

## Mrs. Rama Mukherjee Vs Escorts Ltd.

**Court:** Delhi High Court

**Date of Decision:** April 27, 2012

**Acts Referred:** Negotiable Instruments Act, 1881 (NI) â€” Section 138, 2, 6, 64, 72

**Citation:** (2012) 3 BC 427

**Hon'ble Judges:** Mukta Gupta, J

**Bench:** Single Bench

**Advocate:** A.K. De and Mr. Rajesh Dwivedi, for the Appellant; S.P. Srivastava, for the Respondent

### Judgement

Hon"ble Ms. Justice Mukta Gupta

1. By this petition the Petitioner seeks quashing of the complaint No. 1459/2006 pending before the Learned Metropolitan Magistrate filed by the

Respondent for offence u/s 138 Negotiable Instruments Act (in short ""NI Act""). Learned counsel for the Petitioner contends that the Learned

Metropolitan Magistrate, Karkardooma Court at Delhi has no jurisdiction to try the present complaint as no part of cause of action has taken place

at Delhi. The business transaction between the parties was entered into at Kolkata where the Respondent/Complainant has its office. In the course

of business transaction the Petitioner by letter dated 4th August, 1998 issued 5 undated blank account payee cheques bearing Nos. 352300,

352801, 352302, 352803 and 352804 drawn on the Oriental Bank of Commerce, Salt Lake Branch, Kolkata payable at Kolkata in favour of the

Respondent. One of the cheque being cheque No. 352800 for Rs. 3,00,000/- was encashed. The Petitioner replaced the other four cheques by

cheque Nos. 561894, 561895, 561898 and 561899 due to expiry of their validity vide letter dated 23rd April, 1999 and requested the

Respondent to return the said four cheques. However, despite number of communications the Respondent failed to return the same. Further the

Petitioner also intimated the Respondent about the closure of the account. Even then the Respondent with mala-fide intention presented cheque

No. 352803 for Rs. 15,00,000/- for encashment on 3rd May, 2004 after six years of its issuance and closure of the account of the Petitioner and

thus the same got dishonoured resulting in filing of the abovementioned complaint.

2. The grievance of the Petitioner is that the Respondent is dragging the Petitioner into litigation in different parts of the country and has filed

another complaint in the Court of First Munsif Judicial Magistrate, Sri Nagar in respect of another cheque bearing No. 352801. It is contended

that there is no averment in the complaint relating to the accrual of the cause of action at Delhi and thus the order of the learned Metropolitan

Magistrate dated 26th June, 2004 taking cognizance of offence and issuing summons to the Petitioner be set aside due to lack of jurisdiction.

3. Learned counsel for the Respondent on the other hand contends that the Court at Delhi has jurisdiction to entertain the complaint as the parties

entered into an agreement and as per Clause 34 of the agreement, it was provided that the agreement shall be considered as having been executed

at Delhi. It was further agreed that in case of a dispute arising, the same shall be litigated at the Courts at Delhi and shall be considered according

to the law for the time being in force in Delhi. This Clause was further amended vide letter dated 21st October, 2002 wherein it was agreed that

the dispute shall be referred for adjudication by arbitration in the first instance and the venue of arbitration shall be exclusively at Delhi. It is further

contended that no commercial transaction between the Petitioner and the Respondent was carried out in Kolkata. The contract between the

parties was signed at Delhi. The cheques in question were handed over to the Respondent at Delhi. The order of goods for consideration of which

these cheques were given was made from Delhi. The said cheques were presented at Delhi. The legal notice was sent from Delhi. Thus, the Court

at Delhi has territorial jurisdiction to try the offences.

4. I have heard learned counsels for the parties.

5. The issue of territorial jurisdiction u/s 138 NI Act was considered by the Hon"ble Supreme Court in K. Bhaskaran Vs. Sankaran Vaidhyan

Balan and Another, The Hon"ble Supreme Court observed that the following 5 acts are essential to constitute an offence u/s 138 of the NI Act

and if these five different acts were done in five different localities, any one of the Courts exercising jurisdiction in one of the five local areas can

become the place of trial for offence u/s 138 of the Act:-

(i) Drawing of the cheque

(ii) Presentation of cheque to the bank

(iii) Return of the cheque unpaid by the drawee bank

(iv) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount and

(iv) Failure of the drawer to make payment within 15 days of the receipt of the notice.

