

THE HON'BLE Dr.JUSTICE SHAMEEM AKTHER

CRIMINAL APPEAL No.486 OF 2011

JUDGMENT:

This Criminal Appeal, under Section 378(4) of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C."), is directed against the judgment, dated 20.12.2010, in Criminal Appeal No.244 of 2008 on the file of IV Additional Sessions Judge, East Godavari District at Kakinada, whereunder the first appellate Court acquitted the 2nd respondent-accused of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the Act').

2. Heard the submissions of Sri S.Srirama Chandra Murthy, the learned counsel appearing on behalf of the appellant-complainant, the learned Additional Public Prosecutor (Andhra Pradesh) representing the respondent-State and perused the record.

3. No representation for the 2nd respondent/accused. 1

4. Learned counsel for the appellant/complainant would contend that there is valid service of notice on the 2nd respondent/accused; that Ex.A.5-returned postal cover clearly demonstrates that number of times the Postman went to the address mentioned on Ex.A.5, but the 2nd respondent/accused was not present and ultimately he returned the postal cover with an endorsement that "the addressee left" and therefore, it amounts to valid service of notice; that the trial Court had rightly held that there was valid service on the 2nd respondent/accused under Section 138 of the Act; however, the first appellate Court

erroneously held that there was no valid service of notice on the 2nd respondent/accused and ultimately prayed to set aside the judgment passed by the trial Court and convict the 2nd respondent/accused.

5. The only point that falls for consideration in this appeal is whether there was valid service of notice on the 2nd respondent/accused?

6. Learned counsel for the appellant/complainant had relied on a decision reported in **K.Bhaskaran v. Sankaran Vaidhyan Balan and Another**¹, wherein at para 24 the Hon'ble Apex Court held as follows:

“No doubt Section 138 of the Act does not require that the notice should be given only by “post”. Nonetheless the principle incorporated in Section 27 (quoted above) can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice.”

In the above decision, it is held that when sender has despatched the notice by post with correct address written on it, then it can be deemed to have been served on the addressee, unless he proves that it was not really served.

7. In the instant case, admittedly, the notice was not received by the 2nd respondent/accused. In those days, the 2nd

¹ (1999) 7 Supreme Court Cases 510

respondent/accused said to be in camp, the notice sent was returned with an endorsement 'addressee left'. It is also appropriate to state that there was no constructive service of legal notice, which is mandatory, as contemplated under Section 138 of the Act. It is not a case that the 2nd respondent/accused refused the notice or in any other manner, he avoided the service of notice. When the notice was returned with an endorsement 'addressee left' to camp, it establishes that notice was not duly served.

8. While dealing with the same subject matter, the first appellate Court had elaborately dealt with whether there was a valid service of notice as contemplated under Section 138 of the Act or not and ultimately held that there was no valid service of notice. The findings of the first appellate Court are supported by evidence on record. There is no infirmity in the impugned judgment so as to modify the same. There is nothing to take a different view. The appeal is devoid of merit and is liable to be dismissed.

9. Accordingly, the appeal is dismissed confirming the Judgment, dated 20.12.2010, in CrI.A.No.244 of 2008, passed by the IV Additional Sessions Judge, East Godavari District, Kakinada.

Miscellaneous petitions pending, if any, in this Criminal Appeal shall stand closed.

Dr. JUSTICE SHAMEEM AKTHER

DECEMBER 13, 2018

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Date: 13.12.2018

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