

HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

Criminal Appeal No.834 of 2006

JUDGMENT:

The challenge in this Criminal Appeal at the instance of complainant, is the judgment dated 22.06.2005 in S.T.C.No.127 of 2004 on the file of Judicial Magistrate of First Class, Puttur, wherein the learned Magistrate dismissed the complaint and acquitted the accused.

2) The parties in this appeal are referred as they were arrayed before the Trial Court.

3) The factual matrix of the case which led to file the appeal can be stated thus:

a) The accused borrowed a sum of Rs.1,50,000/- on 01.02.2004 from the complainant for his urgent necessities and executed Ex.P1—pronote in favour of the complainant agreeing to repay the pronote debt amount with interest at the rate of 24% p.a. The accused issued Ex.P2—cheque drawn on State Bank of Hyderabad, SVIMS Extension counter, for a sum of Rs.1,25,000/- on 05.06.2004 towards part payment of pronote debt. When the complainant presented the said cheque in Indian Overseas Bank, Narayanavanam on 07.06.2004, the same was dishonoured on 19.06.2004 due to “*insufficient funds*”. Therefore, the complainant issued legal notice dated 21.06.2004 under Ex.P6 but the same was returned with postal acknowledgement “*addressee is continuously absent, hence sent to sender*”.

Hence, the complaint.

b) The learned Magistrate took cognizance of the complaint against the accused for the offence under Section 138 r/w 142 of Negotiable Instruments Act, 1881 (for short “N.I Act”) and registered the case as S.T.C.No.127 of 2004.

c) During trial, PWs.1 and 2 were examined and Exs.P1 to P7 were marked on behalf of complainant. DW1 was examined on behalf of accused.

d) The Trial Court having regard to the evidence on record held that there was no material alteration with regard to date in Ex.P1—pronote as alleged and Ex.P2—cheque was issued by the accused to discharge the legally enforceable debt. However, the Trial Court dismissed the complaint on the ground that complainant could not prove issuance of statutory notice under Section 138(b) of N.I. Act and therefore, complaint was not maintainable and accordingly, acquitted the accused.

Hence, the instant appeal by the complainant.

4) Heard arguments of Sri Mastan Naidu Cherukuri, learned counsel for appellant/complainant. Though notice to 1st respondent/accused was served but there is no representation on his behalf.

5) The point for determination in this appeal is:

“Whether the judgment of the Trial Court is factually and legally sustainable?”

6) **POINT**: As observed supra, the sole ground on which the Trial Court dismissed the complaint is that the complainant failed to establish that he issued statutory notice under Section 138(b) of N.I. Act to the accused and therefore, the complaint was not maintainable. The Trial Court observed that mere non-denial of accused that he was not present for 7 days itself does not mean that the notice was sent to him and the complainant has to prove that the accused was present at the same address and managed the postal authorities to get the endorsement that “addressee was continuously absent for 7 days and hence returned to sender”. Therefore, this appeal is confined to the above finding of the Trial Court.

7) Severely fulminating the judgment of the Trial Court, learned counsel for appellant would argue that in this case the address mentioned in Ex.P.7—returned registered postal cover, the address mentioned in the complaint as well as address mentioned in the summons sent to the accused, is one and the same. The accused, who is working as an employee in TTD and residing at Avilala village & Post, received the Court summons and appeared and contested the criminal case. Whereas Ex.P.7—notice was returned with the endorsement “addressee is continuously absent for 7 days, hence returned to the sender”. Therefore, it is evident that though accused was a resident of the same address since long, managed to see that the notice cover was not served on him and returned to the complainant. In those circumstances, having regard to the fact that the summons sent to the same address was received by the

accused, the Trial Court ought to have drawn a presumption that Ex.P.7—notice was duly served on him. On the other hand, the Trial Court on a misconception of facts and law, held as if mere non-denial of the accused that he was not present for 7 days, by itself does not mean that notice was served on him. Learned counsel strenuously argued that when the complainant is able to establish that the statutory notice under Section 138(b) of N.I. Act was sent to the correct address of the accused, a presumption can be drawn that the notice has been received by the accused inspite of the fact that it was not actually received by him. To buttress his contention, he relied upon the following decisions:

- (i) *C.C.Alavi Haji v. Palapetty Muhammed and another*¹
- (ii) *Indo Automobiles v. Jai Durga Enterprises and others*²
- (iii) *N. Parameswaran Unni v. G. Kannan and another*³

8) On perusal of the record, I find force in the argument of learned counsel for appellant. The address of the accused mentioned in Ex.P.6—copy of the notice, Ex.P.7—returned postal cover and the complaint, is one and the same. In all these documents, the particulars of the accused i.e, name of the accused, his designation as employee in TTD and his residence at Avilala Village & Post, Tirupati Rural Mandal, etc., are mentioned. Admittedly, the accused received the Court summons and appeared and contested the criminal case. It thus manifests that the address mentioned in all the aforesaid documents including Ex.P.7 was

¹ (2007) 6 Supreme Court Cases 555

² (2008) 8 Supreme Court Cases 529

³ (2017) 5 Supreme Court Cases 737

the correct address of the accused, as otherwise, there was no possibility for the accused to respond to the Court summons sent to him on the same address in criminal case and attend and contest the matter. Hence the complainant could establish that the statutory notice under Section 138(b) of N.I Act was sent to the accused to the correct address. From this fact, service of the notice to the accused can be presumed under Section 27 of General Clauses Act, 1897. The said Section reads thus:

“Section 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.”

