IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 05.06.2018

JUDGMENT PRONOUNCED ON : 18.07.2018

CORAM

THE HONOURABLE MR. JUSTICE R.PONGIAPPAN

Crl.A.No.42 of 2011

Mohammed Rafik .. Appellant / Respondent / Complainant

versus

Rajavel .. Respondent / Appellant / Accused

Prayer: Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, to set aside the judgment dated 08.02.2010 made in C.A.No.73 of 2009 on the file of the Additional District and Sessions Judge [Fast Track Court No.II], Salem in reversing the judgment dated 08.07.2009 made in STC No.2234 of 2007 on the file of the Judicial Magistrate No.III, Salem by allowing the present Criminal Appeal.

For Appellant : Mr.B.Kumarasamy

For Respondent : Mr.P.Murugan
Legal Aid Counsel

J U D G M E N T

This Criminal Appeal is directed against the judgment rendered by the learned Additional District and Sessions Judge [Fast Track Court No.II], Salem, in Crl.A.No.73 of 2009 dated 08.02.2010, wherein, he allowed the appeal filed by the respondent and set aside the conviction and sentence passed by the learned Judicial Magistrate No.III, Salem in STC No.2234 of 2007 dated 08.07.2009.

2. The case of the appellant / complainant in the Trial Court is as follows:

2.1. On 23.05.2007, the respondent had borrowed a sum of Rs.50,000/- as hand loan and to discharge the said loan, he had issued a cheque bearing No.279490 dated 28.08.2007 for

Rs.50,000/- drawn on I.C.I.C.I. Bank Limited, Salem Branch, in favour of the appellant. The appellant presented the cheque [Ex.P.1] for encashment through I.C.I.C.I. Bank, Salem Branch, but the same was returned on 29.08.2007 as unpaid for the reason of "insufficient funds". The said Return Memo has been marked as Ex.P.2. Thereafter, on 03.09.2007, the appellant issued a statutory notice [Ex.P.3], in which, he demanded the respondent to pay the cheque amount within 15 days. On 20.09.2007, the said notice was returned to the appellant for the reason of "unclaimed" and the same was marked as Ex.P.4. Thus, the appellant lodged a private complaint before the learned Judicial Magistrate No.III, Salem, praying to punish the respondent for the offence under Section 138 of the Negotiable Instruments Act, 1881.

2.2. After taking cognizance in the Trial Court, summons were issued to the respondent for his appearance. On appearance the copies of the documents relied on by the appellant were furnished and after giving sufficient time, the respondent was questioned with regard to the allegation levelled by the appellant, for which, the respondent denied the offence and pleaded as not guilty. So for proving the guilt of the respondent, the appellant had himself examined as P.W.1, besides 4 documents were exhibited as P.1 to P.4. After concluding the trial, the learned Judicial Magistrate No.III, Salem, convicted the accused and sentenced him to undergo six months simple imprisonment with a fine of Rs.1,000/-, in default to undergo one month simple imprisonment. As against the said conviction, the respondent filed the Criminal Appeal [Crl.A.No.73 of 2009] before the learned Additional District and Sessions Judge [Fast Track Court No.II], Salem.

2.3. After elaborate enquiry, on 08.02.2010, the learned Additional District and Sessions Judge [Fast Track Court No.II], Salem, allowed the appeal and set aside the order of conviction. Against which, now the appellant being the complainant in the Trial Court approached this Court for setting aside the judgment passed by the learned Additional District and Sessions Judge [Fast Track Court No.II], Salem and for restoring the order of conviction [STC.No.2234 of 2007] passed by the learned Judicial Magistrate No.III, Salem dated 08.07.2009.

3. Heard Mr.B.Kumarasamy, learned counsel appearing for the appellant and Mr.P.Murugan, learned counsel appearing for the respondent. I have perused the grounds of appeal and also the judgments rendered by the Courts below.

4. The first and foremost contention raised by the learned counsel appearing for the appellant is that in the complaint filed before the learned Judicial Magistrate No.III,

Salem, the address of the respondent was mentioned as "Rajavel, age 25, S/o.Sarveswaran, 44/158, Palaniappa Nagar, Suramangalam Main Road (Vani Mahal Backside), Salem - 636 005". Further, he would submit that before filing the complaint, the statutory notice [Ex.P.3] had also issued to the same address. So, it would be served on the respondent but purposely he evaded to receive the notice.