6. The Hon"ble Supreme Court was of the view that the complainant can choose any one of those Courts having jurisdiction over any one of the

local areas within the territorial limits of which any one of those five acts was done. As the amplitude stands so widened and so expansive it is an

idle exercise to raise jurisdictional question regarding the offence u/s 138 of the Act. The relevant paras of the report reads as under:-

15. It is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could

be done at 5 different localities. But concatenation of all the above five is a sine qua non for the completion of the offence u/s 138 of the Code. In

this context a reference to Section 178(d) of the Code is useful. It is extracted below:

Where the offence consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of

such local areas.

16. Thus it is clear, if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local

areas can become the place of trial for the offence u/s 138 of the Act. In other words, the complainant can choose any one of those courts having

jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done. As the amplitude stands so

widened and so expansive it is an idle exercise to raise jurisdictional question regarding the offence u/s 138 of the Act.

7. In *Shri Ishar Alloy Steels Ltd. Vs. Jayaswals NECO Ltd.*, Hon"ble Supreme Court observed held:-

10. It, however, does not mean that the cheque is always to be presented to the drawer"s bank on which the cheque is issued. The payee of the

cheque has the option to present the cheque in any bank including the collecting bank where he has his account but to attract the criminal liability of

the drawer of the cheque such collecting bank is obliged to present the cheque in the drawee or payee bank on which the cheque is drawn within

the period of six months from the date on which it is shown to have been issued. In other words a cheque issued by (A) in favour of (B) drawn in a

bank named (C) where the drawer has an account can be presented by the payee to the bank upon which it is drawn i.e. (C) bank within a period

of six months or present it to any other bank for collection of the cheque amount provided such other bank including the collecting bank presents

the cheque for collection to the (C) bank. The non presentation of the cheque to the drawee-bank within the period specified in the Section would

absolve the person issuing the cheque of his criminal liability u/s 138 of the Act, who shall otherwise may be liable to pay the cheque amount to the

payee in a civil action initiated under the law. A combined reading of Sections 2, 72 and 138 of the Act would leave no doubt in our mind that the

law mandates the cheque to be presented at the bank on which it is drawn if the drawer is to be held criminally liable. Such presentation is

necessarily to be made within six months at the bank on which the cheque is drawn, whether presented personally or through another bank,

namely, the collecting bank of the payee.

8. This Court in *Shree Raj Travels & Tours Ltd. & Ors. vs. Destination of the World (Subcontinent) Pvt. Ltd.* (Crl.M.C. 1056/2011) decided on

21st September, 2011) while applying the guidelines laid down by Hon"ble Supreme Court in *K. Bhaskaran* (supra) held that the observations of

the Hon"ble Supreme Court in paras 15 & 16 are in the nature of obiter and that the acts can be performed in only 4 places as act Nos. 2 & 3 as

discussed in *K. Bhaskaran* (supra) relate to only one place i.e. the place where the drawee bank is located. Further in view of the decision of the

Hon"ble Supreme Court in *Shri Ishar Alloy Steels Ltd.* (supra) this Court observed that the cheque is required to be presented for encashment to

the drawee bank and that the payee bank, merely acts as an agent of the payee for the purpose of presenting the cheque in question for

encashment to the drawee bank. Thus, the payee bank acts merely as an agent of the payee for the purposes of presenting the cheque in question

and further that no part of cause of action for the offence punishable u/s 138 of NI Act arises in the Court within the local limits of which the

collecting Bank of the payee is situated. The relevant paras of the report reads as under:-

16. The expressions: "presentation of the cheque to the Bank"" and "if the five different acts were done in five different localities any one of the

courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence u/s 138 of the Act"" to be found in paras 14

and 16 respectively in *Bhaskaran's* case (supra) have been understood by many to mean that the Court within local limits of which the payee Bank

i.e. the Bank where the complainant deposited the cheque is situated has the jurisdiction to try the complaint u/s 138 of the NI Act, and the

understanding appears to be fortified by the observations of the Supreme Court in paras 15 and 16 that if the 5 acts contemplated as the ingredient

of an offence u/s 138 of the NI Act were done in 5 different localities, any one of the court exercising jurisdiction in any one of the 5 local areas

would have jurisdiction.

