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Court : Kerala

Decided On : Nov-23-2010

Judge : M.L. Joseph Francis, J.

Acts : Negotiable Instruments Act - Section 138; Evidence Act - Section 114(e); General Clauses Act - Section 27; Code of Criminal Procedure (CrPC) (Cr.P.C) - Sections 313, 357(1)

Appeal No. : Crl.A. No. 1958 of 2003

Appellant : Ranjith

Respondent : State of Kerala

Advocate for Pet/Ap. : SRI.M.R.RAJESH, Adv.

Judgement :

M.L. JOSEPH FRANCIS, J.

Crl.A. No. 1958 of 200

Dated this the 23rd day of November, 2010

1. This appeal is filed by the complainant in C.C. No. 252 of 1995 on the file of the Judicial First Class Magistrate, Varkala, The second respondent herein was the accused in that case, which was filed by the complainant alleging commission of the offence under Section 138 of the N.I. Act.

2. The allegation is that the accused borrowed a amount of Rs.50,000/- from the complainant and on 1.5.1994 towards the discharge of that liability, the accused issued Ext.P1 cheque bearing dt.1.7.1994. When the complainant presented that cheque for collection through his bank, it was dishonoured due to insufficiency of funds in the account of the accused. When the complainant received the memo in respect of that fact, the complainant approached the accused directly and informed her about the dishoour of the cheque. Thereafter the complainant issued a lawyer notice on 1.12.1994. The accused had shifted her residence temporarily to Vadasserikonam with the intention of avoiding the notice and hence the notice was re-directed to the temporary residence. The complainant alleges that the accused purposefully not accepted that notice and therefore it was returned and the accused did not repay the amount even after the notice.

3. In the Magistrate Court, on the side of the complainant, Pws.1 to 3 were examined and Exts.P1 to P6 and X1 were marked. On the side of the accused, no evidence was adduced. The learned Magistrate, on considering the evidence, found that the accused has committed an offence under Section 138 of the N.I. Act and she was convicted and sentenced to undergo S.I. for a period of six months and to pay Rs.50,000/-, the cheque amount, as compensation under Section 357(3) Cr.P.C. in default to undergo S.I. for a further period of two months. Against that conviction and sentence the accused filed Crl.A.No. 161 of 1997 before the First Additional Sessions Court, Trivandrum, which was allowed and the accused was acquitted on the ground that notice was not served on the accused. Against that judgment the complainant filed this appeal.

4. Heard learned counsel for the appellant and the learned Public Prosecutor.

5. The learned counsel for the appellant submitted that the lower appellate court committed a grave error in not appreciating the requirement of issuing notice and its receipt as contemplated under Section 138 of the N.I. Act. This aspect was correctly appreciated and a finding was correctly entered on it by the trial court. The learned counsel for the appellant further submitted that the lower appellate court failed to note that the accused has purposefully evaded notice and there is deemed service of notice. The learned counsel further submitted that the lower

appellate court failed to note that the presumption available under Section 114(e) of the Indian Evidence Act and Section 27 of the General Clauses Act are applicable in the instant case.

6. When the accused was questioned under Section 313 Cr.P.C., she stated that the complainant was her relative and it was the usual habit of the complainant to visit her house. He was a chitty foreman also. The accused was in acute need of money as she was laid up in connection with kidney trouble. She borrowed Rs.12,000/- from the complainant. All the amounts were given back. The complainant dishonestly received Ext.P1 cheque signed by the accused with the help of one Kumar. The complaint is a falsely foisted one. She had admitted that no amount was there in her account for honouring the cheque.

7. The complainant was examined as PW1. According to him, the accused borrowed an amount of Rs.50,000/- from the complainant on 1.5.1994. She had received the amount by reaching the house of the complainant at Vadasserikonam. According to him, Ext.P1 cheque has been drawn on that day for the discharge of the said liability. The cheque bears the date 1.7.1994. It was presented for collection through the State Bank of Travancore, Cheruniyoor branch. Ext.P2 is the memo received to him stating that it was dishonoured for want of sufficient funds in the account of the accused.

8. PW2 is the Bank Manager of the drawee bank, Indian Overseas Bank, Vadasserikonam. Ext.X1 is the certified copy of the account of the accused. PW2 has stated that Ext.P1 cheque was bounced for want of sufficient funds in the account of the accused and Ext.P2 is the memo issued by him to the payee bank stating that fact. Ext.X1 shows that an amount of Rs.108.60 only was there in the account of the accused when Ext.P1 cheque was presented for collection.

9. In Section 313 Cr.P.C. statement, the accused has admitted that Ext.P1 cheque was signed by her and there was no sufficient amount in her account to honour Ext.P1 cheque, which was dt.1.7.1994. It was dishonoured on 18.11.1994 for want of sufficient funds in the account of the accused. That shows that the cheque was presented after the date mentioned in it i.e. 1.7.1994 and within six months. The complainant received Ext.P6 intimation through the payee bank that the cheque

was bounced for want of sufficient funds in the account of the accused on 21.11.1994. Ext.P3 is the postal receipt, which shows that on 1.12.1994 a notice was issued to the accused through an advocate. That shows that within 15 days of the date of the bouncing of the cheque he had issued a legal notice. The complaint was filed on 23.1.1995.

10. Ext.P5 is the registered notice sent by the complainant addressed to the accused, which was returned unserved. The accused has no case that her address shown in Ext.P5 registered notice is not correct. The endorsement in Ext.P5 notice shows that on 7.12.1994 that notice was redirected to the present address of the accused and on subsequent dates the accused was absent and the addressee left the place and on 18.12.1994 the notice was returned to the complainant's Advocate.

11. In the decision reported in C.C. Alavi Haji v. Palapetty Muhammed ((2007) 6 SCC 555) it was held that:

"The Supreme Court has already held that when a notice is sent by registered post and is returned with a postal endorsement 'refused' or 'not available in the house' or 'house locked' or 'shop closed' or 'addressee not in station', due service has to be presumed."

In view of the principles laid down in this ruling, due service of Ext.P5 notice has to be presumed. The accused has not adduced any evidence to show that she had no knowledge that the notice was brought to her address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the Postman was incorrect. Since the complainant has proved all the ingredients of the offence under Section 138 of the N.I. Act, the learned Additional Sessions Judge is not justified in acquitting the accused and the conviction entered by the learned Magistrate has to be maintained.

12. In the decision reported in Damodar S. Prabhu v. Sayed Babalal H (2010(2) KHC 428 (SC)), it was held that in a case of dishonour of cheques, compensatory aspect of the remedy should be given priority over the punitive aspect. Considering the facts and circumstances of the case, I am of the view that

sentencing the accused to pay a fine of Rs.60,000/- would meet the ends of justice. The said fine shall be paid as compensation under Section 357(1) of Cr.P.C.

13. Accordingly this appeal is allowed. The judgment in Crl.A.No. 161 of 1997 on the file of the First Additional Sessions Court, Trivandrum acquitting the accused is set aside and the accused in C.C.No. 252 of 1995 on the file of the J.,F.C.M., Varkala is found guilty and she is convicted under Section 138 of the N.I. Act and sentenced to pay a fine of Rs.60,000/- The said fine shall be paid to the appellant as compensation under Section 357(1) of Cr.P.C. The accused is permitted either to deposit the fine amount before the court below or directly pay the compensation to the appellant within four months from today and produce a memo to that effect before the court below in case of direct payment. If the accused fails to deposit or pay the said amount within the aforesaid period, she shall suffer S.I. for a period of one month by way of default sentence.

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