THE HON'BLE SRI JUSTICE M.S.K.JAISWAL

CRIMINAL REVISION CASE No.781 of 2013

ORDER:

The Criminal Revision Case is filed against the Judgment dated 04.04.2013 in Criminal Appeal No.717 of 2012 on the file of the Special Judge for trial of offences under SCs & STs (POA) Act-cum-VI Additional Metropolitan Sessions Judge, Secunderabad, by and under which the conviction and sentence imposed against the petitioner/accused by the learned XII Special Magistrate at Hyderabad in CC.No.260/2011, dated 16.07.2012, was confirmed.

Heard the learned counsel appearing for the petitioner/accused and the learned counsel appearing for the 2nd respondent/complainant.

The 1st respondent/*de facto* complainant filed the complaint alleging that he is the Authorized dealer in aluminum section and carrying business in that field. While so, the petitioner/accused placed order for supply of various aluminum sections and the complainant supplied the same, for which, the petitioner/accused issued two cheques, one cheque bearing No.197869, dated 29.11.2006 for Rs.50,000/- drawn on ICICI Bank, Main Road, Himayatnagar, Hyderabad and another cheque bearing No.538949, dated 20.12.2006 for Rs.1,50,000/- drawn on Syndicate Bank, new Nallakunta, Hyderabad towards discharge of legally enforceable liability. It is alleged that when the cheques were present with the Deena Bank, R.P.Road, Secunderabad on 23.04.2006, the same were returned dishonoured. The cheque for Rs.50,000/- was returned with endorsement “account closed”, and another cheque for Rs.1,50,000/- was returned with endorsement “insufficient of funds”. The 2nd respondent/complainant got issued Ex.P5-legal notice on 09.05.2007. The petitioner/accused received the notice under Ex.P8-acknowledgment, but failed to pay the amount or even give reply to the notice.

During the course of trial, the complainant examined himself as PW.1 and produced Exs.P1 to P10. The petitioner/accused denied the evidence on record. In defence, the petitioner/accused examined himself as D.W.1 and got marked Ex.D1 Bill (Tax invoice), dated 03.03.2012.

The petitioner/accused was tried for an offence punishable under Section 138 of the Negotiable Instruments Act (for short 'the Act') by the learned XII Special Magistrate at Hyderabad in C.C.No.260 of 2011 and by Judgment dated 16.07.2012, the learned Magistrate found the petitioner/accused guilty of the offence punishable under Section 138 of the Act and convicted and sentenced him to undergo rigorous imprisonment for 6 (six) months and to pay fine of Rs.5,000/- in default to suffer simple imprisonment for two months.

Against the said judgment, the petitioner/accused preferred the appeal and the learned appellate Court confirmed the findings of the trial Magistrate and dismissed the appeal. Aggrieved by the same, the petitioner/accused preferred the present revision.

The point for consideration is as to whether the Judgments of the Courts below is based on legally acceptable evidence or whether it needs interference?

Having perused the oral and documentary evidence on record and also the impugned Judgments of both the Courts below, what emerges is that the substantive factual matrix is not in dispute. The specific case of the complaint who is respondent herein is that he supplied certain material to the petitioner/accused and it is the petitioner/accused who issued the two cheques viz., Exs.P.1 and P.2 for Rs.50,000/- and Rs.1,50,000/- respectively and both the cheques when presented were dishonoured. The statutory notice did not yield any result. Hence, the complaint.

The petitioner has raised various contentions. All of them have been held to be not proved by both the Courts below. The fact, however, remains that the petitioner/accused admits that he issued the two cheques in question and his specific case is that he issued the two cheques by way of security but not for the amounts mentioned therein. The further assertion made by the petitioner/accused is that he issued the self-cheques by putting the signatures and he has already repaid the amount covered by the two cheques to one Abbi Shekhar who is the son of the complainant/PW.1. During the course of his examination under Section 313 Cr.P.C., the specific reply given by the petitioner/accused is that the complainant PW.1 questioned him as to why he paid the amount to his son when the shop belongs to him (PW.1). He further asserts that he has settled the account and took the entire amount.

What is manifest from the above is that it is for the petitioner/accused to prove the fact that he has paid the amount covered by two cheques to the son of PW.1 and settled the matter. Absolutely, no oral or documentary evidence is produced in that direction. Therefore, both the Courts below held that the defence of the petitioner/accused is not substantiated.

Even though the issuance and receipt of the statutory notice is not denied or disputed during the course of trial, learned Counsel appearing for the petitioner/accused submits that he has not received the notice, the office copy of which is Ex.P.5. As per the contention of the respondent/complainant, he issued the legal notice on 09-05-2007 and sent it by post under postal receipt – Ex.P.6 and also under Certificate of Posting under Ex.P.7 and that Ex.P.8 is the postal acknowledgment card. As already stated, at no stage, the petitioner denied having received the notice.

