

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.07.2015

Coram

THE HONOURABLE MR. JUSTICE B.RAJENDRAN

Criminal Revision Case No.605 of 2009
and M.P.Nos. 1 and 2 of 2009

Kannan

.. Petitioner/Accused

vs

Thulasirajan

.. Respondent/Complainant

Criminal Revision Case filed under Section 397 read with 401 of Cr.P.C. against the judgment dated 08.04.2009 passed by the learned I Additional Sessions Judge, Salem, in Crl.A.No.158 of 2007, confirming the judgment dated 03.10.2007 passed by the learned Judicial Magistrate No.V, Salem, in C.C.No.165 of 2006.

For Petitioner : Mr.T.M.Ramalingam

For Respondent : Mr.N.S.Sivakumar

ORDER

By the judgment dated 03.10.2007 in C.C.No.165 of 2006 on the file of the Judicial Magistrate No.V, Salem, the petitioner was convicted for the offence punishable under Section 138 of the Negotiable Instruments Act and sentenced to undergo simple imprisonment for a period of 45 days and to pay a fine of Rs.1500/-, in default, to undergo simple imprisonment for one week. Aggrieved by the same, the petitioner filed Crl.A.No.158 of 2007 and the same was dismissed by the learned I Additional Sessions Judge, Salem, by judgment dated 08.04.2009. It is against those concurrent decisions of the court below, the present Criminal Revision Case is filed.

2. The case of the complainant/respondent is that the accused received a handloan of Rs.27,500/- from the complainant on 01.06.2004. Towards the discharge of the said debt, the petitioner issued two post-dated cheques for Rs.2500/- and Rs.25,000/-. When the cheques were presented for collection on 26.06.2004, it returned with an endorsement "Funds insufficient". Therefore, the complainant/respondent issued a statutory notice calling upon the petitioner/accused to repay the cheque amount, but, there was no response. Hence, the complaint under Section 138 of the Negotiable Instruments Act was filed.

3. The first ground raised by Mr.T.M.Ramalingam, learned counsel for the petitioner in this Criminal Revision Case is that there is a delay of 17 days in presenting the complaint before the

Trial Court and therefore, the Trial Court ought not to have entertained the application seeking to condone the delay. Secondly, he would contend that the statutory notice said to have been issued by the complainant has not been received by the accused and it returned with the postal endorsement "Not Claimed". Regarding service of notice, the postman was not examined. When the statutory notice has not been received by the accused, as per the judgments of this Court reported in 2008 1 DCR 648 [A.Muthusamy vs. G.Ayyappan] and [2011] 1 MLJ CrI.752 [K.Rajamanickam vs. P.Arumugam], it will amount to insufficient service of notice. He would further submit that this Court has also held that even the postal endorsement "not claimed" cannot be equated to "refused", and when the postal endorsement found on a notice issued to a person is "not claimed", it cannot be concluded that the petitioner/accused had refused to receive the same, when it was sought to be delivered to him. Therefore, he would contend that when the notice has not been served, the conviction ordered by the trial Court and confirmed by the first appellate Court is not correct. Accordingly, the learned counsel for the petitioner would pray for setting aside the conviction and sentence imposed on him.

4. As regards service of notice, Mr.N.S.Sivakumar, learned counsel for the respondent/complainant would submit that the statutory notice was posted only to the correct and proper address of the petitioner/accused and therefore, the petitioner cannot take the defence regarding the service of notice, when it returned "Not Claimed". The learned counsel would further contend that as per the recent judgment of this Court reported in 2015 (1) L.W. (CrI.) 720, M/s.Jayalakshmi Textiles vs. S.K.Kolandasamy, wherein, referring to the Full Bench of the Hon'ble Supreme Court in the case of C.C.Alavi Haji vs. Palapetty Muhammed and another in Appeal (CrI.) No.767 of 2007 dated 18.05.2007, it was ultimately held that when the notice was sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issuance of notice in terms of Clause (b) of Proviso to Section 138 of the Act stands complied with, since the notice is issued to enable the drawer of the cheque to make payment within 15 days, i.e., either he can pay the cheque amount or raise his defence rebutting any liability on his part. It was further held that even if notice is not served, the drawer of the cheque can still pay the amount and discharge his liability. Therefore, what is required under the Act is that the notice has to be sent to the correct address as contemplated under Section 27 of the General Clauses Act, 1897. When there is compliance of Section 27 of the General Clauses Act, 1897, merely because of non delivery of the statutory notice, for any reason whatsoever, especially when it is proved that it was sent to the proper and correct address, then the burden shifts on the person to prove that he was deliberately not served the statutory notice. Relying on the said decision, he would pray for the dismissal of the Criminal Revision Case.

