



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 11.11.2019

CORAM

THE HONOURABLE MR. JUSTICE B.PUGALENDHI

Crl.A(MD)No.47 of 2014

Premkumari .. Appellant/Respondent/Complainant

Vs.

V.Mehavannan .. Respondent/Appellant/Accused

PRAYER: Criminal Appeal filed under Section 378 of the Criminal Procedure Code as against the judgment of acquittal passed by the 1st Additional Sessions Court, Tuticorin, in C.A.No.61 of 2013 dated 10.10.2013, which reversed the judgment of Fast Track Court (Magistrate Level), Tuticorin in CC.No.30 of 2013 dated 04.07.2013 and set aside the same.

For Appellant : Mr.B.Rajesh Saravanan

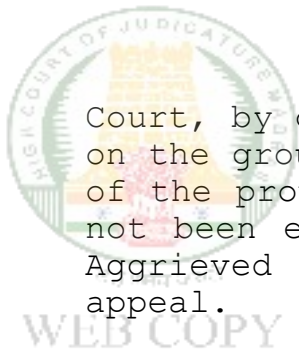
For Respondent : Mr.S.Sundarapandian

JUDGMENT

This appeal is filed by the complainant in C.C.No.30 of 2013, as against the order passed by the first appellate Court, namely, 1st Additional Sessions Court, Tuticorin, in C.A.No.61 of 2013, dated 10.10.2013.

2. The appellant / complainant has filed a private complaint as against the respondent / accused before the Fast Track Court (Magistrate Level), Tuticorin, for the offence under Section 138 of the Negotiable Instruments Act. The trial Court, in conclusion of trial, by order dated 04.07.2013 in C.C.No.30 of 2013, has found the respondent / accused guilty under Section 138 of the Negotiable Instruments Act, convicted and sentenced him to undergo simple imprisonment for one year and also directed to pay a sum of Rs.1,50,000/-, being the Cheque amount, as compensation to the complainant within one month, in default, to undergo simple imprisonment for one month.

3. As against the order of the trial Court, the respondent / accused preferred an appeal before the Principal Sessions Court and the same was taken on file by the learned 1st Additional Sessions Judge, Tuticorin, in C.A.No.61 of 2013 and the first appellate



Court, by order dated 10.10.2013, acquitted the respondent / accused on the ground that the statutory notice as required under Clause (b) of the proviso to Section 138 of the Negotiable Instruments Act has not been effected and thereby, acquitted the respondent / accused. Aggrieved over the same, the complainant has preferred the present appeal.

4. According to the appellant / complainant, the respondent / accused and her wife were known to her and they are family friends. They used to borrow money from the complainant for their business and for family purposes. On 06.09.2012, the accused borrowed a sum of Rs.1,50,000/-, by executing a promissory note, with a undertaking to repay the same with 12% interest per annum. In discharge of the said liability, the accused had also issued a Cheque, bearing No.471186, dated 26.11.2012 for Rs.1,50,000/-. When the said Cheque was presented for collection, the same was returned on 28.11.2012 with an endorsement 'insufficient funds'.

5. Therefore, the complainant has sent a statutory notice to the accused on 04.12.2012 and the same was returned with an endorsement 'left' and thereafter, another notice was sent to the official address of the accused and the same was also returned with an endorsement 'unclaimed'. After the completion of the statutory period, the complainant had lodged the private complaint before the Magistrate, under Section 138 of the Negotiable Instruments Act.

6. Before the trial Court, the complainant was examined as PW1 and seven documents were marked. On the side of the defence, a promissory note dated 06.09.2012 was marked. In conclusion of the trial, the trial Court found the respondent / accused guilty, convicted and sentenced him as stated supra. However, on appeal, the first appellate Court has reversed the finding of the trial court.

7. Heard Mr.B.Rajesh Saravanan, learned Counsel appearing for the appellant / complainant and Mr.S.Sundarapandian, learned Counsel appearing for the respondent / accused.

8. The learned Counsel for the complainant would submit that the accused was a family friend and he used to borrow money on several occasions and on 06.09.2012, he borrowed a sum of Rs.1,50,000/-. In discharge of the said liability, the accused has issued a Cheque [Ex.P1] in favour of the complainant on 26.11.2012. The Cheque, on presentation, was returned with an endorsement 'insufficient funds' [Ex.P2]. The complainant, thereafter, has taken out a notice to the accused to his residential address [Ex.P4], which was returned with an endorsement 'left'. The accused was a permanent employee of Tuticorin Thermal Power Station (TTPS), Tuticorin and therefore, the complainant has sent another notice to the official address of the accused [Ex.P5]. But, the same was also returned with an endorsement 'unclaimed'. Therefore, the complainant, after the statutory period, has filed the present



complaint.

