

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.945 OF 2002

Shrikant Bhausaheb Ghatage
Age 48 yrs. Occ: Business
R/o. 158 'E' Ward,
Kadamwadi, Kolhapur
....Appellant

V/s.

1 Rangarao Shripati Thorwat
Age 33, Occupation: Business,
R/o. CS No.15, 'E' Ward,
Jadhavwadi, Kolhapur.

2 The State of Maharashtra
....Respondents

Mr. S.V.Marwadi with Ms. Trupti Khamkar, Advocates for Appellant.
Mr. Ajay Patil, APP for the Respondent-State.
Mr. Ashok B. Tajane, Advocate for Respondent No.1.

CORAM :- SANDEEP K. SHINDE, J.

DATE :- 7TH FEBRUARY, 2018.

PC.:-

This Appeal is preferred against the judgment and order dated 24.5.2002 passed by the Second Additional Sessions Judge, Kolhapur in Criminal Appeal No.57 of 2001 whereby the Respondent No.1 (Original Accused) was acquitted and the conviction recorded against him under Section 138 of the

Negotiable Instruments Act, 1881 was set aside.

2 The facts in brief giving rise to this appeal are as under:

The Appellant had filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 against the Respondent-Accused. The Respondent-Accused was convicted by the learned J.M.F.C. in Regular Criminal Case No.567 of 1997 by the judgment and order dated 24.5.2001. Therefore, he preferred Criminal Appeal No.57 of 2001 before the learned Sessions Court at Kolhapur. The said Criminal Appeal was allowed by the judgment and order dated 24.5.2002 and the order of conviction and sentence passed under Section 138 of the Negotiable Instruments Act, 1881 came to be set aside and the Respondent-Accused was acquitted of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881. Aggrieved by the order in Appeal as aforesaid, the Appellant (Original Complainant) has preferred this Appeal.

3 Heard Mr. Marwadi the learned counsel for the Appellant and Mr. Tajane the learned counsel for the Respondent-Accused. Perused the record and proceedings.

4 The only ground on which conviction has been set aside in Appeal is that, the complainant has failed to prove that statutory notice was sent by him and that evidence adduced by the

complainant was not reliable to hold that statutory notice was received by the Respondent.

5 Mr. Marwadi the learned counsel for the Appellant would submit that in terms of the provisions of Section 138 of the Negotiable Instruments Act, 1881 read with Section 27 of the General Clauses Act, 1897, Clause (b) to the proviso, once the sender establishes the fact that the notice was dispatched by post with correct address written thereon, it should be deemed to have been served on the sendee unless he establishes that it was not really served and that he was not responsible for such non-service. He would further submit that once the notice is shown to have been dispatched by post and the envelope in which such notice is shown as was carrying correct address of the sendee written on it, the presumption would arise in favour of the sender to the effect that such notice was duly served upon the sendee unless that presumption is rebutted. That in support of his submission, Mr. Marwadi the learned Advocate has taken me through the record and proceedings and pointed out following documents namely,

- (I) Statutory notice dated 28.8.1997 at Exhibit 53 addressed to the Respondent No.1-Accused at, 15 'E' Ward, Jadhavwadi, Taluka: Karvir, District:

Kolhapur.

(II) Postal Receipt No.2036 dated 28.8.1997 showing address of Respondent-Accused, viz. 15E Jadhavwadi, Taluka: Karvir, Exhibit 54.

(III) Letter issued by the Postal Authorities, Kolhapur dated 25.9.1997 evidencing postal packet sent under Postal Receipt No.2036 has been delivered at the given address.

(IV) A receipt dated 1.9.1997, Exhibit 73 bearing name/signature of the Respondent-Accused, evidencing envelope sent under receipt no.2036 has been delivered to the addressee.

6 That since postal acknowledgment was not received, the learned advocate for the Complainant had filed complaint in the office of the Superintendent of Post office, Kolhapur requesting to make necessary enquiries about delivery of subject envelope to the addressee. The document at Exhibit 74 is an acknowledgment of the complaint.

7 Mr. Marwadi has also taken me through the evidence of one Mr. Karambe, PW.3 who was working as Public Relation Officer in the Post office department. I have gone through his evidence. This

witness was examined by the Complainant who has produced on record documents at Exhibits 72, 73 and 74. This witness would further say that after receiving the complaint sent by advocate Mr. P.B.Patil on behalf of the Complainant, Department enquired into the matter and thereafter certified that the subject postal packet was delivered to the assessee. Such certificate is at Exhibit 72. It appears from the evidence that certificate at Exhibit 72 was issued by one Mr. G.R.Patil, Superintendent in Post Department and signature was identified by him.

