HIGH COURT OF ANDHRA PRADESH
Before Justice C.V. Ramulu

K. Annaji Rao v/s N. Krishna Raju Sekhar & Another

Criminal Appeal No.758 of 1998

Decided On, 25 March 2004

Judgment Text

This appeal is filed against the Judgment dated 27-3-1998 in C.C.No.118 of 1996 on the file of the IV Additional Judicial First Class Magistrate, Kakinada, wherein the respondent-accused was acquitted under Section 255(1) of the Code of, Criminal Procedure of the offence under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act').

The case of the complainant, in brief, is as under

On 15-11-1994, the respondent-accused borrowed an amount of Rs.75,000/- from the complainant-P.W1 for the purpose of investment in his business and executed a promissory note (original of Ex.P1). On demand, the respondent-accused gave a cheque bearing No.846763, dated 22-8-1995 (Ex.P2) for Rs.50,000/- drawn on State Bank of Hyderabad, APSP Quarters, Kakinada towards part payment of the amount due under Ex.P1. P.W1 presented Ex.P2 for encashment through Andhra Bank, Srinagar Branch, Kakinada on 22-1-1996. The same was returned as dishonoured for want of sufficient funds, through Ex.P3 memo, dated 23-1-1996. P.W1 was informed about the dishonour of cheque on 27-1-1996. Thereafter, PW1 got issued Ex.P4-legal notice on 29-1-1996 to the respondent-accused through registered post and also under certificate of posting informing about the dishonour of cheque for want of sufficient funds and requesting the accused to pay the amount covered by the cheque within 15 days from the date of receipt of notice. The respondent-accused received the notice sent under certificate of posting (Ex.P7) on 31-1-1996, but the accused evaded to receive the notice sent by registered post and the cover (Ex.P6) was returned with an endorsement 'addressee left'. In spite of receipt of notice, the respondent did not pay the amount covered by the cheque and thus, the respondent was liable for punishment under Section 138 of the act.

The plea of the accused was one of total denial.

Before the trial Court, the complainant examined himself as PW.1 and got examined P.Ws.2 and 3 on his behalf. He got marked Exs.P1 to P11. The accused did not adduce either oral or documentary evidence. On application of the entire evidence placed before it, the trial Court found the accused not guilty of the offence under Section 138 of the Act and as such, acquitted him under Section 255(1) of Cr.P.C. Aggrieved by the same, the present appeal is filed by the complainant.

Insofar as the service of notice as required under Section 138(b) of the Act is concerned, the learned counsel for the appellant-complaint strenuously contended that Ex.P4 legal notice was sent by Registered post with acknowledgment due on 29-1-1996 and through certificate of posting on 30-1-1996 to the respondent. But, the notice sent, by registered post was returned unserved on 31-1-1996 (Ex.P6) with an endorsement ‘addressee left'. On this, learned counsel for the appellant submitted that once the notice as required under Section 138(b) of the Act is sent by registered post, whether it was refused or not claimed or returned with the endorsement 'addressee is left' is of no consequence if the address was found to be correct. According to the evidence of P.W1, he got issued Ex.P4 notice on 29-1-1996 by registered post and the same was returned under Ex.P6 on 31-1-1996. Even in the teeth of this evidence, learned counsel for the appellant contends that since address of the respondent-accused was not found to be incorrect, it must be deemed that it was served on the respondent accused,

even if there is postal endorsement ‘addressee left'. Even in the cross-examination of P.W.1, it was suggested by the accused that the statutory notice was not sent to correct address, but the same was denied by PW.1.

I am afraid I cannot accept the said contention. The endorsement of the postal departmental as 'refuse to receive' or some other endorsement, which gives an impression that the addressee wantonly avoid to receive such a notice, it can be said that there is deemed service of notice, but not in the circumstances as in the instant case.

Further, the learned counsel for the appellant strenuously contended that under Ex.P7 another copy of the legal notice (Ex.P.4) was sent on 30-1-1996 through certificate of posting, the service of which was not denied by the respondent-accused. The mere assertion on the part of P.W. 1 -complainant that the accused received notice under Ex.P7 amounts to discharge of the initial burden on the part of the complainant. Further, no suggestion was made to P.W.1 in the cross-examination by the defence that Ex.P7 notice was not served on the accused. Therefore, it must be deemed that the notice was served on the accused. Further, the accused has not entered into the witness box and did not discharge his burden. In support of her contention, the learned counsel for the appellant relied upon the decisions reported in M.R. Reddy V. Gopuma Reddy Ram Reddy (1997(2) ALD (Crl.)189(AP)) and Girish Chandra Pandey V. Kanhaiyalal Chandak (1998 (2) ALD (Crl.)731 (AP).

In M.R. Reddy's case (1 supra), a learned single judge of this Court held that the notice, though address is correctly mentioned, returned unserved, it is deemed to have been served on the date of last postal endorsement on the envelope containing the notice.

In Girish Chandra Pandey's case (2 supra), a learned single Judge of the Calcutta High Court held that a notice sent by registered post with the correct address is deemed to have been served, though it was returned with endorsement 'always absent in my duty'.

