
(2006) 05 KL CK 0037

High Court Of Kerala

Case No: Criminal A. No. 203 of 2001

Chacko

APPELLANT

Vs

Kurian

RESPONDENT

Date of Decision: May 30, 2006

Acts Referred:

- Negotiable Instruments Act, 1881 (NI) - Section 138

Citation: (2007) 4 BC 14 : (2006) CriLJ 4383 : (2006) 3 ILR (Ker) 808 : (2006) 3 KLT 694

Hon'ble Judges: K.A. Abdul Gafoor, J

Bench: Single Bench

Advocate: Bechu Kurian Thomas, Prakash Puthiadam and Markose Thomas, for the Appellant; Kochumol Koduvath and P.M. Habeeb, Public Prosecutor, for the Respondent

Final Decision: Dismissed

Judgement

K.A. Abdul Gafoor, J.

The complainant before the trial court is the appellant herein He filed a complaint against respondents 1 and 2 herein, alleging an offence u/s 38 of the Negotiable Instruments Act, 1881 (for short "the Act"). The trial court acquitted the accused. Hence this appeal.

2. Whether there was notice, in terms of Clause (b) of the proviso to Section 138 of the Act, is the moot question involved in this case.

3. Ext.P1 cheque issued by the accused bounced, when presented to the bank. This resulted in a notice, copy of which is produced as Ext.P3. But, the notice addressed to the accused returned back to the sender unclaimed. Ext.P5 series are the notices so returned. In the light of these facts, it is contended by the appellant that he had discharged the part of his duty in terms of Clause (b) of the proviso to Section 138 of the Act, by making a demand in the notice addressed to on the accused persons, for repayment of the amount covered by the cheque-Ext.P1, which bounced for want of sufficient funds in the account maintained by the accused. The postman took the notice to

the residence of the accused. They were absent. It was repeated on three days. Thereafter, nobody claimed it. Therefore, it was returned "unclaimed returned to sender". When those notices were addressed to the accused/respondents and those were returned as unclaimed, it should be taken that the notice mentioned in Clause (b) of the proviso to Section 138 had been completed and there was a demand in writing of the amount covered by the cheque. In this respect, the decision reported in [K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another.](#) is relied on. It is submitted that when a notice is returned unclaimed, it shall be deemed to have been served on the addressee. The decision reported in Joseph Jose v. J. Baby and Ors. 2002 (3) KLT 64 (SN) : 2002 (2) KLJ 332 is also relied on to submit that the endorsement "unclaimed" in Ext. PS series can be taken as "refusal" and therefore, there is due compliance of the requirement of a notice u/s 138 of the Act. Therefore, the order of acquittal was not justified, the counsel contends.

4. It is submitted by the counsel for the accused that before the return of notice, no intimation memo was served on the accused. The endorsement on Ext.P5 series will reveal that when the postman reached the premises of the addressees, on 9.10.97, 13.10.97, 14.10.97 and 15.10.97, they were absent. It was further endorsed on the cover that not intimated. Later it was returned to the sender as unclaimed.

5. The return of the notice, without service of the due intimation about the arrival of the registered letter in the post office, will not amount to due service of notice of demand in terms of Clause (b) of the proviso to S. 138 of the Act, even going by the decision in Bhaskaran's case. The facts in the said case will reveal that there was a service of intimation on the addressee to collect the registered letter from the post office. Such evidence is not forthcoming in this case. On the other hand, endorsement in Ext.P5 series covers will reveal that no such intimation had been served on the accused. Therefore, there was no deemed service of notice. So, even relying on the decision in Joseph's case, it cannot be stated that there was refusal of notice, to deem its service the counsel for the accused contends.

6. The facts in Bhaskaran's case reveal that when the postman reached the addressee's premises on consecutive dates, the addressee was absent. Later an intimation was served on the addressee. The postal article remained unclaimed for few more days and was returned. It was in that fact-frame the Supreme Court held in paragraph 24 of the said decision that:

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.

7. Ext.P5 series do not reveal that any intimation had been given on the addressees regarding the arrival of the registered letters in the post office when the addressees were absent, on the dates on which the postman reached their premises. Unless the addressees were aware of that fact, they could not have claimed the registered letters

from the post office. Without serving an intimation memo, it cannot be taken that the addressees did not claim the letter, even though it was returned as if "unclaimed".

8. In this case, thus, the accused have proved that they were not aware of the arrival of the registered letters, for those being claimed from the post office. Therefore, the decision in Bhaskaran's case is not attracted to the facts of this case. When intimation is not so served, the dictum in Joseph's case also cannot be applied because, going by the said decision, in the absence of any intimation given to the addressees, it cannot be taken that they have refused the letter.

Thus, in this case, there was no statutory demand in writing for repayment of the amount covered by the cheque as enjoined in Clause (b) of the proviso of Section 138 of the Act. The finding of the court below on that ground cannot be stated to be faulty to invite interference from this Court. Hence, the appeal fails and it is dismissed.