

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 22.04.2019

Coram:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

Criminal Appeal No.202 of 2013

S.Sundaraj .. Appellant/Respondent/Complainant

/versus/

R.Neelakandan ... Respondent/Appellant/Accused

Prayer: Criminal Appeal has been filed under Section 378 of Criminal Procedure Code praying to set aside the order of acquittal dated 11.12.2012 made in C.A.No.158 of 2012 on the file of the Principal Sessions Judge, Erode reversing the judgment dated 31.07.2012 in S.T.C.No.262 of 2011 on the file of the Fast Track Court No.II (Magistrate Level), Erode.

For Appellant : Mr.M.Guruprasad

For Respondent : No appearance

J U D G M E N T

The appeal is directed against the judgment of the Lower Appellate Court in C.A.No.158 of 2012, which has reversed the judgment of the Trial Court in S.T.C.No.262 of 2011 on the file of the Fast Track Court No.II (Magistrate Level), Erode.

2. The subject matter of this appeal is in respect of a cheque, which was issued by the accused/respondent herein for a sum of Rs.5,00,000/- to discharge the debt borrowed by him. When the cheque was presented for collection, however, the same was returned for "insufficient funds". The complainant has issued a statutory notice to the accused/respondent, which was received by the wife of the accused. Since there was no reply or payment of the cheque amount within the period prescribed, a complaint was filed and taken cognizance by the learned Judicial Magistrate, Erode.

3. In the course of trial, the accused contested the case on the ground that the cheque was given as a security for the transaction between him and the complainant and there is no enforceable liability. Further, it was contended that the

statutory notice served on the wife of the accused is not an adequate service of notice as contemplated under Section 138 of Negotiable Instruments Act.

4. The Trial Court after considering the averments made by the complainant as well as the defence of the accused, the evidence of the complainant and the defence witnesses held that the cheque [Ex.P1] dated 23.08.2011 was signed by the accused and given to the complainant and the statutory notice [Ex.P3] has been received by the wife of the accused. The defence Exs.D1 to D4 do not indicate that the accused is not residing at the premises where the statutory notice was served. Further taking note of the fact that after notice from the Court, the accused has appeared before the Court and contested the matter which indicates he was aware of the criminal prosecution initiated against him. As far as the enforceable debt for which the cheque was given, the Trial Court has considered the fact that having admitted the genuineness of the cheque, the burden to discharge the presumption is on the accused. He has just contended that the cheques were given as a security for the discount purpose. However, there is no material evidence to probabalise that the cheque was not issued for legally enforceable debt and mere vague denial just to avoid the liability cannot be considered as rebuttal. Hence, the Trial Court found the accused guilty of offence under Section 138 of Negotiable Instruments Act convicted and sentenced him to undergo 1 year Simple Imprisonment and fine of Rs.5000/-; in default to undergo further sentence of 3 months Simple Imprisonment.

5. Aggrieved by that, the accused has preferred appeal before the learned Principal Sessions Judge, Erode. The learned Principal Sessions Judge, Erode while considering the appeal held that the cheque Ex.P1 was issued by the accused in favour of the complainant. The issuance of cheque to the complainant having been admitted by the accused, his contention that the cheque was obtained by force through henchmen rejected by the Lower Appellate Court and relying upon the judgment of Rangappa Vs. Sri Mohan reported in 2011(11) Supreme Court Cases 441, the Lower Appellate Court held that the complainant has disclosed legally enforceable debt. The accused has admitted his signature. Therefore, the statutory presumption comes into play and the same has not been rebutted by the accused. Mere denial of liability without any supportive evidence will not amount to discharge of burden of presumption. However, the Lower Appellate Court relying upon the judgment of the Hon'ble Supreme Court rendered in M.D.Thomas Vs. P.S.Jaleel and another reported in (2009) 14 Supreme Court Cases 398 had held that the statutory notice served on the wife of the accused is not a sufficient

service. While proviso to Section 138 of Negotiable Instruments Act specifies condition which requires to satisfy before taking cognizance of offence under Negotiable Instruments Act, the statutory notice should be served on the drawer of the cheque within a period of 30 days from the receipt of information by him from the bank regarding the return of the cheque as unpaid as per Clause (b) of the proviso to Section 138 of Negotiable Instruments Act, whereas in this case such notice was not served on the drawer of the cheque but was received by his wife and the accused through the defence exhibits and through his testimony has established that he was not residing in the said address at relevant point of time.