5. Heard both sides. By consent, the main revision itself is taken up final disposal.

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6. The first ground raised regarding the question of limitation is not acceptable, because, the Trial Court, on finding that the

reason for the delay is properly explained and the same is acceptable has condoned the delay of 17 days, in which, I do not find any fault with.

7. As far as the second contention regarding non-service of notice, the interesting question of law arise for consideration in this case as to, whether in a proceedings under Section 138 of the Negotiable Instrument Act, if the statutory notice is sent to the proper and correct address and returned unclaimed or unserved, or if it is not served on the accused for any other reason, whether that by itself would vitiate the complaint filed by the complainant under the said Act.

8. In this case, the notice was rightly sent to the correct address, it returned with the postal endorsement "unclaimed", if he voluntarily does not take the notice, then, it is wrong on his part. Further, it is clearly proved that the notice has been sent to the proper address, therefore, as per the recent decision rendered by me in the case reported in 2015 (1) L.W. (Crl.) 720, M/s.Jayalakshmi Textiles vs. S.K.Kolandasamy (cited supra), following the Full Bench judgment of the Hon'ble Apex Court in the case of C.C.Alavi Haji vs. Palapetty Muhammed and another, wherein, the above question has been elaborately dealt with me by referring to various decisions and I have ultimately held that that even if a notice is sent and it is returned unclaimed, if it is clearly proved that it was sent to the correct and proper address, then it can be construed that service of notice is proper.

9. Further, in the recent judgment cited supra, viz., 2015 (1) L.W. (Crl.) 720, M/s.Jayalakshmi Textiles vs. S.K.Kolandasamy, I have also placed reliance on the judgment of the Hon'ble Supreme Court rendered in the case of K.Bhaskaran vs. Sankaran Vaidhyan Balan in Criminal Appeal No.1015 of 1999 dated 29.09.1999 and I have ultimately held that in the case of dishonoured cheque, notice of demand sent to drawer but received back with postal endorsement "refused" or "unclaimed", it is presumed that service is completed unless the addressee shows that it was not really served and that he was not responsible for such non-service.

10. Conveniently, in the case in hand, if the petitioner avoided the service of notice. Can the person be shown any leniency? Definitely not. When a person adopted deceitful modes to avoid service of notice and then takes a defence that notice was not served on him, the Court cannot give any protection to him as contemplated under Section 138 of the Act. Therefore, I hold that the statutory notice has been duly served on the petitioner/accused in compliance with the provisions of the Negotiable Instruments Act and it will not vitiate the complaint preferred by the complainant in any manner. Under such circumstance, the plea of the petitioner that he is not served with the summons or statutory notice cannot be accepted.

11. At this juncture, Mr.N.S.Sivakumar, learned counsel appearing for the respondent/complainant would submit that the Trial Court directed the petitioner/accused to undergo simple imprisonment for 45 days and it came to be confirmed by the Appellate Court, but, he is not really interested in sending the accused to jail, the

respondent is in dire need of money, he will be satisfied if the petitioner/accused is directed to pay double the cheque amount.

12. Taking into consideration of the submission made by the learned counsel for the respondent/complainant and the fact that the petitioner/accused is willing to pay back double the cheque amount, I am of the view that some leniency can be shown to the petitioner in reducing the sentence. Accordingly, while confirming the conviction imposed by the Appellate Court, the sentence alone is modified to the effect, the petitioner/accused is directed to deposit double the cheque amount as compensation, instead of the sentence awarded by the Appellate Court, to the credit of C.C.No.165 of 2006 on the file of the Judicial Magistrate No.V, Salem, within a period of three months from the date of receipt of a copy of this order, failing which, the judgment passed by the Appellate Court regarding the sentence shall stand revived and the respondent/complainant is at liberty to approach the Trial Court, which shall take steps to secure the accused to undergo the remaining period of sentence.

13. With the above modification in sentence, this Criminal Revision Case is partly allowed. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

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To

1.The I Additional Sessions Judge,
Salem.

2.-Do- thro The Principal Sessions Judge, Salem

3.The Judicial Magistrate No.V, Salem,

4.Thro The Chief Judicial Magistrate, Salem.

5. The Public Prosecutor, Madras

1 cc to Mr. .N.S.Sivakumar, Advocate Sr.No.32458

Cr1.RC.No.605 of 2009

rsi(co)
pmk.23.7.2015