

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 20TH DAY OF MAY 2015/30TH VAISAKHA, 1937

CRL.A.No. 1550 of 2004 (A)

AGAINST THE JUDGMENT IN Cr1.L.P. 561/2004 of HIGH COURT OF KERALA
DATED 20-09-2004

AGAINST THE JUDGMENT IN CC 185/2002 of C.J.M., TRIVANDRUM/SPL.COURT
FOR TRIAL OF CYBER CRIME DATED 31-05-2004

APPELLANT(S)/COMPLAINANT:

K.S.BALACHANDRAN NAIR,
'BINDU', T.C.NO.IX/2292, SASTHAMANGALAM
THIRUVANANTHAPURAM.

BY ADVS.SRI.C.J.JOY
SMT.TINY THOMAS

RESPONDENT(S)/ACCUSED & STATE:

1. G.ANIRUDHAN, SENIOR ACCOUNTANT
CASH CERTIFICATE SECION, POSTAL ACCOUNTS, DEPARTMENT
MUTHOOT BUILDINGS, SASTHAMANGALAM, THIRUVANANTHAPURAM.

2. STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

R,R1 BY ADV. SRI.PIRAPPANCODE V.S.SUDHIR
by PP SMT SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20-05-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.D.RAJAN, J

.....
Crl.Appeal No.1550 of 2004
.....

Dated 20th May, 2015

JUDGMENT

'CR'

This appeal arises out of the judgment in C.C.No.185 of 2002 of the Chief Judicial Magistrate, Thiruvananthapuram for offence punishable under Section 138 of the Negotiable Instruments Act. Appellant's case in the trial court was that respondent borrowed a sum of Rs.2,50,000/- and in discharge of that debt, he issued a cheque dated 20.6.2001 drawn on the Post Office Savings Bank. When it was presented for encashment, it was dishonoured for want of sufficient funds. Appellant gave a notice in writing demanding the due amount, but it was returned "unclaimed". There was no repayment of the due amount even after the above notice. Hence the complaint in the trial court.

2. In the trial court, appellant was examined as PW1 and his documents were marked as Ext.P1 to P6. The incriminating circumstances brought out in evidence were denied by the 1st respondent while questioning him. He contended that there was no notice under section 138(b) of the N.I.Act and to prove

that point he examined DW1 and DW2 and marked Ext.D1 to D4 in the trial court. The learned Chief Judicial Magistrate, after analysing the evidence, acquitted the accused (first respondent), hence the appeal.

3. Learned counsel appearing for the appellant contended that he made a demand of the due amount by giving a notice in writing on the first respondent and the intimation was returned as 'unclaimed'. When there is valid service of notice as per law, it is a deemed service and the finding of the trial court is unsustainable.

4. Learned counsel appearing for the respondent submitted that the evidence of DW2 is sufficient to presume that there was no notice issued under Section 138(b) of the Negotiable Instruments Act to the first respondent. When there is no valid notice that no offence under section 138 of the N.I.Act would attract.

5. According to Section 138 of the Negotiable Instruments Act, where any cheque drawn by a person on an account maintained by him with a bank for payment of any amount and money to another person from out of that account, for the discharge in whole or in part of any debt or

liability, is returned by the bank, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with a bank, such person shall be deemed to have committed an offence under Section 138 of the Negotiable Instruments Act. The cheque has to be presented within the statutory period in which it is drawn or within the period of its validity. Secondly, the payee or holder in due course of the cheque makes a demand for payment of such amount by giving a notice in writing to the drawer of the cheque within the statutory period on the date of receipt of information from the bank regarding the return of the cheque as unpaid. The oral evidence of PW1 would show that when Ext.P1 cheque was presented for encashment, it was dishonoured for want of sufficient funds. For that, he received Ext.P2 intimation from the bank. Ext.P3 is the dishonour memo and Ext.P4 is the lawyer notice. Ext.P5 is the acknowledgment card and Ext.P6 is the postal receipt.

