

IN THE HIGH COURT OF JUDICATURE AT MADRAS**CORAM****THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN****RESERVED ON :21.07.2017****PRONOUNCED ON :22.11.2017****CRL.RC. No.1253 of 2014**

Mr.Aman

.. Petitioner

..Vs..

Mr.N.Velan

.. Respondent

Prayer:- Criminal Revision Petition filed under Section 397 and 401 Cr.P.C., against the final Judgment passed in C.A.No.151 of 2013 dated 25.04.2014 on the file of V Additional Judge, City Civil Court at Chennai confirming the Judgment passed in C.C.No.4823 of 2011 dated 22.07.2013 on the file of the Metropolitan Magistrate, Fast Track Court No.II, Egmore, Chennai and liable to set aside the same and to grant acquittal to the petitioner.

For Petitioner :Mr.M.Vivekanandan

For Respondent :Mr.K.N.Nataraj

ORDER

This Criminal Revision Petition has been filed under Section 397 and 401 Cr.P.C., against the Judgment passed in C.A.No.151 of 2013 dated 25.04.2014 on the file of V Additional Judge, City Civil Court at Chennai confirming the Judgment passed in C.C.No.4823 of 2011 and liable to set aside the same and to grant acquittal to the petitioner.

2. The brief facts of this case is that:-

The respondent herein filed this private complaint for dishonour of the cheque issued by the revision petitioner herein and the case of the complainant before the trial Court is that the accused borrowed a sum of Rs.8,00,000/- from the complainant. The accused issued a cheque bearing No.000276 dated 19.04.2011, drawn on Kotak Mahindra Bank Limited, T.Nagar Branch, Chennai for Rs.8,00,000/- in favour of the complainant. The complainant when placed it for collection with his banker, Allahabad Bank, Jawahar Nagar, Egmore, Chennai on 19.04.2011 the same returned unpaid with endorsement "Account closed". The complainant sent a legal notice dated 26.04.2011 to the accused. On 11.05.2011 the postal cover containing legal notice returned unserved with an endorsement "Intimation delivered unclaimed". On the side of the complainant, the complainant was examined as PW1 through him Ex.P1 to Ex.P5 marked. On the side of the accused, DW1 to DW4 were examined as defence witnesses. No document was marked as Exhibit.

3. Learned counsel appearing for the accused would submit that the address mentioned in the legal notice is not of the accused. The complainant wantonly sent legal notice to a wrong address and thereby he caused the notice not served on the accused. The complainant is not maintainable against the accused. Hence, he prayed for acquittal.

4. According to the learned counsel for the respondent/complainant the statutory notice sent by the complainant was served on the accused and he claimed to have observed the procedure under Section 138(b) of the Act.

5. To prove his case the complainant has examined himself as PW1 and through him he has marked Ex.P1 to Ex.P5. On the side of accused one Mr.Jaqruth sha has been examined as DW1 who speaks about the execution of cheque and passing of consideration, Mr.Irshath Ahmed has been examined as DW2 who speaks about the accused's residence in Ruby Castle, Mrs.Meenakshi Assistant Postmaster, Post Office, High Court Campus has been examined as DW3 and one Mr.Muthukrishnan, Postman, Park Town Head Post Office, Chennai has been examined as DW4. The accused has not disputed the signature found in the Ex.P1-cheque. The only defence taken by him is that the statutory notice was not duly served on the accused. The evidence of DW4 clearly shows that even after the intimation was delivered to the accused, he had not claimed it from the post office and subsequently returned the postal cover containing notice unserved to the complainant.

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6. Aggrieved against the conviction and sentence passed by the trial Magistrate, the revision petitioner preferred in C.A.No.151 of 2013 and after due consideration and re-appreciation of evidence on record, dismissed the Criminal Appeal and hence, the Criminal Revision.

7. The Points for determination of this appeal is that:-

- i) Whether the order of conviction laid by both the Courts below is sustainable in law?
- ii) Whether the sentence award is excessive?

8. The learned counsel appearing for the revision petitioner could contend that there is a mistake in the address said to have been in the address in Ex.P3, legal notice which has resulted in returning of postal complaint and hence, for want of necessary statutory notice as contemplated under Section 138 of Negotiable Instruments Act, the entire criminal proceedings is to be negated.

