

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.07.2015

CORAM

THE HONOURABLE MR.JUSTICE B.RAJENDRAN

Crl.R.C. No. 1080 of 2008

S.Balamani

... Petitioner/Accused

Vs.

Vijayashanthi

... Respondent /Complainant

Criminal Revision Case filed under Sections 397 and 401 of the Criminal Procedure Code to call for the records pertaining to Crl.A. No.140 of 07 on the file of the Additional District Sessions Court, FTC (II), Salem and set aside the judgment and order of conviction dated 14.03.2008 recorded therein while affirming the judgment and order of conviction recorded by Judicial Magistrate No.3, Salem in C.C. No. 720 of 2004.

For Petitioner : Mr.K.U.Shanmuganathan

For Respondent : No Appearance

ORDER

The Petitioner is the accused in C.C. No. 720 of 2004 on the file of the learned Judicial Magistrate No.3, Salem. The petitioner stood trial for the offence punishable under Section 138 of The Negotiable Instruments Act. Upon trial, the petitioner was convicted for the offence under Section 138 of Negotiable Instruments Act and sentenced to undergo six months simple imprisonment with fine of Rs.3,000/- failing which to undergo another six months simple imprisonment. On appeal, the Appellate Court, while affirming the conviction imposed on the petitioner under Section 138 of the Negotiable Instruments Act, modified the sentence alone into one of payment of the cheque amount of Rs.1,00,000/- within two months, failing which to undergo simple imprisonment for two months. As against the order passed by the Appellate Court, the petitioner has come forward with this Criminal Revision Case.

2. The case of the respondent is that the petitioner has borrowed a sum of Rs.1,00,000/- from her and for repayment of the borrowed amount, the petitioner has issued a cheque dated 10.07.2004 drawn on Salem Urban Cooperative Bank. When the cheque was presented for collection on 13.07.2004 by the respondent with her bankers, it was dishonoured for the reason "insufficient funds". On 24.07.2004, the respondent issued a statutory notice. In spite of receipt of the notice, the

petitioner has neither issued any reply nor paid the cheque amount, hence, the respondent has filed the complaint.

3. The learned counsel for the petitioner mainly contended that the statutory notice dated 24.07.2004 was not issued by the respondent to the correct address and it was wantonly sent to a wrong address. The respondent has not filed any proof for having served the statutory notice on the petitioner and she filed only the returned postal cover, Ex.P5. However, the petitioner, in her complaint, has stated that she was intimated by the postal authorities that the notice was delivered to the petitioner. In this context, the learned counsel for the petitioner relied on the decision of the Hon'ble Supreme Court reported in CDJ 2006 SC 464 (D.Vinod Shivappa Versus Nanda Belliappa) and also CDJ 2004 SC 1191 (V.Raja Kumari versus P.Subbarama Naidu and another) to contend that the service of notice is not sufficient and consequently the complaint itself is not maintainable.

4. The learned counsel for the petitioner would further contend that the cheque in question was not given by the petitioner for repayment of the loan and it was given as security for due repayment of loan on behalf of her relative. Infact, her relative on whose behalf the petitioner has given the cheque he has settled the amount payable to the respondent. Even in the complaint, the respondent has not stated as to when the amount was paid by her, but she only stated that the amount was given to the petitioner on different dates. The above aspects have not been properly considered by the courts below. Therefore, the learned counsel for the petitioner prayed for setting aside the orders passed by the courts below.

5. Though notice was duly served on the respondent, when the case was taken up for hearing on 25.06.2015, the counsel for petitioner was directed to take private notice to the respondent. Accordingly, private notice was taken and it was duly served on the respondent 30.06.2015. Thereafter, when the case was posted on 10.07.2015, in order to give an opportunity to the respondent, it was adjourned to 16.07.2015 and on 16.07.2015 also there was no representation for the respondent. As a last chance, the case was adjourned to 22.07.2015 and on that day, it was posted under the caption 'for orders'. On 22.07.2015 also, none appeared for the respondent and the learned counsel for the petitioner was heard. Again the case was directed to be posted today under the caption 'for orders'. Even today, though the case is posted under the caption 'for orders' and the name of the respondent is also printed in the cause list, none appeared for the respondent. Hence, the criminal revision case is taken up for final disposal on merits.

