

Jayachandran Vs. Baburaj

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Court : Kerala

Decided On : May-20-1998

Reported in : 1998(2)ALD(Cri)613; 1999(2)ALT(Cri)152;
[2001]103CompCas79(Ker); 1998CriLJ3671

Judge : S. Marimuthu, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138

Appeal No. : Criminal Appeal No. 34 of 1995

Appellant : Jayachandran

Respondent : Baburaj

Advocate for Def. : P. Vijayabhanu, Adv.

Advocate for Pet/Ap. : P.V. Chandran, Adv.

Disposition : Appeal dismissed

Judgement :

S. Marimuthu, J.

1. This appeal is filed by the complainant, one Jayachandran, questioning' the judgment of acquittal delivered by the JudicialMagistrate of First Class, Trichur, in S. T. No. 690 of 1992. The case of the appellant as culled out from the judgment

of the trial court as well as from the argument of learned counsel appearing for him would be that a cheque was issued in his favour for a sum of Rs. 25,000 by the accused/ respondent and when the cheque was put in the bank for collection, it was returned with an endorsement that there was no sufficient fund in the account of the respondent. On receipt of the memo of the bank, within 15 days, the appellant issued a notice to the respondent. The notice was returned unserved. Therefore, the appellant filed a complaint under Section 138 of the Negotiable Instruments Act (hereafter referred to as 'the Act'). Learned counsel for the appellant submitted that the acquittal of the respondent is erroneous and it requires interference by this court.

2. On the other hand, the submission of learned counsel appearing for the respondent would be that proviso (c) to Section 138 of the Act, which gives a right to the drawer, was not complied with in this case and, therefore, the acquittal recorded by the magistrate is correct and it is in accordance with law.

3. On account of the above rival submissions on both the sides, the point to be decided is whether the judgment of acquittal recorded by the court below can be sustained ?

4. The cheque drawn by the respondent is marked as exhibit P-1. The memo of the bank returning the cheque as dishonoured as well as the letter sent by the bank have been marked as exhibits P-2 and P-3, dated October 13, 1992. On receipt of exhibit P-2 memo, the appellant issued a statutory notice on October 24, 1992, a copy of the same has been marked as exhibit P-4. The original of exhibit P-4 notice was returned unserved with the postal endorsement 'Addressee out of station. Hence returned'. The unserved cover is marked as exhibit P-5. The postal endorsement in exhibit P-5 would disclose that the postman had gone to the residence of the respondent on five occasions and on all these five occasions the respondent was out of station and, therefore, he finally returned the cover on November 2, 1992. Learned counsel for the appellant submitted that giving the notice on October 24, 1992, is sufficient to perform his duty as contemplated under proviso (c) to Section 138 of the Act and, therefore, he has nothing to do with the non-receipt of the notice by the addressee, namely, the drawer of the cheque. No

doubt, a reading of provisos (b) and (c) to Section 138 of the Act would evince that the payee (complainant) has nothing to perform on his part as contemplated in proviso (c) to Section 138 of the Act. In support of the above submission, learned counsel for the appellant placed before me the following decisions of this court. The same decisions were also relied upon by learned counsel appearing for the respondent in support of his case :

5. In *Sosamma (Smt.) v. Rajendran* [1994] 80 Comp Cas 503 (Ker), a single Bench of this court has held as follows (page 508) :

' . . . the liability under Section 138 of the Act would arise only if the accused defaulted payment within 15 days of the 'receipt' of notice. This has got special significance ; only if the person accused of the offence knows as to the dishonour can he pay the amount within the stipulated time. The purpose and object of the said provision cannot be lost sight of in interpreting the provision regarding service of notice. . . . There may be cases where notice is returned unclaimed on account of the deliberate evasion by the accused when the same was tendered by the postman. . . . The general burden to prove the prosecution case since rests with the complainant, it is necessary for the complainant to prove the facts constituting the sending of notice and its receipt.'

6. In *Kunjan Panicker v. Christudas* [1997] 2 KLT 539, a Division Bench of this court has held that the endorsement made by the postal authority that the cover was unclaimed amounts to refusal by the addressee when the cover contains the proper address. The Bench is of the view that when notice has been sent to the proper address and when it has been unclaimed by the addressee, it can be deemed that the addressee has refused to receive the notice and that satisfies the receipt of notice as contemplated in proviso (c) to Section 138 of the Act. In *Smt Sosamma's case* [1994] 80 Comp Cas 503 (Ker), it has also been viewed by this court that in the case of the postal endorsement being unclaimed the burden lies on the complainant to establish that the addressee unclaimed the notice. In yet another decision, *Madhu (K.) v. Omega Pipes Ltd.* [1996] 85 Comp Cas 263 (Ker), a single Bench of this court has taken the view that giving notice as provided under proviso (b) to Section 138 of the Act is completed by posting the notice.

That is, to say, within 15 days from the receipt of the memo from the bank if the statutory notice is posted by the payee to the drawer, that act of the payee satisfies the requirement of proviso (b) to Section 138 of the Act. A passing remark has also been made in this decision in paragraph 7 that a wrongdoer or an evader can successfully keep the notice unserved on him within the time prescribed either by influencing the postman or by any other source. Therefore, such attitude of the drawer should not be encouraged. But it is not the view of the learned judge in this case that non-service of notice on the drawer of the cheque would satisfy the requirement as provided in proviso (b) to Section 138 of the Act.

7. A reading of proviso (c) to Section 138 is manifestly clear that the criminal liability can be fastened on the accused person only if he has not complied with paying the amount within 15 days from the date of receipt of the notice. Otherwise such criminal liability cannot be put on his shoulders. Therefore, the main cause of action for putting the wheel of criminal prosecution in motion arises only from the date of receipt of the notice by the drawer or from the date of his knowledge of the notice or from the date of his refusal to receive the notice.

8. In the instant case before me, it is obviously clear as evidenced by the documents and the oral testimony that when the postman went to the residence of the respondent on five occasions the respondent was not available. Therefore, the notice was returned unserved. In such circumstance it is open to the appellant to establish that on all the five occasions when the postman went to the residence of the respondent he was present there physically but refused to receive or that on those five occasions the respondent was not present when the postman went there to serve the notice by examining the postman and the neighbours. But such effort has not been taken by the appellant before the trial court to satisfy proviso (c) to Section 138 of the Act. But learned counsel for the appellant submitted that the appellant was not responsible for the non-receipt of the notice by the respondent and, therefore, a chance may be given to the appellant to examine the postman as well as the other material witnesses to fortify the postal endorsement made in the returned cover. But that submission of learned counsel cannot be accepted at this stage. For opportunities were readily available when the trial was on before the magistrate, to examine the postman or any other witnesses in

respect of the above aspect. That was not availed of by the appellant. The prosecution has commenced in the year 1992 and now in the year 1998 the matter is taken up by this court. If the above argument of learned counsel for the appellant is accepted and the matter is remanded for the examination of the postman and the other witnesses for the purpose of ascertaining whether the postal endorsement made in the cover is true, it is needless to say that it amounts to giving a chance to the complainant to fill up the lacuna which is totally forbidden in criminal law.

9. On account of the foregoing reasons, I do not find sufficient grounds to interfere with the judgment of acquittal of the court below and that it has to be sustained. In the result, the appeal stands dismissed.

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