9. Per contra, the learned counsel for the respondent could contend that only in respect of the postal pin number, there was a mistake however the Postal Department based upon the address which is clearly mentioned has taken the cover to the concerned apartment and after intimation to the complainant and as he failed to be taken the delivery of the same it was 'returned' after the statutory period and hence, prayed for dismissal of the revision petition.

10. The learned counsel for the respondent further contended that there is no dispute in respect of borrowal of money and issuance cheque by the revision petitioner for legally enforceable debt and it is admitted by the

revision petitioner and also the person who are responsible for borrowal of the money by the revision petitioner from the respondent herein who were examined as D.W.1 and D.W.2 and hence, prayed for dismissal.

11. Heard both sides and perused the records.

12. As stated supra, the private complainant has been examined as P.W.1 and Ex.P1, cheque and Ex.P2, returned memo has been marked before the trial Court. Ex.P3 is a legal notice which according to the revision petitioner was sent to a false address and hence, non service of the legal notice is fatal to the criminal prosecution.

13. Per contra, the contention of the first respondent/private complainant is that only in respect of the pin number, there was an error has been crept in. However, the postal department has been dutiful in taking the steps and serving the same with the apartment wherein, the revision petitioner is residing and after delivering the postal intimation to the security man in the said apartment. As the revision petitioner has not chosen to collect the registered letter as per the postal intimation and hence service is held to be sufficient.

14. The short point that arises for consideration in this Criminal

Revision is:

Whether there is proper compliance of the service of the statutory notice as mandated under Section 138 of the Negotiable Instruments Act?

15. The revision petitioner is the accused.

16. The revision petitioner relied upon the decision of this Court reported in (2004) 8 SCC 774 (V.Raja Kumari v.P.Subbarama Naidu and another) which is to the effect that wherein it has been held that when the complainant fails to send legal notice to the correct address of the accused and fails to serve, the cause of action for filing the complaint under Section 138 of the Negotiable Instruments Act will not arise and further held that service of legal notice on the respondent/accused is a mandatory.

In the reply, the counsel for the revision petitioner relied upon the decision of this Supreme Court in (2004) 8 SCC 774 (V.Raja kumari V.P.Subbarama Naidu and another) to the limited extent that:-

"statutory notice sent to the correct address of the drawer but returning with the endorsement that door of the house was locked and in such circumstances, held, High Court rightly held that non-service of the notice could not be a ground for dismissal of the complaint even before the

same was numbered and burden to show that the accused drawee had managed to get an incorrect postal endorsement, held, lies on the complainant and effects thereof have to be considered during the trial on the background facts of the case".

and further held that:

"The question whether notice as required under Section 139 of the Negotiable Instruments Act, 1881 has been served has to be decided during trial and the complaint ought not to be dismissed at the threshold on the purported ground that there was no proper service of notice".

17. After considering the legal preposition as laid down by the Apex Court and on the factual of the background on this case, it is seen that the narrow point that needs to be addressed by this Court is that:-

Whether there was a proper compliance of service of statutory notice as mandated under Section 138 of the Negotiable Instruments Act?

18. Under the statutory scheme, after the amendment into the Negotiable Instruments Act wherein introduction of Section 138 to 144 in the Negotiable Instruments Act is made. The statutory scheme un-mistakenly shows, the burden is on the complaint to show the service of the notice. (emphasis supplied)

19. To buttress the said burden of proof, it appears that the private

complainant as examined D.W.3, Meenakshi, Assistant Post Master, High Court Campus Post Office and also D.W.4, Muthukrishnan who in his cross examination have categorically stated that even if there are minor errors have been in the address we try to ascertain the actual address of the addressee and he also categorically deposed that he had served the postal intimation to the accused/revision petitioner and the intimation has been duly served upon the revision petitioner.

