

Janardhanan Vs. Jayachandran

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Court : Kerala

Decided On : Nov-08-2004

Reported in : 2005(1)ALD(Cri)43; I(2007)BC425; [2005]128CompCas357(Ker); 2005(1)KLT859

Judge : J.M. James, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138; [Evidence Act, 1872](#) - Sections 63(1); Transfer of Property Act - Sections 106

Appeal No. : Crl.A. No. 349 of 1999

Appellant : Janardhanan

Respondent : Jayachandran

Advocate for Def. : K.S. Madhusoodanan,, C.P. Peethambaran, Advs. and; K. Ha

Advocate for Pet/Ap. : Kaleeswaram Raj, Adv.

Disposition : Appeal allowed

Judgement :

J.M. James, J.

1. The complainant is the appellant. He filed C.C.No. 556/95 before the Judicial First Class Magistrate, Payyannur under Section 138 of the Negotiable

Instruments Act, in short 'the Act' against the 1st respondent/accused. The parties adduced evidence. The copy of the lawyer notice issued on behalf of the complainant was not authenticated by the Advocate, who produced the same before the Court. Therefore, the marking of the notice was objected. A petition under Section 311 Cr.P.C. with a copy of the lawyer notice was filed praying to recall PW. 1, the complainant, and mark the copy of notice as Ext.P7. But that was rejected on the ground that it does not comply with the provisions under Section 63 of the Evidence Act. Thereafter, the learned Magistrate found the accused not guilty for want of statutory notice under Clause (b) of the proviso to Section 138 of the Act and therefore, dismissed the complaint and acquitted the accused. Hence the complainant came up in appeal before this Court.

2. The question that arises for consideration is whether a notice contemplated under the Act was sent to the accused, but inadvertently, without the signature of the Advocate on it, could be considered as a valid notice.

3. The learned counsel appearing for the appellant relied on *Abdurehim Sait v. Sahul Hameed* (1981 KLT 289) and *Viswanathan v. Ramachandran Nair* (1996 (2) KLT 449) to show that even if there is no signature, which was omitted inadvertently to be affixed on the notice, would not invalidate the said notice. On the other hand, the learned counsel for the 1st respondent/accused contended, relying on *Patel Maqanbhai Bapujibhai and Ors. v. Patel Ishwarbhai Motibhai and Ors.* (AIR 1984 Guj. 69) and *Kalyan Singh v. Smt. Chhoti and Ors.* (AIR 1990 SC 396) that unless the Court accepts the copy of the notice which comes within the scope of Section 63 of the Evidence Act, the same cannot be accepted as secondary evidence. Therefore, prayed to sustain the rejection of the complaint by the Magistrate.

4. The complainant presented Ext.P1 cheque, which he was holding as issued by the accused, on 10.6.1995 for clearance. It was dishonoured under Ext.P2 memo dated 11.7.1995 for the reason 'fund insufficient'; as shown in Sl. No. 15. The complainant thereafter issued a notice dated 17.7.1995. Ext.P3 is the postal receipt dated 18.7.1995. Ext.P4 is the postal acknowledgment card dated 9.7.1995, which reveal that the 1st respondent had received the notice dated

17.7.1995. Along with the complaint, the advocate filed a copy of the notice, but without any authentication or certifying the same as true copy of the original. The contentions were raised before the Court below and as discussed above. The learned Magistrate rejected the plea of the complainant.

5. The learned counsel for the 1st respondent accused have relied on Kalyan Singh's case (cited supra) to emphasis his argument that the copy of the notice without signature of the Advocate cannot be accepted. The facts of Kalyan Singh's case show that Ext.P3, a sale deed and Ext.P4 a Will had come up before the Apex Court for consideration. The plaintiff's title related back to the sale deed which was in the year 1975 A.D. It was stated to be a registered sale deed, through which the property was sold. The plaintiff has not produced the original sale deed nor the certified copy of it. An alternate copy of the sale deed, as Ext.P3, was produced stating that it was a copy that was given along with the original copy for registration and after registration, the said copy had been returned to the party. The person who produced the same, Gopal Prasad, had no personal knowledge about the registration of the sale deed. He did not produce the Register to establish that the deed was actually registered and a copy was kept in the record. There was no endorsement to that effect also, in Ext.P3 produced by him. Therefore, the Apex Court, discussing Section 63 of the Evidence Act and clauses therein, held that Ext.P3 cannot be considered as a secondary evidence.

6. In Patel Maganbhai Bapujibhai's case (supra) a statement recorded by the Police Officer, in the course of investigation, has come up for consideration whether it was a public document or not. It was held that certified copy of the same cannot be admitted in evidence under Section 63(1) of the Evidence Act.

7. In the case at hand, as discussed above, Ext.P1 cheque had been dishonoured under Ext.P2 memo. As could be seen from Exts.P3 and P4, a notice of intimation, regarding dishonour of Ext.P1 cheque and demand thereon was made as provided under Section 138 of the Act. From Ext.P4, the receipt of the said notice is acknowledged and accepted. The Advocate, who filed the complaint on behalf of the complainant had inadvertently produced a copy of the notice without any

authentication on it. It was then argued that the same was not acceptable under Section 63 of the Evidence Act. The learned counsel appearing for the respondent now contended before me that as there being no original with the complainant, he cannot produce any copy before the Court, as such a document produced cannot come under Section 63(3) of the Evidence Act; 'copies made from or compared with the original'.

