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Chacko Vs. Joseph

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Court : Kerala

Decided On : Mar-27-2003

Reported in : III(2003)BC1; 2003(2)KLT1

Judge : R. Basant, J.

Acts : Negotiable Instruments Act, 1881 - Sections 138 and 139

Appeal No. : Crl. A. Nos. 430, 431 and 435 of 1995

Appellant : Chacko

Respondent : Joseph

Advocate for Def. : Siby Mathew,; Philip J. Vettickattu, Advs. and; M.A. Kha

Advocate for Pet/Ap. : T.R. Ramachandran Nair, Adv.

Disposition : Appeals allowed

Judgement :

R. Basant, J.

1. These appeals are taken up for disposal together as agreed by the rival contestants as the appellant and respondent in these appeals are common and the challenge raised is against a common judgment. The complainant is the appellant. He had alleged that the accused had committed the offence punishable

under Section 138 of the Negotiable Instruments Act in respect of three cheques for a total amount of Rs. 6,00,000. By the impugned judgment the accused was found not guilty and acquitted.

2. The complainant alleged that the accused had issued three cheques for a total amount of Rs. 6,00,000 to him for the due discharge of a legally enforceable debt/ liability. The complainant had advanced the said amount and for return of the same three post dated cheques dt. 1.6.1990, 15.6.1990 and 1.7.1990 were issued to the accused by the complainant. The said cheques when presented for encashment were dishonoured by the bank on the ground of insufficiency of funds. The information of dishonour was received by the complainant on the respective dates of dishonour. The complainant allegedly informed the accused of the fact of dishonour. Both of them are Professors in a college. The complainant caused registered notices of demand as insisted by law to be issued to the accused. The notices addressed to the residential address of the accused were not received and were returned to the accused. Even before the complainant actually received those notices back, by way of abundant caution, the complainant caused further notices to be issued to the accused at his official address. These were also evaded. All such attempts to effect service did not fructify. No payment was made by the accused. It is in these circumstances that the complainant came to court with three separate complaints.

3. Cognisance was taken by the learned Magistrate. The accused denied the offence alleged against him. Thereupon the complainant examined Pws. 1 to 4. PW. 1 is the complainant. PW. 2 is the manager of the drawee bank. PW. 3 is the Principalof the college and he is examined obviously for the purpose of showing that the accused who was present in college had not accepted the notices addressed to him at the college address. PW. 4 is the postman and he was examined for proving that the notices addressed to the accused at his correct address could not be served as the accused attempted to evade the same. Exts. P1 to P24 were marked.

4. The accused denied all circumstances which appeared in evidence and which were put to him. He conceded that the cheques in question were drawn on cheque

leaves issued to him by his bank to operate his account. He further conceded that all the three cheques do bear his signature. But according to him these cheques were not issued by him to the complainant. They were not issued for the discharge of any legally enforceable debt/liability. He took up the contention that he had kept blank signed cheque leaves at his place of work and such blank signed cheque leaves were found missing when he returned to work after a short gap of time due to illness. The obvious suggestion was that the complainant must have stealthily come into possession of the blank signed cheque leaves and was misutilising the same with mala fide motives. He contended that the complainant, though a college teacher, was indulging in business activities in timber to the detriment of his academic responsibilities. The accused had raised objections against the same and it was in these circumstances that the complainant was vexatiously prosecuting the accused.

5. The accused examined DWs.1 to 7 and proved Exts.D1 to D12. DWs. 1 to 6 are examined and Exts.D1 to D12 were marked with the intention of showing that the complainant had some business transactions in timber. DW.7 a watchman of the accused was examined to disprove the contention that the accused was evading the notice addressed to his residential address.

6. The learned Magistrate on an anxious consideration of the rival contentions came to the conclusion that the complainant has not succeeded in proving the ingredients of the offence under Section 138 of the Negotiable Instruments Act alleged against the accused. The specific finding was that the cheques are not proved to have been issued for the discharge of any legally enforceable debt/liability.