6. Appellant contended that Ext.P4 notice was returned with Ext.P5 acknowledgment as "unclaimed". When notice is sent by registered post in the correct address of the drawer of

the cheque, it is presumed that the procedure mentioned under section 138(b) of the Act stands complied with. The first respondent contended that there was no issuance of notice since he was on leave and admitted in a hospital. To prove the non service of notice, he examined DW2 who was the post woman working in Sasthamangalam Post Office. She deposed that when she tried to serve Ext.P4 notice on DW1, first respondent was on leave, therefore she could not serve it. But, she did not know to whom she gave the intimation and no documents were produced in the trial court to substantiate her contention. In the trial court she stated that the concerned register is missing in her office. It is pertinent to note that she served the intimation and unable to say to whom she gave the intimation. When a registered letter is entrusted to the post office it is the responsible duty of the postal department to deliver the letter to the addressee. If it is not delivered to the addressee, they have to return it to the sender which is the official function of the post office and there is no scope for interference by a third person. When the letter is refused by the addressee an endorsement thereon shall be made by the post woman and she does so in discharge of her official duty.

If the intimation was given to any other person the post woman has to record the name of the person to whom such intimation has given and keep that record in that post office. It is her duty to bring proof of such service before court when she assert that evidence. She admitted that the first respondent is working in Postal Accounts Department. In such situation non production of any reliable documentary evidence, it is not possible to presume that she served the intimation to another person. Hence mere oral testimony itself is not sufficient to support the non service of notice under Section 138(b) of Negotiable Instruments Act. What is the impact of the non production of the Register was not stated by the trial court.

7. The fact that the first respondent was working in the Postal Accounts Department is very relevant in this context. Whether he was a dishonest evader to escape from the legal impact of S.138 of the Act was not examined by the trial court. It is clear that the notice was issued in the correct address. If a strict interpretation is given to the word "unclaimed", it can be presumed that the drawer actually received the notice within 15 days. For that the decision of the Apex Court in **The**

State of Madhya Pradesh V. Hiralal and others (JT 1996

(1) SC 669) is relevant, in which it was held as follows:-

“ In view of the office report, it would be clear that the respondents obviously managed to have the notice returned with postal remarks “ not available in the house”. “House locked” and “shop closed” respectively. In that view, it must be deemed that the notices have been served on the respondents”.

8. The realistic interpretation of the expression giving notice has been explained by this court and Apex Court in various dictums. If the payee dispatched the notice in the correct address of the drawer within the statutory period (15 days before 6.2.2002 and 30 days after that date) it can be considered that he made a demand by giving a notice in writing. Section 27 of the General Clauses Act explains the mode of service by post which consists of two parts. First part deals with the mode of service and the second part deals with the time of service. The existence of such mode of service is to be established by positive evidence and it is only then that presumption under that section can arise. If the evidence available on record is insufficient to establish the mode of service, the presumption cannot arise. The question of valid notice is a question of fact to be determined by adducing

evidence before the trial court. The burden to rebut the presumption lies on the party challenging the factum of service by the circumstances on record. Therefore, mere denial of receipt without any documentary evidence is not sufficient to rebut it. When the payee send a notice by registered post with correct address of the drawer of the cheque, the principle incorporated under Section 27 of the General Clauses Act will be attracted. This position was clarified by the Apex Court in **Alavi Haji V. Muhammed** (2007(3) KLT 77) in which it was held as follows:- " It is thus, trite to say that where the payee dispatches the notice by registered post with correct address of the drawer of the cheque, the principle incorporated in S.27 of the GC.Act would be attracted: the requirement of Clause (b) of proviso to S.138 of the Act stands complied with and cause of action to file a complaint arises on the expiry of the period prescribed in Clause © of the said proviso for payment by the drawer of the cheque. Nevertheless, it would be without prejudice to the right of the drawer to show that he had no knowledge that the notice was brought to his address".

The presumption under Section 27 of the General Clauses Act is rule of evidence in the matter of proof

of "service" by post and that presumption can arise only on the proof of the conditions set out in the first part of the section.

Therefore it shows that when notice is sent by registered post in the correct address of the drawer of the cheque, and the same is returned as unclaimed, it is presumed that mandatory directions complied under section 138(b) of the Act stands complied with.

9. When there is no evidence to substantiate the service of intimation to another person the burden is heavy on DW2. The trial court failed to appreciate the correct legal position which needs interference. Therefore, the finding of the Chief Judicial Magistrate is set aside and the matter is remitted to trial court for fresh consideration as per law. Since the matter is pending before court from 2004 onwards, the Learned Chief Judicial Magistrate shall dispose of the matter on merit within six months from the date of receipt of a copy of this judgment. Both parties are directed to appear in the court of Chief Judicial Magistrate, Thiruvananthapuram on 6th July, 2015.

P.D.RAJAN, JUDGE

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