17. But, it is apparent that the observations in para 15 and 16 are an obiter as it is not 5 places where the 5 acts constituting an offence u/s 138 of

the NI Act can possibly be performed. The acts can be performed, as would be explained hereinafter, only at 4 places and I would immediately

state that act No. 2 and act No. 3 relate to only one place i.e. the place where the drawee bank is located.

21. Though the decision in Ishar Alloy's case (supra) has been rendered in the context of limitation for presentation of a cheque, the said decision

brings out in no uncertain terms that Section 138 of the NI Act contemplates that a cheque is required to be presented for encashment to the

drawee Bank and that the payee Bank, merely acts as an agent of the payee/complainant for the purposes of presenting the cheque in question for

encashment to the drawee Bank.

27. A con-joint reading of Sections 6, 7, 64 and 72 as also of Section 138 of the NI Act brings out that in order to attract penal provisions of

Section 138 of the NI Act a cheque is required to be presented for encashment to the drawee Bank and that the payee Bank acts merely as an

agent of the payee/complainant for the purposes of presenting the cheque in question to the drawee Bank. The necessary corollary thereof is that

no part of cause of action for the offence punishable u/s 138 of the NI Act arises in the Court within the local limits of which the collecting Bank of

the complainant i.e. payee Bank is situated and thus said Court has no jurisdiction to try a complaint u/s 138 of the NI Act filed by the

complainant.

9. Further the place from where the notice of demand for payment of cheque amount was sent cannot be considered to have jurisdiction for the

purpose of Section 138 of NI Act as held in Harman Electronics (P) Ltd. and Another Vs. National Panasonic India Ltd., . Their Lordship's

held:-

12.....The only question, therefore, which arises for consideration is that as to whether sending of notice from Delhi itself would give rise to a cause

of action for taking cognizance under the Negotiable Instruments Act.

13. It is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of

a cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence u/s 138 of the Negotiable

Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso

appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If

the ingredients for constitution of the offence laid down in provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act are

intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action

for filing a complaint. As it is only on receipt of the notice that the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the

proviso to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of

the notice would.

For constitution of an offence u/s 138 of the Act, the notice must be received by the accused. It may be deemed to have been received in certain

situations. The word "communicate" inter alia means "to make known, inform, convey, etc

20..... A court derives a jurisdiction only when the cause of action arose within its jurisdiction. The same cannot be conferred by any act of

omission or commission on the part of the accused. A distinction must also be borne in mind between the ingredient of an offence and commission

of a part of the offence. While issuance of a notice by the holder of a negotiable instrument is necessary, service thereof is also imperative. Only on

a service of such notice and failure on the part of the accused to pay the demanded amount within a period of 15 days thereafter, the commission

of an offence completes. Giving of notice, therefore, cannot have any precedent over the service. It is only from that view of the matter that in

Dalmia Cement (Bharat) Ltd. v. Galaxy Traders & Agencies Ltd. emphasis has been laid on service of notice.

(Emphasis Supplied).

10. A perusal of Bhaskaran (supra) and Harman (supra) shows that there is no conflict in the two judgments as they have been rendered in

different contexts. The decision in Bhaskaran case deals with regard to "giving of notice" occurring in proviso (b) to Section 138 NI Act and that

being for the purposes of limitation for filing the complaint u/s 138 NI Act whereas, the judgment in Harman deals with receipt of notice for the

purpose of jurisdiction.

11. The issue of jurisdiction was also considered in case of M/s. Religare Finvest Ltd. Vs. Sambath Kumar (Crl.M.C. Nos. 872, 1148, 1235 of

2010 decided on 2nd July, 2010) wherein this Court held that since the cause of action such as handing over of cheque to the complainant,

presentation of the cheque to the payee bank, issue of legal demand notice etc. were at Delhi, Courts at Delhi have jurisdiction to entertain the

complaint. The relevant paras of the report reads as under:-

20. A perusal of the complaints filed by the complainant company against the accused persons in the present case would show that the following

cause of actions persist within the jurisdiction of Delhi courts:

(i) The complainant company is having its registered office at New Delhi and maintaining all the records and doing its business from its registered

office, i.e. from Nehru Place, New Delhi;