20. To resolve the controversy, it appears that the trial Court also put a Court question to the P.W.4 for which P.W.4 has categorically deposed regarding the procedure adopted by the postal department for ascertaining the person when there are minor error in the mail address and servicing of the intimation of the registered post upon him and when such intimation has been served upon him, it is a mandatory upon him to come and collect the registered letter or a parcel, as a case may be, from the concerned post office with intimation card served upon him and hence, relying upon the independent witness of the D.W.3 and D.W.4. Both the Courts have come to the conclusion that the notice was un-served as unclaimed, the Post Master communicated the information about the notice by issuing endorsement card enabling the addressee to get the postal card. However, it appears that the revision petitioner has not collected the above postal cover from the concerned post office.

21. After going through the evidence of P.W.4, Post Master of the Park Town in Chennai in whose jurisdiction area, the revision petitioner is stated to be living and the address mentioned in the Ex.P3, cover Door number is clearly mentioned, street name is properly mentioned and further deposed that he met with the security man of the said apartment and he is duly served the intimation card upon him and there is nothing worthwhile has been elicited in the cross examination to discredit his evidence and even for a Court question, he is answered as narrated above.

22. In view of the clear and categorical evidence of P.W.4 independent witness (P.W.3+P.W.4), both the Courts below have categorically held that intimation regarding the Ex.P3, legal notice has been duly served upon the revision petitioner and he failed to collect the same from the concerned Post Office, the same was returned as per the Ex.P4 and hence, relying upon the decision of the Hon'ble Supreme Court in (2006) 6 SCC 456 (D.Vinod Shivappa V.Nanda Belliappa) herein it has held that :-

It is no doubt true that the receipt of the notice has to be proved, but if the notice is refused by the addressee, it may be presumed to have been served. In a case where notice is not claimed even though sent by registered post, with the aid of Section 27 of the General Clauses Act, the drawer of the cheque may be called upon to rebut the presumption which arises in favour of service of notice. However, no rule of universal application can be laid down that in all cases

where notice is not served on account of non-availability of the addressee, the court must presume service of notice.

Therefore, the question as to whether the service of notice has been fraudulently refused by unscrupulous means and whether there was deemed service of notice, in the sense that the endorsement made on the returned envelope was a manipulated and false endorsement, is essentially a question of fact, and that must be considered in the light of the evidence on record.

and thus on combined reading evidence of P.W.3+P.W.4 and the application of the preposition of law as enunciated in the above Supreme Court judgment to the facts of the case, I hold that the service is sufficient and similar, I do not find any illegality or irregularity warranting interference of this Court in the revisional jurisdiction finding arrived at by Court below.

23. Before departing, it remains to be stated that with regard to the borrowal of money and issuance of cheque and the dishonour of the cheque D.W.1 and D.W.2, the revision petitioner who are middle man for which who are common fronts for the parties herein have clearly spoken to about the fact and also the revision petitioner never denied the above said factum.

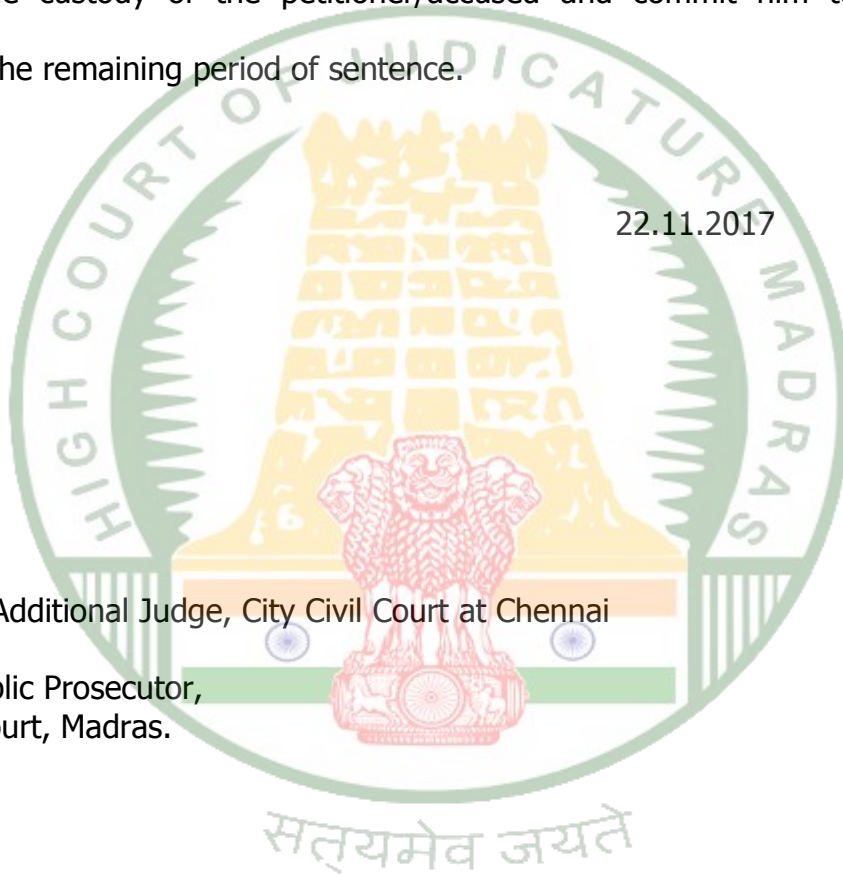
24. In view of the above discussion, I do not find any material to interfere with the conviction and sentence passed by the Courts below and accordingly, this Criminal Revision Petition is dismissed. The bail bond executed by the petitioner/accused is cancelled. The trial Court is directed to secure the custody of the petitioner/accused and commit him to jail to undergo the remaining period of sentence.