7. Before me the learned counsel for the appellant-complainant and respondent-accused have advanced detailed arguments. While the learned counsel for the appellant-complainant supports the other findings in the impugned common judgment and assails the finding that the cheques have not been proved to be ones issued for the discharge of any legally enforceable debt/liability, the learned counsel for the respondent-accused supports the finding on that aspect but assails the finding that the statutory time table has been followed satisfactorily by the

complainant.

8. The first question to be considered is whether the finding that the cheques have not been proved to be issued for the discharge of a legally enforceable debt/liability iscorrect or not. Exts.P1, P9 and P15 are the cheques in question. They are admittedly signed by the accused. Those cheques are admittedly written on cheque leaves issued to the accused by his bank to operate his account. We have the oral evidence of PW.1/ complainant about the circumstances under which the cheques found their way into his possession from the possession of the accused. The presumption under Section 139 of the Negotiable Instruments Act does also stare at the accused. It is by now trite that the burden is on the accused to rebut the presumption under Section 139 of the Negotiable Instruments Act.

9. As against these we have the version of the accused that he, a post graduate college teacher had kept his cheque book at his place of work after affixing his signature in blank cheque leaves at his place of work. He obviously attempts to suggest that during his absence the complainant must have stealthily removed those cheques and misutilised the same.

10. This disputed question of fact has now got to be resolved by the court. Section 3 of the Evidence Act, it has always been said, is the Bible of a court of facts. Section 3 defines the expression 'proved', 'disproved' and 'not proved'. A fact is said to be proved when a court on the basis of the materials available before it believes in the existence of such fact or considers its existence so probable that an ordinarily prudent person ought to act on the supposition that such fact exists. The court has to alertly consider all the relevant inputs. It has to draw on its reserves of knowledge of man and matters and the common and natural course of events and human behaviour. The court has no magic wand to ascertain truth. In India now, a Judge has to perform the duties which a Judge and a jury were expected to perform earlier. While resolving questions of fact the court has to adopt the yardstick of an ordinarily prudent person. That standard is read into and incorporated in the definition of the expression 'proved' in Section 3.

11. It is contended that the proceedings being criminal, absolute and fool proof standards have to be insisted. On the question of burden of proof there can be no

doubt. The primary burden in all criminal prosecutions rests on the shoulders of the complainant/ prosecutor to prove his case beyond reasonable doubt. To decide whether the burden has been discharged, the presumption under Section 139 has also got to be considered. That is only a rebuttable presumption of fact. The burden is on the accused to rebut the presumption. This burden is certainly not as heavy and onerous as the initial paramount burden on the prosecution. The case of the accused shall be tested/measured on the touch stone/with the yardstick of preponderance of possibilities and probabililies. This burden on the accused is akin to that of a litigant in a civil proceedings. He needs to prove his case only by the inferior test of preponderance of possibilities and probabilities as in a civil case. This does not of course mean that any and every fanciful defence, suggestion or theory will be purchased by a court. Certainly the accused, to succeed in his defence, must discharge the burden under Section 139 at least by the standards applicable in a civil proceedings.

12. I must immediately note that whether the proceedings be civil or criminal, the definition of the expression 'proved' in Section 3 must apply with equal force. Whether the proceedings be civil or criminal, the standard to be adopted is that of a reasonably prudent person and the question will be decided on the basis of possibilities and probabilities. A higher degree of probability is insisted in a criminal prosecution from the prosecutor. This does not mean that a criminal court need not assess possibilities and probabilities while considering the case of the complainant. It is true that a higher degree of probability must be insisted by the courts while considering the case of a complainant/prosecutor in acriminal prosecution. What is the theoretical basis for this insistence? If the definition of the expression 'proved' is common to both civil and criminal proceedings how is it that a criminal court is expected to insist on a higher degree of proof in a criminal prosecution alone. Of course we have a plethora of precedents - English as well as Indian, which reiterate that the golden thread that runs through the entire fabric of criminal law in this country is that the prosecutor must prove his case beyond reasonable doubt. This of course does not mean that the definition of the expression 'proved' in Section 3 is inapplicable to criminal prosecutions. Section 3 reads in the standards of a reasonably prudent person. The courts have to adopt his yardstick. The nature and extent of proof which a reasonably prudent person