I am afraid, I cannot accept the said contention. The above decisions are not applicable to the case on hand as the facts in those cases are different from the one of the case on hand. I am inclined to follow the Judgment reported in A. Sudershan V. Sri Mannen (Shabir) (1997 (1) ALT (Crl.)785), which has relied upon by the Court below. In the said decision, it was held as under:

".....the combined reading of Clauses (b) and (c) of Section 138 of the Negotiable Instruments Act, it is clear that unless a notice in writing is received by the drawer of such a cheques, the offence would not be constituted. Therefore, the receipt of notice is absolutely necessary as a pre-condition for constituting such an offence. The act of giving a notice contemplated by Section 138 of the Negotiable Instruments Act means actually serving the notice in terms of Section 27 of the General Clauses Act. In other words, even if there is any ambiguity regarding what constitutes service of notice u/s.138 of the Negotiable Instruments Act, Section 27 of the General Clauses Act,1897 has clarified the position of law……..Therefore, I am constrained to hold in this case that due to the non-service of notice on the accused in terms of Clauses (b) and (c) of Section 138 of the Negotiable Instruments Act an offence under that section is not constituted and the complaint is liable to be dismissed..."

In **Sridhar M.A. V. Metalloy N.Steel Corpn (2000 (1) SCC 397)** the apex Court held that notice should not be deemed to have been served as a matter of course and deemed service is to be accepted in the facts of each case. **In the instant case, the case of the respondent-accused was that he was not served with statutory notice. But, the case of complainant was that he sent the statutory notice to the respondent by registered post and also through certificate of posting and the notice sent by register post was returned unserved with the endorsement 'addressee left'. No evidence is placed before the Court that the notice sent by certificate of posting was, in fact, served on the respondent. In these circumstances, the respondent-accused is entitled to benefit of doubt as to whether such service of notice, in fact had been effected on him. Therefore, I am of the opinion that unless the notice issued by the complainant is served on the**

respondent-accused as required under Section 138(b) read with clause (c) thereof, the complaint is not maintainable and the accused cannot be convicted for the offence under Section 138 of the Act.

The next contention of the learned counsel for the appellant, is that, the reasons furnished by the Court below that since the cheques was presented twice, which came in the evidence of P.W.1, that itself does not invalidate the complaint filed before the Court. The learned counsel has drawn attention of this Court to certain portions in paragraphs 7 and 8 of the Judgment of the Court below and submitted that such finding is not tenable in view of the decision of the apex Court in Sadanandan Bhadran V. Madhavan Sunil Kumar (1998 (2) ALD (Crl.) 529 SC = 1998 (6) SCC 514) in which it was held as under:

"7. Besides the language of Sections 138 and 142 which clearly postulates only one cause of action, there are other formidable impediments which negate the concept of successive causes of action. One of them that for dishonor of one cheque, there can be only one offence and such offence is committed by the drawer, it on his failure to make the payment within fifteen days of the notice accordance, with clause (b) or proviso to Section 138. That necessarily means that for similar after service of fresh notice on subsequent the draw cannot be liable for any can the once be treated as non est so as to give the payee a right to file a complaint treating the second offence as the first one. At that stage, it will not be a question of waiver of the right of the payee to but of which stands already absolution of the drawer of an offence, which stands already committed by him and which cannot be committed by him again.

8. The other impediment to the acceptance of the concept successive causes of action is that it will make the period of limitation under clause (c) of Section 142 otiose, for, a payee who failed to file his complaint within one month and thereby forfeited his right to prosecute the drawer, can circumvent the above limitative clause by filing a complaint on the basis of a fresh presentation of the cheque and its dishonour. Since in the interpretation of statutes, the court always presumes that the legislature inserted every part thereof for a purpose and the legislative intention is that every part should have effect, the above conclusion cannot be drawn for that will make the provision for limiting the period of making the complaint nugatory.

9. Now, the question is how the apparently conflicting provisions of the Act, one enabling the payee to repeatedly present the cheque and the other giving him only one opportunity to file a complaint for its dishonour, and that too, within one month from the date the cause of action arises, can be reconciled. Having given our consideration to the question we are of the opinion that the above two provisions can be harmonized, with the interpretation that on each presentation of the cheque and its dishonour, a fresh right - and not cause of action - accrues in his favour. He may, therefore, without taking pre-emptory action in exercise of his such right under clause (b) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque. But once he gives a notice under clause (b) of Section 138, he forfeits such right for in case of failure of the drawer to pay the money within the stipulated time, he would be liable for offence and the cause of action for filing the complaint will arise. Needless to say, the period of one month for filing the complaint will be reckoned from the day, immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawer expires."

In view of the above decision, I am in complete agreement with the contention of the learned counsel for the appellant with regard to the second contention. As per the complaint, Ex.P2 cheque dated 22-8-1995 was presented on 22-1-1996. But, during the course of evidence, it came to light that the said cheque was also presented early.