
(2006) 07 AP CK 0076

In the Andhra Pradesh High Court

Case No : Criminal Appeal No. 895 of 1999

C.S. Madhusudhan

APPELLANT

Vs

B. Eswaramma Rao and The State of A.P.

RESPONDENT

Date of Decision : 21-07-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 251
Negotiable Instruments Act, 1881 (NI) — Section 138, 142

Citation : (2006) 2 ALD(Cri) 422 : (2006) 3 ALT(Cri) 175 : (2007) 2 BC 634 :
(2006) CriLJ 4569

Hon'ble Judges : B. Seshasayana Reddy, J

Bench : Single Bench

Advocate : N. Shoba, for the Appellant; M. ViJayakumar, for the Respondent No. 1 and Public Prosecutor for the Respondent No. 2, for the Respondent

Final Decision : Dismissed

Judgement

B. Seshasayana Reddy, J.—This criminal appeal is directed against the judgment dated 8-2-1999 passed in criminal appeal No. 82 of 1998 on the file of the III Additional Metropolitan Sessions Judge, Hyderabad, whereby and where under the learned III Additional Metropolitan Sessions Judge, Hyderabad set-aside the conviction and sentence of accused B. Eshwaramma for the offence u/s 138 of Negotiable Instruments Act passed in C.C. No. 190 of 1995 on the file of VI Metropolitan Magistrate, Hyderabad.

2. The facts of the case in brief giving rise to filing of this criminal appeal by complainant- C.S. Madhusudhan are:

The respondent-accused allegedly has taken a hand loan of Rs. 75,000/- from the complainant for the purpose of her son's business and in discharge of which, she issued a cheque - Ex.P.1 dated 30-4-1995 drawn on Bank of Baroda, Barkathpura branch. On the presentation of the such cheque, it came to be dishonoured for want of sufficient funds. Thereupon the appellant- complainant got issued a statutory notice under Ex.P.3. The respondent-accused evaded to

receive the notice. The appellant-complainant having waited for statutory period presented a complaint before VI Metropolitan Magistrate, Hyderabad. The learned Magistrate took the complaint on file as C.C. No. 190 of 1995. On appearance of the respondent-accused, learned Magistrate examined him u/s 251 Cr.P.C. putting substance of accusation levelled against him. The respondent-accused pleaded not guilty and claimed to be tried. The appellant-complainant examined three witnesses as PWs 1 to 3 and marked 8 documents as Exs.P.1 to P.8. On behalf of the respondent-accused, three witnesses were examined as DWs 1 to 3. The learned Magistrate, on considering the evidence on record and on hearing the counsel for the parties, found the respondent-accused guilty for the offence u/s 138 of the Negotiable Instruments Act and convicted her accordingly and sentenced her to undergo rigorous imprisonment for a period of two months and to pay a fine of Rs. 2,000/-, in default, simple imprisonment for one month, by the judgment dated 28-2-1998.

3. Assailing the judgment of conviction and sentence passed in C.C.N.190 of 1995, respondent-accused filed Criminal Appeal No. 82 of 1998 on the file of III Additional Metropolitan Sessions Judge, Hyderabad. The learned III Additional Metropolitan Sessions Judge, Hyderabad, on considering the material on record and hearing counsel appearing for the parties, recorded a finding that statutory notice provided u/s 138(b) of the Negotiable Instruments Act is not properly served and thus the complaint is devoid of statutory notice as provided u/s 138 of Negotiable Instruments Act and accordingly set-aside the conviction and sentence imposed on the respondent-accused for the offence u/s 138 of the Negotiable Instruments Act and allowed the appeal by judgment dated 8-2-1999. Hence, this criminal appeal by the complainant.

