V. Raja Kumari vs P. Subbarama Naidu & Anr on 2 November, 2004

Author: Arijit Pasayat

Bench: Arijit Pasayat, C.K.Thakker

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           CASE NO.:
Appeal (crl.)  887 of 1999

PETITIONER:
V. Raja Kumari

RESPONDENT:
P. Subbarama Naidu & Anr.

DATE OF JUDGMENT: 02/11/2004

BENCH:
ARIJIT PASAYAT & C.K.THAKKER

JUDGMENT:
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J U D G M E N T ARIJIT PASAYAT, J.

The appellant (hereinafter referred to as the 'accused') calls in question legality of judgment rendered by learned Single Judge of the Andhra Pradesh High Court holding that the question whether notice as required under Section 138 of the Negotiable Instruments Act, 1881 (in short the 'Act') has been served has to be decided during trial and the complaint ought not to be dismissed at the threshold on the purported ground that there was no proper service of notice.

Backgrounds facts in a nutshell are as follows:

> Complaint was filed by respondent no.1 alleging commission of offence punishable under Section 138 read with Section 142 of the Act. It was alleged that cheque dated 30.6.1997 bearing no. SB/A/31 839579 for an amount of Rs.80,000/- issued by the accused in discharge of the advance amount paid by the complainant in respect of the sale consideration was dishonoured by the drawee bank on account of insufficiency of funds. The complainant received this intimation on

2.8.1997. He got issued legal notice on 9.8.1997 through his advocate to the correct address of the accused. In the complaint, it is stated that the said legal notice was returned with an endorsement that the door of the house of the accused was locked. Subsequently, the amount was not paid by the accused. Hence, he filed the complaint. The learned Magistrate after going through the contents of the complaint recorded the sworn statement of the complainant. Taking into consideration of the

contents of the sworn statement, he opined that under Section 138 of the Act, the service of notice on the person, whose cheque was dishonoured is mandatory and in the instant case the notice was not served on the accused and mere sending of notice by the complainant to the accused cannot be taken into consideration. Holding thus, he dismissed the complaint. The said order was assailed before the High Court. A revision petition in terms of Sections 397 and 401 of the Code of Criminal Procedure, 1973 (in short the 'Code') was filed before High Court. The High Court by the impugned order held that the procedure followed by the Magistrate is not correct. The complainant complied with the requirement of law by sending registered legal notice. Non-service of notice is not a ground for rejecting the complaint, even before it is numbered. What is the effect of non- service of the notice when the door of the house of the accused was closed, will be considered after trial. Reference was made to a decision of the High Court in V. Satyanarayana v. A.P. Travel & Tourism Development Corporation Ltd. (1) (1997 (2) ALT (Crl.) 1 A.P.) where it was held that the complaint under Section 138 of the Act cannot be quashed or dismissed merely because the notice was not served on the accused or drawer, without enquiring into the circumstances leading to the non-service of notice.

In support of the appeal learned counsel for the appellant submitted that basic requirement for initiation of proceeding is service of notice. If the complaint itself does not show that notice has been served, it is to be thrown out at the threshold as was rightly done by the learned Magistrate and the High Court erroneously interfered with it.

Strong reliance was placed on Shakti Travel & Tours v. State of Bihar and Another (2002 (9) SCC 415), stating that when the complainant did not assert that demand notice has been served, the complaint was not maintainable.

Learned counsel for the respondent-complainant, on the other hand, submitted that the complaint clearly indicated that the accused managed to get an endorsement about the 'house been locked'. This was clearly stated to be incorrect endorsement. Therefore, as rightly held by the High Court the effect of the endorsement has to be considered during trial.

The factual position in Shakti Travel (supra) as appears from the short order of this Court was different. There was no mention in the complaint about service of notice. In the instant case there is an assertion about incorrect endorsement regarding locking of the house. The effect of such endorsement has to be adjudged during trial.

The important point to be decided in this case is whether the cause of action has arisen at all as the notice sent by the complainant to the accused was returned with the endorsement "house been locked". The conditions pertaining to the notice to be given to the drawer have been formulated and incorporated in clauses (b) to (c) of the proviso to Section 138 of the Act. The said clauses are extracted below:

> "(b) 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; and

(c) 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."

