

Muniraj. Vs.T.Viswanath

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Court : Chennai

Decided On : Jul-19-2012

Judge : R.Mala, J.

Acts : Negotiable Instruments Act - Section 138; Code of Criminal Procedure(CrPC) - Section 378; Evidence Act - Section 114; G.C.Act - Section 27

Appeal No. : Cri.A.No.578 of 2005

Appellant : Muniraj

Respondent : T.Viswanath

Advocate for Def. : Mr.K.Selvarangan, Adv

Advocate for Pet/Ap. : Mr.P.Mani, Adv.

Judgement :

Prayer.:- Appeal is filed under Section 378 of Cr.P.C. against the Judgment dated 27.04.2005 made in C.C.No.30 of 2004 on the file of the District Munsif cum Judicial Magistrate, Denkanikottai.

JUDGMENT

1. The appeal arises out of the Judgment of acquittal dated 27.04.2005 made in C.C.No.30 of 2004 on the file of the District Munsif cum Judicial Magistrate,

Denkanikottai.

2. The appellant, as a complainant, preferred a private complaint stating that the respondent/accused borrowed a sum of Rs.75,000/- on 05.12.2003 and agreed to repay the same within two months. But, he had not repaid the amount and for that, on 05.02.2004, he issued Exs.P1 to P3-Cheques, dated 05.02.2004, each for Rs.25,000/-, totalling Rs.75,000/-, bearing Nos.809251, 809253 and 809254, drawn in favour of State Bank of Mysore, Bangalore. The cheques had been presented on 05.03.2004 for encashment before the Indian Bank, Thally and the same had been returned on 13.03.2004, with return memos, i.e. Exs.P5 to P7, indicating as insufficient funds . Immediately, he issued Ex.P8-legal notice to the accused on 23.03.2004 and the said notice was not served and the postal cover was returned on 16.04.2004. Therefore, the accused, with malafide intention, after knowing fully well that there was no sufficient funds to honour the cheque, issued the cheques, thereby, committed offence punishable under Section 138 of the Negotiable Instruments Act.

3. The learned Magistrate, after following the procedure, examined P.W.1 and marked the documents as Exs.P1 to P9 and placed the incriminating evidence against the accused, but, the same was denied by him. On the side of the accused, D.W.1 was examined and Ex.D1 was marked. After considering the oral and documentary evidence, the learned Magistrate acquitted the accused stating that there was no notice under Section 138 Proviso (b) of the Negotiable Instruments Act and also the complainant had not proved that Exs.P1 to P3 were issued for discharging the legally existing liability since he is not having sufficient financial status to lend such money. Aggrieved against the same, the present appeal has been preferred by the appellant.

4. The learned counsel appearing for the appellant submitted that Exs.P1 to P3-cheques were returned on 13.03.2004 and Ex.P9-legal notice was sent on 23.03.2004 to the accused and the postal cover was returned under Ex.P9 indicating as "Door locked, Not Claimed, Returned to Sender". Therefore, the notice is valid under Section 138 Proviso (b) of the Negotiable Instruments Act. To substantiate the same, he relied upon the following decisions of the Apex Court:

a) 2005 Criminal L.J. 127

b) 2007 AIR SCW 3578

c) 2010 (2) MWN (Cr.) DCC 5 (SC).

He further submitted that the respondent has not disputed the signature in the Cheque. Therefore, the appellant is entitled to invoke the presumption under Sections 118 and 139 of the Negotiable Instruments Act. So, there is presumption under Section 139 of the Negotiable Instruments Act that Exs.P1 to P3 were issued for discharging the legally enforceable debt. Therefore, he prayed for allowing this appeal.

5. Resisting the same, the learned counsel for the respondent submitted that Ex.P8- legal notice was issued by one Krishna Reddy and not by the appellant herein. Hence, there was no notice under Section 138 Proviso (b) of the Negotiable Instruments Act. He further submitted that the appellant has not filed any document to show that he has sufficient means to lend Rs.75,000/- and the trial Court has considered all the aspects in a proper perspective and came to the correct conclusion. Hence, he prayed for dismissal of this appeal.

6. Considered the rival submissions on either side and perused the documents.

7. Exs.P1 to P3 were issued on 05.02.2004. The Cheques were presented for encashment and the same were returned with return memos, Exs.P5 to P7, indicating as 'insufficient funds' on 13.03.2004. Therefore, Ex.P8 - legal notice had been issued on 23.03.2004.

