

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.08.2018

CORAM

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

Crl.O.P.No.29470 of 2015
and MP.No.1 of 2015

S.Karthiyayenee

...Petitioner/Accused

Vs.

P.K.Velusamy

...Respondent/Complainant

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the records in S.T.C.No.26 of 2015, on the file of the Judicial Magistrate No-I, Erode and quash the same.

For Petitioner :M/s.C.Sriranjani
For Respondent :Mr.T.Balaji

O R D E R

This petition has been filed by the accused to quash the proceedings in S.T.C.No.26 of 2015 on the file of the Judicial Magistrate No-I, Erode.

2. The learned counsel for the petitioner has submitted that the respondent herein has filed a complaint stating that the petitioner herein has to be punished under Section 138 of the Negotiable Instruments Act. She further submitted that in the complaint itself the respondent has stated that the statutory notice which was sent to the petitioner herein, returned unserved and in such a case, there is no cause of action for filing complaint under Section 138 of the Negotiable Instruments Act. In support of her contention, she relied upon the decision of this Court in Harish C.Chadda and another Vs. Xs Financial Services Limited dated 09.01.2001, wherein this Court has held that for filing complaint under Section 138 of the Negotiable Instruments Act, the condition precedent is that statutory notice should have been served on the accused.

3. The learned counsel for the respondent, on the contrary, contended that the notice was sent to the petitioner herein to the correct address and the same was returned as 'addressee left'. He further submitted that even though the petitioner was working in the same company, she has purposely refused to receive the said notice and returned the same. He further submitted that in view of Section 27 of the

General Clauses Act, a presumption has to be drawn that notice has been duly served on the petitioner herein and therefore, he prayed to dismiss the above petition.

4. In Harish C.Chadda and another Vs. Xs Financial Services Limited (Supra) a private complaint was filed under Section 138 of the Negotiable Instruments Act against the company and its directors. The accused Nos.5 and 8 had filed petition under Section 482 of Cr.P.C., to quash the proceedings against them on the ground, no notices were issued or served on them. Taking into consideration notice was not at all issued to the accused Nos.5 and 8, this Court has quashed the proceedings against them. But in this case statutory notice was sent but it was returned as addressee left. Under the said circumstances the aforesaid decision will not apply to the facts of this case.

5. At this juncture, it would be relevant to refer to the decision of the Hon'ble Supreme Court in C.C.Alavi Haji Vs. Palapetty Muhammed & Anr (2007) 2 MLJ(Criminal) 248 SCC, wherein the matter was referred to the three Judges Bench to decide the question of service of notice in terms of Clause (b) of the proviso to Section 138 of the Negotiable Instruments Act, 1881 (in short The Act). In that case, the Hon'ble Supreme Court in paragraph Nos.10 to 17 has observed as follows:-

'10. It is, thus, trite to say that where the payee dispatches the notice by registered post with correct address of the drawer of the cheque, the principle incorporated in Section 27 of the G.C. Act would be attracted; the requirement of Clause

(b) of proviso to Section 138 of the Act stands complied with and cause of action to file a complaint arises on the expiry of the period prescribed in Clause(c) of the said proviso for payment by the drawer of the cheque. Nevertheless, it would be without prejudice to the right of the drawer to show that he had no knowledge that the notice was brought to his address.

11. However, the Referring Bench was of the view that this Court in Vinod Shivappas case (Supra) did not take note of Section 114 of Evidence Act in its proper perspective. It felt that the presumption under Section 114 of the Evidence Act being a rebuttable presumption, the complaint should contain necessary averments to raise the presumption of service of notice; that it was not sufficient for a complainant to state that a notice was sent by registered post and that the notice was returned with the endorsement out of station; and that there should be a further averment that the addressee-drawer had

deliberately avoided receiving the notice or that the addressee had knowledge of the notice, for raising a presumption under Section 114 of Evidence Act.

12. Therefore, the moot question requiring consideration is in regard to the implication of Section 114 of the Indian Evidence Act, 1872 insofar as the service of notice under the said proviso is concerned. Section 114 of the Indian Evidence Act, 1872 reads as follows:

Section 114- Court may presume existence of certain facts- The Court may presume the existence of any fact which it thinks likely to have happened. Regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case. Illustrations The Court may presume.

(f) That the common course of business has been followed in particular cases;

13. According to Section 114 of the Act, read with illustration

(f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the Court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 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 G.C. Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Act is extracted below:

'''27. Meaning of service by post.-

Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the

expression serve or either of the expressions give or send or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

14. Section 27 gives rise to a presumption that service of notice has been effected 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. This 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. [Vide Jagdish Singh Vs. Natthu Singh; State of M.P. Vs. Hiralal & Ors. And V. Raja Kumari Vs. P. Subbarama Naidu & Anr.] It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the 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.

15. Insofar as the question of disclosure of necessary particulars with regard to the issue of notice in terms of proviso (b) of Section 138 of the Act, in order to enable the Court to draw presumption or inference either under Section 27 of the G.C. Act or Section 114 of the Evidence Act, is concerned, there is no material difference between the two provisions. In our opinion, therefore, when the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with. It is needless to emphasize that the complaint must contain basic facts regarding the mode and manner of the issuance of

notice to the drawer of the cheque. It is well settled that at the time of taking cognizance of the complaint under Section 138 of the Act, the Court is required to be prima facie satisfied that a case under the said Section is made out and the aforementioned mandatory statutory procedural requirements have been complied with. It is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect. In our opinion, this interpretation of the provision would effectuate the object and purpose for which proviso to Section 138 was enacted, namely, to avoid unnecessary hardship to an honest drawer of a cheque and to provide him an opportunity to make amends.

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 © 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 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 born 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 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."

6. As per the aforesaid decision of the Hon'ble Supreme Court, once a notice was sent through registered post by mentioning the correct address, in view of the Section 27 of General Clauses Act, it has to be presumed that the notice has been served or that the addressee is deemed to have knowledge of the notice. It is for the addressee to prove that he had no knowledge of about the notice. Further, it is also clear that 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 along with a copy of the complaint and therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons, cannot obviously contend that there was no proper services of notice as required under Section 138 of the Negotiable Instruments Act, by ignoring statutory presumption to the contrary under Section 27 of the General Clauses Act and Section 114 of the Evidence Act.

7. The learned counsel for the petitioner further contended that the respondent has not produced any document to show that the petitioner has borrowed money. The said fact is to be decided only after taking evidence before the trial Court. It is open to the petitioner to rebut presumption which arises, under Section 139 of the Act. Therefore, this petition is liable to be dismissed. Accordingly, this petition is

8. The learned counsel for the petitioner submitted that the petitioner is residing at Chennai and she is a lady and it is very difficult for her to go to Erode for each and every hearing and appear before the trial Court and hence she requests to dispense with the personal appearance of the petitioner before the trial Court.

9. Considering the said request, the personal appearance of the petitioner before the trial Court is dispensed with. The petitioner shall appear before the trial Court as and when required by the trial Court. Considering the fact that the case was originally filed in the year 2009, the trial Court is directed to expedite the trial and dispose of the case as early as possible preferably within a period of six months from the date of receipt of copy of this order. Consequently, connected miscellaneous petition is closed. .

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

msrm

To

1. The Judicial Magistrate No.1,
Erode.

2.The Public Prosecutor,
High Court, Madras.

+lcc to M/s.C.Sriranjani, Advocate Sr.No.57835

+lcc to Mr.A.Thiyagarajan, Advocate Sr.No.57349

VGII(CO)

sm:24.10.2018

Cr1.O.P.No.29470 of 2015
and MP.No.1 of 2015

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