IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

MONDAY, THE 12TH DECEMBER 2005 / 21ST AGRAHAYANA 1927

CRL.A.No. 38 of 1996()

CRLA.353/1992 of SESSIONS COURT, KOZHIKOE
ST.2764/1992 of JUDL. MAGISTRATE OF FIRST CLASS-I, KOZHIKODE

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APPELLANT:

M.P.BALAN, PROPRIETOR, BEENA BANKERS,
NADUVATTOM AMSOM, KOZHIKODE TALUK.

BY ADV. SMT.R.RANJINI

RESPONDENTS:

PULIKKAL MOHANAN, S/O.SANKARAN, PROPRIETOR,
JANSAN MEDICALS, NEAR RAILWAY TRACK,
KUNHIKANDI PARAMBA, PANNIYANKARA AMSOM, DESOM,
KOZHIKODE TALUK.

BY ADV. SRI.V.M.SURENDRAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12.12.2005, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. HEMA, J.

CRL.A. NO.38 of 1996

Dated this the 12th day of December, 2005

JUDGMENT

The appellant filed a complaint before the Judicial Magistrate of First Class, Kozhikode alleging offence under Section 138 of the Negotiable Instruments Act (`N.I.Act', for short). As per the allegations in the complaint issued cheque dated 10.8.1990 drawn on his account in the Vysya Bank Ltd. for an amount of Rs.25,000/- in discharge of a debt which he owed to complainant. The cheque, when presented for encashment through the Dhanalakshmi Bank Ltd., was returned unpaid on 13.8.1990, since funds were insufficient. A notice was sent to the accused through a lawyer on 20.8.1990. But it was undelivered with the endorsement that the drawer did not come and collect the article in spite of being told to do so. Therefore, another notice was issued demanding cash payment. On 31.8.1990 the notice was received by the accused on 10.9.1990. But no payment was made within 15 days and hence a complaint was filed on 8.10.1990.

2. PW1 was examined, Exhibits P1 to P4 series were marked on the side of the appellant. The accused did not adduce any evidence. The trial court convicted and sentenced the first respondent to undergo simple imprisonment for three months. The first respondent was further ordered to pay a sum of Rs.25,000/- to PW1 as compensation under Section 357(3) Cr.P.C. and in default, to undergo simple imprisonment for three months. The said conviction and sentence were challenged by the first respondent before the Sessions Court.

3. The learned Sessions Judge found that the finding of the learned Magistrate that Exhibit P1 was issued by the first respondent and it was supported by consideration was correct. It was also held that there was sufficient evidence to prove that cheque was issued in discharge of the liability.

But it was held that the complaint is barred by limitation, since the second notice was admittedly issued by the complainant-appellant beyond the period of 15 days from the date of return of the cheque, i.e., 13.8.1990. The second notice was issued on 31.8.1990. The learned appellate Judge found that according to the proviso to Section 138 of N.I.Act, a notice has to be issued within 15 days from the date of return of the cheque. But the second notice was issued only after 15 days and that is why the complaint was found to be time barred.

4. It is clear from the findings and observations of the learned Sessions Judge that the court was entering a finding with respect to the issuance of notice and the period of limitation with respect to the date on which the second notice was sent (Exhibit P4 series). The memo issued from the bank dated 11.8.1990 was received by the complainant on 13.8.1990 and since the second notice was issued only on 31.8.1990, it was not sent within 15 days of the receipt of information by him from the bank regarding the turn of the cheque as unpaid. The complainant averred in the complaint filed by him that he had received memo from the bank on 13.8.1990 and he also produced the same as Exhibit P2 series and also averred that a notice was issued to the first respondent demanding cash payment on 20.8.1990. The said notice along with the postal receipt are marked as Exhibit P3 series. The postal endorsement and the copy of the lawyer notice will go to show that a notice was issued to the first respondent demanding payment of money covered by Exhibit P1 as early as on 20.8.1990, i.e., within seven days from the date of receipt of memo from the bank.

