



Crl.R.C.No.401 of 2020
& Crl.M.P.No.3180 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on: 05.06.2023

Pronounced on: 15.06.2023

Coram:

THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

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1. M/s.Mookaiah & Sons,
Rep. by its Partner M.Ganesh,

2. M.Ganesh,
No.72, Pettayan Chatram,
Puducherry – 605 009.

... Petitioners/Appellants/Accused

/versus/

Gopalji Agarwal,
Rep by Power Agent,
Ramesh Babu,
No.63, Thattankulam Road,
Madhavaram,
Chennai – 600 060.

... Respondent/Accused/Complainant

Prayer: Criminal Revision Case has been filed under Section 397 & 401 of Cr.P.C., pleaded to set aside the judgment of the Learned XVIII Additional Sessions Judge, Chennai, dated 31.10.2019 in C.A.No.123 of 2019 confirming the judgment dated 28.02.2019 passed by the Learned Metropolitan Magistrate (Fast Track Court-IV), George Town, Chennai, in C.C.No.2383 of 2016.



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For Petitioners : Ms.L.Lakshmi Swaroopa

For Respondent : Mr.Siddharth Bahety

ORDER

This Criminal Revision Case is filed by M/s.Mookaiah & Sons (Accused No:1) and its partner M.Ganesh (Accused No:2) having lost their Criminal Appeal No.123 of 2019, preferred against the Trial Court judgment holding them guilty of offence under Section 138 of N.I Act and sentenced A-2 to undergo 10 months S.I and A-1 and A-2 jointly and severely pay fine of Rs.25 lakhs with 9% interest p.a as compensation to the complainant, from the date of dishonour of the cheque (08/04/2014) till the date of judgement in C.C.No.2383 of 2016 dated 28/02/2019, on the file of Metropolitan Magistrate, Fast Track Court No:IV, George Town, Chennai, within a month, in default A-2/M.Ganesh, to undergo 2 months S.I.

2. The complaint of Mr.Gopalji Agarwal represented by his Power Agent Mr.Ramesh Babu against the revision petitioners is that, M/s.Mookiah & Sons, Pondicherry a partnership firm through its partner borrowed Rs.25 lakhs from the complainant on 24/12/2012 for the business purpose and promised to



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repay it on demand along with 30% interest per annum. A pro-note was executed by M.Ganesh, Partner M/s.Mookaiah & Sons in favour of the complainant on the said date. The loan amount was transferred through bank into the account of the accused. After repeated demand to repay the loan, a cheque dated 04/04/2014, for Rs.25 lakhs from the account maintained in the name of the first accused firm at SBI, SME Branch, Pondicherry was issued in favour of the complainant. The said cheque on presentation returned with memo "Funds insufficient". The complainant caused notice dated 06/05/2014 to the Firm and the Partner calling upon to pay the cheque amount. They received the notice on 09/05/2014, but neither paid the cheque amount nor reply to the notice.

3. From the perusal of the records, it appears, on 26/06/2014, the written complaint presented before the VII, MM, George Town, Chennai on 26/06/2014. The complaint was returned to be filed along with condone delay petition. Then, the complaint filed along with condone delay of 2 days in preferring the complaint. The Learned Magistrate has condone the delay and taken the complaint on file assigning S.T.C.No.58/2015. Later for want of jurisdiction, the complaint was transferred to Pondicherry, the Union Territory in which the



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accused carrying on its business. The Judicial Magistrate-II, Pondicherry, took the complaint on file and assigned S.T.C.No:1420/2015. After the Hon'ble Supreme Court judgment clarifying its earlier judgement on jurisdiction, the complaint was returned to VII Metropolitan Magistrate, George Town, Chennai. The Learned Metropolitan Magistrate on 15/09/2016, after recording the sworn statement of the complainant took the complaint on file as C.C.No.2383 of 2016.