5. On the other hand, the learned counsel appearing for the respondent would submit that the statutory notice [Ex.P.3] sent by the appellant was returned by mentioning the reason as "not claimed". Further, in the complaint as well as in the evidence given by P.W.1 there is no specific allegation as the respondent evaded to receive the notice. So, without any specific allegation, this Court cannot came to the conclusion that the notice sent to the respondent is deemed to be served on that address. In this regard, the learned counsel relied on the judgment of this Court in NAGASUBRAMANIAN vs. M/s.HOPE KNITTING HOME reported in 2004 [2] MWN [Cr] DCC 15 wherein, it has observed as follows:

> "17.Thus the general burden is upon the Complainant to prove the facts constituting the sending of notice and that there is deliberate evasion of service of notice by the Accused. In the instant case, absolutely no averments are made either in the complaint or in the evidence of P.W.1 / Complainant herein that there was deliberate evasion of A.1 and A.2 to receive the notice. Considering the facts of the present case, it is not an appropriate case to raise the presumption of "Deemed Service" against A.1 and A.2."

6. The learned counsel appearing for the respondent would submit that the First Appellate Court has also followed the principle laid down in the judgment stated supra and thereafter, allowed the appeal. Therefore, interference is not necessary in the judgment rendered by the First Appellate Court and hence, he prayed for dismissal of the appeal.

7. Now, on going through the return cover [Ex.P.4], it is true that the statutory notice [Ex.P.3] was issued to the respondent for the address mentioned in the complaint. In this case, after receiving the summons, which were issued to the address mentioned in the returned cover [Ex.P.4], the respondent appeared before the Court. No doubt, the attitude of the respondent shows that he purposely evaded to receive the summons. Reliance is placed in the judgment of C.C.ALAVI HAJI

vs. PALAPETTY MUHAMMED & ANOTHER reported in 2007 (2) MLJ (Crl.) 248 SC in which our Honourable Apex Court has held as follows:

> "17...............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 Bhaskarans 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."

8. Now, applying the said principle with the case in our hand also, a statutory notice had been issued to the respondent for the address mentioned in the complaint and the same was returned as "unclaimed". On the other hand, the summons sent to the respondent from the Magistrate Court was received by the very same respondent, which shows that the respondent purposely evaded to receive the statutory notice. That evasion raises the presumption that the notice has been issued upon the respondent. So, the first point taken on consideration by the appellate court for setting aside the conviction is nothing but erroneous one.

9. However, on going through the records of the trial court, it seems that during the time of giving evidence as well as in the compliant, the appellant has not been stated about the date of presentation of the cheque. Moreover, in the cross-examination, he specifically stated that at the time of giving loan, the cheque pertaining to this case alone received from the respondent. In this regard, on the side of the respondent it was stated that the present cheque has been issued as a security to the loan availed by the brother of the respondent.

10. Now, on going through the pleadings in the complaint, it was mentioned that only after a demand, the cheque has been issued by the respondent for discharging the loan availed already. On the other hand, he had stated in the cross-

examination that only after receiving the cheque, he had given the loan amount. Furthermore, on going through the proof affidavit filed by the appellant [P.W.1] in paragraph No.1, he stated as follows:

> "1) I submit that the accused had borrowed a sum of Rs.50,000/- (Rupees fifty thousand only) from me for his urgent family expenses on 23.05.2007 and promised to repay it after three months. But as promised the accused did not repay the sum, and so when the accused was pressed for payment of the said sum by me, subsequently the accused had issued the following Cheque dated 28.08.2007 with an intention to discharge the said liability may kindly be marked as Exhibit P.1."

11. So, with regard to the debt availed by the respondent, P.W.1 gave 3 evidences in the Trial Court. It shows that the evidence given by the P.W.1 is not a convincing one. Accordingly, in the Trial Court, the liability of the respondent had not been proved on placing the sufficient material.

12. In the light of the above discussion, the Criminal Appeal is dismissed and the judgment of acquittal dated 08.02.2010 passed by the learned Additional District and Sessions Judge [Fast Track Court No.II], Salem, in Crl.A.No.73 of 2009 is hereby confirmed.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

sri

To

1.The Additional District and Sessions Judge
[Fast Track Court No.II],
Salem.

2.The Judicial Magistrate No.III,
Salem.

3.The Section Officer,
Criminal Section,
Madras High Court,
Chennai.

+1cc to Mr.P.MURUGAN, Advocate, S.R.No. 47377

Judgment in
Crl.A.No.42 of 2011

SSV(CO)
TR(31/07/2018)