

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.10.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.VENUGOPAL

Crl.A.No.645 of 2015

M/s.Sivasakthi Agencies,
No.61, Sembudoss Street,
I Floor, Chennai-600 001
rep. by its
Power holder and Authorised
Signatory & Manager
P.Srinivasan

..Appellant/Complainant

Vs.

Ajit Construction,
rep. by its Proprietor
J.Kesavan,
No.17A, Venkatesa Naicken Street,
Seven Wells,
Chennai-600 001.

..Respondent/Accused

Prayer: Criminal Appeal filed under Section 378(4) of Cr.P.C., against the judgment of acquittal of the Respondent/Accused passed by the Learned IV Metropolitan Magistrate, George Town, Chennai (Fast Track Court) in C.C.No.1277 of 2013 dated 25.08.2015.

For Appellant : Mr.A.Thirumaran

For Respondent : M/s.N.Anand Venkatesh

J U D G M E N T

The Appellant/Complainant has focused the instant Criminal Appeal before this Court as against the Judgment passed by the Learned IV Metropolitan Magistrate, George Town, (Fast Track Court), Chennai in C.C.No.1277 of 2013 dated 25.08.2015.

2.Heard the Learned counsel for the Appellant/Complainant and the Learned counsel for the Respondent/Accused.

3.The Learned Judge while passing the impugned judgment in C.C.No.1277 of 2013 dated 25.08.2015 at para 19 had observed that as per Section 138(b) of the Negotiable Instruments Act, notice was not sent to the proper address in regard to demand of money towards cheque and also that the said notice was not served on the Accused. Also, the trial Court had opined that since the ingredients of Sec.138 (b) and (c) of the Negotiable Instruments Act were not satisfied, a case could not be filed in respect of an offence under Section 138 of the Act.

4.As far as the present case was concerned, since as per Section 138(b) of the Negotiable Instruments Act, notice was not issued to the proper address of the Accused and also that the said notice was not properly served, the trial Court had observed that a case could not be filed in respect of the offence under Section 138 of the N.I. Act and hence, there was no necessity to go into other aspects of the case and consequently, found the Respondent/Accused not guilty and acquitted him under Section 255(1) of the Criminal Procedure Code.

5.Assailing the legality, validity and correctness of the judgment of Acquittal dated 25.08.2015 in C.C.No.1277 of 2013 passed by the trial Court, the Appellant/Complainant has filed the instant Criminal Appeal before this Court, primarily contending that a statutory notice dated 23.01.2013 namely, Ex.P14 was issued to the Respondent/Accused in terms of Section 138 (b) of the N.I. Act and in fact, this was the last known address of the Accused to which the invoices were raised and indeed, the notice was returned with an endorsement 'left'.

6.The Learned counsel for the Appellant/Complainant relies on the decision of the Hon'ble Supreme Court in C.C.Alavihaji V. Palapetty Muhammed and another [2007 STPC (DC) 952 SC] wherein at para 17, it is observed as under:

"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, with ... 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 (supra), 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."

7.Lastly, it is the submission made on behalf of the Appellant/Complainant that the trial Court had erroneously held that there was no cause of action for filing the complaint by the Appellant in C.C.No.1277 of 2013.

8.Per contra, it is the contention of the Learned counsel for the Respondent/Accused that in the instant case, Ex.P14/notice was not served to the proper address of the Respondent/Accused and in fact, there was a postal endorsement 'left' in Ex.P15 and inasmuch as the cause of action had not arisen for the Appellant/Complainant to file a complaint, the trial Court had rightly acquitted the Accused and dismissed the complaint, which may not be displaced by this Court at this distant point of time.

9.At this stage, this Court on perusal of the complaint filed by the Appellant/Complainant under Section 200 and 190 (1)(a) of the Criminal Procedure Code (in respect of an offence under Section 138 of the N.I. Act) against the Respondent/Accused shows that at para 17 it was mentioned as under:

"17.That the complaint is filed in time after the expiry of the statutory period of 15 days from the date of receipt of returned cover containing the statutory notice (29.01.2013) and within the period of limitation."