4. To prove the complaint, the Power Agent of the payee examined as P.W-1. The Power of Attorney deed dated 23/06/2014 executed by Gopalji Agrawal in favour of Ramesh Babu, the Pro-note dated 24/12/2012 executed by M.Ganesh Partner M/s.Mookiah & Sons for Rs.25,00,000/-, the Statement of Account maintained by the complainant, the Cheque bearing No: '046803' drawn in favour of the Gopalji Agrawal by the M.Ganesh on behalf of M/s Mookiah & Sons, the Return Memo of HSBC Bank, Chennai intimating the return of cheque for funds insufficiency and the legal notice dated 06/05/2014 with the postal department receipt dated 07/05/2014 and the acknowledgement card indicating the notices were served on 09/05/2014 were marked as Ex.P-1 to Ex.P-6 respectively.



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5. To disprove the complaint, the Second accused Mr.M.Ganesh had mounted the witness box and got examined as DW-1. No document filed on behalf of the accused.

6. Contending that, the complaint is not maintainable since the statutory notice was served on him or the firm as required under Section 138(b) of the N.I Act, the accused sought for dismissal of the complaint. In the cross examination when D.W-1 (M.Ganesh) was confronted with the postal acknowledgement cards marked as Ex.P-6, he denied the signatures and the seal affixed on it.

7. The Trial Court as well as the Lower Appellate Court rejected the case of the accused by holding that the Statutory Notice is duly served at the address of the accused on 09/05/2014. The error in the complaint that the Statutory Notice was served on 13/05/2014 is a typographic error. The entry in the postal acknowledgement card will prevail over the averment found in the complaint.



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8. The Learned Counsel for the revision petitioners submitted that the Courts below have erred in convicting the accused, despite the procedural and legal lapse in the complaint. The sworn statement of the complainant been recorded twice one by the Learned Judicial Magistrate II, Pondicherry and another by VII Metropolitan Magistrate, George Town, Chennai. This procedure is unheard and contrary to law. Further, the receipt of the Statutory Notice is emphatically denied by the accused. To maintain a complaint under Section 138 of N.I Act, the notice ought to be served only on the drawer of the cheque, the burden to prove the same is on the complainant. Whereas, in this case, the complainant had failed to prove that the notice was received by the accused. Service of notice to any other person other than the drawer of the cheque is not a proper service in the light of Section 138 (b) of the NI Act.

9. In support of his argument, the Learned Counsel for the Revision Petitioner strongly relied upon the judgment of the Hon'ble Supreme Court rendered in *M.D.Thomas –vs- P.S.Jaleel and another* reported in (2009) 14 SCC 398.



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10. Per contra, the Learned Counsel for the complainant/respondent submitted that the accused had not denied the signature in the pro-note Ex.P-2, the issuance of cheque Ex.P.4 or the signature in it. The fact that, it was returned for funds insufficient is established through the Bank Memo Ex.P.5.

11. Contra to the proven fact that the statutory notice (Ex.P.6) was delivered at the address of A-1 and A-2 on 09/05/2014 and the recipient had signed affixing the seal of the first accused firm.

12. The only defence of the accused/revision petitioner is that he did not receive it, therefore, the complaint is not maintainable. This submission is unsustainable since, receipt of notice by any person authorised or by any adult member in the address is sufficient. The signature and the seal of the first accused found on the postal acknowledgement card is proof of service on the person authorised to receive. Therefore, the finding of the Court below has to be confirmed.

13. Heard the Learned Counsel for the petitioners and the Learned Counsel for the respondent. Records perused.



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Section 138 (b) of Negotiable Instruments Act reads as under:-

138. Dishonour of cheque for insufficiency, etc., of funds in the account.—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to [two] years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless

(a)

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c)



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14. Plain reading of Section 138(b) extracted above indicates the payee or the holder in due course of the cheque, to make a demand for the payment of the cheque amount by giving a notice in writing, to the drawer of the cheque. The act not even mandates that, such notice should be through post. If notice is sent by post, the explanation under General Clauses for the term service of notice gets attracted.

15. The drawer may be a corporeal person or incorporeal person represented through a human agency. In such case, if the drawer of the cheque is a Company or partnership firm, notice should be served on the Company in writing as mandated under Section 138 (b) of N.I Act, 1881 and proof of that service can be only the acknowledgement of serving the notice on the representative of the Company is the Firm at the address of the Company. The purport of this Section is obvious. The drawer of the cheque must know that the cheque which has given for discharging debt, had returned for want of fund, which is an offence, liable for prosecution but same can be averted if the cheque amount is paid within 15 days from the receipt of the notice.