would insist to come to conclusions would certainly depend on the purpose for which such conclusions are to be drawn. It is hence that the courts, as reasonably prudent persons, do insist on a higher degree of proof in criminal prosecutions. A successful criminal prosecution normally has the effect of depriving a person of his life and liberty. The gravity of the consequence impels and compels the courts and reasonably prudent persons to insist on higher degree of proof. Hence higher degree of proof is insisted when the consequences are graver. It is only in this respect that burden of proof in a criminal case and a civil case differ. Whether one calls it proof beyond shadow of a reasonable doubt, proof beyond reasonable doubt, proof beyond doubt or satisfactory proof, it all only boils down to the definition of the expression 'proved' in Section 3 of the Evidence Act. The precedents only administer a rule of caution that in a criminal case higher degree of probability must be insisted before disputed questions of fact are held to be proved. It is not a fetish. It is not imposition of impossible standards on a prosecution. The courts appear to have been fed on an incorrect diet that all acquittals are wholesome and welcome in the anxiety to eliminate one innocent person from the crowd of guilty men. The conviction of the guilty is as much the responsibility of the system as it must zealously ensure the acquittal of the innocent. Neither concern can be squandered at the altar of the other. I am persuaded to make these observations as I am shocked by the nature of the improbable and artificial pleas raised by the accused and the vehemence with which it is canvased before court that the said plea must be accepted.

13. The prosecution case must rest on its merit. The improbability of the defence is no reason to accept the case of the prosecution. As a general principle this can ofcourse be accepted. But when a court tries to appreciate evidence and has to choose between two versions, the totally unacceptable stand taken by the accused, more often that not, turns out to be a very vital and crucial input to decide whether the contra version of the prosecution can be accepted or not. This does not mean that when the prosecution case does not reveal an offence a conviction can be entered on the basis of the unacceptable defence set up by the accused. All that I intend to note is that the court has to be reasonable. The standards of an ordinarily prudent person must be zealously adhered to even in a criminal trial. Otherwise the language and decisions of the courts would become alien and

incapable of acceptance and digestion of even the reasonable men in the polity. That cannot be permitted to happen.

14. What is the defence raised by the accused in this case? How has he discharged the burden under Section 139 of the Negotiable Instruments Act? He wants the court to believe that he, a post graduate university teacher in a college, kept signed blank cheque leaves at his place of work where it was accessible to all and sundry and when he returned after a brief spell of illness the said cheques were found missing. There is not even semblance of an explanation offered for that conduct of his - of keeping signed blank cheques, which is quite improbable and, if I may say so, weird. While considering whether the burden under Section 139 has been discharged by the accused, no court can afford to ignore this totally improbable and artificial version set up by the accused.

15. What is the conduct of the accused after he allegedly realised that the blank signed cheque leaves kept by him were stealthily removed? He wants the court to believe that he meekly acquiesced to the situation without any response. He did not file a police complaint. He did not even instruct the bank to stop payment. In the wake of this improbable and artificial piece of conduct, the contention that the burden under Section 139 has been discharged deserves to be frowned upon.