Learned Counsel appearing for the petitioner has relied upon a decision of the Supreme Court reported in **M.D.THOMAS v. P.S.JALEEL (2010 (2) ALT (Crl) 95 (SC)**, wherein it is held as under:-

> "Clause (b) of the proviso to sec. 38 cast on the payee or the holder in due course of the cheque, as the case may be, a duty to make a demand for payment of the said amount of money

by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. In the present case, the notice of demand was served upon the wife of the appellant and not the appellant. Therefore, there is no escape from the conclusion that complainant-respondent had not complied with the requirement of giving notice in terms of Clause (b) of proviso to Section 138 of the Act. Unfortunately, the High Court overlooked this important lacuna in the complainant's case. Therefore, the conviction of the appellant cannot be sustained. In the result, the appeal is allowed. The impugned order is set aside and the order of acquittal passed by the trial Court is restored."

The facts in the instant case are at variance with that before the Apex Court. That apart, when that decision of the Supreme Court was rendered on 03-04-2009, subsequently, the Supreme Court in various decisions held that even if the notices sent by Registered Post to the proper address has returned unserved on the ground such as refused, out of station, door locked etc., it shall be deemed to be a valid service in view of the provisions of Section 114 of the Evidence Act and also Section 27 of the General Clauses Act. In a decision rendered on 17-07-2014 in **AJEET SEEDS LTD. v. K.GOPALA KRISHNAIAH (2014 (2) ALD (Crl) 702 (SC)**, the Supreme Court laid down as follows in paras 10 and 11:-

> "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.
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> 11. Applying the above conclusions to the facts of this case, it must be held that the High Court clearly erred in quashing the complaint on the ground that there was no recital in the complaint that the notice Under Section 138 of the NI Act was served upon the accused. The High Court also erred in quashing the

complaint on the ground that there was no proof either that the notice was served or it was returned unserved/unclaimed. That is a matter of evidence. We must mention that in ***C.C. Alavi Haji v. Palapelly Muhammed and another (2007) 6 SCC 555)***, this Court did not deviate from the view taken in ***Vinod Shivappa v. Nanda Belliappa (2006) 6 SCC 456)***, but reiterated the view expressed therein with certain clarification. We have already quoted the relevant paragraphs from ***Vinod Shivappa*** (cited supra) where this Court has held that service of notice is a matter of evidence and proof and it would be premature 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."

A three Judge Bench of the Supreme Court in a decision reported in **C.C.ALAVI HAJI v. PALAPETTY MUHAMMED AND ANOTHER (2007) 3 SCC (Cri) 236**) have comprehensively dealt with this aspect and held as under:-

"It is not necessary to aver in the complaint under Section 138 of the N.I.Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

When Section 114 of the Evidence Act, 1872 is applied to communications sent by post, it 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 General Clauses Act, 1897 is a far stronger presumption. While Section 114 of the Evidence Act refers to a general presumption, Section 27 of the 1897 Act refers to a specific presumption.

Section 27 of the 1897 Act gives rise to a presumption that service of notice has been effect when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further 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. The Supreme 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.”

In view of the above authoritative pronouncement, I have no hesitation to hold that a statutory notice shall be deemed to have been served on the drawer of the cheque once it is shown that the said notice is sent by proper mode of communication and proof thereof is filed. Once that is done, in view of the presumptions contemplated under Section 114 of the Evidence Act and Section 27 of the General Clauses Act, it is for the addressee to show that he has not received any notice and had no knowledge about the intention of the complainant demanding payment, failing which prosecution will be launched.

In view of the foregoing discussion, both on facts and law, I see no reason to interfere with the findings of both the Courts below and there are no merits in the revision and the same is liable to be dismissed.

With regard to the sentence, learned Counsel appearing for the petitioner submits that the petitioner/accused has been sentenced to undergo R.I. for a period of six months and pay a fine of Rs.5,000/-. The relationship between the petitioner/accused and the respondent/complainant i.e., business dealing and both of them had been doing business for the several years in the past. It is on record that on several occasions, goods were supplied to the petitioner/accused by the respondent/complainant for which the petitioner/accused paid the amounts as promised and even the cheques that were issued for the previous transactions had been honoured. In that view of the matter, I feel that sentencing the petitioner/accused to imprisonment will not sub-serve the ends of justice and instead he can be directed to pay a compensation of Rs.2,00,000/- to the respondent/complainant within a specified time, failing which he can be directed to undergo imprisonment.

In the result, the Criminal Revision Case is disposed of. The sentence of imprisonment recorded by both the Courts below is set aside subject to the condition that the petitioner/accused should deposit a sum of Rs.2,00,000/- (Rupees two lakhs only) in the trial Court on or before 31.03.2016, failing which, the petitioner shall undergo rigorous imprisonment for a period of six months. As and when the amount is deposited by the petitioner/accused, the respondent/complainant is at liberty to withdraw the said amount. Without furnishing any security

Miscellaneous petitions, if any, pending in this Criminal Revision Case shall stand closed.

M.S.K.Jaiswal, J

Date: 1st February, 2016
Dsr/smr