(ii) The loan agreement is the written documentary evidence which was executed between the petitioner and the Crl.M.C. Nos. 872, 1148 &

1235/2010 accused in Delhi;

(iii) The cheque was handed over by the accused to the complainant at Delhi;

(iv) The cheque was presented to the payee bank, i.e. Presenting bank in Delhi;

(v) The cheque was dishonoured by the drawer bank's clearing branch which situates at New Delhi;

(vi) The complainant came to know about the dishonour of cheque within the jurisdiction of this Hon'ble Court;

(vii) The parties to the agreement in terms of the agreement conferred the jurisdiction upon the courts at New Delhi alone; and

(viii) Legal demand notice was issued from Delhi.

20. From the above, it is crystal clear that most and substantial part of cause of action for filing of complaint by the complainant company against

the accused persons u/s 138 of the NI Act had arisen within the jurisdiction of the courts at Delhi. Hence, the impugned orders of the court below

holding that no part of cause of action has arisen in Delhi, on the face of it are illegal and unlawful and against the factual matrix of the case. The

impugned orders are, therefore, liable to be set aside and are hereby set aside. These petitions are allowed. The cases are remanded back to the

court below with directions to proceed and decide the complaints u/s 138 of the NI Act filed by the complainant company against the accused

persons in accordance with law. The complainant company is directed to appear before the court below for further directions at 2:00 P.M. On

09.07.2010. A copy of this order be sent to the concerned trial court for information. A copy of this judgment be kept in the files of the connected

petitions which have also been disposed of by this common judgment.

12. Thus M/s Religare Finvest (supra) relied on by the Petitioner was a case where even the drawer bank's clearing branch which dishonoured the

cheque was also situated at New Delhi. In the said case, the jurisdiction was vested in the Courts at Delhi because of the drawer's bank's clearing

branch being at Delhi and not because the cheque was presented in the payee bank or that the legal notice of demand was issued from a place at

Delhi. Applying the decisions aforementioned to the facts of the present case, I do not consider it fit to state that just because the cheques were

presented at Delhi or the demand notice was sent from Delhi, Courts at Delhi would have jurisdiction to try the present case.

13. It was further contended by the Respondent that by virtue of clause 34 of the agreement it was agreed by the parties that the disputes arising

out of the agreement shall be litigated at the Courts at Delhi and shall be considered according to the law for the time being in force at Delhi. This

clause was further amended vide letter dated 21st October, 2002 wherein it was agreed that the dispute shall be referred to adjudication by

arbitration in the first instance & the venue of arbitration shall exclusively be at Delhi and, thus, by virtue of the said agreement too, the Courts at

Delhi should have jurisdiction to try the case. To this, the answer has to be in the negative. The Hon"ble Supreme Court in Harman Electronics Pvt.

Ltd. (supra) held that a Court deserves a jurisdiction only when the cause of action arises within its territorial jurisdiction and the same cannot be

conferred by any act or omission on part of the parties. It was held:-

20. Indisputably all statutes deserve their strict application, but while doing so the cardinal principles therefore cannot be lost sight of. A Court

derives a jurisdiction only when the cause of action arose within his jurisdiction. The same cannot be conferred by any act of omission or

commission on the part of the accused. A distinction must also be borne in mind between the ingredient of an offence and commission of a part of

the offence. While issuance of a notice by the holder of a negotiable instrument is necessary, service thereof is also imperative. Only on a service of

such notice and failure on the part of the accused to pay the demanded amount within a period of 15 days thereafter, commission of an completes.

Giving of notice, therefore, cannot have any precedent over the service. It is only from that view of the matter in M/s. Dalmia Cement (Bharat) Ltd.

Vs. M/s. Galaxy Traders and Agencies Ltd., emphasis has been laid on service of notice.

14. In view of the aforesaid discussion, in the instant case the Courts at Delhi have no jurisdiction to try the present complaint u/s 138 NI Act. The

parties cannot, by agreement to the contrary, confer jurisdiction to the Court, which is not competent to try the same. Learned Metropolitan

Magistrate is directed to return the complaint to the Respondent to be filed before the Court of competent jurisdiction at Kolkatta. Petition and

application are disposed of accordingly.