16. The learned Magistrate appears to have sailed to the conclusion that the version of the complainant is discrepant, contradictory and unacceptable. There is incongruity between the averments in the complaint and evidence, it was observed. I am unable to find any such crucial incongruity or inconsistency which can persuade the court to hold that the burden on the accused under Section 139 has thereby been discharged. I have carefully gone through the notices of demand issued under Section 138, the complaints filed before court as also the evidence tendered by the complainant on oath. According to me it would be impermissible to construe the averments in the complaint and the statements in chief examination as stating that the complainant saw the accused write and sign the cheques in question. Read as a whole, the pleadings and the evidence can lead to only one conclusion and that is that the signed and written cheque leaves were handed over by the accused to the complainant. An attempt is made to place reliance on

the decision reported in Capital Syndicate v. Jameela (2003 (1) KLT 604) to contend that adverse inference must be drawn against the complainant for the reasonthat the entries in the cheque are not in the hand of the accused himself. That decision does not at all say that when the hand writing in the cheque either entirely or in part is not that of the accused, the presumption under Section 139 would stand discharged and the cheque can then be reckoned as one which is materially altered. The presumption under Section 139 of the Negotiable Instruments Act is definitely not limited to cheques written in the hand of the drawer only. A cheque issued by the accused filled up by some other is not by itself a cheque materially altered. The decision in 2003 (1) KLT 604 does not and cannot yield to such a conclusion. Depending of course upon circumstances, the presumption appears to be easy generally that the accused who handed over a blank cheque leaf duly signed to another, authorised such person to make the relevant entries. Admission of the signature by a literate person goes a long way in the proof of the document. A person is certainly bound to explain the circumstances under which he had affixed his signature in the document and especially so in a document like a negotiable instrument/cheque, that too by such an educated and knowledgable person like the accused.

17. I must also note that the defence urged by the accused is one which cannot be accepted unless compelling reasons are there. The purpose and object of enacting Section 138 of the Negotiable Instruments Act is to ensure credibility for transactions in cheque. A transaction in cheque must be as safe and sure as a transaction in cash. This evidently is the legislative intention. Section 138 of the Negotiable Instruments Act seeks to usher in a healthy commercial morality among the polity. Ensuring payment to the payee is not the only or even the primary purpose. Ensuring credibility for cheque transactions is the legislative goal. The defence that blank signed cheque leaves were kept by an account holder accessible to others is a defence which must inherently be frowned upon. If the commercial morality sought to be achieved under Section 138 of the Negotiable Instruments Act were to be achieved no account holder having cheque facility can be permitted to deal with such his cheque book casually, irresponsibly, playfully or frivolously. The law can safely assume that no person shall deal with his cheques in such manner. The burden would be very heavy and onerous on a

person who contends that he, contrary to the standards applicable to a reasonable person, dealt with his cheque book in such manner. The accused in this case has not succeeded in adducing any evidence to discharge this onerous burden on him.

18. The complainant had stated that he, a college professor, had no business dealings. DW. 1 to DW. 6 were examined and the defence exhibits were all marked in an attempt to disprove that assertion. That the witness has deviated from truth on an aspect unrelated to the facts in issue is certainly not a vital or crucial input. Even assuming that the complainant had not stuck to truth on this aspect, I find no crucial significance for that circumstance in the resolution of the controversy. The embarassment of a college teacher to admit that he carries on timber business either himself or through his relatives is understandable. That cannot certainly lead to rejection of his testimony in an omnibus manner.

19. Taking the totality of the circumstances into account I have no hesitation to conclude that the court below had erred grossly in coming to the conclusion that the cheques in question have not been proved to be ones issued for the discharge of a legally enforceable debt/liability. The challenge on this aspect in these circumstances succeeds. Appellate interference is called for.

20. The learned counsel for the respondent-accused then contends that the statutory time table has not been followed by the complainant. Separate consideration of the facts in each appeal becomes necessary on this aspect.