As per the above Section, service of notice can be presumed in respect of a letter containing a document which was addressed prepaid and posted by registered post. In the instant case, all the requirements are established. As already noted supra, the correct address of the accused is a proven fact. Ex.P.7—returned postal cover contains statutory notice sent to the accused by registered post by prepaying the requisite postal stamps. Hence the complainant has complied with all the requisites under Section 27 of the General Clauses Act and thereby the presumption under Section 27 comes into operation. It is true that the presumption is a rebuttable presumption in view of the clause “unless the contrary is

proved” employed in Section 27 but it must be noted, the accused has not effectively rebutted the presumption. Neither in the cross-examination of PW.1 nor in chief of DW.1 any specific suggestion was given to the effect that the accused was not residing in the address mentioned in Exs.P.6 and P.7. Hon’ble Apex Court has rendered the following judgments on the presumption of service of notice under Section 138(b) of N.I. Act in terms of Section 27 of General Clauses Act and Section 114 of Indian Evidence Act.

i) In *C.C.Alavi Haji*¹, the Full Bench of the Apex Court held thus:

“Para 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 GC 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.”

ii) Similar view was expressed in *Indo Automobiles*², as follows:

“Para 8: Admittedly, notice under Section 138(b) of the Negotiable Instruments Act was sent to the respondents through registered post and under a certificate of posting to the correct address of the respondents. The High Court had quashed proceedings on the ground that although notice through registered post and also under certificate of posting were sent by the appellant complainant to the respondents but because of the endorsement of the postal peon, the service could not be said to have been effected. In our view, the High Court was not justified in holding that service of notice could not be found to be valid.

Para 9: In K. Bhaskaran v. Sankaran Vaidhyan Balan [(1999) 7 SCC 510 : 1999 SCC (Cri) 1284] it has been held that the context of Section 138(b)

*of the Negotiable Instruments Act invites a liberal interpretation favouring the person who has the statutory obligation to give notice under the Act because he must be presumed to be the loser in the transaction, and provision itself has been made in his interest and if a strict interpretation is asked for that would give a handle to the trickster cheque drawer. It is also well settled that once notice has been sent by registered post with acknowledgment due **to a correct address** (emphasis supplied), it must be presumed that the service has been made effective.”*

iii) The same ratio has been reiterated by the Apex Court in ***N.Parameswaran Unni***³, wherein it was held thus:

“Para 11: A bare reading of Section 138 of the NI Act indicates that the purport of Section 138 is to prevent and punish the dishonest drawers of cheques who evade and avoid their liability. As explained in clause (b) of the proviso, the payee or the holder of the cheque in due course is necessarily required to serve a written notice on the drawer of the cheque within fifteen days from the date of intimation received from the bank about dishonour.

Para 12: It is explicitly made clear under clause (c) of Section 138 of the NI Act, that this gives an opportunity to a drawer of the cheque to make payment within fifteen days of receipt of such notice sent by the drawee. It is manifest that the object of providing clause (c) is to avoid unnecessary hardship. Even if the drawer has failed to make payment within fifteen days of receipt of such notice as provided under clause (c), the drawer shall be deemed to have committed an offence under the Act and thereafter the drawee would be competent to file complaint against the drawer by following the procedure prescribed under Section 142 of the Act.

Para 13: It is clear from Section 27 of the General Clauses Act, 1897 and Section 114 of the Evidence Act, 1872, that once notice is sent by registered post by correctly addressing to the drawer of the cheque, the service of notice is deemed to have been effected. Then requirements under proviso (b) of Section 138 stand complied, if notice is sent in the prescribed manner. However, the drawer is at liberty to rebut this presumption.”

Thus the Apex Court has pellucidly expounded the object of issuing notice under Section 138 of N.I Act and the circumstances when presumption of service of notice can be drawn inspite of the fact the notice was not physically served on the accused. The drawing of presumption arises when notice is sent by registered post to the correct address. When these facts are established, the presumption is a concomitant one. Applying the above precedential jurisprudence, it is clear that in the instant case service of notice on accused is a presumed fact, which was not rebutted by the accused. Hence the mandatory requirement under Section 138(b) of N.I. Act was amply complied. In that view, the finding of the Trial Court that the complainant could not serve the notice under Section 138 of N.I Act on accused is unsustainable. The decisions relied upon by the Trial Court are of no avail because of the ratio consistently propounded by the Apex Court as mentioned supra.

9) In the result, this Criminal Appeal is allowed and the judgment in S.T.C.No.127 of 2004 on the file of Judicial Magistrate of First Class, Puttur, is set aside and the accused is convicted for the offence under Section 138 of N.I Act and sentenced to pay a fine of Rs.1,50,000/- (Rupees one lakh fifty thousand only) within three(3) weeks from the date of this judgment, failing which, he shall undergo Simple Imprisonment for a period of three(3) months. On deposit of fine amount, the same shall be paid to the appellant/complainant as compensation under Section 357(3) Cr.P.C.

As a sequel, pending miscellaneous petitions, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 05.09.2018

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