8. Now, this Court has to decide whether Ex.P8-notice is valid under Section 138 Proviso (b) of the Negotiable Instruments Act?. Ex.P8-legal notice had been sent by Registered Post and postal cover was returned. The returned postal cover was marked as Ex.P9. While perusing the document Ex.P9, it was mentioned as "Door locked, Not Claimed Returned to Sender". In Ex.P8, it was stated that the notice was issued by one Krishna Reddy, but the notice in the returned cover Ex.P9 was opened which shows that the notice was issued by the appellant Muniraj. At this juncture, it is appropriate to consider the decision, relied upon by the learned

counsel appearing on behalf of the appellant, reported in 2005 Cri.L.J.127 (V.Raja Kumari vs. P.Subbarama Naidu and another), wherein, it was held that lawyer notice despatched by sender by post with correct address on it, it can be deemed to be served on sendee unless he proves that it was not really served.

9. While considering the decision reported in 2007 AIR SCW 3578 (C.C.Alavi Haji vs. Palapetty Muhammed & Anr.), it was held that pre-requirement of giving notice to drawer of cheque is mandatory and object of such requirement is to avoid unnecessary hardship to an honest drawer. In the citation, it was specifically stated 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. It is appropriate to incorporate paras 13 and 14 of the Judgment and the same are extracted hereunder:

13. According to Section 114 of the Act, read with illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the Court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the G.C.Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C.Act is extracted below:

"27. Meaning of service by post : Where any Central Act or Regulation made after the commencement of this Act authorizes 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, pre-paying 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."

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This 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. [Vide Jagdish Singh v. Natthu Singh; State of M.P. v. Hiralal & Ors. And V.Rajakumari Vs. P.Subbarama Naidu & Anr.]. It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

10. In the present case on hand, while perusing the document Ex.P9, it was mentioned as "Door locked, Not claimed, Returned to sender". In such circumstances, as per the dictum of the Apex Court, I am of the view that Ex.P8-notice has presumed to be served on the respondent. Hence, the legal notice is valid under Section 138 Proviso (b) of the Negotiable Instruments Act.

11. Now, this Court has to decide whether the trial Court was correct in holding that the appellant has not proved that Exs.P1 to P3 were issued for discharging the legally existing liability?. Admittedly, notice had been sent by the appellant,

but, there was no reply. On the side of the accused, the statement of account was marked as Ex.D1 and Mr.Prasath, Assistant Branch Manager of SBI, Sankarapuram, was examined as D.W.1. In his evidence, he deposed that he issued a cheque book, containing 10 cheque leaf, bearing Nos.809251 to 809260, in the year 1996. Therefore, it is appropriate to consider Ex.D1-statement of account of the accused for the period of 06.07.1997 to 27.06.2004. In the year 2001, cheque leaf Nos.227029 and 227031 had been mentioned. Considering the same, the cheques were not issued in the year 2004.

12. D.W.1, in his chief examination, deposed that he received summons only in respect of 7 cheques and the same were issued only in the year 1996. Considering the evidence of D.W.1, I am of view that the appellant herein has not proved that the cheques were issued on 05.02.2004.

13. When P.W.1 was in witness box, he denied a suggestion that the respondent herein had issued a cheque in favour of one Kesavareddy, through the complainant, Muniraj as Benami of Kesavareddy, a complaint has been filed against the accused. In such circumstances, no document has been produced by the appellant to prove that he lent money of Rs.75,000/- and received the cheques on 05.02.2004. Even though the respondent / accused has rebutted the presumption under Section 139 of the Negotiable Instruments Act, the complainant has not proved that Exs.P1 to P3 were issued for discharging the legally enforceable liability. So, the decision relied upon by the learned counsel for the appellant reported in 2010 (2) MWN (Cr.) DCC 5 (SC) (Rangappa vs. Sri Mohan), is not applicable to the facts of this case.

14. It is appropriate to consider the document Ex.P8. While perusing Ex.P8, the notice was sent by one Krishna Reddy, Son of late. Munireddy, but, whereas, the appellant herein is Muniraj. The respondent has admitted that the cheques were issued in favour of one Kesava Reddy. Therefore, on 05.02.2004, the respondent never issued any cheque and to prove the same that cheques were issued during the year 1996, he examined D.W.1 and marked Ex.D1. So, the ingredients of Section 138 of the Negotiable Instruments Act is not made out. Hence, I am of the view that the trial Court has considered all those documents and came to the

correct conclusion that the appellant has not proved Exs.P1 to P3 were issued for discharging the existing liability on 05.02.2004. Therefore, the appeal deserves to be dismissed.

15. In fine,

a) the appeal is dismissed;

b) the Judgment of acquittal passed by the trial Court is hereby confirmed.

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