21. So far as Crl. A. 430 of 1995 is concerned which arises from S.T. 146 of 1991, no serious objection is raised in this aspect. The cheque is dated 1.6.1990. The cheque was presented and dishonoured on 22.10.1990. The complainant admittedly had information of such dishonour oh 22.10.1990 itself. Though in his evidence the complainant contended that after receipt of the intimation of dishonour he informed the accused of such dishonour in all the 3 cases, that cannot be construed as a notice in writing demanding payment contemplated under Section 138 of the Negotiable Instruments Act. No one has a case that a demand in writing to pay the cheque amount was made by the complainant or received by the accused. But that alleged conduct clearly shows that the complainant had knowledge of the dishonour of the cheques on the date of such

dishonour itself. This is the case in respect of all the three cheques. The complainant did know of the dishonour on the respective dates of dishonour, it can thus be safely concluded. That alleged intimation of dishonour, even if accepted, does not admittedly amount to a demand for the cheque amount as insisted by Section 138 of the Negotiable Instruments Act.

22. Coming back to the first cheque concerned in Crl.A.430 of 1995 the complainant had knowledge of the dishonour on 22.10.1990. He must have sent the notice of demand within 15 days. He did send the notice on 24.10.1990. The notice was not received but it was returned unserved. The complaint was filed on 7.12.1990. In these circumstances there can be no dispute on the question that the complaint had been filed within 45 days of the date of receipt/deemed receipt of the notice of demand by the accused. Reckoned from the date of despatch of the notice (24.10.1990) the complaint filed on 7.12.1990 is within 45 days. In these circumstances the criticism that the statutory time table has not been followed cannot be accepted in Crl. A. 430 of 1995. After discussions at the bar this contention is not seriously pressed in so far as this appeal is concerned.

23. The cheques concerned in Crl. A. Nos. 431 and 435 of 1995 are dt. 15.6.1990 and 1.7.1990 respectively. Both of them were dishonoured on 31.10.1990. As stated earlier on the date of dishonour itself the complainant admittedly had knowledge of such dishonour. The notices of demands issued on 7.11.1990 at the residential address werenot served on the accused. It was returned on 27.11.1990 to the complainant. Even before he actually got back the notices sent in the residential address the complainant had come to know that the accused may be evading the notices. He therefore issued another notice dated 21.11.1990 to the accused at his college address. This second notice dt. 21.11.1990 can by no stretch of imagination be held to be a valid notice of demand under Section 138 of the Negotiable Instruments Act as it is not sent within 15 days of 31.10.1990 when the cheques were dishonoured and the complainant had knowledge of such dishonour. There is a further contention that yet another notice of demand dt. 2.12.1990 was issued in both these cases. That notice cannot also be reckoned as a valid notice as such notice is also issued long after the lapse of 15 days from the date of knowledge of dishonour on 31.10.1990. It is in these circumstances not

necessary to consider the validity of the notices sent on 21.11.1990 and 2.12.1990. They are legally invalid as a period far exceeding 15 days had elapsed from the date of knowledge of the dishonour (31.10.1990) when they were issued.

24. Thus the only question to be considered is whether the lawyer notice dt. 7.11.1990 demanding payment under the cheques concerned in Crl. A. Nos. 431 and 435 of 1995 is valid or not. The complaint in both these cases were filed on 1.1.1991. I have already found that this notice sent on 7.11.1990 does comply with the mandate of Section 138 of the Negotiable Instruments Act that such notice of demand must be issued within 15 days of the date of knowledge of dishonour. That requirement is satisfied. The complaints in these cases were filed on 1.1.1991. Under Section 138 of the Negotiable Instruments Act the complaint must be filed within 30 days of the date on which the cause of action arises. The cause of action in a proceeding under Section 138 of the Negotiable Instruments Act would arise if within 15 days of the date of receipt of the notice of demand the amount due under the cheque is not paid by the drawer to the payee.

25. In these two cases the notice of demand was sent on 7.11.1990. It was not received. According to the complainant the accused was deliberately evading the notice. According to the accused he did not deliberately avoid receipt of the notice. Whatever that be, there is no contention that the notices have not been sent in the correct residential address of the accused by prepaid post. The presumption of due service is therefore definitely available to the complainant. No serious contention is raised before me by the learned counsel for the accused also on this aspect. Both counsel are in agreement that presumption of due service can legitimately be invoked.

