.

Result:- Sentence converted to the fine.

ABC 2019 (II) 273 GAU

ACQUITTAL & BAIL CASES

HIGH COURT OF GAUHATI

(Rumi Kumari Phukan, J.)

Criminal Petition No. 224 of 2017

Decided on 10 May, 2019

SHRI JOY KANTA SINHA ***- Petitioner(s).***

Versus

STATE OF ASSSAM & ANR. ***- Respondent(s).***

Law Covered:- ***(A) Negotiable Instruments Act, 1881 — Section 138(b) — Notice — Service of — contention of the petitioner about non-service — complainant produced certain documents to show that a notice was sent by registered post in the given address — service***

of same is authenticated by the postal department— which is the sufficient compliance of the condition of 138 of the NI Act. (Para 13)

(B) Negotiable Instruments Act, 1881 — Section 138 (b) — Notice — Authenticity of the report of postal department — Held, this Court cannot ascertain the authenticity of report of postal department which is necessarily subject matter of proof. (Para 13)

Facts:- *The respondent lodged the complaint before the Court raising the grievances that the accused had taken loan from him and the accused petitioner issued a cheque but on being presented the concerned cheque returned dishonoured with endorsement of the bank "insufficient fund". The respondent thereafter served a legal notice to the accused by demanding of money, to which he did not respond, so he filed the complaint case u/s 138 of NI Act and the learned trial Court took cognizance of the offence u/s 138 of NI Act. Raising the contention that no proper notice was served upon the accused, present petition was filed contending that as the alleged notice was not issued at the correct address of the petitioner so it was not served. It is submitted that so called notice was issued illegally and served to some other persons other than the petitioner, so the impugned proceeding u/s 138 of NI Act is not maintainable and liable to be quashed and set aside.*

Held:- Now, turning to the case in hand it is to be seen that as against the contention raised by the petitioner about non-service of notice, the respondent has produced certain documents vide annexure D to H to show that such a notice was sent by registered post in the given address and service of same is authenticated by the postal department, which is the sufficient compliance of the condition of 138 of the NI Act. This Court cannot ascertain the authenticity of such report of postal department which is necessarily subject matter of proof. (Para-13)

Counsel:- ***For Petitioner(s):*** *Mr. B Sinha, Mr. M Gogoi, Adv.*
For Respondent(s): *Mr. J U N M Laskar, Advs.*

Cases Referred:-

1. *Alavi haji Vs. Palapetty Muhammed and Another, (2007) 6 SCC 555 C.C, (Para-10)*
2. *Ajeet Seeds Limited Vs. K Gopala krishnaiah (2014) 12 SCC 685, (Para-10)*
3. *Central Bank of India Vs. Saxons Farms (1999) 8 SCC 221, (Para-12)*
4. *V. Raja Kumari Vs. P. Subbarama Naidu and Ors. (2004) 8 SCC 774, (Para-12)*
5. *D Vinod Shivappa Vs. Nanda Belliappa (2006) 6 SCC 456, (Para-12)*
6. *M/S. Jayalakshmi Textiles Vs. S.K Kolandasamay (2015) 1 LW(Crl.) 720, (Para-12)*

JUDGMENT & ORDER

a ***RUMI KUMARI PHUKAN, J.: -*** 1. By way of this application u/s 482 of CrPC, petitioner has sought for quashing of the complaint case filed by the respondent No. 2 pertaining to complaint case No. 41/16 u/s 138 of NI Act pending before the learned Addl. CJM, Cachar, Silchar.

b 2. I have heard the submission of learned counsel for the petitioner Mr. B Sinha assisted by Mr. M Gogoi and Mr. T Kakoti, assisted by J.U.N.M Laskar for the respondent. State is a formal Party.

3. The respondent Haidar Hussain Laskar lodged the
c complaint before the Court raising the grievances that the accused (present petitioner) had taken loan of Rs. 250,000/- from him on 28.08.2015 with a promise to return the same within 3 months. As the said amount was not returned on request made by the respondent/ complainant, the accused petitioner issued a cheque of equal amount
d to him on 15.11.2015 and on being presented the concerned cheque returned dishonoured with endorsement of the bank "insufficient fund". The respondent thereafter served a legal notice to the accused by demanding of money, to which he did not respond, so he filed the complaint case u/s 138 of NI Act and the learned trial Court took
e cognizance of the offence u/s 138 of NI Act.

4. Raising the contention that no proper notice was served upon the petitioner (the accused in the said case), present petition has been filed with the contention as the alleged notice was not issued at
f the correct address of the petitioner so it was not served. It is submitted that so called notice was issued illegally and served to some other persons other than the petitioner, so the impugned proceeding u/s 138 of NI Act is not maintainable and liable to be quashed and set aside.

g 5. By narrating long details of the fact about the different posting of the present petitioner, it is submitted that at the relevant time of issuance of notice he was not present in the given address but serving at Guwahati. Relevant official order of such posting and
h transfer have been shown to the Court, annexed with the present petition vide annexure- 6 to 9 but however no clear picture is reflected as to the place of posting and these are all official orders directing the petitioner to attend duty on deputation at different places, which again could not ascertain that he was not present at the given address at the relevant time.

On the basis of the averment made by the petitioner, at the time of admission of the petition, this Court passed an order for stay of the further proceeding dated 03.04.2017 which was extended from time to time.

6. On appearance of the respondent/complainant refuting the contention of the petitioner and submitted an IA(Crl.) No. 600/17 supported by an affidavit along with some annexures contending that the wife of the petitioner has duly received such demand notice, as per delivery slip of postal department which was also ascertained after enquiry by the Senior Superintendent of Postal Department, Cachar Division, Silchar in his reply dated 25.02.2016, to the letter made by the applicant dated 16.02.2016 vide annexure-D to H. Thus, the respondent has vehemently objected to the contention raised that the notice was not served upon him in the given address and has prayed for dismissal of petition and to vacate the interim order of stay.

