



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 09.08.2019

Delivered on : 22.08.2019

CORAM:

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Crl.O.P. (MD) .No.11647 of 2014

and

M.P. (MD) Nos.1 and 2 of 2014

K.Manoharan

: Petitioner

Versus

Thiru.N.Kamatchi Reddiar

: Respondent

Prayer: Petition is filed under Section 482 of the Code of Criminal Procedure praying to call for the records relating to C.C.No.2247 of 2013 on the file of the learned Judicial Magistrate No.II, Sattur and quash the same.

For Petitioner : Mr.S.Natarajan

For Respondent : Mr.V.Sasikumar

O R D E R

The petitioner is the sole accused in C.C.No.2247 of 2013 on the file of the learned Judicial Magistrate No.II, Sattur, for an offence under Section 138 of the Negotiable Instruments Act, 1881. To quash the same, the present petition has been filed.

2. The case of the respondent/complainant is that the petitioner/accused, is his eldest son and he along with his wife are working in Chennai. The petitioner has received a sum of Rs.80,00,000/- [Rupees Eighty Lakhs only] in the month of May, 2012, for the purpose of purchasing a house in Chennai. In order to repay the above loan, he issued a cheque drawn on ICICI Bank, Sivakasi Branch, for a sum of Rs.80,00,000/- [Rupees Eighty Lakhs only] bearing No.960720. When the same was presented for encashment before the complainant's bank, it has been returned on the ground of 'Insufficient Funds'. Thereafter, the complainant sent a legal notice dated 14.05.2013 through speed post, calling upon the petitioner to pay the amount, the petitioner received the legal notice on 16.05.2013, but, he neither replied nor came forward to pay the amount. Hence, the complaint has been filed. The learned Judicial Magistrate has taken cognizance of the offence and also issued summons to the petitioner. Now, to quash the same, the present petition has been filed.



3. Mr.S.Natarajan, learned counsel appearing for the petitioner submitted that the petitioner is the eldest son of the complainant. He was residing at Door No.226/1A, Varshana Flats - F, Theru Veethi Amman Koil Street, Porur, Chennai-116 and he was working as a Project Manager in one Pranav Tele Ventures Private Limited, West CIT Nagar at Chennai, upto February, 2012. Thereafter, he discontinued his work. Before his marriage, he maintained an account in ICICI Bank Limited at Sivakasi Branch, and the said account was operated by his father/complainant. The disputed cheque book was received by the petitioner from the bank in the year 2008, and for his marriage and other expenses, some blank signed cheques were given to his father. After the marriage, in the year 2009, there was some dispute in his family and they are not in talking terms. Now, using one of the cheques, the complaint has been filed.

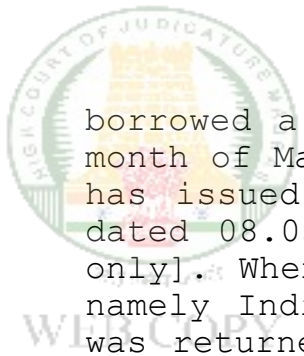
4. The learned counsel appearing for the petitioner mainly contended that, after the cheque being returned by the drawee bank, the complainant said to have issued a legal notice demanding payment. But, no such demand notice was sent to the petitioner, and the notice addressed to one L & T, Infotech, Poonamallee High Road, Chennai, under the care of his wife K.Sharmila Devi, where neither the petitioner nor his wife was working. That apart, on a perusal of the acknowledgement produced along with the complaint, it could be seen that no signature is found in the acknowledgement, and the petitioner did not receive the demand notice. Without sending the demand notice to the proper address of the petitioner, the complaint has been filed.

5. According to the learned counsel, issuing proper demand notice and communicating the same is one of the ingredients of the offence under Section 138 of the Negotiable Instruments Act, 1881 [hereinafter referred to as "the Act"]. In the absence of a proper service of demand notice to the petitioner, the complaint cannot be maintained. The learned counsel also produced the certified copy of the acknowledgement filed along with the complaint.

6. Per contra, Mr.V.Sasikumar, learned counsel appearing for the respondent/complainant contended that since the address of the petitioner was not disclosed to the complainant, notice has been sent to the address, where the petitioner's wife was working and the notice was also duly received by them. Despite receipt of notice, the petitioner did not come forward to pay the amount. Hence, the complaint has been filed. The other contentions raised by the petitioner can only be proved during trial and the complaint cannot be quashed on that ground.