26. What then is the dispute? The dispute is regarding the date on which deemed service can be said to have been effected. That date is crucial because it is from the date of receipt that the period of 45 days has to be calculated - 15 days for the accused to make payment and a further 30 days within which the complaint must be filed if payment were not effected. The complaint was filed on 1.1.1991. If the presumption of deemed service can or has to be drawn on any day prior to 16.11.1990 as contended,the consequence would be that as on 1.1.1991 a period

of 45 days would have elapsed from such date of deemed service.

27. On what date can the service be deemed to have been effected? Counsel are at variance on this aspect. The learned counsel for the accused contends that the notice of demand having been despatched on 7.11.1990, it must have reached the accused on 8.11.1990. Even if the accused did not receive the same the post man could have retained it only for a further period of 3 days so that after elapse of 3 days - 8th, 9th and 10th, the notice must have been returned to the sender. Presumption of due service must hence necessarily be drawn at least on 10.11.1990 in which event the complaint filed on 1.1.1991 would be barred by limitation, it having been filed beyond 45 days of such date of deemed service.

28. The learned counsel for the complainant contends that it would be puerile to so assume the date of deemed service. Normally the presumption of deemed service can and need be drawn only when the notice sent by the complainant is received back by him without service. Of course there may be exceptional cases where the complainant sleeps over his rights and does not make enquiries about the notice sent by him. If within a reasonable time the notice is not returned, the complainant is certainly expected to make enquiries. If he does not draw the presumption of due service at the appropriate time by being indifferent to his own rights, such a complainant may not be justified in insisting that the presumption of due service can be drawn only if and when he gets the notice sent by him returned to him unserved. But in all other cases where the notice sent is returned to the sender within a reasonable time, such sender will be obliged to invoke the presumption of due service only on the date on which the sender receives back the returned notice.

29. I find considerable force in this submission made by the learned counsel for the appellant-complainant. Section 138 must, notwithstanding the fact that it is a penal provision, receive an interpretation which would advance the purpose which the statutory provision seeks to achieve. A sender who sends the notice is entitled to presume that the notice addressed to the addressee in the correct address will be served. He is entitled to wait for a reasonable time in the anticipation that the service will be effected. My attention has not been drawn to any provision which

obliges the postal authorities not to retain the notice anticipating service beyond any particular period. No provision has been brought to my notice which prohibits the postal authorities from retaining postal articles addressed to addressees at their request or otherwise for a period exceeding 3 days anticipating service. In actual practice I find that the postal authorities do show such indulgence to addressees who make request to retain such articles till such date when the addressee will be able to receive it. In these circumstances according to me it would be puerile to expect a sender to invoke the presumption of due service even before he realises and is satisfied that there is no actual service. Otherwise, a sender will have to be at the post office of destination making enquiries as to whether the notice sent by him has been served or not and whether he should invoke the presumption of due service. That cannot of course be the law. It would be unjust, inequitable, unreasonable and perverse to expect the complainant to invoke the presumption of due service even before he is satisfied reasonably that such notice has not actually been served. The interpretation that the presumption of due service will arise only when the sender gets back the returned notice does appear to me to be just, reasonable, equitable and practically prudent. My attention has not been drawn to any specific precedent taking a contra view. Counsel were requested to advance detailed arguments on this question of law.

30. Reliance has been placed on the decisions reported in Madan and Co. v. Wazir Jaivir Chand (AIR 1989 SC 630), Madhu v. Omega Pipes Ltd. (1994 (1) KLT 441), S. Prasanna v. R. Vijayalakshmi (1992 (2) Crl. L.J. 1233) etc. to contend that actual service is not necessary and the presumption of due service can be invoked. There can be no quarrel with that proposition. In a case where the notice sent by pre paid post in the correct address is returned unserved, there can be no doubt that the presumption of due service can be made in order to make the scheme under Section 138 of the Negotiable Instruments Act work effectively.