10.Further, at para 18 of the complaint, it was mentioned as follows:

"18.The place of business of the complainant as well as the bank of the complainant are within the jurisdiction of B-2 North Beach Police Station and therefore, well

within the jurisdiction of this Hon'ble Court."

11. Apart from that, at para 16 of the complaint, the Appellant/Complainant had averred the following:

"16. The Complainant further submits that the accused had failed and neglected to pay the amount fully as demanded in the notice dated 23.01.2013, even after the expiry of the fifteen days from the date of receipt of the notice, being the time stipulated under the Act and mentioned in the Notice sent by the Complainant to the Accused and the manner in which the accused evaded the statutory notice dated 23.01.2013, implies that the accused is ready to settle the issue. By the act of the accused in not complying with the demands of the statutory notice dated 23.01.2013, the accused have committed offences under the provisions of Section 138 of Negotiable Instruments Act, 1881, (as amended by Amendment Act, 2002)."

12. In this connection, this Court on going through the evidence of P.W.1 (Appellant/Complainant) finds that P.W.1 had deposed to the effect that in the year 2012, the Respondent/Accused had executed a loan agreement/Ex.D1 and in the said document, the address of the Respondent/Accused was mentioned as Sharma Nagar. Further, it is the evidence of P.W.1 (Appellant/Complainant) in cross examination that the Respondent/Accused had vacated from the residence mentioned in the complaint. Also that he had stated in his evidence that he does not know whether any memo was filed before the Court in regard to the change of address of the Respondent/Accused and that was known only to the counsel.

13. At this juncture, this Court aptly refers to Section 138 of the N.I. Act which runs as under:

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 [substituted by Act of 2002, S.7, for "a term which may extend to one year" (w.e.f. 06.02.2003)] (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, [substituted by Act 55 of 2002, S.7, for "within fifteen days" (w.e.f.06.02.2003)][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.

Explanation-For the purposes of this section, "debt or other liability means a legally enforceable debt or other liability."

14. From the contents of the Section 138(b) of the N.I. Act, it is lucidly clear that a demand for payment of the amount of money must be made in writing by issuance of a notice to the drawer of the cheque (within 30 days) of receipt of information by him from the bank regarding the return of the cheque as not paid. Further, as per Section 138 (c) of the N.I. Act, if the 'drawer' of such cheque failed to make payment of the money in question to the 'payee' or as a case may be 'holder in due course', within 15 days of the notice, a

cause of action had arisen for the Complainant to file a complaint.

15. It is pertinently pointed out by this Court that the object of issuance of notice to the drawer of cheque is to prevent unnecessary hardships to a honest Drawer. It is to be remembered that only the real date of service of the Complainant's demand notice in respect of an Accused that give raise to 'cause of action' if an Accused is evading service or deliberately not appearing before the Court coercive measures could be adopted, if a notice was an imperfect or a defective one, in Law, neither a proceedings could be launched under Section 138 of the N.I. Act nor an Accused could be held guilty, as opined by this Court.

16. In fact, the return of a cover by RPAD sent to a wrong address cannot be said to be a deemed service in the eye of Law. Also that the fact that the Respondent/Accused had not received the notice could only be established by adducing evidence. In this connection, it cannot be brushed aside that 'issuance of notice' in Law is different and 'the receipt of notice' is another. A cursory glance of the ingredients of Section 138 of the N.I. Act clearly contemplates that 'the Demand should be made by a giving a notice' in writing. It also envisages that there should be a failure on the Drawer's part to pay the sum within 15 days from the receipt of notice.