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16. The spirit and purpose of this Section by serving notice at the address of the drawer whether it is received by him personally or of his agent or any adult member in that address or even refuse to receive is a sufficient compliance of service. If one look at other laws like Civil Procedure Code and Code of Criminal Procedure which deals with service of summons. It is explicitly stated that, in case person to whom the summon is intended to serve not present, same may be served on any adult male member in the premises.

17. In this case, the first accused is a partnership firm, the seal of the 1st accused is affixed and a representative of the 1st accused have signed in the postal acknowledgement card. The notice sent to the 2nd accused same person in the said address had signed and fixed seal acknowledging the receipt of the notice. We find the seal of the firm in which he is the partner and the said firm is the drawer of the cheque. Therefore, on a non existing reason, the revision is filed. We see from record, the accused has borrowed Rs.25 lakhs and executed pro-note on the day of borrowing and to discharge the debt given the cheque Ex.P.4. He cannot escape the wrath of Section 138 of N.I Act, by giving a cheque to discharge



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the debt and take a hyper technical plea that the statutory notice not served on him personally but someone present in his Company had received. Therefore, notice received by its representative is not notice duly served on the drawer under Section 138 (b) of N.I Act.

18. The Three Judges Bench of Hon'ble Supreme Court in *Neerja Realtors Pvt Ltd -vs- Janglu (dead) through L.R* reported in *Manu/SC/0046/2018*, had observed:-

“36. It is for the Court to determine whether the service is good or bad. In determining whether the service is good or not, the attention of Courts is drawn to the necessity of strictly following the provisions of the Code of Civil Procedure as to the service of processes. Ordinarily, service should not be considered sufficient unless all the requirements of the law in that behalf are fulfilled. The object of the service is to inform a party of the proceedings in due time. When from the return of a serving officer it appears that there is no likelihood that a process will come to the knowledge of the party in due time, or a probability exists that it will not so come to his knowledge, the service should not be considered to be proper. The law contemplates that the primary method of service should be tendering or delivering a copy of the



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process to the party personally, in case in which it may be practicable to do so. It is the duty of the serving officer to make all proper efforts to find the party, with a view to effect personal service. If it be not possible after reasonable endeavour to find the party, then only the service may be made on an adult male member of the family residing with him.”

19. While dealing with Order V Rule 12 of C.P.C., the Hon'ble Supreme Court had observed that, in case, *the defendant refuses to accept the service are cannot be found and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, such affixture is deem to be a valid service.*

Section 27 of the General Clauses Act, reads as below:-

“27. Meaning of service by post.—*Where any [Central Act] or Regulation made after the commencement of this Act*



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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.”

20. As pointed out earlier, Section 138 (b) of N.I Act does not mandate the notice must be served through post. However, when sent through post, the meaning of service by post as defined in the General Clauses Act has to be considered and the proof of sending the notice to the address where the accused carrying on his business or normally resides is proof of posting. The affixture of signature in the acknowledgement card and seal of the addressee is sufficient proof of service of the notice on the addressee. It is not necessary that, such notice must be delivered only to the drawer. The receipt of the notice on behalf of the drawer by any adult member in the family or its representative is sufficient.

21. The accused who has admitted the execution of pro-note, liability and issuance of cheque and also delivery of the notice at his address has no



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defence to rebut the presumption. Therefore, the finding of the Courts below is perfectly correct both in law and facts. Hence, this ***Criminal Revision Case is dismissed.*** Consequently, connected Miscellaneous Petition is closed.

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Index :Yes.

Internet :Yes.

Neutral Citation :Yes/No.

Speaking order/Non-speaking order

bsm

To,

1. The XVIII Additional Sessions Judge, Chennai,

2. The Metropolitan Magistrate (Fast Track Court-IV), George Town, Chennai



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Dr.G.JAYACHANDRAN,J.
bsm

Pre-delivery order made in
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