7. I have considered the rival submissions and also perused the materials available on record carefully.

8. Father is the complainant, and son is the accused. The complaint has been filed on the ground that, the petitioner/accused



borrowed a sum of Rs.80,00,000/- [Rupees Eighty Lakhs only] in the month of May, 2012, and in order to repay the amount, the petitioner has issued a cheque drawn on ICICI Bank Limited, Sivakasi Branch, dated 08.05.2013 for a sum of Rs.80,00,000/- [Rupees Eighty Lakhs only]. When the cheque was presented before the complainant bank, namely Indian Bank, Sattur Branch, Virudhunagar District, the same was returned with the endorsement 'Insufficient Funds'. Thereafter, the complainant sent a legal notice dated 14.05.2013, through his counsel to the accused through speed post, calling upon the accused to pay the amount and the accused received the legal notice on 16.05.2013, but, he neither sent any reply nor came forward to pay the amount. Hence, the complaint has been filed.

9. Now, it is the case of the petitioner/accused that, he never borrowed any amount from the complainant. Before marriage, the complainant only maintained the petitioner's account at Sivakasi and the petitioner has given a signed cheque book for his personal expenses. After his marriage, there was a dispute between his family. Due to the same, now, he misused the cheque given by the petitioner, and the present complaint has been filed.

10. The primordial contention of the petitioner is that the alleged demand notice issued to the petitioner was not sent to his address. But, it has been sent to one L&T Infotech, Poonamallee High Road, Chennai under the care of his wife K.Sharmila Devi. Neither the petitioner nor his wife were working in L&T Infotech, where notice has been sent. The petitioner never received any notice, and in the acknowledgement for receipt of notice filed along with the complaint, no signature is found. Hence, in the absence of any valid demand notice, the offence under Section 138 of the Negotiable Instruments Act, 1881, will not complete. Hence, the present complaint itself is not maintainable.

11. The offence under Section 138 of the Negotiable Instruments Act, 1881, would complete only on satisfying the following ingredients:

- "(1) drawing of the cheque,**
- (2) presentation of the cheque to the bank,**
- (3) returning the cheque unpaid by the drawee bank,**
- (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount,**
- (5) failure of the drawer to make payment within 15 days of the receipt of the notice."**

12. To bring home an offence under Section 138, all the above ingredients are required to be proved, and one of the ingredients is, giving notice in writing to the drawer of the cheque demanding payment of the cheque amount. For constituting the offence, a notice should be sent to the accused, only on service of such notice and failure on the part of the accused to pay the



demanded amount, within a period of fifteen days thereafter, the offence will be completed.

13. The Hon'ble Supreme Court in **M/s.Rahul Builders v. M/s.Arihant Fertilizers & Chemical and another [2008(1) MWN (Cr.) DCC 160 (SC)]**, has held as follows:

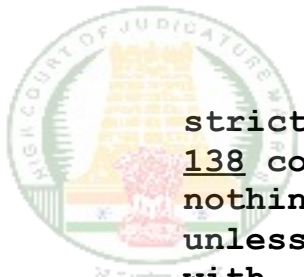
"10. Service of a notice, it is trite, is imperative in character for maintaining a complaint. It creates a legal fiction. Operation of Section 138 of the Act is limited by the proviso. When the proviso applies, the main Section would not. Unless a notice is served in conformity with Proviso (b) appended to Section 138 of the Act, the complaint petition would not be maintainable. The Parliament while enacting the said provision consciously imposed certain conditions. One of the conditions was service of a notice making demand of the payment of the amount of cheque as is evident from the use of the phraseology "payment of the said amount of money". Such a notice has to be issued within a period of 30 days from the date of receipt of information from the bank in regard to the return of the cheque as unpaid. The statute envisages application of the penal provisions. A penal provision should be construed strictly; the condition precedent wherefor is service of notice."

14. In another judgment reported in 2013(10) SCC 72 [**Nishant Aggarwal v. Kailash Kumar Sharma**], the Hon'ble Supreme Court has held as follows:

"22..... In this way, this Court concluded that issuance of notice would not by itself give rise to a cause of action but communication of the notice would. In other words, the Court clarified that only on the service of such notice and failure on the part of the accused to pay the demanded amount within a period of 15 days thereafter, the commission of an offence completes."

