

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:03.03.2015

CORAM:

THE HONOURABLE MS. JUSTICE R. MALA

Criminal Appeal Nos.1083 and 1084 of 2006

Subbulakshmi

.. Appellant/Complainant in
both the appeals

v.

G.R.Senthilnathan

... Respondent/Accused in
both the appeals

Prayer:Criminal appeals filed under Section 378 Cr.P.C., against the judgment of acquittal dated 29.09.2006 made in C.C.Nos.407 and 521 of 2004 on the file of the Judicial Magistrate No.I, Coimbatore.

For Appellant : Mr.P.Saravana Sowmiyan
For Respondent : Mr.Ganesh Rajan

C O M M O N J U D G M E N T

The Criminal appeals arise out of the judgment of acquittal dated 29.09.2006 made in C.C.Nos.407 and 521 of 2004 on the file of the Judicial Magistrate No.I, Coimbatore.

Crl.A.No.1083 of 2006 (C.C.No.407 of 2004):

2.The appellant herein as a complainant preferred a private complaint stating that on 29.11.2003, the respondent/accused has borrowed Rs.5,000/- for his family expenses from the appellant and to discharge the same, he issued Ex.P1 cheque to the appellant. When the appellant has presented the cheque for encashment on 01.12.2003, it was returned as "insufficient funds" vide Ex.P2 return memo and the debit advice was marked as Ex.P3. Therefore, the appellant has sent legal notice Ex.P4 to the respondent on 13.12.2003 and the acknowledgment card was marked as Ex.P5. But it was returned as "not claimed" on 27.12.2003. Since the respondent neither sent any reply nor repaid the amount, the appellant has preferred the private complaint under Section 138 of the Negotiable Instruments Act (hereinafter called as "the Act").

Cr1.A.No.1084 of 2006 (C.C.No.521 of 2004):

3.The appellant herein as a complainant preferred a private complaint stating that on 29.11.2003, the respondent/accused has borrowed Rs.2,00,000/- for his family expenses from the appellant and to discharge the same, he issued Ex.P1 cheque to the appellant. When the appellant has presented the cheque for encashment on 01.12.2003, it was returned as "insufficient funds" vide Ex.P2 return memo. Therefore, the appellant has sent legal notice Ex.P3 to the respondent on 13.12.2003 and the acknowledgment card was marked as Ex.P4. But it was returned as "not claimed" on 27.12.2003. Since the respondent neither sent any reply nor repaid the amount, the appellant has preferred private complaint under Section 138 of the Act.

4.The trial Court has taken cognizance of an offence after following the procedure and recording sworn statement. Since the accused pleaded not guilty, the trial Court examined P.W.1 and marked Exs.P1 to P5 on the side of the complainant and examined D.W.1 and marked Exs.D1 to D8 on the side of the respondent. The trial Court after considering the oral and documentary evidence, acquitted the accused stating that the complainant has not proved that he sent statutory notice to the accused.

5.Challenging the judgment of acquittal passed by the trial Court, learned counsel for the appellant/complainant submitted that admittedly, the complainant has sent legal notice to the respondent and even the respondent has not received the same, it is deemed to be served under Section 27 of the General Clauses Act. It is further submitted that the accused frequently changed his address and hence, the appellant is unable to serve the notice to the correct address. To substantiate his arguments, he relied upon the decision of the Apex Court reported in (2007) 6 SCC 555 (C.C.Alavi Haji v. Palapetty Muhammed and another) and submits that notice is deemed to be valid under Section 138 of the Act. Therefore, he prayed for allowing the appeals.

