
(2001) 01 MAD CK 0098
In the Madras High Court
Case No : Criminal A. No. 202 of 1994

Pattabirama Reddy

APPELLANT

Vs

Nageshwara Reddy

RESPONDENT

Date of Decision : 13-01-2001

Acts Referred:

Citation : (2001) 01 MAD CK 0098

Hon'ble Judges : B. Akbar Basha Khadhiri, J

Bench : Single Bench

Advocate : T. Sivagnanasambandam, for the Appellant; T.R. Ravikumar, for the Respondent

Final Decision : Dismissed

Judgement

B. Akbar Basha Khadhiri, J.—The instant appeal is filed against the judgment passed by the learned XVII Metropolitan Magistrate, Saidapet, Madras in C.C. No. 3774/91, which arose out of a private complaint preferred by the Appellant against the Respondent for alleged commission of offence u/s 138 of Negotiable Instruments Act.

2. The facts briefly stated as under: According to the Appellant, the Respondent borrowed Rs. 50,000/- from the Appellant on 16.5.1990 and executed Ex.P.1, Promissory Note agreeing to repay the said amount with interest to the Appellant. Thereafter, the Respondent herein issued a cheque bearing No. 832793, dated 25.4.1991 for Rs. 61,624/-. The Appellant presented the cheque before the Bank for collection on 26.4.1991, but it was returned with Ex.P-3. Memo with an endorsement refer to drawer on 27.4.91. Thereafter, the Appellant issued a telegram to the Respondent calling for payment within the statutory period before institution of proceedings u/s 138 of Negotiable Instruments Act. There was no response from the Respondent. Therefore, the Appellant preferred a private complaint before the learned Metropolitan Magistrate in C.C. No. 3774/91.

Before the learned Magistrate, the Appellant examined two witnesses on his side and produce Ex.P.1 to Ex.P.7 documents pending the trial, the Appellant filed C.M.P. praying to send for a copy of the telegram from the Postal Department. Learned Judicial Magistrate dismissed the petition stating that as per the provision of Section 92 Cr.P.C, he has no authority to send for the document. After completion of the trial, the learned Judicial Magistrate acquitted the Respondent on the ground that statutory notice required u/s 138 of Negotiable Instruments Act has not been served on the Respondent demanding payment and that vitiates the trial. Aggrieved by the acquittal of the Respondent, the Petitioner has come forward with the instant appeal.

3. Heard, both sides. A short point that arise in this appeal is whether the telegram dated 2.5.91 can be accepted as the statutory notice required u/s 138 of Negotiable Instruments Act. It should be pointed out that the complaint has to be preferred within one month from the date of cause of action. In *S. Prithviraj Kukkillayya Vs. Mathew Koshy and Another*, , a Division Bench of the Kerala High Court consisting of K.T. Thomas, J., (as His Lordship then was), and K. Shamsuddin, J. expressed the view that as per Clause (b) of Section 142 of the Negotiable Instruments Act, no court shall take cognizance of offence unless complaint is made within one month of the date, on which the cause of action arises under Clause (c) of the proviso to Section 138 of the Negotiable Instruments Act. It was further held that Clause (c) of Section 138 of the Negotiable Instruments Act speaks of failure to make payment to the payee or the holder of the cheque as the case may be within fifteen days of notice contemplated in Clause (b) of Section 138 of the Negotiable Instruments Act. It was also pointed out that the act of issuing cheque cannot be considered as starting point of commission of offence, nor does dishonour of cheque by itself give rise to a cause of action, because payment can be made on receipt of the notice of demand contemplated in Clause (b) of Section 138 of the Negotiable Instruments Act and in that event, there is no offence, nor any attempt to commit the offence, nor even a preparation to commit the offence and failure to pay the amount within fifteen days of receipt of notice alone is the cause of action. Therefore, it is seen that it does not attract the offence u/s 138 of the Act when the statutory notice as required is issued, but non payment before the expiry of this statutory time limit provided under the section, only gives raise to cause of action.

4. In the instance case, the learned Counsel for the Appellant vehemently contended that the provisions relating to the statutory notice is fully satisfied in view of the telegram having been issued to the Respondent on 2.5.1991. Here sending of telegram, how far it would satisfy the statutory requirement has to be considered. Learned Counsel relied upon a decision rendered by Pratap Singh, J. in 1991 L.W. (Cri.) 468 (*V.P. Revathi v. Asha Bagree, Director B.M. Steels (P) Limited*, 96, Coral Merchants Street, Madras-600 001), wherein the learned Judge has stated that the telegram calling upon the drawer of a dishonoured cheque to make payment would satisfy the requirement. The learned Judge

observed that the notice need not necessarily be sent by registered post only, but it should be in writing.