8 Mr. Marwadi the learned counsel appearing for the Appellant would, therefore, submit that in view of the evidence as aforesaid produced by the Complainant, finding recorded by the learned Sessions Judge that there is no cogent evidence to hold firstly, that the statutory notice was sent and secondly, that notice was served on the Respondent, is erroneous and, therefore, the order of acquittal recorded on by the learned Appellate Court only on this ground may kindly be quashed and set aside.

9 Mr. Tajane the learned counsel for the Respondent-Accused, however, strenuously urged that the document at Exhibit 72, i.e., certificate issued by the Postal Authorities cannot be relied upon as contents thereof were not proved as required under Section

67 of Indian Evidence Act, 1872. He would further submit that author of the said document has not been examined and as such, the Court at the first instance, i.e., the Trial Court had committed an error by exhibiting the said document as Exhibit 72. Mr. Tajane would further submit that the receipt at Exhibit 73 though bears the name, signature of the addressee, but that is not the signature of the Respondent herein. He would submit that document at Exhibit 73 cannot be looked into as it suffers from several infirmities. Mr. Tajane, would, therefore, submit that the Complainant has failed to prove at the first instance that notice was sent and further there is no reliable evidence to hold that notice was sent at proper address. He would, therefore, support the judgment and order passed by the learned Appellate Court. Mr. Tajane has also brought to my notice the discrepancy in the receipt number against which postal packet was allegedly dispatched. He would submit that in the complaint, it is stated that receipt was bearing no.2030 however, all other documents on record including Exhibit 72 would show that the postal packet was delivered against receipt no.2036. Mr. Tajane would, therefore, submit that evidence placed on record by the complainant about the dispatch or sending of notice and receipt of notice at the correct address is not reliable and, therefore, finding

recorded by the Court of Appeal may not be interfered with.

10 Mr. Marwadi the learned counsel appearing for the Appellant in support of his submission has relied upon the judgment of the Division Bench of this Court in the case of **Malanbai Ratnaparkhi v. Govind R. Motade and another** reported in **2002 Cri. L.J.1188**. He has also invited my attention to the provisions of Section 27 of the General Clauses Act, 1897. I have gone through the said ruling. In paragraph 7 of **Malanbai Ratnaparkhi (Supra)**, the learned Single Judge upon referring to the judgment of the Apex Court in **K.Bhaskaran's** case has held that considering the provisions contained in S. 27 of the General Clauses Act, 1897, once the sender establishes the fact that the notice was dispatched by post with correct address written thereon, it should be deemed to have been served on the sendee unless he establishes that it was not really served and that he was not responsible for such non-service.

11 On the question of notice, the Apex Court in the decision of **K.Bhaskaran v. Sankaran Vaidhyan Balan (1999) 7 SCC 510** has held; 'On the part of the payee has to make a demand by "giving a notice" in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such "giving", the travails of

the prosecution would have been very much lessened. But the legislature says that failure on the part of the drawer to pay the amount should be within 15 days “of the receipt” of the said notice. It is, therefore, clear that “giving notice” in the context is not the same as receipt of notice. Giving is a process of which receipt is accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address.

12 In the case in hand, there is sufficient evidence on record to hold that notice was sent by complainant to the addressee at the correct address. The evidence in the shape of Exhibits 72, 73 produced on record by the officer of the department of Post, Mr. Karambe has proved that complainant had sent the notice to the addressee. In fact, the documents at Exhibits 73 and 74 shows that it was delivered at the correct address of the Respondent and as such, the finding recorded by the Appellate Court is contrary to the evidence on record.

13 While this Court was dictating the judgment, parties to the Appeal as it appears have arrived at settlement and requested the Court to adjourn the proceedings till Friday i.e., 9th February, 2018 so as to enable them to take instructions.

14 At the request of the learned counsel for the Parties,
stand over to 9.2.2018.

(SANDEEP K. SHINDE, J.)

ON 9.2.2018 (IN CHAMBER)

Mr. S.V.Marwadi with Ms. Trupti Khamkar, Advocates for Appellant.
Mr. Ajay Patil, APP for the Respondent-State.
Mr. Ashok B. Tajane, Advocate for Respondent No.1.

Mr. Marwadi the learned counsel for the Appellant on
instructions of the Appellant, who is present in the chamber, seeks
leave to withdraw the Appeal. Leave granted. Appeal is allowed to
be withdrawn and is ,accordingly, disposed of.

(SANDEEP K. SHINDE, J.)