6. I have carefully examined the judgments of the Courts below. Before examining the judgment passed by the Courts below, it is relevant to look into the deposition of PW1. PW1 is the husband of the complainant. In his deposition, he has stated that his wife/complainant has authorised him to depose in this case. He further deposed in the cross-examination that

the amount was borrowed by the respondent on various dates, but admits that the date of such borrowal have not been mentioned in the complaint. He further deposed there was only one transaction between his wife and the petitioner herein. He also categorically admits the he does not know whether the statutory notice has been sent to the correct address of the petitioner or not. He further deposed that the statutory notice was sent to the respondent at Chairman Chinnaiya Pillai Street, Maravaneri, Salem. As far as notice sent through the Court, he admits that it was sent to the respondent at 6th cross street Maravaneri. In fact, he also admits that only to ensure that the Court notice is served on the petitioner, he met her in the Court in connection with some other case and ascertained the correct address of the petitioner. He also admits that he is running a finance business in the name of 'Shree Rajaganapathi Finance'. He also admits that in connection with another case against the petitioner relating to dishonour of cheque for Rs.40,000/-, he had engaged some other advocate and issued notice on 15.11.2003 to the petitioner in which the address was mentioned as 4th street, Maravaneri. But insofar as the grant of money to the petitioner as loan, even in the chief examination as well as cross-examination, he only says during September, 2003 to June, 2004 on various dates, his wife has given different amount totalling Rs.1,00,000/- to the petitioner. Thus, PW1 has not given specific statement as to what was the total amount paid to the petitioner and on which date.

7. On the contrary, on behalf of the accused/petitioner herein, Exs. D1 to D8 were marked. Even though in a proceeding under Section 138 of The Negotiable Instruments Act the accused can maintain silence and the burden is on the complainant to prove his or her own case, the accused/petitioner examined herself as DW1. The accused/petitioner has filed Ex.D1, a notice dated 15.11.2003 sent on behalf of PW1, husband of the complainant himself in which the address of the accused/petitioner was correctly mentioned as No.14/7, 4th Street, Maravaneri, Salem - 7. Ex.D1, notice dated 15.11.2003 was sent on behalf of PW1, husband of the complainant for dishonour of a cheque allegedly issued by the accused/petitioner for Rs.40,000/- in favour of PW1. In this connection, it is seen from para No.10 of the order passed by the trial Court that the statutory notice dated 24.07.2004 sent by the respondent has been addressed to No.25, Chairman Chinnaiya Pillai Street, Maravaneri, Salem and the said notice was attempted to be delivered by the postman on 26.04.2004, however, it was returned with an endorsement 'door locked'. Subsequently, the postman appears to have attempted to deliver the notice on 27.07.2004 and 29.07.2004 but ultimately, it was returned with an endorsement 'intimation delivered'. The unserved postal cover was marked as Ex.P5, on behalf of the complainant. If really the address to which the notice dated 24.07.2004 is not correct and the petitioner is not residing there, the Postman would have only made an endorsement that there is no such person or 'resident is not found' or 'no such person is residing there'. But the fact remains that Ex.P5 was

returned with an endorsement 'door locked' which would mean that the person is residing there. In that context both the Courts below have categorically held notice has been properly sent without taking into consideration that in respect of the very same accused/petitioner herein, PW1 has sent a notice demanding payment of cheque amount of Rs.40,000/- to the correct address even prior to the issuance of statutory notice in this case. Further, PW1 admits that to ensure that court notice is sent to the correct address, he met the petitioner and ascertained her correct address. Therefore, the argument of the counsel for the petitioner that the statutory notice dated 24.07.2004 was sent by the complainant/respondent to an incorrect address to ensure that the notice is not served on the accused/petitioner is a plausible argument and it has force.