7. I have considered the rival submission of learned counsel of both the parties.

8. It has been contended by learned counsel for the respondent that non-service of notice on the part of the present petitioner is a false pretext to avoid the proceeding. Moreover, matter of non service of notice, if any, is a disputed matter, which can be proved by way of evidence & not under such criminal petition. On the other hand, learned counsel for the petitioner has tried to impress the Court that no notice was ever served upon him which is mandatory pre-condition for proceeding of case u/s 138 of NI Act.

9. Due consideration is given to the submission of both the parties. As per the provision of NI Act, it is mandatory that the notice is to be issued in the proper and correct address of the respondent available to the complainant concerned and by producing necessary receipt of sending notice and A/D etc. such a service can be proved. Even otherwise, u/s 27 of General Clauses Act, while notice is not returned in due time and same can also be considered as due service of notice, by raising necessary presumption. The act itself no way mandated about the "**service of notice**" but has been prescribed about "**issuance of notice**" in proper and the correct address.

10. In a decision of ***(2007) 6 SCC 555 C.C Alavi haji Vs. Palapetty Muhammed and Another,*** it has been categorically held that in a case u/s 138 of NI Act once the notice is sent by registered post by

correctly addressing the drawer to the cheque, the service of notice is deemed to have been effected. The mandatory requirement of issuance of notice in terms of Sec. 138 proviso (b) stands complied with when the notice is sent in the said manner. However, the drawer can rebut the presumption of service of notice by showing that he had no knowledge that the notice was brought to his address or the address mentioned in on cover was incorrect or letter was never tendered or the report of the postman was incorrect. However, such matter can be rebutted by way of adducing evidence. But so far as on the part of the complainant as well as the Court there will be no bar to raise the presumption of service of notice u/s 27 of General Clauses Act read with Section 114 III. (f) of the Evidence Act. In the subsequent decision of ***(2014) 12 SCC 685 Ajeet Seeds Limited Vs. K Gopala krishnaiah*** it is held that it is not proper to the High Court to quash the complaint on ground of absence of proof of service of notice and or absence of averment in the complaint regarding such service.

11. Elaborating the Provision of Section 114 of the Evidence Act, it has been held that the aforesaid provision enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. However, Section 27 of the General Clauses Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post.

12. ***In Central Bank of India Vs. Saxons Farms (1999) 8 SCC 221 the Supreme Court*** *held that the object of the notice is to give a chance to the drawer of cheque to rectify his omission and also to protect an honest drawer. The service of notice of demand in clause (B) of Section 138 is a condition precedent for filing a complaint u/s 138 of NI Act.*

Section 27 of General Clauses Act, 1897 also provides for the meaning of service by post. The provision gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. That in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

* *In* ***V. Raja Kumari Vs. P. Subbarama Naidu and Ors. (2004) 8 SCC 774*** *the Supreme Court held that service or non-service of notice is a question of fact and complaint under Section 138 of the Act cannot be quashed or dismissed merely because the notice was not served on the*

accused on the accused or drawer, without enquiring into the circumstances leading to the non-service of notice. Non service of notice is not a ground for rejecting the complain, even before it is numbered. What is the effect of nonservice of notice when the door of the house of the accused was closed, will be considered after trial.

Moreover, Section 27 of General Clauses Act, 1897 provides that 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 service 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.

** In* ***D Vinod Shivappa Vs. Nanda Belliappa (2006) 6 SCC 456*** *the Supreme Court held that 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 correct and even the addressee is available but a wrong endorsement is manipulated by the addressee. In such a 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 knew 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 pre- mature 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 jurisdiction under Section 482 of the Code of Criminal Procedure.*

** In a recent case of* ***2015 in M/S. Jayalakshmi Textiles Vs. S.K Kolandasamay (2015) 1 LW(Crl.) 720,*** *the Madras High Court was confronted with a similar issue and observed that when the notice is sent by registered post by correctly addressing the drawer of the cheque, the*

mandatory requirement of issue of notice in terms of clause (b) of proviso to Section 138 of the Act stands complied with. It is needless to emphasize that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque.

13. Now, turning to the case in hand it is to be seen that as against the contention raised by the petitioner about non-service of notice, the respondent has produced certain documents vide annexure D to H to show that such a notice was sent by registered post in the given address and service of same is authenticated by the postal department, which is the sufficient compliance of the condition of 138 of the NI Act. This Court cannot ascertain the authenticity of such report of postal department which is necessarily subject matter of proof.

14. In view of the legal proposition and for the reasons and discussion above, the petition is hereby rejected. Stay order stands vacated. Both the parties are directed to appear before the learned trial Court on 14.06.2019.

***Result*:-** Petition rejected.

ABC 2019 (II) 279 GAU

ACQUITTAL & BAIL CASES

HIGH COURT OF GAUHATI

(Rumi Kumari Phukan, J.)

Criminal Appeal No. 267 of 2017

Decided on 11 June, 2019

SUNIL DAS ***- Appellant(s).***

Versus

STATE OF ASSSAM & ANR. ***- Respondent(s).***

Law Covered*:-** ***(A) Negotiable Instruments Act, 1881 — Section 138 — Dismissal of case by trial Court — on different parameters that the complainant has not examined the witnesses in whose presence, payment was made — that in how many instalments money was paid— source of income— under what circumstances the cheque was issued— Held, when the accused failed to rebut the statutory presumptions in favour of the complainant/ holder, in due course— parameters decided by trial Court were not relevant to decide a case u/s 138 — The findings of the trial court is perverse