9. According to the learned Counsel for the appellant, the complaint in this case was filed with both the residential and official address of the respondent / accused, to which, the statutory notices [Ex.P4 & P5] were issued. He would further submit that on receipt of summons from the trial Court, the respondent / accused had also appeared before the trial Court and contested the case. Therefore, the learned Counsel for the appellant would contend that the respondent / accused has purposefully evaded the service and as such, it is deemed to be of a service of notice.

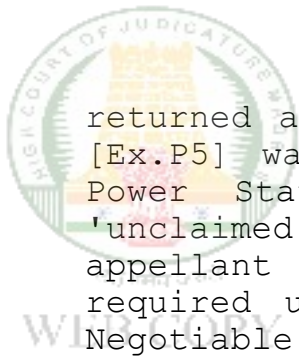
10. The learned Counsel for the appellant has also relied upon a decision reported in **2013 (1) DCC 344**, wherein, it has been held that if demand notice under Section 138 of Negotiable Instruments Act is sent through registered post on correct address of drawee, it shall be presumed to be served until proves contrary. Therefore, the learned Counsel prays for interference.

11. Per contra, the learned Counsel appearing for the respondent / accused, by referring to the decision of the Kerala High Court reported in **2010 (2) MWN (Crl.) DCC 53 (Kerala)**, has submitted that if statutory notices are returned with endorsement 'left house', then the complainant should have ascertained the correct address and should have made another notice to the correct address. Without sending such notice and without establishing that the accused managed to get postal endorsement mala fidely, the complainant cannot contend that there was service of notice.

12. The learned Counsel for the respondent / accused would also rely upon the decision reported in **2004 (2) MWN (Crl.) DCC 15 MDS**, wherein, this Court has discussed the issue as to whether the complainant can invoke presumption of 'Deemed service of notice' and has finally held that mere return of notice as intimated unclaimed by itself would not amount to constructive service of notice when it is not averred in the complaint that the accused evaded service of notice. Since, in the complaint, the appellant / complainant has not averred so, the learned Counsel prays for dismissal of this appeal.

13. Heard the learned Counsel appearing for the respective parties and also perused the records.

14. Admittedly, the accused in this case was working as a permanent employee in Tuticorin Thermal Power Station (TTPS), Tuticorin. In the complaint, the appellant / complainant has mentioned both the residential and official address of the respondent / accused and on receipt of summons from the trial Court, the respondent / accused has entered appearance and contested the case. The appellant / complainant has sent a statutory notice, dated 04.12.2012 [Ex.P4], to the residential address, which was



returned as 'left' and thereafter, another notice dated 17.12.2012 [Ex.P5] was sent to the official address, ie., Tuticorin Thermal Power Station (TTPS), Tuticorin, which was also returned as 'unclaimed'. Therefore, this Court is inclined to presume that the appellant / complainant has effected the statutory notice as required under Clause (b) of the proviso to Section 138 of the Negotiable Instruments Act.

15. Insofar as the plea raised by the respondent / accused as to the averment in the complaint that the accused has evaded the service of notice, the Hon'ble Supreme Court, in **C.C.Alavi Haji vs. Palapetty Muhammed and another**, reported in (2007) 6 SCC 555, has discussed the issue in detail and has held 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 GC 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 the 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 GC Act is a far stronger presumption. Further, while Section 114 of the Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of GC 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 expression '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 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. It is needless to emphasise 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 (c) 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 borne 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 GC 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 Bhaskaran's 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."

16. In view of the aforesaid decision of the Hon'ble Supreme Court and in view of the reasonings assigned supra, this Court is inclined to interfere with the judgment passed by the learned 1st Additional Sessions Judge, Tuticorin, in C.A.No.61 of 2013, dated 10.10.2013.

17. In fine,

- This Criminal Appeal is allowed.

- The impugned judgment passed by the learned 1st Additional Sessions Judge, Tuticorin, in C.A.No.61 of 2013, dated 10.10.2013, reversing the order of conviction passed by the learned Magistrate, Fast Track Court, Tuticorin, in C.C.No.30 of 2013, dated 04.07.2013, is set aside.

- The conviction and sentence imposed by the trial Court, namely, Fast Track Court (Magistrate Level), Tuticorin, in C.C.No.30 of 2013, dated 04.07.2013, are hereby restored and the trial Court is directed to secure the respondent / accused.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar(CS)

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To

1.The 1st Additional Sessions Court, Tuticorin.

2.The Judicial Magistrate, Fast Track Court,
(Magistrate Level), Tuticorin.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

4.The Section Officer, Criminal Section, (2 Copies)
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.B. RAJESH SARAVANAN, Advocate (SR-97624[F] dated 12/11/2019)

+1 CC to M/s.S. SUNDARAPANDIAN, Advocate (SR-97871[F] dated 13/11/2019)

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