

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

Criminal Appeal No. 1097 OF 2008

Judgment:

Aggrieved of the judgment, dated 19.06.2008, in Calendar Case No.1278 of 2004 on the file of X Additional Chief Metropolitan Magistrate, Secunderabad, whereby and whereunder the complaint filed under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the NI Act') by the complainant – appellant herein was dismissed acquitting the accused - first respondent herein on the ground that the evidence on record would clearly indicate that the complainant failed to issue notice in writing as required by the provisions of Section 138 Clauses (b) and (c) of the NI Act and, thus, there was no compliance of the statutory provisions, the instant appeal is preferred.

2. The facts, in brief, are that the first respondent alleged to have borrowed an amount of Rs.50,000/- from the appellant for personal needs, in token of which, a promissory note was executed on the same day and towards repayment, the first respondent alleged to have issued a cheque on 24.05.2004 and, when it was presented for realization on two occasions, it was dishonoured for the reason of "Insufficient Funds" on the first occasion and on the second occasion for the reason "No Account/Account Closed" and that constrained the appellant to issue statutory notices as contemplated under the provisions of Section 138 of the NI Act and, accordingly, twice the appellant had issued notices which were returned un-served and she initiated criminal prosecution for the offence punishable under Section 138 of the NI Act.

3. Having observed the formalities, evidence was recorded, and having heard both sides, the learned Magistrate appreciated the evidence on record through PW.1 and Exs.P1 to P6 and the evidence let in by the first respondent through DWs.1 and 2 and Exs.D1 to D6 and referring to the provisions of Section 138 Clauses (b) and (c) of the NI Act and observing that Sections 102 and 103 of the Indian Evidence Act

since casts burden on the appellant/complainant to prove affirmatively the compliance of the provisions of Section 138 (b) of the NI Act and the mere assertion that the first respondent managed the postal authorities would not amount to strict compliance of the mandatory provisions of receipt of statutory notice and also observing that it was unnecessary to probe into the merits, recorded acquittal holding that the accused was found not guilty of the offence under Section 138 of the NI Act and, as such, he was acquitted under Section 255(1) of the Code of Criminal Procedure, 1973.

4. Heard Sri A. Sameer Kumar, learned counsel for the appellant and Sri A. Hari Prasad Reddy, learned counsel for the first respondent.

5. The learned counsel for the appellant contends that the learned Magistrate was not right in holding that the statutory notice was not effected despite the fact that there was convincing evidence on record through PW.1 that there was evasion by the first respondent to receive notice. In the said context, learned counsel for the appellant placed reliance on the decision of the Hon'ble Apex Court in **M/s. Ajeet Seeds Limited v. K. Gopala Krishnaiah** borrowing the proposition that Section 27 of the General Clauses Act, 1897, mandates a presumption as to service of notice and further placing reliance on the decision in **D. Vinod Shivappa v. Nanda Belliappa**, rendered by the Hon'ble Apex Court. Therefore, it is his submission that the judgment challenged herein is liable to be set aside.

6. On the other hand, learned counsel for the first respondent submits that the judgment under challenge cannot be faulted with, since the learned Magistrate has gone into the burden of proof cast on the complainant by the provisions of Sections 102 and 103 of the Indian Evidence Act elaborately discussed and finding from the assertion of the complainant who is examined as PW.1 that the service was not effected and finding that there was no strict compliance of the statutory notice as provided by the provisions of Section 138(b) of the NI Act the judgment cannot be set aside.

7. Perused the judgment under challenge and the material on record.

8. The judgment under challenge reflects that the learned Magistrate, referring to the effects of Section 138 Clauses (b) and (c) of the NI Act and the assertion of PW.1 to the effect that the first respondent managed the postal authorities for such non-service and since burden is cast on her by the provisions of Sections 102 and 103 of the Indian Evidence Act, held that it cannot be said that there was an effective service of statutory notice and despite such notice there was failure on the part of the first respondent to respond to the notice and, in that view of the matter, he found the accused not guilty and acquitted him under Section 255(1) Cr.P.C. The learned Magistrate also made a mention that there was no need to probe into the merits in view of the technical and legal flaw and at the threshold the Calendar Case was disposed of by acquitting the accused.