8. After hearing the learned counsel and also on considering the appreciation of the facts in this case, I am of the view that the learned Magistrate had lost sight of the object and reasons of sending a notice under Section 138 of the Act. It is true that under Section 106 of Transfer of Property Act, every notice must be in writing, signed by or on behalf of the person giving it. In Abdurehim's case (supra), issuance of the notice under Section 11(4)(i) of the Kerala Buildings (Lease and Rent Control) Act, 1965 came up for consideration before a Single Judge of this Court. After discussing various authorities, the learned Single Judge observed as follows:--

'Under Section 106 T.P. Act, every notice must be in writing signed by or on behalf of the person giving it. There is no such insistence on the provision to Section 11(4)(i) of the Act. And the tenant in replying to Ext.B 1 by Ext. A5 had no case of any defect in the notice. Also in his first objection he does not have such a case. No doubt, he has taken a general ground of non-compliance with Section 11(4)(i) in the second objection. The essential principle behind a statutory provision should not be lost sight of in the labyrinth of technicalities. It is certainly necessary and proper that mandatory direction should be adhered to. Unless a document which under law requires execution and signature with solemnity the form and nature of signature and the place where the signature appear may not be of much consequence. No doubt, the signature must be affixed with the intention of authenticating the whole document. It is not questioned that Ext.B 1 is notice issued on behalf of the landlord by his Advocate. The fact that it was not signed by the Advocate obviously due to an inadvertent omission will not make the notice in any way invalid.'

9. In Viswanathan 's case (supra) also, another learned Single Judge of this Court had occasion to consider the different aspects of the informations required in the notice. In Ahmad Hassan v. The Union of India (AIR 1960 All. 530), where the notice under Section 80 C.P.C. did not contain the number of the railway receipt or quoted the number wrongly, was found to be insufficient in disclosing a cause of action. This {Ahmad Hassan's) case was distinguished in Harish Chand v. The Union of India (AIR 1962 All. 307), wherein it was held that 'the non-mention of the number of the railway receipt or mention of the number of the receipt wrongly will not make a notice under Section 80 C.P.C. insufficient or improper.' The said decision was later on followed in Firm Deokishan Srigopal v. Union of India (AIR 1966 All. 16) and in Santhosh Kumar Sharma v. Motilal Mahawar (1993 (2) Crl. LJ 2072). Considering these aspects, the learned Single Judge, while disposing of an appeal, challenging the findings under Section 138 of the Negotiable Instruments Act, held that 'Under Section 80 C.P.C. notice should disclose correctly the cause of action for suit. Such a requirement is not available in Section 138(b) and so, the rigour is less in the latter case.'

10. The [Negotiable Instruments Act, 1881](#) was amended by the Banking, Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988, wherein a new chapter 'XVII' was incorporated for penalties in case of dishonour of cheques for insufficiency of funds in the account of the drawer of the cheque. The intention of such incorporation of the provision was with a view to encourage the character of use of cheques and enhancing credibility of the instrument. Later on, through an Amendment Act 1955 of 2002, different provisions were included for enhancement of the imprisonment from one year to two years and also for various other provisions for a speedy disposal of cases filed under Section 138 of the Act. Therefore, the primary object of the enactment of the Act and the provisions contained therein are that when a cheque is issued and it is dishonoured at the time of presentation, the same was only to be intimated in writing so as to given an opportunity to the accused to make payment within the time stipulated under the Act.

11. The 1st respondent/accused has no contention that due to want of signature in the notice sent as per Ext.P3 postal receipt dated 13.7.1995, received by him on

19.7.1995, as could be seen from Ext.P5 acknowledgment card, he was prevented from making payment of the cheque amount within the permitted period. Merely because the counsel concerned had failed to put his signature or certify the same as a true copy, it cannot be held as inadmissible in evidence, for no prejudice has been caused to the 1st respondent and he was not at all prevented from settling the account with the complainant or sending a reply stating his reasons in not doing so. As discussed, the facts in Kalyan Singh's case (supra) and Patel Maganbhai Bapujibhai and Ors.'s case (supra), are entirely different. There the application of Section 63 was rigorously required. That is not so in proceedings under Section 138 of the Act. The complainant/appellant had given a notice as required under Section 138 of the Act, which has been received by the 1st respondent/accused. Therefore, there is sufficient compliance. All other contentions on the contrary cannot be accepted at all. The learned Magistrate was carried on technicalities. He did not apply his judicial mind, particularly keeping in view the amendments of the Act and its recent changes, so as to implement the provisions thereon strictly. Hence I hold that there was a valid notice issued under the Act by the appellant to the accused/1st respondent, who has received it and failed to comply with the demand therein.

12. At this stage learned counsel appearing for the 1st respondent submitted that an opportunity may be given to him for adducing further evidence. On going through the evidence available on record, I find that there is no need for adducing any further evidence. The entire requirements under Section 138 of the Act has been complied with. Ext.P1 cheque was of the year 1995. It cannot now be remitted allowing the parties to undergo the same procedure for further few years. Therefore, for finality of the matter, and on re-appreciation of the evidence I hold that the accused is guilty of the offence punishable under Section 138 of the Act. Hence he is convicted thereunder. Learned counsel for the 1st respondent/accused submitted that a lenient view may be taken in respect of the sentence. As I am finally deciding the matter at this stage, I am of the opinion that justice would be met if the 1st respondent/accused is sentenced to undergo imprisonment till the raising of the Court and also is directed to pay a fine of Rs. 30,000 (Rupees Thirty thousand only), in default to undergo Simple Imprisonment for six months. On deposit of the fine amount, the same shall be paid to the

appellant/ complainant. I further grant 60 (sixty) days time from today to make the payment of fine ordered herein. The appeal is allowed accordingly, setting aside the impugned judgment.

The 1st respondent/accused shall appear before the Court below to receive the sentence of imprisonment imposed on him on any day within the above said 60 (sixty) days. In case of failure of the 1st respondent to comply with the directions, the Court below shall proceed according to the law, to get his presence and sentence imposed.

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