6.Resisting the same, learned counsel for the respondent/accused submits that issuance of notice itself is disputed, hence, the appellant has not entitled to invoke presumption under Sections 118 and 139 of the Act. It is further submitted that statutory notice was issued under Section 138(b) of the Act, but it was not issued to the correct address of the respondent and to prove the same, Exs.D1 to D8 were marked. On the date of issuance of notice, the respondent was not resided in that address and that factum was rightly considered by the trial Court. To substantiate his arguments, he relied upon the decision of the Apex Court reported in (2007) 6 SCC 555 (C.C.Alavi Haji v. Palapetty Muhammed and another) and the same has been followed by this Court in 2012 (3) MWN (Cr.) (DCC) 84 (Mad.) in Apollo Tyres Ltd., rep. by Deputy Manager (Legal) and Power of Attorney Agent, Kapil Kumar v. Amar Tyres and others). Since there is

no evidence to show that the notice has been sent to the correct address of the respondent, Section 27 of the General Clauses Act will not be applicable. The trial Court has considered all the aspects in proper perspective and rightly acquitted the respondent/accused. Therefore, he prayed for dismissal of the appeals.

7. Considered the rival submissions made on both sides and perused the materials available on record.

8. It is the case of the appellant that the respondent had borrowed Rs.5,000/- and Rs.2,00,000/- from the appellant and to discharge the same, he issued two cheques under Ex.P1 (in both the cases). When the appellant presented the cheques for encashment, they were returned as "insufficient funds" vide Ex.P2 return memo. So the appellant has sent statutory notice to the respondent under Exs.P3 and P4, which were returned as "not claimed". Since the respondent neither sent any reply nor repaid the amount, the appellant preferred private complaints against the accused under Section 138 of the Act.

9. Admittedly, on 13.12.2003, the statutory notice was issued to the following address:

"G.R.Senthilnathan,
Flat No.B-55, Sreevatsu Garden
Villikinar Pirivu
Thudialur
Coimbatore. "

10. Now it is appropriate to consider the following documents filed by the respondent/accused:

(i) Ex.D1 is the letter dated 29.09.2005, certifying that the respondent was staying in Villa B-55 at Sreevatsa Garden from 15.05.2000 to 31.05.2002.

(ii) Ex.D2 is the lease agreement dated 29.05.2002, which shows that from 01.06.2002 onwards, the respondent was staying at Flat No.P-I, Block-II, K.T.V.R.Enclave, Marudhakonar road, Velandipalayam, Coimbatore-25.

(iii) Ex.D3 is the demand note from B.S.N.L., which shows the address mentioned in Ex.D2.

(iv) Ex.D4 series is the telephone bills dated 09.09.2002 to 09.05.2003 which shows the address mentioned in Ex.D2.

(v) Ex.D5 series is the telephone bills from 29.12.2003, which shows the address as 21D, 2nd floor, MKG street, K.K.Pudur, S.B.Colony, Coimbatore-641 038.

(vi) Ex.D6 is the cash bill dated 11.09.2003, which shows that the respondent purchased water heater from Associated Electronics and the address was mentioned as the address in Ex.D5.

(vii) Ex.D7 is the ration card during 2005-2009 shows that the respondent was residing in Old No.90A, New No.21C, Maniyam Marudhakutty street, Coimbatore (west).

(viii) Ex.D8 shows that on 18.03.2005, the respondent was residing at Mudaliar thottam, Kannarpalayam road, Karamadai, Coimbatore.

But on 13.12.2003, the appellant/complainant has sent statutory note to the respondent to his address as "Flat No.B-55, Sreevatsu Garden, Villikinar Pirivu, Thudialur, Coimbatore". It shows that the notice was not sent to the respondent to his correct address.

11. At this juncture, it is appropriate to consider the decision of the Apex Court reported in (2007) 6 SCC 555 (C.C.Alavi Haji v. Palapetty Muhammed and another), wherein it was held that the course opens to drawer where he claims not to have received the notice sent by post but received copy of the complaint with the summons. Held, he can within 15 days of the receipt of the summons make payment of the cheque amount and on that basis submit to the Court that the complaint be rejected. He then cannot contend that there was no proper service of notice. It was further observed that once the payee of the cheque issues notice to the drawer of the cheque, the cause of action to file a complaint arises on the expiry of the period prescribed for payment by the drawer of the cheque. If he does not file a complaint within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138 of the Act, his complaint gets barred by time. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed. [Vide Jagdish Singh Vs. Natthu Singh ; State of M.P. Vs. Hiralal & Ors. and V.Raja Kumari Vs. P.Subbarama Naidu & Anr.] Further, in para-17 and 18, it was held as follows:

"17. It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of Criminal Law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the G.C. Act and Section 114 of the Evidence Act. In

our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskaran's case, if the "giving of notice" in the context of Clause (b) of the proviso was the same as the "receipt of notice" a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act.