On the part of the payee he has to make a demand by "giving a notice" in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such "giving", the travails of the prosecution would have been very much lessened. But the legislature says that failure on the part of the drawer to pay the amount should be within 15 days "of the receipt" of the said notice. It is, therefore, clear that "giving notice" in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address.

In Black's Law Dictionary "giving of notice" is distinguished from receiving of the notice" (vide p. 621) : "A person notifies or gives notice to another by taking such steps as may be reasonably required to inform the other in the ordinary course, whether or not such other actually comes to know of it." A person "receives" a notice when it is duly delivered to him or at the place of his business. 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 the court should not adopt an interpretation which helps a dishonest evader, and clips an honest payee as that would defeat the very legislative measure In Maxwell's Interpretation of Statutes, the learned author has emphasised that "provisions relating, to giving of notice often receive liberal interpretation" (vide p. 99 of the 12th Edn.). The context envisaged in Section 138 of the Act invites a liberal interpretation for the person who has the statutory obligation to give notice because he is presumed to be the loser in the transaction and it is for his interest the very provision is made by the legislature. The words in clause (b) of the proviso to Section 138 of the Act show that the payee has the statutory obligation to "make a demand" by giving notice. The thrust in the clause is on the need to "make a demand". It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once it is despatched his part is over and the next depends on what the sendee does.

It is well settled that a notice refused to be accepted by the addressee can be presumed to have been served on him (vide Harcharan Singh v. Shivrani (1981 (2) SCC 535) and Jagdish Singh v. Natthu Singh ((1992 (1) SCC 647).

Here the notice is returned as addressee being not found and not as refused. Will there be any significant difference between the two so far as the presumption of service is concerned? In this connection a reference to Section 27 of the General Clauses Act, 1897 will be useful. The section reads thus:

> "27. Meaning of service by post.-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 'serve' or either of a the expressions 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, preparing 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."

No doubt Section 138 of the Act does not require that the notice should be given only by "post". Nonetheless the principle incorporated in Section 27 (quoted above) can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then 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. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice.

This position was noted by this Court in K. Bhaskaran v. Sankaran Vaidhyan Balan and Another (1999 (7) SCC 510).

The object of notice is to give a chance to the drawer of the cheque to rectify his omission and also to protect an honest drawer. Service of notice of demand in clause (b) of the proviso to Section 138 is a condition precedent for filing a complaint under Section 138 of the Act. In the present appeal there is no dispute that notice was in writing and this was sent within fifteen days of receipt of information by the appellant-Bank regarding return of cheques as unpaid. Therefore, the only question to be examined is whether in the notice there was a demand for payment. (See Central Bank of India and Another v. Saxons Farms and Others (1999 (8) SCC 221) At this juncture it is relevant to take note of order passed by this Court in State of M.P. v. Hiralal and Others (1996 (7) 523). It was, inter alia, noted as follows:

> "In view of the office report, it would be clear that the respondents obviously managed to have the notice returned with postal remarks "not available in the house", "house locked" and "shop closed"

respectively. In that view, it must be deemed that the notices have been served on the respondents."

In Madhu v. Omega Pipes Ltd. [1994 (1) ALT (Crl.) 603 (Kerala)] the scope and ambit of Section 138 clauses (b) and (c) of the Act were noted by the Kerala High Court and Justice K.T. Thomas (as His Lordship was then) observed as follows:

> "In Clause (c) of the proviso the drawer of the cheque is given fifteen days from the date 'of receipt of said notice' for making payment. This affords clear indication that 'giving notice' in the context is not the same as receipt of notice. Giving is the process of which receipt is the accomplishment. The payee has to perform the former process

> by sending the notice to the drawer in his correct address, if receipt or even tender of notice is indispensable for giving the notice in the context envisaged in Clause (b) an evader would successfully keep the postal article at bay at least till the period of fifteen days expires. Law shall not help the wrong doer to take advantage of his tactics. Hence the realistic interpretation for the expression 'giving notice' in the present context is that, if the payee has dispatched notice in the correct address of drawer reasonably ahead of the expiry of fifteen days, it can be regarded that he made the demand by giving notice within the statutory period. Any other interpretation is likely to frustrate the purpose for providing such a notice."

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.

In view of the aforesaid, the inevitable conclusion is that the High Court was justified in its view and no interference is called for in this case.

The appeal deserves to be dismissed which we direct.