4. The learned Counsel appearing for the appellant-complainant submits that notice as contemplated u/s 138(b) of the Negotiable Instruments Act has been sent to the respondent-accused to her permanent address and therefore, it is to be construed as valid notice. A further submission has been made by the learned Counsel that the respondent-accused has purposefully evaded to receive notice and therefore, the finding recorded by the lower appellate court with regard to non-service of notice as provide u/s 138 of Negotiable Instruments Act is not legal and proper and the same is required to be set-aside and the matter needs to be remanded back to the lower appellate court for fresh consideration.

5. The learned Counsel appearing for the respondent-accused submits that respondent-accused at the relevant point of time was residing at Hyderabad and the appellant-complainant having full knowledge of the said fact sent the statutory notice to Eluru and therefore, the notice sent to respondent-accused to Eluru address cannot be construed as a valid notice within the meaning of Section 138(b) of the Negotiable Instruments Act. It is also contended that the lower appellate court considered the evidence brought on record in the right perspective and held that the complaint is devoid of statutory notice as provided u/s 138(b) of Negotiable Instruments Act.

6. The only issue that falls for consideration in this appeal is whether the complaint filed by the appellant-complainant is devoid of statutory notice as provide u/s 138(b) of Negotiable Instruments Act ?

7. u/s 138(b) of Negotiable Instruments Act, where a cheque issued by the drawer in the discharge of any debt or any other liability is returned by the bank unpaid, because the amount standing to the credit of that account is insufficient to honour the cheque, the said person is deemed to have committed an offence. This is subject to proviso to Section 138 which provides that the cheque should have been presented to the bank within the period of six months from the date of which it is drawn or within the period of its validity, whichever is earlier. The payee must also make a demand for the payment of the said amount by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of the information by him from the bank regarding the return of the cheque unpaid. If despite this demand, the drawer fails to make the payment within fifteen days of the receipt of the notice, a cause of action arises for prosecuting him for the offence punishable u/s 138 of the Act. Section 142 provides that the court shall take cognizance of an offence punishable u/s 138 of the Act upon receipt of a complaint in writing made by the payee or, as the case may be, the holder in due course of the cheque. Such complaint must be made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138. However, discretion is given to the court to take cognizance of the complaint even after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making the complaint within such period.

8. It is not disputed that the drawer of the cheque makes himself liable for prosecution u/s 138 of the Act if he fails to make the payment within fifteen days of the receipt of the notice given by the drawee. His failure to make the payment within the stipulated period gives rise to a cause of action to the complainant to prosecute the drawer u/s 138 of the Act.

9. The question is whether in a case of this nature, where the postal endorsement shows that the notice could not be served on account of the non-availability of the addressee, a cause of action may still arise for prosecution of the drawer of the cheque on the basis of deemed service of notice under Clause (c) of proviso to Section 138 of the Act. In my view this question has to be answered by reference to the facts of each case and no rule of universal application can be laid down that in all cases where notice is not served on account of non-availability of the addressee, the court must presume service of notice.

10. It is well settled that in interpreting a statute the court must adopt that construction which suppresses the mischief and advances the remedy. This is a rule laid down in Heydon's Case (76 ER 637) also known as the rule of purposive construction or mischief rule.