18. In the instant case, the averment made in the complaint in this regard is:

"Though the complainant issued lawyer's notice intimating the dishonour of cheque and demanded payment on 4.8.2001, the same was returned on 10.8.2001 saying that the accused was "out of station"."

True, there was no averment to the effect that the notice was sent at the correct address of the drawer of the cheque by "registered post acknowledgment due". But the returned envelope was annexed to the complaint and it thus, formed a part of the complaint which showed that the notice was sent by registered post acknowledgment due to the correct address and was returned with an endorsement that "the addressee was abroad". We are of the view that on facts in hand the requirements of Section 138 of the Act had been sufficiently complied with and the decision of the High Court does not call for interference."

In the above decision, it was specifically held that if notice was sent to the correct address and the addressee refused to receive the same or out of station, notice is deemed to be served to the person as per Section 27 of the General Clauses Act. In the case on hand, notice was not sent to the correct address of the respondent. The above decision has been followed by me in the decision of this Court reported in 2012 (3) MWN (Cr.) (DCC) 84 (Mad.) in Apollo Tyres Ltd., rep. by Deputy Manager (Legal) and Power of Attorney Agent, Kapil Kumar v. Amar Tyres and others), in para-26, it was held as follows:

"26. The same proposition was held in the decision of the Apex Court relied upon by the learned counsel for Appellant reported in C.C. Alavihaji v. Palapetty Muhammed and another, 2007 (6) SCC 555, wherein para 17, it is held as follows:

"The requirement of giving of notice is a clear departure from the rule of Criminal Law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of

the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected."

But here, admittedly notice has not been issued and there is no evidence to show that the notice has been issued to the Respondents 2 to 4 to the correct address by way of filing Post Receipt or Acknowledgment Card or Return Cover. In the above decision cited supra, it was held that notice has been sent to correct address, but it was returned and hence by invoking Section 27 of General Clauses Act, it was presumed that notice has been issued under Section 138 of the Act. So the Apex Court has held that the object of issuance of notice is to give an opportunity to the Respondent to repay the amount before preferring Complaint. But, in the present case on hand, PW1 himself has admitted that he has not filed any document to show that the notice has been issued to correct address of these Respondents. In such circumstances, I am of the view the notice has not been issued to correct address. "

12. Considering the above decision along with the facts and circumstance of the case, admittedly the appellant has not sent statutory notice to the correct address of the respondent/accused. So the argument advanced by the learned counsel for the appellant that the notice is deemed to be served to the respondent as per Section 27 of the General Clauses Act, is unacceptable one. In such circumstances, I am of the opinion, the appellant/complainant has not issued notice to the respondent/accused as contemplated under Section 138(b) of the Act. Therefore, no cause of action arose for filing complaint. The trial Court has rightly held that no notice under Section 138(b) of the Act was issued. So the judgment of acquittal passed by the trial Court does not warrant any interference and it is hereby confirmed. The Criminal Appeals deserve to be dismissed and they are hereby dismissed.

13. In the result, the Criminal Appeals are dismissed by confirming the judgment of acquittal dated 29.09.2006 made in C.C.Nos.407 and 521 of 2004 on the file of the Judicial Magistrate No.I, Coimbatore.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

kj

To

1.The Judicial Magistrate No.I, Coimbatore.

2. -do- Thro'The Chief Judicial Magistrate, Coimbatore.

3.The Public Prosecutor, High Court, Madras.

+ 1 cc to M/s. P. Saravana Sowmiyan, Advocate SR.11759

+ 2 ccs to M/s Ganesh Rajan, Advocate Sr.11591

Cr1.A.Nos.1083 and 1084 of 2006

UG(CO)
EU 30.03.15



WEB COPY