5. Of course a telegraph is a document, which is in writing but still the question is whether it satisfies the requirement of a statutory notice. It should be pointed out that the telegram cannot be equated to the fax message where all the contents are transmitted. A telegram has to pass through a serious of mechanical process. There are possibilities of errors in creeping either at the point where it is sent or at the point where it is received and transcribed. That is why, the law insist that a letter should be sent in confirmation of the telegram"

In 1993 Cri.L.R. (S.C) 591 (District Magistrate and Anr. v. S. Jothisankar), Their Lordships of the Apex Court considered the probative value of the telegram. It has been observed by the Apex Court that the telegram by itself is not an authentic document. It is alike an unsigned/anonymous communication. Unless a telegram is confirmed by a subsequent signed application, representation or an affidavit, the contents of the telegram have no authenticity at all. Even in the decision cited by the learned Counsel for the Appellant, the facts would indicate that the complainant therein had not stopped by sending telegram, but on the same day, a letter of confirmation was also sent to the accused. The requirement prescribed by the Apex Court is satisfied. The learned Judge had accepted that the statutory notice has been issued in that case.

6. Coming to the facts of the instant case it is evident that according to the Appellant he has sent a telegram on 2.5.1991. He had not sent any confirmatory letter and he had not even applied for a copy of the telegram within the time limit described to obtain a copy from the postal department. Even obtaining a copy will be of no use, because that would only be a copy of anonymous communication as indicated by the Apex Court.

7. The learned Counsel for the Appellant pointed out that the learned Judicial Magistrate has rejected the C.M.P. filed for sending a copy of the telegram. Ofcourse Ex.P.6 communication has been produced to show that the Postal Authorities have written to the Petitioner that since he had not applied for a copy within 45 days of sending, a telegram copy could not be furnished. The C.M.P. was for a direction to the postal authorities to furnish a copy. The learned Magistrate felt inability in the sense that he had not an authority to direct the postal authorities to issue a copy of the telegram. Section 92 Code of Criminal Procedure reads as under:

Procedure as to letters and telegrams:

(I) If any document, parcel or thing in the custody of a postal or telegraph authority is, in the opinion of the District Magistrate, Chief Judicial Magistrate, Court of Session or High Court wanted for the purpose of any investigation, inquiry, trial or other proceedings under this code such Magistrate or court may require the postal or telegraph authority, as the case may be, deliver the document, parcel or tiling to such person as the Magistrate or court directs.

(2) If any such document, parcel or thing is, in the opinion of any other Magistrate, whether Executive or Judicial, or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose he may require the postal or telegraph authority, as the case may be, to cause search to be made for and to detain such document, parcel or thing pending the order of a District Magistrate, Chief Judicial Magistrate or court Sub-section (1).

As per the sub-section (1) of Section 92 of Code of Criminal Procedure the High Court or Sessions Court may direct the postal authority to send for the telegram. Sub.Section (2) of Section 92 of Code of Criminal Procedure makes it clear that the Petitioner can utmost request the Magistrate to direct the postal authority to search and keep the records safe. I feel that the learned Judicial Magistrate has rightly rejected the request of the Petitioner for direction to the postal authorities to issue a copy of telegram.

8. Now, the learned Counsel for the Appellant seeks that he may be permitted to approach the higher Judicial Officers, i.e, the Sessions Judge or the High Court for him to comply with the provisions of sub. Sec (1) of Section 92 of Code of Criminal Procedure and get a copy of the telegram. I have already pointed out that the Apex Court has clearly held that the telegram is only an unsigned or anonymous communication indicating that by itself it has no probative value. I feel, no useful purpose will be served by seeking further course to get a copy of the document, which is an unsigned and anonymous document in the eye of law.

9. At this juncture, learned Counsel for the Appellant draw my attention to the evidence of P.W.1, wherein, he had stated that subsequently he had sent a registered notice to the Respondent, but he had not received the acknowledgement. A perusal of the record would go to show that even that notice copy had not been produced before the learned Judicial Magistrate for him to consider whether the statutory notice has been sent and also served upon the Respondent. It seems that the Petitioner has not complied with the statutory provision of sending notice as required u/s 138(b) of the Negotiable Instruments Act. The learned Judicial Magistrate has rightly held that the Appellant herein has not proved the guilt of the Respondent. Accordingly, this appeal is dismissed.