

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

THURSDAY, THE 25TH DAY OF JUNE 2015 / 4TH ASHADHA, 1937

CRL.A.No. 1627 of 2004

AGAINST THE JUDGMENT IN CC 1298/1998 of J.M.F.C.-I, MUVATUPUZHA

APPELLANT(S)/COMPLAINANT

K.M.JOSE, S/O.MANI,
KOTTAPPILLY HOUSE, VARAPPETTY KARA, VARAPPETTY VILLAGE,
KOTHAMANGALAM.

BY ADV.SRI.JOHN VARGHESE(THOPPIL)

RESPONDENT(S):ACCUSED/STATE

1. V.S.SUGATHAN, VATTAKAITHAYIL HOUSE,
KAKKATTOOR KARA, VARAPPETTY P.O., PIN-686 691.
2. STATE OF KERALA REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

R1 BY ADV. SRI.S.JIJI

R2 BY PUBLIC PROSECUTOR SMT.LALIZA T.Y

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25-06-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.T. RAVIKUMAR, J.

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Crl.Appeal No.1627 OF 2004

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Dated this the 25th day of June, 2015

JUDGMENT

This appeal has been preferred against the order of acquittal passed by the Court of Judicial First Class Magistrate, Muvattupuzha in C.C.No.1298 of 1998. The appellant herein was the complainant therein. He filed the complaint which was taken on file and registered as C.C.No.1298 of 1998 alleging commission of offence under section 138 of the Negotiable Instruments Act against the first respondent herein. After evaluating the evidence on record, the learned Magistrate found that Ext.P4 notice caused by the appellant pursuant to the dishonour of the cheque in terms of proviso (b) to section 138, N.I Act was not served on the first respondent and the appellant failed to prove the same. In such circumstances, it was found that the complaint itself was not maintainable. In view of the findings against the first point framed for consideration whether the complaint is instituted in accordance with the legal

requirements as per section 138 of the N.I Act and whether the notice is duly served, it was found that the appellant-complainant has failed to establish the commission of offence under section 138, N.I Act by the accused/first respondent. Consequently, he was acquitted under section 255(1) Cr.P.C. Hence, this appeal.

2. I have heard the learned counsel for the appellant, learned counsel for the first respondent and also the learned Public Prosecutor. The allegation in the complaint was that in discharge of a legally enforceable debt of Rs.25,000/-, the accused issued Ext.P1 cheque dated 8.4.1998 drawn on State Bank of Travancore, Muvattupuzha and the said cheque on its presentation had bounced owing to insufficiency of funds in the account maintained by the first respondent. It was also alleged therein that lawyer notice demanding payment of the amount covered by the cheque was issued on 21.10.1998 and the accused received the same on 26.10.1998. However, he failed to pay the amount. As noticed hereinbefore, to bring home the charge against the first respondent, the complainant was examined as PW1 besides getting examined the postmaster and

postman respectively as PWs 2 and 3. Exts.P1 to P7 were also got marked. After closing the evidence of the complainant, the first respondent/accused was questioned under section 313, Cr.P.C and he denied all the incriminating circumstances put to him. He did not adduce any defence evidence. It was after evaluating the evidence on record that the court below acquitted the first respondent under section 255(1) Cr.P.C holding that the appellant herein/the complainant failed to prove that statutory notice was served on the first respondent. The court below found that in terms of the provisions under section 138, N.I.Act, it is the bounden duty of the complainant to establish that the statutory notice contemplated thereunder was served on the accused.

3. To know whether it is the correct position in terms of the provisions under section 138, N.I Act, it is only appropriate to refer to the said provision which reads thus:-

“138. Dishonour of cheque for insufficiency, etc., of funds in the account.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the

discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, 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 that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the

payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.”