31. Reliance has also been placed in the decisions reported in SIL Import, U.S.A. v. Exim Aides Silk Exporters (1999 (2) KLT 275 (SC)), Darshan Singh v. State (2001(2) KLT SN 12 Case No. 13) and Viswanathan v. Surendran (1998 (1) KLT 694) in support of the contention that the date of knowledge of the complainant about the date of receipt of the notice of demand by the accused is irrelevant. I

have no hesitation to accept this proposition also. Where the notice of demand under Section 138 has actually been received by the drawer of the cheque, the date of knowledge of the complainant about such receipt is irrelevant. The statutory clock would start ticking as soon as the notice of demand is received by the drawer of the cheque from the payee/ holder in due course. Once the clock starts ticking, the knowledge of the sender about the fact of or the date of receipt becomes irrelevant and the period prescribed would run out starting from such date of receipt.

32. But not so when there is no receipt of the notice of demand by the accused. In the instant case it is not a case of receipt or refusal of the notice. It is only a case of on-service consequent to the conduct of the accused not being available at his residence (deliberately or otherwise) and his conduct of not making any arrangement to receive the notice addressed to him at his correct residential address. When can presumption of due service be drawn in such a case? That is the larger question that arises for consideration.

33. This question appears to have engaged the attention of the High Court of Calcutta in the decision reported in Santa Priya v. Udya Sankar Das (1994 (2) KLT 404(Calcutta)). The court came to the conclusion that it is not the date of receipt which is important but it is the date of knowledge of the complainant pf such receipt which is important. It is submitted that this principle cannot be accepted any more in view of the later decision in 1999 (2) KLT 275 (SC)). In a case where the notice has actually been served, as indicated earlier, the date of knowledge of the complainant of such receipt by the accused would be irrelevant. But in identifying the date on which presumption of due service ought to be drawn, I am of opinion that it is the date of knowledge of the complainant that the notice has not been served which is crucial. Any other interpretation is only bound to bring in unnecessary confusion and vagueness.

34. The complainant cannot be left guessing as to the date on which he must draw the presumption of due service. Justice, equity, reasonableness and the interests of achievement of the object of the statutory provision do all convey eloquently that such presumption of due service need only be drawn when the complainant is

satisfied that the notice is not served and is returned, provided however that the complainant acts reasonably and does not sleep over his remedy for an unreasonably long period of time without making enquiries about the fate of the notice sent by him if it is not returned earlier to him.

35. In 1998 (1) KLT 694 a learned Judge of this court had occasion to consider this question. That was a case where there was actual refusal. This court held that the presumption of due service is to be drawn on the actual date of refusal and not on the date when the notice could or would normally have been served on the accused, I find another decision of the Andhra Pradesh High Court reported in S.B. V. Satyanarayana Rao v. A. Venkateshwar Rao (Judgments on Dishonour of Cheques I (1996) BC 464). Justice Ramesh Madhav Bapat of the Andhra Pradesh High Court has opined as follows:

'.... The starting point of limitation has to be coupled from the date on which the accusedreceives the notice or the date on which the accused can receive the notice. In the present case,the complainant made unnecessary rush in filing the complaint two days earlier'.

The learned Judge's opinion that the starting point of limitation has to be counted from the date on which the accused actually receives the notice or the date on which the accused can receive the notice appears to me to be eminently correct. Of course I am unable to agree that after the 7th day of the date on which the postal article reaches the post office of destination the addressee cannot claim/receive the notice on any day prior to its actual return to the complainant. According to me it is open to the addressee to claim the notice from the postal authorities and receive the same even after the 3rd/7th day. It would then be impermissible to draw presumption of due service on any day prior to day of actual return to the sender.