22.11.2017

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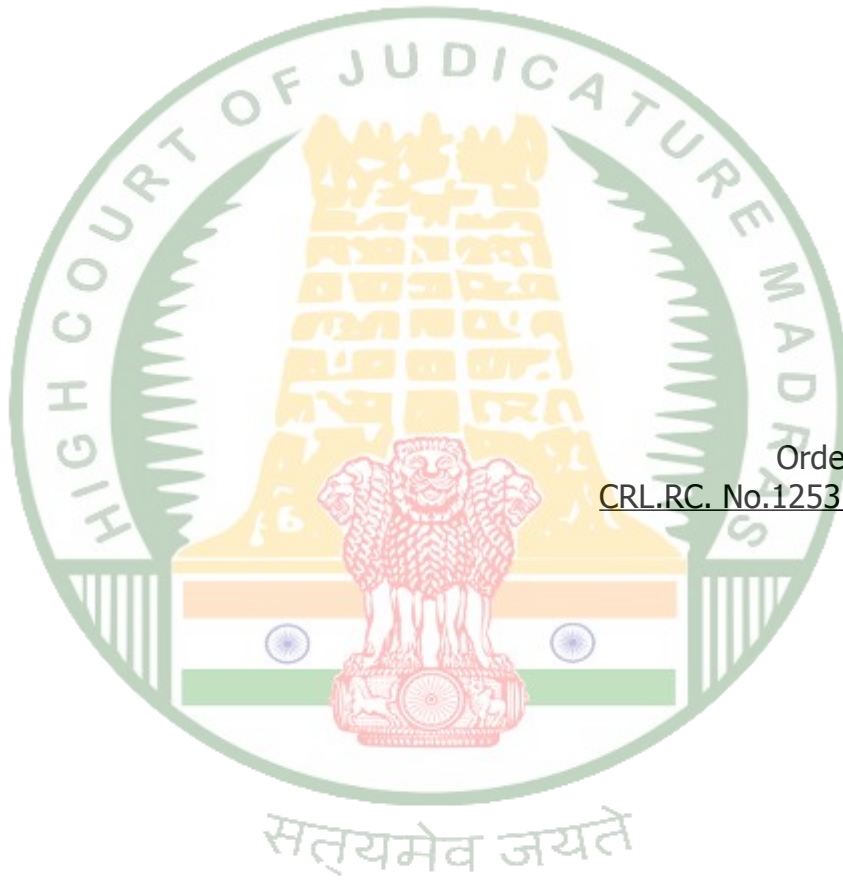
To

- 1.The V Additional Judge, City Civil Court at Chennai
- 2.The Public Prosecutor,
High Court, Madras.



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RMT.TEEKAA RAMAN,J.,
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Order in
CRL.RC. No.1253 of 2014

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22.11.2017