Suresh Kumar Vs. Sasi

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Court : Kerala

Decided On : Dec-20-2002

Reported in : 2003(2)KLT367

Judge : N. Krishnan Nair, J.

Acts : Negotiable Instruments Act, 1881 - Sections 138; General Clauses Act - Sections 27

Appeal No. : C.R.R.P. No. 99/2002

Appellant : Suresh Kumar

Respondent : Sasi

Advocate for Def. : J.S. Ajithkumar, Adv. and; Noorji Noushad, Public Prosecutor

Advocate for Pet/Ap. : Nair Ajay Krishnan and; Nagaraj Narayanan, Advs.

Disposition : Revision allowed

Judgement :
ORDER

N. Krishnan Nair, J.

1. This revision is directed against the Judgment dated 23rd November 2001 of the Sessions Judge, Thiruvananthapuram in Crl. Appeal No. 167/2000. The case

arose on a complaint filed by the first respondent herein against the petitioner before the J.F.C.M.-I, Attingal alleging the commission of the offence punishable under Section 138 of the Negotiable Instruments Act. The allegation is that on 15th October 1996 the petitioner borrowed a sum of Rs. 4 lakhs from the first respondent and issued a cheque for the said amount drawn on the State Bank of Venjaramoodu. When the cheque was presented for encashment it was returned dishonoured with the endorsement funds insufficient. Thereupon the first respondent issued a notice calling upon the petitioner to pay the amount covered by the dishonoured cheque. Since no payment was made pursuant to the notice, the complaint was filed.

2. The petitioner pleaded not guilty. In order to prove the guilt of the petitioner P.W.1 to P.W.3 were examined and Exts.P-1 to P-10 were marked. The defence examined 3 witnesses as D.W.1 to D.W.3 and marked Exts.D-1 to D-5. On an elaborate consideration of the evidence, the learned Magistrate found the petitioner guilty of the offence, convicted him, and sentenced him to undergo simple imprisonment for one year. Aggrieved by the order of conviction and sentence passed by the Magistrate, the petitioner preferred Crl. Appeal No. 167/2000 before the Sessions Judge, Trivandrum and the learned Sessions Judge by the impugned Judgment confirmed the conviction and sentence. Hence this revision.

3. The learned counsel for the petitioner strongly contended that the courts below should have found that there was no proper notice as envisaged in Clause (b) of the proviso to Section 138 of the Negotiable Instruments Act and therefore the petitioner is not guilty of the offence punishable under Section 138 of the Negotiable Instruments Act. According to the learned counsel, the courts below have not properly scanned or weighed the evidence in the case. On the other hand the learned counsel for the first respondent supported the impugned orders and urged that there is no ground for interference.

4. The only question arising for consideration in the case is whether there was a proper notice as envisaged in Clause (b) of the proviso to Section 138 of the Negotiable Instruments Act. Clauses (b) and (c) of Section 138 of the Negotiable

Instruments Act lays down the conditions pertaining to the notice to be given to the drawer. The said clauses are extracted below

Clause (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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.

Clause (c).- The drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may to the holder in due course of the cheque within 15 days of the receipt of the said notice.

5. In this case the definite case of the first respondent is that he issued Ext.P-6 notice to the petitioner before the initiation of the proceedings and the petitioner received the notice. But the petitioner would contend that the address in Ext.P-6 is not his correct address and he has not received the notice. Ext.P-6 notice was sent in the following address:

K. Suresh Kumar, S/o. Krishna Pillai, Chempakassery House, Chemboor, Mudakkal. P.O.

6. It is also gatherable from Ext.P-6 that the postman has made the following endorsement on 26th November 1996 'intimation'. Subsequently on the failure of the addressee to receive the same, Ext.P-6 was returned to the sender as unclaimed. Thus the notice was returned as unclaimed and not returned as refused. A notice returned as unclaimed can be presumed to have been served on the addressee if it is sent in the correct address. It has been held by the Supreme Court in Bhaskaran v. Balan (1999 (3) KLT 440 (SC)) that the principle incorporated in Section 27 of the General Clauses Act can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. According to the Supreme Court then it can be deemed to have been served on the sender unless he proves that it was not really served and that he was not responsible for such non-service. Section 27 of the General Clauses Act reads as follows:

'27. Meaning of service by post. - Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve' or either of the expressions '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, prepaying 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.'

7. Section 27 of the General Clauses Act is attracted only if the notice is sent in the correct address. In this case the definite case of the petitioner is that Ext.P-6 notice alleged to have been sent to him prior to the initiation of the proceedings is not in his correct address. Therefore, the burden is on the first respondent to prove that Ext.P-6 notice was sent to the petitioner in his correct address. Once it is proved that Ext.P-6 notice was sent in the correct address, the burden shifts to the petitioner to prove that it was not really served on him and that he was not responsible for such non service. Therefore, the important question arising for consideration is whether the first respondent has succeeded in proving that the notice was sent in the correct address of the petitioner. According to the petitioner, his house name is not Chempakassery as shown in Ext.P-6 but it is Krishnavilasom. The first respondent mainly relies on the evidence of P.W.2 and P.W.3 and Exts.P-8, P-9 and P-10 to show that Ext.P-6 notice was sent to the petitioner in his correct address. On going through the evidence of P.W.2 and P.W.3 and Exts.P-8, P-9 and P-101 cannot agree with the courts below that the first respondent herein has succeeded in proving that Ext.P-6 notice was sent to the petitioner in his correct address. Ext.P-9 is the alleged photocopy of the passport of the petitioner. In Ext.P-9 the house name of the holder of the passport is shown as Chempakassery veedu. According to the petitioner, Ext.P-9 is not a copy of the passport issued to him. The first respondent cited and examined P.W.2 and P.W.3 to prove that Ext,P-9 is the true copy of the passport of the petitioner. P.W.2 is the U.D. Clerk in the Passport Office, Trivandrum. He would say that the records relating to the issuance of passport to Sureshkumar, S/o. KrishnaPillai, were destroyed and the passport was issued from the passport office, Ernakulam. Ext.P-8 is the passport particulars. P.W.3 is the Superintendent, Passport Office,