36. The controversy can be reckoned as set at rest by the decision of the Supreme Court in K. Bhaskaran v. Sankaran Vaidhyan Balan ((1999) 7 SCC 510). In paragraph 25 of the said decision which I extract below the Supreme Court has stated categorically that when a notice is returned by the sendee as unclaimed, such date would be the commencing date for reckoning the period of 15 days

under Section 138(c).

'25. Thus, when a notice is returned by the sendee as unclaimed such date would be thecommencing date in reckoning the period of 15 days contemplated in Clause (c) to this proviso of Section 138 of the Act. Of course such reckoning would be without prejudice to the right of the drawer ofthe cheque to show that he had no knowledge that the notice was brought to his address. Inthe present case the accused did not even attempt to discharge the burden to rebut the aforesaidpresumption'.

If such date of return is reckoned as the date of deemed receipt, there is no question of the notice being served on the accused thereafter and any confusion or conflict arising between the deemed date of service and the actual date of service. The reckoning of the date of deemed receipt as the date of return of the notice is unlikely to result in any prejudice to any one as even the accused would only get further time from such date of deemed service to discharge the liability due under the cheque.

37. In the instant case the complainant, after sending the first notice in the residential address became satisfied at some point of time before he actually got the notice returned to him on 27.11.1990, that the accused may not receive the notice. That precisely is the reason why he sent a further notice in the college address of the accused on 21.11.1990. At least on that date the presumption of deemed service must be invoked, contends the counsel for the accused. Of course even if 21.11.1990 the date of issue of the next notice were reckoned as the date of deemed service, the complaints filed on 1.1.1991 are perfectly within the time schedule prescribed under Section 138 and therefore this contention that not 27.11.1990 but 21.11.1990 should be reckoned as the date of deemed service cannot in any manner alter the conclusion of mine in these two cases.

38. It follows from the above discussions that the complainant had promptly issued a notice of demand within 45 days and had initiated prosecution within 30 days of the date of deemed service of such notice. The statutory time table has hence been followed satisfactorily by the complainant. The challenge on that ground is without merit.

39. No other contentions are urged before me by the defence. I am satisfied that all ingredients of the offence punishable under Section 138 of the Negotiable Instruments Act are proved against the accused.

40. Coming to the question of sentence, I do note that the cheques are dt. June/ July 1990. Section 138 of the Negotiable Instruments Act was brought into the statute book only in 1988. Notwithstanding the unworthy stand taken by the accused, I am of opinion that a deterrent substantive sentence of imprisonment need not be imposed on the accused. I have already adverted to the principles governing imposition of sentence in a prosecution under Section 138 of the Negotiable Instruments Act in the decision in Anil Kumar v. Shammy (2002(3) KLT 852). I am satisfied that a lenient substantive sentence of imprisonment coupled with an appropriate direction under Section 357(3) Cr. P.C. coupled with appropriate default sentences shall serve the ends of justice ideally.

41. In the result

i. These appeals are allowed.

ii. The impugned common judgment is set aside.

iii. The respondent-accused is found guilty, convicted and sentenced in all the three cases to undergo imprisonment till rising of court.

iv. The accused is further directed under Section 357(3) Crl. P.C.

(a) In Crl. Appeal 430of 1995 to pay an amount of Rs. 2,75,000/- (Rupees two lakhs seventy five thousand only) and in default to undergo simple imprisonment for a period of three months.

(b) In Crl. Appeal 431 of 1995 to pay an amount of Rs. 2,25,000/- (Rupees two lakhs twenty five thousand only) and in default to undergo simple imprisonment for a period of three months.

(c) In Crl. Appeal 435 of 1995 to pay an amount of Rs. 1,75,000/- (Rupees one lakh seventy five thousand only) and in default to undergo simple imprisonment for a period of three months.

v. If deposited the amount shall be released to the complainant.

42. The learned Magistrate shall take necessary steps for execution of the sentence hereby imposed. The respondent shall appear before the learned Magistrate on 30.6.2003 for execution of the sentence.

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