

(1997) 12 MAD CK 0100

In the Madras High Court

Case No : Criminal R.C. No. 823 of 1997 and 6339 of 1997

L. Sonkadhir

APPELLANT

Vs

P. Thiyagarajan

RESPONDENT

Date of Decision : 20-12-1997

Acts Referred:

General Clauses Act, 1897 — Section 27

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (1998) CriLJ 3903

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : S. Ananthanarayanan, for the Appellant;

Judgement

M. Karpagavinayagam, J.—This revision is directed against the order of the learned Judicial Magistrate No. 1, Tindivanam, made in C.M.P.

No. 1322 of 1997 in C.C. No. 358 of 1997 dated 24-10-1997, dismissing the petition filed by the petitioner, who is an accused, for discharge

from the complaint made by the respondent for the offence u/s 130 of the Negotiable Instruments Act.

2. The complainant/respondent herein filed the complaint, which was taken on file in C.C. No. 358 of 1997 by the Judicial Magistrate No. 1,

Tindivanam, against the petitioner/accused for the offence u/s 138 of the Negotiable Instruments Act.

3. According to the complainant, the accused/petitioner purchased black granites on 4-1-1997 for Rs. 80,000/- and issued a cheque for the said

amount. On 30-6-1997 the cheque was presented and the same was returned by the Bank on 9-4-1997 with an endorsement that there is

insufficiency of funds. Therefore, on 17-4-1997 the complainant, the respondent

herein sent a statutory notice to the accused demanding for the payment of the cheque amount. The accused not the complainant and pleaded with him to give two months time for the payment of the said amount. But, despite the lapse of two months" time, the petitioner had failed to repay the amount. So, he again presented the cheque on 25-6-1997 for collection and it was returned on 30-6-1997 with the endorsement ""insufficiency of funds"". Yet another notice dated 1-7-1997 was issued and the same was returned to the complainant on 14-7-1997. Then, the complaint was filed, since the complainant felt that the accused wantonly evaded to receive the said notice.

4. After having entertained the complaint, the lower Court sent summons to the petitioner, who in turn, appeared before the Court and filed the application for discharge.

5. The only ground that had been urged in the said petition in that the complaint has been filed without service of statutory notice on the petitioner

and therefore, the complaint u/s 138 of the Negotiable Instruments Act (hereinafter referred to as ""the Act"")) could not be maintainable.

6. However, after hearing both the parties, the lower Court considered the said aspect elaborately and dismissed the application. Hence, the revision.

7. Mr. Ananthanarayanan, appearing for the petitioner, would contend, on the basis of the judgment of this Court in B. Adhikari v. Ponraj 1996

CLJ 180 that the complaint u/s 138 of the Act cannot be a valid one, in view of the non-service of the statutory notice, as contemplated u/s 138(b) of the Act.

8. In the said judgment reported in 1996 CLJ 180, it has been specifically held that the cause of action for a drawee to lodge a complaint would

arise only after making the demand to the drawer claiming the amount to be paid by giving a notice in writing and where no notice making demand

for payment was served upon the drawer as contemplated under Sub-clauses (b) and (c) of Section 138 of the Act, which would mean that no

demand has been made from the date of dishonour of the cheque in question, the conviction for offence u/s 138 of the Act would not be

sustainable.

9. As far as the above decision is concerned, being a well settled one, it cannot be disputed at all. But, in this case, in the very complaint, the

complainant has specifically stated that the accused know about the dishonour of the cheque presented for the first time, that the accused

requested for two months" time, that thereafter he did not make the payment and that therefore, the complainant, the respondent herein again

presented the cheque, which was again dishonoured, which resulted in the issue of the second notice, which was returned to the complainant.

10. The case of the complainant, as stated in the complaint, is that the accused wantonly evaded to receive the notice. So, the question arises in

this case is, when the accused deliberately evaded the service and wantonly avoided to receive the notice, whether it would be a proper service as

contemplated u/s 138(b) of the Act ?

11. The judgment in 1996 CLJ 180 (Supra), which is cited by the petitioner, is not applicable of the present case for two reasons. (1) There is no

averment in the said proceeding that the notice was not served, because the accused evaded the service, (2) The entire trial is over and on the

basis of the appreciation of the evidence, since there is no evidence to show that there is an issuance of notice and the service of the same, it was

concluded by the revisional Court after the conviction by the trial Court, confirmed by the lower appellate Court, that there was no service of

notice. But in this case the specific stand taken by the complainant respondent herein is that the accused evaded service.

12. In S. Prasanna v. R. Vijayalakshmi 1991 LW (Cri) 576 : 1992 MLJ (Cri) 40 : 1992 CLJ 1233 this Court has held as follows (at page 1235

of Cri LJ) :-

In the complaint it is stated that the accused deliberately evaded receipt of registered notice. This would amount to his knowledge that such a

notice was sent by the complainant and deliberate refusal of the same. That would be clearly amount to constructive service of notice.

13. In V. Kakhan v. Kothandan 1994 (2) MWN (Cri) 231, it has been held by this Court that ""receipt of notice contemplated therein cannot at all

be one of actual or physical receipt of the notice, but it can be one of either actual or deemed receipt of notice"". In the said decision it has been

further held that ""in the event of his non-availability, for whatever reasons at

the time of delivery of such notice sent either by post or by telegram or arranged to be delivered in person or by special messenger, the date of endorsement by Postman of the person to whom the said notice was entrusted for delivery to the drawer, will have to be taken to be the date of service on him as the date when the drawer would have had full knowledge of the contents thereof".

14. It must also be pointed out that as per Section 27 of the General Clauses Act, 1897, where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression or either or the expressions "give" or send" or any other expression is used, then unless a different interpretation appears, the service shall be deemed to be effected by properly addressing, prepaying 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.

15. So, in view of the above referred authorities and the wordings contained in Clause 27 of the General Clauses Act, it cannot be contended, at this stage, that there is no receipt at all, because the deemed receipt also could be construed as a receipt as contemplated u/s 138 of the Act.

16. Now, Mr. Ananthanarayanan would vehemently argue by raising a question as to how can we accept, especially when the notice was not served physically on the petitioner, that an offence u/s 138 of the Act is made out ?

17. Though I am not able to answer the question raised by the counsel for the petitioner directly, I could only say, in view of the interpretation of the Section, as held by this Court in the citations referred to above, whether there is an actual receipt, though the physical receipt or deemed receipt is a question of fact, has to be gone into only during the course of trial not at this stage.

18. Therefore, while I am not able to persuade myself to agree with the contention of the counsel, the question that has been raised before the lower Court as well as before this Court is only to be decided by the trial Court, after the entire evidence is let in.

19. However, by observation made in this order should not be mistaken that this Court has taken a view on that because the trial Court is to take

its view independently on the basis of evidence to be recorded.

20. With the above observation, the revision is dismissed. Consequently, Crl.M.P. No. 6339 of 1997 is also dismissed

21. Petition dismissed.