15. In **M/s.Sarav Investment & Financial Consultants Pvt. Ltd. & Another vs. Llyods Register of Shipping Indian Office Staff Provident Fund & Another [2007(2) MWN (Cr.) DCC 137 (SC)]**, the Hon'ble Supreme Court at Paragraph Nos.16 and 18, has observed as follows:

"16. Section 138 of the Act contains a penal provision. It is a special statute. It creates a vicarious liability. Even the burden of proof to some extent is on the accused. Having regard to the purport of the said provision as also in view of the fact that it provides for a severe penalty, the provision warrants a



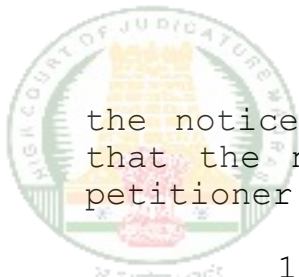
strict construction. Proviso appended to Section 138 contains a non-obstante clause. It provides that nothing contained in the main provision shall apply unless the requirements prescribed therein are complied with. Service of notice is one of the statutory requirements for initiation of a criminal proceeding. Such notice is required to be given within 30 days of the receipt of the information by the complainant from the bank regarding the cheque as unpaid. Clause (c) provides that the holder of the cheque must be given an opportunity to pay the amount in question within 15 days of the receipt of the said notice. Complaint Petition, thus, can be filed for commission of an offence by a drawee of a cheque only 15 days after service of the notice. What are the requirements of service of a notice is no longer res-integra in view of the recent decision of this Court in C.C. Alavi Haji Vs. Palapetty Muhammed & Anr. [JT 2007(7) SC 498].

18. The notice, was only required to be dispatched. Its contents were required to be communicated. Communication to the appellant about the fact of dishonouring of the cheques and calling upon him to pay the amount within 15 days is imperative in character. It is not a case, where, actual communication was not necessary. Service of notice is a part of cause of action for lodging the complaint."

16. In the instant case, from a perusal of the certified copy of the acknowledgement for receipt of the notice by the accused, it is seen that notice has been sent to the following address:

**"K.Manokaran,
C/o.Sharmila Devi,
L&T Infotech,
Poonamalli High Road,
Chennai."**

It is clear that notice was sent to the petitioner under the care of his wife Sharmila Devi, L&T Infotech, Poonamallee High Road, Chennai and a careful perusal of the acknowledgement also shows that there is no signature found in the acknowledgement for receipt of notice. But the complainant has simply stated in the complaint that notice has been sent to the address, where the petitioner's wife said to have been working, and notice has been received by them on 16.05.2013. Now, it is submitted that the petitioner's wife left the service of the above company from 25.01.2013. Be that as it may, now, it is an admitted fact that letter was not addressed to the petitioner's address, but, it was sent to the office, where the petitioner's wife Sharmila Devi was working. As already stated, even in the acknowledgement, no signature is found for receipt of

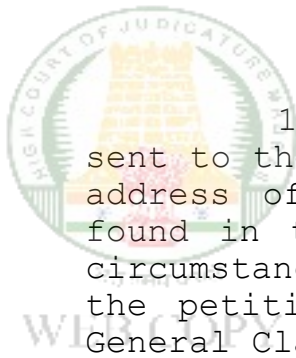


the notice. In the above circumstances, this Court is of the view that the notice has not been sent to the correct address of the petitioner and notice was also not served on him properly.

17. The learned counsel appearing for the respondent contended that as the notice has been sent to the petitioner's address, there is a presumption under Section 27 of the General Clauses Act, 1897, that the service deemed to be effected on the accused. The learned counsel also relied upon the judgment of the Hon'ble Supreme Court in **C.C.Alavi Haji vs. Palapetty Muhammed & Anr reported in JT 2007(7) SC 498.**

18. It is true that there is a presumption under Section 27 of the General Clauses Act, 1897, that if the notice is sent by a registered post to the correct address of the drawer and as such, the requirement of issuance of notice stands complied with. Then, it is for the drawer to rebut the presumption regarding the service of notice. The Hon'ble Supreme Court in the above referred case [**C.C.Alavi Haji's case**], has held as follows:

"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 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....."



19. But, in the instant case, admittedly, notice was not sent to the petitioner's address. Notice was addressed to the office address of the petitioner's wife and there is also no signature found in the acknowledgement for receipt of notice. In the above circumstances, since notice was not sent to the correct address of the petitioner/accused, the presumption under Section 27 of the General Clauses Act, 1897, will not come into play.

20. In view of the foregoing reasons, I am of the considered view that the mandatory demand notice was not served on the petitioner/accused, as such, the offence under Section 138 of the Negotiable Instruments Act, 1881, did not complete, and the complaint is also not maintainable. Hence, the complaint initiated against the petitioner in C.C.No.2247 of 2013 on the file of the learned Judicial Magistrate No.II, Sattur is liable to be quashed and accordingly, quashed.

21. In fine, the Criminal Original Petition stands allowed. Consequently, the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

// True Copy //

Sub Assistant Registrar(CS)

To

The Judicial Magistrate No.II,
Sattur.

+1 CC to Mr.S. NATARAJAN, Advocate SR-82928.

+1 CC to Mr.V. SASI KUMAR, Advocate SR-83283.

Order made in
CrI.O.P. (MD) .No.11647 of 2014

Delivered on:

22.08.2019

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