9. The short point that arises for consideration in the instant appeal is whether the judgment under challenge is liable to be set aside?

10. The facts need not be referred to again and it would suffice if the decisions on which reliance was placed by the learned counsel for the appellant have been referred to.

11. In **D. Vinod Shivappa's** case (2 supra), the proceedings before the learned Magistrate were at the stage of issuing process and similar issue was involved as can be gathered from the facts situation occurring therein. Learned counsel placed reliance on the observations of the Apex Court contained in paragraph 15 which were also extracted in **M/s. Ajeet Seeds Limited's** case (1 supra). In paragraph "8" in **M/s. Ajeet Seeds Limited's** case (1 supra), the Hon'ble Apex Court extracted the observations contained in para "15" in **D. Vinod Shivappa's** case (2 supra). It should be apt to extract paragraphs "8" and "9" for the present context, which are thus:

"8. This Court then referred to Vinod Shivappa's case, where the above aspects have been highlighted. This Court quoted the following paragraph from Vinod Shivappa with approval.

"15. We cannot also lose sight of the fact that the drawer may by dubious means manage to get an incorrect endorsement made on the envelope that the premises has been found locked or that the

addressee was not available at the time when postman went for delivery of the letter. It may be that the address is correct and even the addressee is available but a wrong endorsement is manipulated by the addressee. In such a case, if the facts are proved, it may amount to refusal of the notice. If the complainant is able to prove that the drawer of the cheque knew about the notice and deliberately evaded service and got a false endorsement made only to defeat the process of law, the Court shall presume service of notice. This, however, is a matter of evidence and proof. Thus even in a case where the notice is returned with the endorsement that the premises has always been found locked or the addressee was not available at the time of postal delivery, it will be open to the complainant to prove at the trial by evidence that the endorsement is not correct and that the addressee, namely the drawer of the cheque, with knowledge of the notice had deliberately avoided to receive notice. Therefore, it would be pre-mature at the stage of issuance of process, to move the High Court for quashing of the proceeding under Section 482 of the Code of Criminal Procedure. The question as to whether the service of notice has been fraudulently refused by unscrupulous means is a question of fact to be decided on the basis of evidence. In such a case the High Court ought not to exercise its jurisdiction under Section 482 of the Code of Criminal Procedure.”

9. This Court then explained the nature of presumptions under Section 114 of the Evidence Act and under Section 27 of the GC Act and pointed out how these two presumptions are to be employed while considering the question of service of notice under Section 138 of the NI Act. The relevant paragraphs read as under:

“13. According to Section 114 of the Act, read with Illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the G.C. Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Act is extracted below:

“27. Meaning of service by post.- Where any Central Act or regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression ‘serve’ or either of the expressions ‘give’ or ‘send’ or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post”.

12. The Hon’ble Apex Court in the context of onus of proof cast on the opposite party held in para “10” thus:

“10. It is thus clear that Section 114 of the Evidence Act enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. Section 27 of the GC Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. It is not necessary to aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business.”

13. In view of the observations of the Hon’ble Apex Court afore extracted, which were not gone into by the learned Magistrate, it is a fit case to remit the matter to the lower Court for examining the issue as to effecting service of statutory notice or otherwise in the light of the evidence already recorded and it is open to either of both parties intending to lead further evidence touching the aspect of service of notice and to dispose of the matter as expeditiously as possible, preferably within a period of six (6) months from the date of receipt of a copy of this order. It is made clear that this Court has not expressed any opinion and uninfluenced by any of the observations made in the above by this Court, the learned Magistrate is directed to dispose of the Calendar Case as indicated above.

14. Accordingly, the Criminal Appeal is allowed and the judgment under challenge is set aside remitting the matter to the lower Court with the above directions.

15. As a sequel thereto, the miscellaneous petitions, if any, pending in this appeal shall stand closed.

A. SHANKAR NARAYANA, J

Date: 11.03.2015

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