

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 6TH DAY OF OCTOBER 2015/14TH ASWINA, 1937

CRL.A.No. 609 of 2006 ()

**AGAINST THE JUDGMENT IN CC 304/2002 of JUDICIAL FIRST CLASS MAGISTRATE
KATTAPPANA, DATED 31-01-2006**

APPELLANT(S)/COMPLAINANT::

**VARGHESE, S/O. CHACKO,
VALIAMALIKAPURATHU HOUSE, VELLAYAMKUDY P.O.
VELLAYAMKUDY.**

BY ADV. SRI.A.SHAFAEEK

RESPONDENT(S)/ACCUSED & STATE::

- 1. SAJAN, S/O. THOMAS,
THAKIDIYELKUNNEL HOUSE, VELLAYMKUDY P.O.
VELLAYAMKUDY.**
- 2. STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.**

R1 BY ADV. SRI.JOICE GEORGE

R2 BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 609 of 2006

Dated this the 06th day of October, 2015

J U D G M E N T

This appeal is directed against the acquittal of the accused for the offence punishable under Section 138 of the Negotiable Instruments Act.

2. According to the complainant, the accused was conducting a provisional store at Vellayamkudy. For his business purposes, he borrowed an amount of ₹80,000/- from the complainant on 03.01.2002 agreeing to return the same within six months with 12% interest thereon. When the amount was not paid within the stipulated time, the amount was demanded back and then the accused is alleged to have issued Ext.P1 cheque. The cheque on presentation bounced for want of funds on 12.08.2002. Ext.P4 notice was sent to the accused which was returned with the endorsement that addressee has left the place. Since the amount remained unpaid, the complaint was laid.

3. Cognizance of the offence was taken and after following necessary procedures, summons was issued to the accused. On appearance of the accused, particulars of the offence were read out to him to which he pleaded no guilty. The complainant examined himself as PW1 and had prosecution examined PW2. Exts. P1 to P6 were marked.

4. After the close of the complainant's evidence, the accused was questioned under Section 313 Cr.P.C.. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. The accused examined DW1 in his defence.

5. The court below on appreciation of the evidence found that the accused had in fact borrowed the amount from the complainant and Ext.P1 cheque was in fact issued in discharge of said liability. However, the court below found that the notice which was returned as addressee left from the place could not be acted upon because the complainant in his cross examination stated that when the accused was

not available in station, he went in search of him and located him at Murikkassery. Therefore, the court below came to the conclusion that the notice sent in the address in Vellayamkudy could not be deemed to have been proper notice and since there was no proper notice, the accused is entitled to an acquittal and accordingly, acquittal followed.

6. Assailing the acquittal, the learned counsel for the appellant contended that the court below has not approached the issue in the practical sense and has taken note of irrelevant facts. The reliance placed by the court below on the decision reported in **Anil Raj v. Integrated Finance Co. Ltd.** (2005 (2) KLT 972) is baseless. The learned counsel drew attention of this Court to the fact that the postman has been examined as PW2 and he has spoken about the endorsement on the cover. In cross examination, PW2 has also stated that subsequently also he had served postal articles in the very same address. The learned counsel went on to point out that the only reason for non-

suiting the complainant is that he in cross examination stated that when the shop of the accused was closed and he was not found in station, the complainant went in search of him and he was located in Murikkassery. The court below then jumped to the conclusion that since the complainant knew that the accused was in Murikkassery, it could not be said that notice sent in the address shown in the cover is the proper notice and therefore it could not be said that notice was served on the accused.

7. The learned counsel pointed out that the Apex court had occasion to consider such a situation in the decision reported in **C.C. Alavi Haji v. Palapetty Muhammed and Another** (2007 (2) KHC 932). In the said case, the learned counsel pointed out that the notice issued was returned unclaimed. On receipt of summons, the accused appeared before the court. The Apex court after considering various aspects held that in such cases, it is within the right of the accused to pay the amount within 15

days of appearance before the court below to ward off prosecution. In this case also according to the learned counsel, the same benefit could have been taken by the accused and having not done so, he cannot be heard to say that there was no proper notice. The learned counsel for the appellant also invited attention of this Court to the fact that the address shown in the complaint is the same address shown in the notice and the accused had received summons in the same address. Even assuming that for a short period he shifted his residence, that does not mean that he had changed his address for he had to come back to stay in the place where notice was addressed to and under such circumstances, it could not be said that there was no service of notice.

8. The learned counsel for the respondent on the other hand tried to justify the conclusions drawn by the lower court regarding the non service of notice heavily relying upon the decision reported in **Anil Raj** v.