4. A perusal of proviso (b) to section 138 would reveal that it makes it mandatory to the payee or the holder in due course to make a demand for payment of amount of money covered by the cheque in question by giving notice in writing to the drawer of the cheque within thirty days of the receipt of information by him from the bank regarding the return of the cheque unpaid. It is true that, going by proviso (c) to section 138, on receipt of such a notice issued in terms of the proviso (b) to section 138, the drawer of the said cheque failed to make payment of the money to the payee or the holder in due course as the case may be, within 15 days on receipt of the said notice it should be deemed that he had committed an offence under section 138, N.I Act. The words 'giving a notice' employed in proviso (b) to section 138 cannot be given the meaning of receiving the notice. Going by the Blacks Law Dictionary giving of notice is distinguished from receiving notice. As noticed hereinbefore, what is contemplated under section 138(b) is that

the payee or holder in due course of the cheque was to make a demand on payment of amount of money covered by the cheque by giving a notice in writing to the drawer of the cheque within thirty days of receipt of the information by him from the bank regarding the return of the cheque as unpaid. In such circumstances, it cannot be said that in terms of proviso (b) to section 138, a burden is cast upon the payee or the holder in due course to establish that notice is served on the accused. A perusal of the said provision would reveal that it did not specify the mode of issuance of notice or giving of notice, in writing. The legislative intent of notice as contemplated under section 138, N.I Act is to make the opposite party, who has drawn the cheque, which was bounced on a ground which would attract the offence under section 138, N.I Act put on notice as a demand. In this case, the appellant has not produced the postal receipt evidencing the despatch of Ext.P4 notice. But, at the same time, he produced Ext.P5 postal acknowledgment card. True that, the acknowledgment card of a Postal Department is a clear proof of notice served on the accused. But, in this case, the specific case of the first respondent-accused is that he did not receive the

notice. The contention of the first respondent/accused was that a perusal of Ext.P4 notice itself would reveal that his postal address was shown as Varappetty Post Office and in fact, he was residing at that particular point of time within the limits of Enanellur Post Office. Though the burden was on the first respondent/accused to establish the same for reason best known the appellant summoned the postmaster and postman of Enanellur Post Office, as his witnesses. They were examined as PWs 2 and 3 respectively. PW2 deposed to the effect that some part of Kakkattoor area falls within the jurisdiction of Enanellur Post Office and going by the address of the accused, the area falls within the area of Enanellur. PW3 is the postman and he testified that the accused-first respondent and his family are known to him and they reside in the address which is within the Enanellur Post Office. Thus, it is evident that the onus which should have been discharged by the first respondent was virtually discharged by the complainant himself. In otherwords, by examining PW3 it was brought out by the complainant himself that the area in question where the accused was living at the relevant point of time was included within the limits of

Enanellur Post Office. Indisputably, Ext.P4 notice was issued showing the postal address of the first respondent as Varappetty Post Office. The appellant has not cared to adduce any evidence to show that Ext.P5 which was sent to Varappetty post office was redirected from there and ultimately it was delivered on the first respondent from Enanellur Post Office. True that, the appellant produced Ext.P5 to canvass the said position that it was in fact, served on the first respondent-accused. In the light of the dispute involved in this case as to whether the signature in Ext.P5 is that of the accused-first respondent invoking the power under section 73 of the Indian Evidence Act the court below compared the signature. In that context, it is to be noted that the precise case of the appellant was that it was the first respondent-accused who signed on Ext.P1 cheque. The court below verified the said signature with the one appearing in Ext.P5 and it was found that it is distinctively different from the signature in Ext.P1 cheque. It was in the said circumstances that the court below found that the appellant has failed to establish that the notice which was issued in terms of the proviso (b) to section 138 was not served on the first respondent-accused. A

perusal of proviso (c) of section 138 would reveal that in order to make the drawer of a cheque which was bounced on a ground which would attract the commission of offence under section 138, N.I.Act and make him liable to face prosecution therefor, is his failure to make the payment of the money covered by the cheque in question to the payee or the holder in due course within 15 days from the receipt of notice given in terms of the proviso (b) to section 138. When once it is found that the notice was not served on the accused in terms of the proviso (c) to section 138, it could not be said that the concerned drawer of the cheque is liable to prosecution for an offence under section 138, N.I Act. In this case, as noticed hereinbefore, the postal receipt showing the despatch of Ext.P4 notice was not produced and Ext.P5 postal acknowledgment card which was produced would reveal that the signature thereunder is materially different from the alleged signature of the first respondent-accused in Ext.P1 cheque. In such circumstances, the appreciation of the evidence by the learned Magistrate and the consequential acquittal of the accused under section 255(1) Cr.P.C on the ground of lack of evidence of proper notice cannot

be said to be suffering from infirmity, perverseness or illegality warranting appellate interference. In short, in the said circumstances, this appeal is liable to fail and accordingly it is dismissed.

Sd/-

C.T.RAVIKUMAR, JUDGE

dlk

