IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.08.2017

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THE HONOURABLE MR.JUSTICE C.T.SELVAM

Criminal Appeal No.826 of 2006

M/s.Bharath Engineering
represented by its Proprietrix
N.Krishnaveni .. Appellant

Vs.

1.M/s.Lavanya Hotels Pvt. Ltd.,
represented by its Managing Director,
A.Selvaraj

2.A.Selvaraj
S/o.K.N.Arthanari Mudaliar

3.S.Selvamani
W/o.A.Selvaraj .. Respondents

Criminal Appeal preferred under Section 378 of Cr.P.C against the judgment of learned Additional Sessions Judge, Fast Track Court IV, Erode, Bhavani, passed in C.A.No.71 of 2004 on 31.12.2004 reversing the judgment of learned Judicial Magistrate, Bhavani, passed in C.C.No.183 of 1999 on 05.04.2004.

For Appellant : Mr.P.M.Duraisamy

For Respondents : No appearance [R1]
Mr.S.Doraisamy [R2 & R3]

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JUDGMENT

This appeal arises against the judgment of learned Additional Sessions Judge, Fast Track Court IV, Erode, Bhavani, passed in C.A.No.71 of 2004 on 31.12.2004 reversing the judgment of learned Judicial Magistrate, Bhavani, passed in C.C.No.183 of 1999 on 05.04.2004.

2. Appellant/complainant moved prosecution informing that respondents 2 and 3, on behalf of first respondent, borrowed a sum of Rs.5,20,000/- from them and a cheque dated 16.05.1999 in a sum of Rs.5,20,000/- stood issued to him towards repayment of borrowing, which upon presentation was returned unpaid for the reason 'insufficient funds'. Appellant/complainant following the procedure envisaged u/s.138 of the Negotiable Instruments Act, preferred a complaint. The same was taken on file in C.C.No.183 of 1999 on the file of learned Judicial Magistrate, Bhavani.

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3. Before trial Court, appellant/complainant examined 2 witnesses and marked 13 exhibits. On the side of defence, 2 witnesses were examined and 15 exhibits were marked. On appreciation of materials before it, trial Court, under judgment dated 05.04.2004, convicted respondents and sentenced respondents 2 and 3 to 1 year S.I. and fine of Rs.24,000/- each i/d 6 months

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S.I. and imposed fine of Rs.12,000/- on first respondent i/d 6 months S.I. Out of fine amount, respondents 2 and 3 were directed to pay Rs.20,000/- each and first respondent to pay Rs.10,000/- to appellant/complainant towards compensation. There against, respondents preferred C.A.No.71 of 2004 on the file of learned Additional Sessions Judge, Fast Track Court IV, Erode, Bhavani, which came to be allowed under judgment dated 31.12.2004. Hence, this revision.

4. Heard learned counsel for appellant and learned counsel for respondents 2 and 3. There is no representation for first respondent.

5. The primary ground on which the Court below, in appeal, set aside trial Court's judgment of conviction is that though notices were served on respondents 2 and 3, who were Directors of first respondent company, there was no proof of service of statutory notice contemplated u/s.138 of the Negotiable Instruments Act despite claim of appellant/complainant that notice had been sent also to first respondent company.

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6. Learned counsel for appellant submits that although such is the position, Court below has failed to see that respondents 2 and 3, Directors of first respondent company, were signatories of cheque, were sole Directors of

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first respondent company and in causing a reply to statutory notice had informed that the same was being issued on behalf of first respondent company. Learned counsel referred to Section 7 of the Negotiable Instruments Act towards submitting that respondents 2 and 3 fulfill the description of drawer as per the Negotiable Instruments Act. Contending that if, in such circumstance a finding of acquittal was rendered the purport of the Negotiable Instruments Act would be defeated, learned counsel relied on the judgment of Apex Court in ***C.C.Alavi Haji v. Palapetty Muhammed and another [Appeal (Crl.) 767 of 2007]***, wherein it has been held as follows:

> *'16. As noticed above, the entire purpose of requiring a notice is to give an opportunity to the drawer to pay the cheque amount within 15 days of service of notice and thereby free himself from the penal consequences of Section 138. In Vinod Shivappa (supra), this Court observed: One can also conceive of cases where a well intentioned drawer may have inadvertently missed to make necessary arrangements for reasons beyond his control, even though he genuinely intended to honour the cheque drawn by him. The law treats such lapses induced by inadvertence or negligence to be pardonable, provided the drawer after notice makes amends and pays the amount within the prescribed period. It is for this reason that Clause (c) of proviso to Section 138 provides that the section shall not apply unless the drawer of the cheque fails to make the payment within 15 days of the receipt of the said notice. To repeat, the*

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proviso is meant to protect honest drawers whose cheques may have been dishonoured for the fault of others, or who may have genuinely wanted to fulfil their promise but on account of inadvertence or negligence failed to make necessary arrangements for the payment of the cheque. The proviso is not meant to protect unscrupulous drawers who never intended to honour the cheques issued by them, it being a part of their modus operandi to cheat unsuspecting persons.

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, within 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)

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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.'

Learned counsel prayed that the appeal be allowed and the finding of trial Court be restored.

7. Learned counsel for respondent placed reliance on the judgment of Apex Court in ***M/s.Sarav Investment & Financial Consultants Pvt. Ltd. & another v. Llyods Register of Shipping Indian Office Staff Provident Fund and another [CDJ 2007 SC 1146],*** wherein it has been held as follows:

'16. Section 138 of the Act contains a penal provision. It is a special statute. It creates a vicarious liability. Even the burden of proof to some extent is on the accused. Having regard to the purport of the said provision as also in view of the fact that it provides for a severe penalty, the provision warrants a strict construction. Proviso appended to Section 138 contains a non-obstante clause. It provides that nothing contained in the main provision shall apply unless the requirements prescribed therein are complied with. Service of notice is one of the statutory requirements for initiation of a criminal proceeding. Such notice is required to be given within 30 days of the receipt of the information by the complainant from the bank regarding the cheque as unpaid. Clause (c) provides that the holder of the cheque must be given an opportunity to pay the amount in

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question within 15 days of the receipt of the said notice. Complaint Petition, thus, can be filed for commission of an offence by a drawee of a cheque only 15 days after service of the notice. What are the requirements of service of a notice is no longer res-integra in view of the recent decision of this Court in C.C. Alavi Haji Vs. Palapetty Muhammed & Anr. [JT 2007(7) SC 498].'

Learned counsel prayed that the appeal be dismissed.

8. This Court has considered the rival submissions.

9. This Court would respectfully follow the judgment of the Apex Court in ***M/s.Sarav Investment & Financial Consultants Pvt. Ltd. & another v. Llyods Register of Shipping Indian Office Staff Provident Fund and another [CDJ 2007 SC 1146]*** relied upon by learned counsel for respondent. With due respect, the view expressed in the decision relied upon by learned counsel for petitioner to the effect that the purport of the Negotiable Instruments Act would be served by requiring the accused in an offence u/s.138 of the Negotiable Instruments Act and who claims non-receipt of statutory notice, to effect payment within 15 days of the receipt of the summons from the trial Court, in our humble opinion would amount to legislation. This Court is aware of Article 141 of the Constitution of India which informs that the law declared

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by the Supreme Court shall be binding on all Courts within the territory of India. Even so, this Court would be failing in its duty if it does not express its afore stated view. It is only an open expression of views and debate thereupon that has, over the centuries, contributed to the development of law. That the judgment in ***M/s.Sarav Investment & Financial Consultants Pvt. Ltd.'s*** case relied upon by learned counsel for respondent is a subsequent one is one further reason why this Court would follow the same.

The Criminal Appeal shall stand dismissed.

09.08.2017

Index : Yes/No
Internet : Yes

To

1.The Additional Sessions Judge,
Fast Track Court IV,
Erode, Bhavani.

2.The Judicial Magistrate,
Bhavani.

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C.T.SELVAM, J

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