
(2012) 12 AP CK 0063

In the Andhra Pradesh High Court

Case No : Criminal Appeal No. 1853 of 2005

Vanama Srinivasa Rao

APPELLANT

Vs

State of A.P. and B. Venkata Subbarao

RESPONDENT

Date of Decision : 14-12-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 251
Evidence Act, 1872 — Section 114
General Clauses Act, 1897 — Section 27
Negotiable Instruments Act, 1881 (NI) — Section 138, 138(a), 138(b), 142

Citation : (2013) 1 ALD(Cri) 383 : (2013) 2 ALT(Cri) 42

Hon'ble Judges : P. Durga Prasad, J

Bench : Single Bench

Advocate : Nimmagadda Satyanarayana, for the Appellant; Sreenivasa Rao Velivela, for the Respondent

Final Decision : Allowed

Judgement

Hon'ble Sri P. Durga Prasad, J.—This appeal at the instance of the complainant is directed against the acquittal of the accused in C.C.No. 126 of 1999 by the Judicial First Class Magistrate, Markapur on 10.01.2005. The appellant herein is the complainant and he has filed the complaint for the offence u/s 138 of the Negotiable Instruments Act (for short "the N.I. Act") against the respondent No. 2 herein.

2. According to the appellant-complainant, he is a business man in slates and Proprietor of Raghava Enamil Slate Industries at Markapur and the accused also doing business in slates in the name and style of Subrahmaneswara Slate Company at Vijayawada. The accused in order to clear the previous dues, he issued two post dated cheques bearing No. 506677 dated. 19.09.1998 for Rs. 15,000/- and cheque No. 506678 dated. 07.10.1998 for Rs. 30,000/- drawn on State Bank of Patiala, Vijayawada. The complainant presented the said cheques in State Bank of India, Markapur branch on 09.03.1999 for collection, but the same were returned with an endorsement that "payment stopped by drawyer"

and the complainant issued a legal notice to the accused requesting him to make payment of the above said cheques within 15 days on 16.03.1999 by registered post and certificate of posting. But the cover returned with an endorsement that always door locked and the cover received on 26.03.1999. As the accused did not make the payment of the amount, the complainant filed the present complaint on 20.04.1999 for the offence u/s 138 read with 142 of N.I. Act.

3. The trial Court has taken cognizance of the said complaint and the accused denied the offence u/s 138 of the N.I. Act when he was examined u/s 251 of Cr.P.C.

4. During the course of trial, the complainant examined P.Ws. 1 to 3 and got marked Exs.P. 1 to P. 10 on his behalf. On behalf of the respondent-accused, D.W.1 was examined and Ex.D.1 was marked.

5. Taking into consideration said oral and documentary evidence, the trial Court has found the accused not guilty for the offence u/s 138 of N.I. Act and thereby acquitted the accused.

6. Aggrieved by the said acquittal, the complainant therein has filed the present appeal.

7. Trial Court has acquitted the accused mainly on the ground that the ingredients of Section 138(a) and (c) of N.I. Act were not complied with by the complainant i.e. (a) the cheques were issued in discharge of whole or part of debt liability and (c) the payee must give demand notice within 15 days after receiving the information of dishonour.

8. The appellant's counsel has pleaded that the notice was issued to the accused after dishonour of the cheques on 16.03.1999 to his correct address, but the same was returned with an endorsement that always the door was locked and as the registered letter was addressed to the correct address of the accused, it has to be deemed as service of notice on the accused and the lower Court has erred in coming to the conclusion that the notice was not served on the accused in compliance of provisions of Section 138 of N.I. Act.

9. The next contention of the appellant's counsel is that the accused himself has filed Insolvency Petition showing the complainant as one of the creditors; and the said admission itself establishes that the cheques were issued towards legally enforceable debt.

10. The respondent No. 2's counsel on the other hand has pleaded that as the notice was not served on the accused, the provisions of Section 138(b) of N.I. Act were not complied with and the trial court has rightly held the same in favour of the accused. He further pleaded that the admissions in Insolvency Petition are not binding on the criminal Court and the trial Court has rightly found that there is no legally enforceable debt as on the date of issuance of the cheque and supported the acquittal of the accused by the trial Court.

11. Now, the points that arise for consideration are:

(1) Whether the issuance of notice on 16.03.1999 by the complainant to the accused is sufficient compliance u/s 138(b) of N.I. Act?

(2) Whether the admissions in Insolvency Proceedings are binding on the criminal Court and it will amount to a legally enforceable debt by the accused?

POINT No. 1:

12. As per proviso (b) of Section 138 of N.I. Act the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.

13. As per proviso (c) of Section 138 of N.I. Act the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

14. Therefore, a notice has to be issued within 15 days of receipt of information about the return of the cheque to the drawer.

15. In the present case, P.W.1 in his chief-examination has stated that he has issued the legal notice on 16.03.1999, which is Ex.P.6 under registered post as well as certificate of posting. Notice by registered post was returned un-served and Ex.P.7 is the returned registered postal cover. Ex.P.8 is the postal receipt for certificate of posting. In the cross-examination he admitted that the accused was not served with the legal notice issued by him and he does not know whether the accused did not receive his legal notice sent through certificate posting.