8. In this connection, the learned counsel for the petitioner relied on the decision of the Hon'ble Supreme Court reported in CDJ 2006 SC 464 (D.Vinod Shivappa Versus Nanda Belliappa) for the proposition that even if it is door locked, if it is the contention of the complainant that it is false entry or made up one, it is for the complainant to examine somebody to prove such false entry. In fact, in this judgment, the Honourable Supreme Court, referring to the decision rendered in (2004) 8 SCC 774 (V.Raja Kumari Vs. P.Subbarama Naidu and another), wherein, it has been clearly stated that the burden is only on the complainant to show the accused has managed to get incorrect postal endorsement made held as follows:

"23. In (2004) 8 SCC 774: V.Raja Kumari Vs. P.Subbarama Naidu and another, dealing with a case where the notice could not be served on account of the fact that the door of the house of the drawer was found locked, this Court held that the principle incorporated in Section 27 of the General Clauses Act will apply to a notice sent by post, and it would be for the drawer to prove that it was not really served and that he was not responsible for such non-service. This Court reiterated the principle laid down in K.Bhaskaran vs. Sankaran Vaidhyan Balan and another case supra). This Court while dismissing the appeal concluded:-

"Burden is on the complainant to show that the accused has managed to get an incorrect postal endorsement made. What is the effect of it has to be considered during trial, as the statutory scheme unmistakably shows the burden is on the complainant to show the service of notice. Therefore, where material is brought to show that there was false endorsement about the non-availability of notice, the inference that

is to be drawn has to be judged on the background facts of each case.""

9. The learned counsel for the petitioner also relied upon the judgment of this Court in the case of G.Thiagarajan Vs. A.Annadurai (Crl.A.807 of 2009 dated 01.08.2012), wherein the relevant portion of the order reads as follows:

"8.Now, this Court has to decide whether the notice was issued under Section 138 Proviso (b) of the Negotiable Instruments Act and whether cause of action arose? Admittedly, notice was issued within the stipulated time from the date of returning the cheque under Ex.P2 - return memo. But, in the notice, the respondent's address had wrongly been mentioned. The appellant, in his cross examination, himself admitted that the accused was working in P.S.G.College of Technology. While perusing Ex.P3-notice, it was mentioned as Thiru.C.Annadurai, Lecturer in Physics, P.S.G.College of Science and Arts, Peelamedu, Coimbatore-641 004. In the returned cover also, the above said address was mentioned, which was returned to sender. The appellant himself admitted that the notice was sent to the wrong address of the respondent. While perusing the complaint, it was specifically mentioned as C.Annadurai, Son of Arumugam, previously working as a Lecturer in Physics in P.S.G.College of Arts and Science and now residing at Door No.22/7, Housing Unit, Near P.S.G.Hospital, Peelamedu, Coimbatore. While the appellant herein had admitted that the accused was working in the PSG College of Technology, the notice was sent to the wrong address. Hence, the notice was not issued under Section 138 Proviso (b) of the Negotiable Instruments Act. In such circumstances, I am of the view that the trial Court is correct in holding that the notice was not sent to the correct address. Hence, no cause of action arose for preferring the complaint under Section 138 of the negotiable Instruments Act."

10. By referring to the above decisions, the learned counsel for the petitioner would contend that the statutory notice was sent to an incorrect address knowing fully well that it will not be received by the accused/petitioner herein. He would further contend that even if a notice is sent to the correct address and it is not claimed, it can be deemed that it is insufficient service.

11. In the present case, the husband of the complainant was examined as PW1. Even prior to the issuance of statutory notice dated 24.07.2004, Ex.D1, notice dated 15.11.2003 was sent by PW1 to the correct address of the petitioner/accused and demanded payment of the cheque amount. The complainant has not examined any other witness to show the correctness or validity of the endorsement made by the postal authorities while returning Ex.P5, unserved postal cover. In such circumstances, the courts below ought to have held that the statutory notice dated 24.07.2004 has not been properly served on the accused/petitioner and it can be held that the service of notice to the accused/petitioner is insufficient.

12. Next important point for consideration is as to whether the complainant has discharged her burden in proving the payment of the loan amount to the accused/petitioner. The complainant was not examined in this case, but her husband was examined as PW1. Even in the complaint as well as in the deposition of PW1, it was only stated that the amount of Rs.1,00,000/- was paid to the petitioner/accused on various dates. It was not mentioned as to what was the mode of payment of the amount, on which date the amount was paid, whether any document has been made to be executed by the accused/petitioner to ensure prompt repayment of the borrowed amount. PW1 has simply deposed that that the amount was paid to the accused/petitioner herein on various dates. PW1 also admits that there is a transaction between in his individual capacity with the petitioner/accused in which he has sent Ex.D1, notice dated 15.11.2003 to the correct address of the accused/petitioner demanding repayment of Rs.40,000/-. Even as regards the payment of Rs.40,000/- allegedly due by the accused/petitioner, it was not stated whether the amount was paid by PW1 in his individual capacity or the amount of his wife, complainant, was given to the petitioner/accused. Therefore, it can safely be construed that the complainant has failed to discharge her initial burden of proof of payment of the amount of Rs.1,00,000/- to the accused/petitioner herein.