11. Section 138 of the Act was enacted to punish those unscrupulous persons

who purported to discharge their liability by issuing cheques without really intending to do so, which was demonstrated by the fact that there was no sufficient balance in the account to discharge the liability. Apart from civil liability, a criminal liability was imposed on such unscrupulous drawers of cheques. The prosecution, however, was made subject to certain conditions. With a view to avoid unnecessary prosecution of an honest drawer of a cheque, or to give an opportunity to the drawer to make amends, the proviso to Section 138 provides that after dishonour of the cheque, the payee or the holder of the cheque in due course must give a written notice to the drawer to make good the payment. The drawer is given 15 days time from date of receipt of notice to make the payment, and only if he fails to make the payment he may be prosecuted. The object which the proviso seeks to achieve is quite obvious. It may be that on account of mistake of the bank, a cheque may be returned despite the fact that there is sufficient balance in the account from which the amount is to be paid. In such a case if the drawer of the cheque is prosecuted without notice, it would result in great injustice and hardship to an honest drawer. One can also conceive of cases where a well intentioned drawer may have inadvertently missed to make necessary arrangements for reasons beyond his control, even though he genuinely intended to honour the cheque drawn by him. The law treats such lapses induced by inadvertence or negligence to be pardonable, provided the drawer after notice makes amends and pays the amount within the prescribed period. It is for this reason that Clause (c) of proviso to Section 138 provides that the section shall not apply unless the drawer of the cheque fails to make the payment within 15 days of the receipt of the said notice. To repeat, the proviso is meant to protect honest drawers whose cheques may have been dishonoured for the fault of others, or who may have genuinely wanted to fulfill their promise but on account of inadvertence or negligence failed to make necessary arrangements for the payment of the cheque. That proviso is not meant to protect unscrupulous drawers who never intended to honour the cheques issued by them, it being a part of their modus operandi to cheat unsuspecting persons vide the decision of Supreme Court in *D. Vinod Shivappa v. Nanda Belliappa* AIR 2006 SCW 2757.

12. If a notice is issued and served upon the drawer of the cheque, no controversy arises. Similarly, if the notice is refused by the addressee, it may be presumed to have been served. This is also not disputed. This leaves us with the third situation where the notice could not be served on the addressee for one or the other reason, such as his non availability at the time of delivery , or premises remaining locked on account of his having gone elsewhere etc. If in each such case the law is understood to mean that there has been no service of notice, it would completely defeat the very purpose of the Act. It would then be very easy for an unscrupulous and dishonest drawer of a cheque to make himself scarce for sometime after issuing the cheque so that the requisite statutory notice can never be served upon him and consequently he can never be prosecuted . There is good authority to support the proposition that once the complainant , the

payee of the cheque, issues notice to the drawer of the cheque, the cause of action to file a complaint arises on the expiry of the period prescribed for payment by the drawer of the cheque. If he does not file a complaint within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138 of the Act, his complaint gets barred by time. Thus, a person who can dodge the postman for about a month or two, or a person who can get a fake endorsement made regarding his non availability can successfully avoid his prosecution because the payee is bound to issue notice to him within a period of 30 days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. He is, therefore, bound to issue the legal notice which may be returned with an endorsement that the addressee is not available on the given address.

13. The Supreme Court in D. Vinod Shivappa's case (1 supra) referring K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another, observed as follows:

If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that Court should not adopt in interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure.

14. In V. Raja Kumari Vs. P. Subbarama Naidu and Another, :the Supreme Court reiterated the principle laid down in K. Bhaskaran V. Sankaran Vaidhyan Balan (supra) and another's case and observed as follows:

Burden is on the complainant to show that the accused has managed to get an incorrect postal endorsement made. What is the effect of it has to be considered during trial, as the statutory scheme unmistakably shows the burden is on the complainant to show the service of notice. Therefore, where material is brought to show that there was false endorsement about the non-availability of noticee, the inference that is to be drawn has to be judged on the background facts of each case.

15. The respondent-accused took a specific plea that she never resided in the given address to which Ex.P.3 notice was sent. She examined DW.3 who resides in the house bearing No. 1-7-95 to which address Ex.P.3 notice has been sent. It is stated by DW.3 that he has been residing in the house bearing No. 1- 7-95 owned by the respondent-accused. Even the complainant while examining as PW.1 admits that at the relevant point of time the respondent-accused worked in Hyderabad. The appellant-complainant did not choose to examine the postal authorities or any one to show that the respondent-accused resided in Eluru in the given address at the relevant point of time. The respondent-accused adduced ample evidence to show that she did not reside in Eluru in the given address to which Ex.P.3 notice u/s 138(b) has been sent. The lower appellate court

considered this aspect and recorded a finding that the complaint is devoid of statutory notice as provided u/s 138(b) of the Negotiable Instruments Act. I do not see any flaw in the order passed by the lower appellate court.

16. Accordingly, this Criminal Appeal fails and is dismissed.