5. Exhibit P3 series shows that as per the postal endorsement, a notice was sent to the accused-first respondent as early as on 20.8.1990 which is well within the time stipulated in proviso (b) to Section 138 of N.I.Act. But this fact was not taken into account by the court below. It is well settled that as per Section 138 of N.I.Act, the complainant has only to make a demand by "giving

a notice" in writing to the accused. It is for the payee to perform the process of "giving" notice by sending the notice to the drawer in the correct address. Section 138 of the N.I.Act does not even require that the notice should be given only by post. The principles incorporated in Section 27 of the General Clauses Act if applied would lead to the inference that if notice is issued by post in the correct address, it can be deemed to have been served on the sendee, unless he proves that it was not really served and that he was not responsible for such non-service. This position is well settled by the Supreme Court in the decision reported in ***K.Bhaskaran v.Sankaran Vaidhyan Balan*** (AIR 1999 SC 3762).

5. Therefore, the burden of the complainant is only to prove before the court that a notice was sent as required under Section 138(b) of the N.I.Act to the drawer of the cheque within 15 days of the receipt of information by him from the bank regarding the return of cheque as unpaid. The appellant in this case has produced the postal receipt and also copy of notice which prima facie evidences that a notice was sent as early as on 20.8.1990, ie., within the time stipulated under Section 138(b) of N.I.Act. If as a matter of fact the accused-first respondent has a case that the notice was not served on him and that he was not responsible for such non-service, the burden is on the first respondent to establish this fact. The primary burden on the complainant will be discharged by producing sufficient materials to show that a notice was sent to the accused within 15 days of receipt of the memo from the Bank.

6. In this case the accused has no case that no notice as evidenced by Exhibit P2 series was not sent to him at all. He has not challenged this aspect in the cross-examination. The only answer elicited from PW1 was that he did not know what happened to the notice sent on 20.8.1990. PW1 has stated in the chief-examination that a notice was sent to the accused on 20th and produced Exhibit P2 series also and gave evidence that the notice was returned as unserved. The appellant having proved that a notice was sent as evidenced by

postal endorsement in the absence of any challenge on the correctness of the address in which the notice was served and the date on which the notice was sent as evidenced by Exhibit P2 series, the first respondent cannot be said to have discharged his burden by merely putting a question and eliciting an answer that PW1 did not know as to what happened to the notice sent on 20.8.1990. The appellant has prima facie established that a notice was sent on 20.8.1990 within 15 days of receipt of the memo from the bank well within the time referred to in Section 138(b) of N.I.Act. But the first respondent has no case that the notice was not sent in correct address, nor he was not responsible for the non service or that it was not really served on him. In such circumstances, the notice can be held to have been served on the sendee.

7. Learned Sessions Judge has taken only the date of issuance of second notice and the receipt of the same as the relevant date for computing whether there was compliance of Section 138(b) of N.I.Act. In the light of the dictum laid down in the Supreme Court decision cited above, this finding cannot be sustained. However, on going through the records in this case, I find that it is a fit case where the accused should be given an opportunity to rebut the evidence given by the complainant on this aspect. The evidence was adduced as early as on 16.10.1992 at a time when the legal position was not clarified. That apart, learned counsel appearing for the appellant submitted that this is a genuine case where he would be able to produce even evidence from the Post Office to prove the date of receipt of notice by the accused. No evidence is forthcoming regarding the date on which Exhibit P3 series was served on the accused. It is necessary that an opportunity should be given to both sides to adduce evidence on the relevant aspect. Hence the order acquitting the accused has to be set aside and the matter is to be remanded for fresh consideration and disposal in accordance with law.

The order under challenge is, therefore, set aside. The case is remanded to the trial court for fresh consideration and disposal in accordance with the observations made in this judgment. The trial court will dispose of the case within two months from the date of receipt of a copy of this judgment.

The Criminal Appeal is partly allowed.

K.HEMA, JUDGE

vgs.

K.HEMA,J.

CRL.A.NO.38 OF 1996

JUDGMENT

12.12.2005