17. The fulfilling of the requirements mentioned in Clause (b) and its aftermath in Clause (c) of Section 138 of the N.I. Act being a condition precedence for invoking Section 138 of the Act, giving notice to the Drawer before filing the complaint (under Section 138) is mandatory in character. To put it succinctly, the 'service of notice' is quite an imperative one. Admittedly, the proceedings under Section 138 of the N.I. Act are quasi-criminal in nature and in nature of coercive measure for a 'Breach of Contract' and hence, service be effected by way of substituted service, by paper publication under the relevant ingredients of the Civil Procedure Code. Also that the notice issued by the complainant by registered post should reach the hands of the addressee himself.

18. In the instant case on hand, P.W.1 himself (Appellant/Complainant) in his evidence had admitted that the Respondent/Accused had vacated from the address found in Ex.P15. As a matter of fact, the Appellant/Complainant had issued a lawyer's notice Ex.P14 to the address of the Respondent/Accused (from where he had 'left/vacated') even coming to know of the same, it appears that the

Appellant/Complainant had not taken steps to find out the proper address of the Respondent/Accused and issued notice to him, quite in tune with the ingredients of Section 138 (b) and (c) of the N.I. Act. However, in the complaint filed by the Appellant/Complainant at para 16, it was averred by the Appellant (Complainant) inter-alia to the effect that "... the accused evaded the statutory notice dated 23.01.2013" and also at para 18, the Appellant/Complainant had averred that the place of business of the Complainant as well as the bank of the Complainant are within the jurisdiction of B-2 North Beach Police Station.

19. In view of the fact that the Appellant/Complainant in his deposition as P.W.1 before the trial Court had admitted that from the year 2012, the Respondent/Accused was residing at the address at Sharma Nagar which was mentioned in Ex.D1/loan agreement and even after coming to know of the same and later after assailing that Ex.P14 notice was also returned with an endorsement by the postal authority as 'left' had passes beyond once comprehension as to how the Appellant/Complainant without effecting service of notice to the Respondent/Accused in a proper manner, namely, to the last known address, had filed the complaint mentioning that the Accused (Respondent) had evaded the statutory notice dated 23.01.2013. In any event, when the address of the Respondent/Accused in Ex.D1/loan agreement shows Sharma Nagar address and also when the notice Ex.P14 dated 23.01.2013 sent to the address of the Respondent/Accused which was different that of the Sharma Nagar's address and the same being returned with an endorsement as 'left', then, this Court comes to an inevitable and irresistible conclusion that the Appellant/Complainant had not fulfilled the requisite ingredients of section 138 (b) and (c) of the Act in regard to the service of notice and as such, this Court is of the earnest opinion that there was no cause of action that had arisen on the date of filing of the complaint by the Appellant/Complainant before the trial Court to file the complaint in question in respect of an offence under Section 138 of the N.I. Act against the Respondent/Accused. Resultantly, this Court holds that the complaint filed by the Appellant/Complainant had not specified the ingredients of Section 138 (b) and (c) of the N.I. Act, 1881 and therefore, the view taken by the trial Court in ultimately not finding the Respondent/Accused guilty in respect of an offence under Section 138 of the N.I. Act and consequently, acquitting him, do not suffer from any legal flaw, instead, the same is a flawless one. Therefore, the Criminal Appeal sans merits.

20.In fine, the Criminal Appeal is dismissed. The judgment dated 25.08.2015 in C.C.No.1277 of 2013 of the Learned IV Metropolitan Magistrate, George Town, (Fast Track Court), Chennai is hereby confirmed by this Court for the reasons assigned in this Appeal.

-sd-
Assistant Registrar

/true copy/

Sub Assistant Registrar

DP

To

- 1.The IV Metropolitan Magistrate,
George Town, (Fast Track Court), Chennai
- 2 The Chief Metropolitan Magistrate
Chennai
- 3 The Section Officer
Criminal Section
Highcourt, Madras

+1 cc to Mr.N.Anandvenkatesh, Advocate, Sr.no.59196

Crl.A.No.645 of 2015

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