13. The Hon'ble Supreme Court and this Court in many number of cases held that if the complainant fails to discharge his or her burden relating to payment of money, then the presumption is that the cheque issued by the complainant was not for discharge of any legally enforceable debt or liability and consequently, the complaint under Section 138 of the Negotiable Instruments Act is not maintainable. In the present case, as mentioned above, when the complainant did not prove the manner in which the amount was allegedly paid to the petitioner/accused, the complaint is liable to be dismissed on the ground that the complainant has not discharged her initial burden of proof relating to payment of money.

14. For all the above reasons, this Criminal Revision Case is allowed and the order passed by the learned Additional District Sessions Judge, FTC(II) Salem in C.A.No.140 of 2007 dated 14.03.2008 modifying the conviction and sentence imposed by the learned Judicial Magistrate Court No.3, Salem in

C.C.No.1720 of 2004 dated 31.08.2007 is set aside. The amount of compensation, if any, paid by the petitioner is directed to be refunded to her. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Asst.Registrar (CCC)

/true copy/

Sub Asst. Registrar

pri/rsh

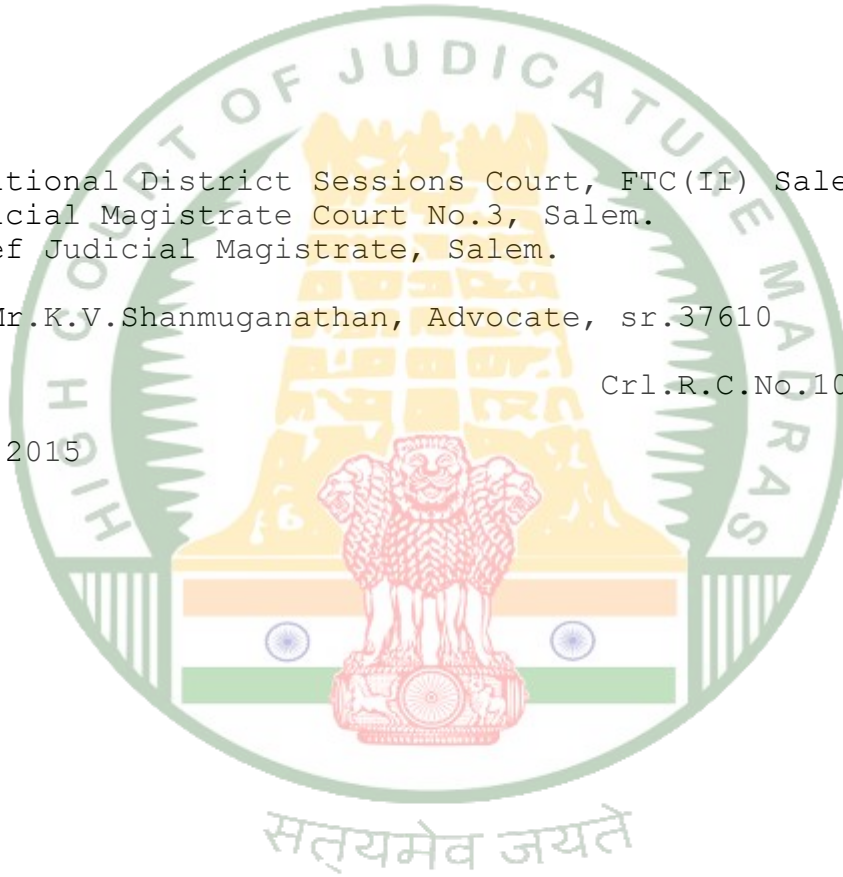
To

- 1.The Additional District Sessions Court, FTC(II) Salem.
- 2.The Judicial Magistrate Court No.3, Salem.
- 3.The Chief Judicial Magistrate, Salem.

+1 cc to Mr.K.V.Shanmuganathan, Advocate, sr.37610

Crl.R.C.No.1080 of 2008

sr co
kra 09.12.2015



WEB COPY