6. The learned counsel for the appellant would submit that the above findings of the Lower Appellate Court is perverse, illegal and contrary to Section 27 of the General Clause Act and that service of notice on any adult member of the family residing in the premises of the accused is sufficient service and no further proof is required. Further the learned counsel would also submit that the accused by producing different address of his residence has tried to mislead the Court to show as if he is not residing in the address in which the statutory notice was served. However, there is no proof let in by him to show that the wife, who received the statutory notice, was not living with him or the person who received the notice is not his wife. The Trial Court has rightly applied Section 27 of the General Clause Act. The Lower Appellate Court erred in allowing the appeal on the sole ground that the statutory notice has not served on the accused, though the Lower Appellate Court has accepted the cheque Ex.P1 was issued by the accused to discharge the enforceable debt.

7. This Court fully convinced with the submissions made by the learned counsel for the appellant. The service of notice on the drawer does not mean that it must be served on the drawer personally. A representative of the drawer or adult member of the family or any person who is presumed to be the representative of the drawer is a competent person to receive the statutory notice. Notice served on any of them is a complete service to the satisfaction of Clause(b) of the proviso to Section 138 of Negotiable Instruments Act. The pedantic interpretation given by the Lower Appellate Court is contrary to law. When statutes including General Clause Act has made clear that the service of notice on the adult member of the family is suffice and proper service, the contra view of the Lower Appellate Court is illegal.

8. The interpretation by the Lower Appellate Court is perverse, illegal and liable to be set aside. The conduct of the

accused is also relevant to pointed out at this juncture. He received Court notice and contested the complaint. As an after thought, he has taken a plea that the statutory notice was not served on him personally. The purpose of statutory notice as worded by Section 138 of Negotiable Instruments Act makes it very clear that before launching the criminal prosecution, the accused person should be put to notice that if he fails to pay the cheque amount within a period of 15 days he will be liable for prosecution. Till the expiry of that period, criminal prosecution cannot be filed. The complainant cannot be taken cognizance by the Magistrate. If at all he had any defence in this regard that gets extinguished the moment he contested the case on the ground that cheque was not issued for discharge of enforceable debt and the cheque was obtained by force through henchmen.

9. It is taken judicial notice that the accused/respondent herein, even at this stage has made all attempt to avoid receipt of the notice from this Court and the private notice sent by the counsel for the appellant as per the order of this Court. Taking advantage of change in door number, he has refused to receive the private notice sent by RPAD on 16.03.2019. Thereafter, this Court ordered paper publication and the same was also effected in one issue of Malaimurasu dated 13.04.2019 Kovai edition.

10. The Lower Appellate Court has miserably failed to take note of crucial fact that the statutory notice was served on the wife of the accused at Isha Apartments, Door No.B-6, Arulvelan Nagar, Thendral Street, Sulai, Erode-638 004. The accused having aggrieved by the judgment of conviction by the Trial Court has preferred appeal showing his address as Door No.10 B, Arulvelavan Nagar, Choolai, Erode. When Court notice as well as private notice sent to that address, the same was returned as "no such addressee". Thereafter, to the other address which was the last known residence of the accused which is RN.Pudur post, Suriyampalayam, a notice was sent by RPAD. Under the pretext that there is difference in door number, the respondent had refused to receive it. Refusing to receive the notice or hiding from receiving the notice would also tantamount to adequate service. Therefore, the reasoning given by the Lower Appellate Court is illegal and liable to be set aside.

11. Accordingly, the appeal is allowed. The the judgment of the lower appellate Court is set aside. The judgment of the trial Court in STC.No.262 of 2011 is restored. The period of sentence already undergone by the accused shall be set off. The accused/respondent is directed to surrender before the trial

Court to undergo the remaining period of sentence imposed by the trial Court.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Fast Track Court No.II (Magistrate Level), Erode.
- 2.The Principal Sessions Judge, Erode.

Copy To: The Section Officer,
Criminal Section, High Court, Madras.

CSL/26.06.2019

CrI.A.No. 202 of 2013



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