Ernakulam. According to him, Ext.P-10 is the copy of the relevant page of the Passport Issue Register relating to the issuance of passport to Sureshkumar, S/o. Krishna Pillai. He would also say that the file relating to the issuance of passport was destroyed. It is relevant to note that in Exts.P-8 and P-10 the house name of the passport holder is not mentioned. Therefore, according to me the evidence of P.W.2 and P.W.3 and Exts.P-8, P-9 and P-10 would not help the first respondent to prove that the address in Ext.P-6 is the correct address of the petitioner. On the other hand the petitioner relies on the evidence of D.W. 1 and D.W.2 and also Exts.D-1 to D-5 to show that the address given in Ext.P-6 is not his address. D.W.1 is the Postman, Mudakkal Post Office. He has deposed that the petitioner is known to him personally and his house name is Krishnavilasom. Ext.D-1 is the telephone bill delivered to the petitioner by D.W.1. D.W.2 is the Secretary of the Mudakkal Grama Panchayat. He would say that house No. 86 in Ward No. 12 of the Mudakkal Panchayat belongs to Krishna Pillai, Krishnavilasom House. Ext.D-2 is the true copy of the relevant page of the assessment register. Ext.D-2 would show that the house name of the petitioner is Krishnavilasom. Ext.D-3 is the S.S.L.C. book and Ext.D-4 is the ration card. Ext.D-5 is the driving licence of the petitioner. Exts.D-3, D-4 and D-5 would also show that the house name of the petitioner is Krishnavilasom. In Ext.P-9 the date of birth is shown as 27th March 1960 while in Exts.D-3, D-4 and D-5 the date of birth is shown as 6th May 1967. The photograph of the petitioner affixed in Ext.D-5 driving licence does not appear to be similar to the copy of the photograph in Ext.P-9. Under these circumstances the version of the first respondent that Ext.P-9 is a true copy of the passport of the petitioner could be accepted only with a pinch of salt. It is also relevant to note that the summons issued to the petitioner was returned stating that there is no such person in the address.

8. The learned Sessions Judge placed much reliance on the evidence of D.W.1 to hold that Ext.P-6 notice was tendered to the petitioner and it was returned to the sender since the petitioner failed to take delivery of the notice in spite of the intimation given by him. According to the learned Sessions Judge, if there is evidence to prove that Ext.P-6 notice was tendered to the addressee as recorded in Ext.P-6 and that addressee to whom Ext.P-6 was tendered is the petitioner himself, it is not open to the petitioner to contend that there was no valid notice. As

stated earlier, Ext.D-1 was proved through D.W.1. It is seen from Ext.D-1 that the house name of the petitioner is not Chempakassery but Krishnavilasom. It is true that in cross-examination D.W.1 has deposed that he was working as a postman at Mudakkal Post Office for about 18 years and the endorsement that the intimation was given to the addressee on 26th November 1996 was made by D.W.1 himself. According to the learned Sessions Judge the intimation of Ext.P-6 notice was served by D.W.1 on the petitioner personally. But on going through the evidence of D.W.1 I find that there is nothing in his evidence to indicate that D.W.1 served the intimation on the petitioner personally. In the normal course intimation is given when the addressee is not found in the address shown in the registered letter. In this case D.W.1 who proved Ext.D-1 cannot be heard to say the house name of the petitioner is Chempakassery house. It appears that the learned Sessions Judge proceeded on the assumption that the intimation of Ext.P-6 notice was served on the petitioner personally and he refused to receive the same. It was quite improbable that D.W. 1 served the intimation on the petitioner personally. According to me even if it is assumed that the intimation was given to the petitioner personally, he is not bound to take delivery if the address is not correct. When a notice is sent to aperson in the wrong address, service of notice shall not be deemed to have effected. On a consideration of the entire evidence, I find that the first respondent has not succeeded in proving that Ext.P-6 notice was sent in the correct address of the petitioner. Therefore, according to me, the prosecution in this case must fail for want of notice as contemplated under Section 138 of the Negotiable Instruments Act. No cause of action has arisen in this case since there is no reliable evidence to show that the petitioner received the notice. According to me, the principle incorporated in Section 27 of the General Clauses Act cannot be imported in this case since the first respondent did not send the notice by post in the correct address of the petitioner. In this connection it is relevant to note the following observations of the Supreme Court in Sridhar v. Metalloy N. Steel Corporation ((2000) 1 SCC 397).

'Although in appropriate case deemed service is to be accepted by the court as indicated, in the decision of this Court in State of M.P. v. Hiralal but it may also be noted that such presumption of deemed service is not a matter of course in all cases and deemed service is to be accepted in the facts of each case.'

On a consideration of the facts and circumstances of this case, I find that the petitioner is entitled to the benefit of doubt as to whether service of notice had been effected on the petitioner. It follows that the petitioner is entitled to an acquittal.

In the result the conviction and sentence passed against the petitioner are set aside.He is found not guilty of the offence under Section 138 of the Negotiable Instruments Act and he is acquitted. This revision is thus allowed.