16. D.W.1 did not state anything with regard to the issuance of notice, Ex.P.6 or service of the same on him. Therefore, admittedly the legal notice, Ex.P.6 issued by the complainant was not served on the accused.

17. The following issue has been referred to the larger bench is "whether in absence of any averments in the complaint to the effect that the accused had a role to play in the matter of non-receipt of legal notice; or that the accused deliberately avoided service of notice, the same could have been entertained keeping in view the decision of this Court in Vinod Shivappa Case?"

18. In " C.C. Alavi Haji Vs. Palapetty Muhammed and Another, the three Judges Bench of Apex Court has held that

there is no need to make such averments in the complaint for raising presumption as to service of notice in the said situation as in view of Section 27 of General Clauses Act and Section 114 of Evidence Act, once the notice is sent by registered post by correctly addressing the drawer of the cheque, the service of notice is deemed to have been effected. Mandatory requirement of issue of

notice in terms of Section 138 proviso (b) stands complied with when the notice is sent in the said manner. However, the drawer can rebut the presumption of service of notice by showing that he had no knowledge that the notice was brought to his address or the address mentioned on the cover was incorrect or the letter was never tendered or the report of the postman was incorrect.

19. In the above said decision "the complainant issued lawyer's notice intimating the dishonour of cheque and demanded payment on 04.08.2001, the same was returned on 10.08.2001 saying that the accused was "out of station." There was no averment to the effect that the notice was sent to the correct address of the drawer of the cheque by "registered post acknowledgement due". But the returned envelope was annexed to the complaint and it thus, formed a part of the complaint which showed that the notice was sent by registered post acknowledgement due to the correct address and was returned with an endorsement that "the addressee was abroad".

20. On the above facts the larger bench has held that the requirements of Section 138 of N.I. Act were sufficiently complied with. In view of the above said legal position it has to be examined in the present case whether the legal notice, Ex.P.6 was addressed to the correct address of the accused.

21. In " Indo Automobiles Vs. Jai Durga Enterprises and Others, the Apex Court held that "once notice has been sent by registered post with acknowledgment due to a correct address, it must be presumed that the service has been made effective."

22. In the present case the notice was sent by registered post with acknowledgment due and the Ex.P.7 is returned postal cover, in which Ex.P.6 legal notice was issued by the complainant. The address mentioned therein and the address shown in the complaint is one and the same. In the complaint, the accused, after receipt of notice, appeared and contested the case. As already observed above, D.W.1 did not state anything about the incorrect address or the said notice was not issued by the complainant. Therefore, Ex.P.6 was issued to the correct address of the accused. Thus, as per the above said principle sending notice to his correct address by registered post acknowledgment due is sufficient compliance of proviso (b) of Section 138 N.I. Act. Accordingly, the point is held.

POINT No. 2:

23. P.W.1, complainant, has stated that the accused has filed I.P.No. 9 of 1999 on the file of II Additional District Judge, Vijayawada impleading his firm as respondent No. 48. He received notice in the said I.P. Ex.P.9 is the said notice. Ex.P.10 is the copy of I.P.No. 9 of 1999 served on him. In the cross-examination he denied that Exs.P.1 and P.2 are no way connected with I.P.No. 9 of 1999. D.W.1 admitted about the filing of I.P.

24. In Ex.P. 10, copy of the petition in I.P.No. 9 of 1999, the complainant was shown as respondent No. 48 and in the schedule an amount of Rs. 2,07,000/-

was shown as due to the complainant company from 1987 to December, 1998. As per Ex.D.1, the said I.P. was allowed and the petitioner therein was declared as insolvent and he shall apply for discharge within one year from the date of the order. Thus, the accused himself has admitted in the I.P. about the amount due to the complainant company from 1987 to December, 1998, whereas the cheques Exs.P. 1 and P.2 were issued on 19.09.1998 and 07.10.1998. Thus, the said cheques were issued for the amount due by that date. Therefore, there is legally enforceable debt as on the date of issuance of said cheques by the accused to the complainant. In the said insolvency petition, the complainant is respondent No. 48 and as the said proceedings are in between the accused and complainant and others, the admissions made therein are binding and admissible in criminal proceedings. Thus, the admission made by the accused can be taken into consideration in these proceedings. Thus, the trial Court has erred in coming to the conclusion that there is no legally enforceable debt in favour of the complainant. Thus, the complainant could establish the compliance of provisions of (b) and (c) of Section 138 of N.I. Act and thereby proved the commission of offence by the accused u/s 138 of N.I. Act. In the result, the appeal is allowed and the judgment passed in C.C.No. 126 of 1999 by the Judicial First Class Magistrate, Markapur on 10.01.2005 is hereby set aside and the accused is found guilty and convicted for the offence u/s 138 of Negotiable Instruments Act and sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs. 1,000/- in default simple imprisonment for 15 days.