Integrated Finance Co. Ltd. (2005 (2) KLT 972). The learned counsel pointed out that in the said case, this Court had occasion to hold, according to the learned counsel, that the burden is on the complainant to show that not only any notice was sent, but it was sent in the correct address and that such proof must be beyond reasonable doubt. The learned counsel relying on the decisions pointed out that not only that court will have to confirm whether notice was actually served or not to the sendee, but also that if the notice was not served, the sendee was responsible for the non service. Applying the principle laid down in the said decision, the learned counsel pointed out that even going by the evidence furnished by PW1, the complainant, he had knowledge that the accused at the relevant time was in Murikkassery and if that be so, notice should have been sent to the address where the accused was then residing. Having not done so, the court below was justified in holding that there was no proper service of notice.

9. It is extremely difficult to accept the contention raised by the learned counsel for the respondent. The law is well settled that the debtor should go in search of the creditor and not visa versa. The accused was acquitted on the sole ground that there was no proper service of notice. The court below found that Ext.P1 cheque was issued in discharge of the debt.

10. It was not the finding of the court below that the accused at the relevant time has ceased to reside in the address shown in the notice. In fact, the evidence of PW2, the postman is to the effect that subsequent to the return of Ext.P6 notice, postal articles have been served on the accused in the same address which would show that he continued to reside in the same address. The mere fact that he might have for a short period left the place and taken residence elsewhere does not mean that he ceased to occupy the place where the notice was addressed to.

11. PW2, the postman has deposed that he had enquired with the members of the family as to where the accused was and they said that he had left the place and his whereabouts are not known.

12. True, in the decision reported in **Anil Raj's** case (supra), this Court had occasion to observe that it is the bounden duty of the court to confirm whether notice of the accused was served or not and if the notice was not served, then the sendee was responsible for the same. A reading of the decision shows that the query was mainly concerned with hypothetical question rather than practical issues. The observation that if the accused proved that there was no service of notice and that he was not responsible for the non service, then the notice cannot be deemed to serve, is too widely stated. That observation has been made without noticing the practical aspects involved in such situations. In the said case, the accused had left for U.A.E. and the notice sent to him was returned with the endorsement “the

addressee left India". In the above decision, this Court was inclined to accept the contentions raised by the accused that the non-service was not due to any fault on his part and therefore, there was no service of notice. It is extremely difficult to agree with the above proposition. Section 27 of the General Clause Act reads as follows:

"27. Meaning of service by post.-- Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

13. In the case on hand, there is no case for the accused that the address shown in the notice is not his real address or that he had shifted his residence from the place

long ago.

14. It is well settled that if the person, who has to send the notice, has sent notice in the last known given address, that would be sufficient and if the addressee leaves the place, it is for him to inform the post office concerned as to which place the postal articles should be redirected. This is an obligation casts on the addressee to whom the postal articles is addressed.

15. It will be quite imprudent and impractical to take the view that the creditor on coming to know that the accused is not available in station, he had to go in search of the debtor and find out where he resides and then send a notice in that address. The obligation of the creditor is only to issue notice in the last known address of the accused and if the accused shifted his residence in the meanwhile, it is his obligation to inform the post office concerned regarding the place to where articles has to be redirected.

16. Significantly enough, as rightly pointed out by the learned counsel for the appellant, in the case on hand, summons was taken out in the address shown in the notice and it was received by the accused. That shows that there was no intention on the part of the accused to give up his residence in the address shown in the notice nor did he do so. May be for a temporary period, he might have resided elsewhere. But that is far from saying that, that is his permanent address.

17. This Court is therefore unable to concur with the finding of the court below that the complainant has to fail on the ground of want of service of notice.

18. It is significant to notice that the court below has found that there was a debt due to the complainant and Ext.P1 cheque was issued in discharge of the said debt. All the other ingredients necessary to attract the offence under Section 138 of the Negotiable Instruments Act is found in favour of the complainant. At any rate, this Court has found

that the finding of the court below that the complainant has to fail on the ground of want of service of notice is erroneous and cannot be sustained.

In the result, this appeal is allowed. The order of acquittal is set aside. The accused stands convicted for the offence punishable under Section 138 of the Negotiable Instruments Act and he is sentenced to undergo imprisonment till rising of the court and to pay a fine of ₹80,000/- in default of payment of which he shall suffer simple imprisonment for a period of three months. If the fine amount is realized, the same shall be paid to the complainant as compensation. The accused is given three months time to pay the fine amount.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge