(2018) 04 P&H CK 0303

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Miscellaneous Appeal No.629-Ma Of 2014(O&M)

Raj Kumar Batra		APPELLANT
	Vs	
Urmila Devi		RESPONDENT

Date of Decision: April 25, 2018

Acts Referred:

- Negotiable Instruments Act, 1881 - Section 94, 138, 138(b)
- Code of Criminal Procedure, 1973 - Section 263(g)

Citation: 2018 (3) CriCC 405 : 2018 (3) JCC 179 : 2018 (3) RCR(Cri) 294

Hon'ble Judges: ARVIND SINGH SANGWAN, J

Bench: Single Bench

Advocate: Kunal Dawar, Lalit Kumar, Johan Kumar

Final Decision: Allowed

Judgement

Leave to appeal is granted. Registry is directed to number as main appeal.

Main appeal

Prayer in this appeal is to set aside the judgment dated 27.01.2014 vide which the complaint filed by the appellant under Section 138 of the Negotiable

Instruments Act (for short 'the Act') was dismissed and the respondent-accused was acquitted of the charge.

Brief facts of the case are that appellant-Raj Kumar Batra filed a complaint under Section 138 of the Act against respondent- Urmila Devi with the

allegations that in the month of October, 2008 she had borrowed a loan of Rs.68,000/- and promised to repay the same in the month of March, 2009.

On repeated requests of the appellant, the accused, after admitting her liability, issued a cheque bearing No. 020545 dated 10.05.2009 for Rs.68,000/-,

drawn on Punjab National Bank. The appellant presented the said cheque in his Bank and the same was returned on 18.05.2009 with the remarks

'Insufficient Funds'. Thereafter, the complainant issued a legal notice dated 20.05.2009 and the accused despite receiving the notice has failed to pay

the amount within a stipulated period of 15 days.

In preliminary evidence, the complainant tendered his affidavit as Ex.CW1/A and reiterated his version given in the complaint.

Along with the affidavit, the appellant tendered the cheque in question as Ex.C1, bank return memo as Ex.C2, Legal notice dated 23.05.2009 as Ex.C3

and the postal receipt as Ex.C4 and closed the evidence on 30.07.2009. Thereafter, the respondent was summoned to face the trial.

The trial Court served the accused with a notice of accusation under Section 138 of the Act to which the respondent-accused did not plead guilty and

claimed the trial. Thereafter, the statement of the respondent-accused as plea of defence was recorded under Section 263(g) of Cr.P.C.. In the

statement dated 31.07.2013, the respondent-accused, stated that she had borrowed only a sum of Rs.15,000/- from the complainant and she has

returned back Rs.8,000/- and had issued only a blank signed cheque to the complainant as security.

In reply to the question put to her that legal notice dated 23.05.2009 (Ex.C3) was sent by the complainant to her demanding to make the payment, the

accused replied that she had not received the legal notice. It was further stated that the appellant has taken three blank signed cheques from her and

had also obtained signature on some blank pages.

Thereafter, the accused exercised her option to cross-examine the appellant and the cross-examination of the appellant was conducted on 29.11.2013.

Thereafter, the accused closed her evidence on 23.01.2014.

The trial Court, thereafter, dismissed the complaint vide impugned judgment dated 27.01.2014 holding that the legal notice issued by the appellant was

not signed by his counsel and, therefore, it is not a valid notice in the eyes of law. It was further held that the legal notice Ex.C3 was sent only on the

first address given in the complaint and since no notice was issued on the second address, therefore, it was held that the legal notice was not served

on the accused person.

I have heard counsel for the parties and perused the trial Court record.

Learned counsel for the appellant has submitted that in the complaint, the appellant has given two addresses of the respondent-accused which are as

under:-

â€œ1st Address: Resident of Gali No.9, Hanuman Nagar, Nehar Paar, Faridabad.

2nd Address: Sumit Welding Works, Kheri Road, Nehar Paar, Faridabad.â€

It is further submitted by the counsel for the appellant that the appellant has served the notice on the residential address of the respondent-accused

vide registered cover and the postal receipt is Ex.C-4. Counsel for the appellant has further submitted that the trial Court has wrongly held that it is not

proved that the notice was served on the respondent-accused on her residential address.

Counsel for the appellant has drawn attention of this Court to the cross-examination of the appellant where, no such suggestion is given to the

appellant that the respondent-accused was not residing at the given address. The operative part of the cross-examination of the appellant read as

under:-

â€œIt is incorrect that the cheque Ex.C1 was given as a security and was a blank signed cheque. It is incorrect that I have filed a false complaint

against the accused by filling excessive amount. I had sent the legal notice on the residential address of the accused. Legal notice was sent on

23.05.2009.â€

Counsel for the appellant further submits that the summons of the case were served on the respondent on the same residential address given in the

complaint. Counsel for the appellant has drawn attention of this Court at page 119 of the trial Court Record where the summons issued by the trial

Court to the respondent for appearance on 25.01.2010 was returned with the note that at the residence of the respondent-accused, her husband-

Rajesh Kumar met the process server and on receiving the summons, he had signed on 23.10.2009.

Learned counsel has also drawn attention to page 125 where another summon was sent for her appearance on 26.04.2010 at the same residential

address and the respondent-accused was served in person on 14.03.2010.

It is, thus, submitted by counsel for the appellant that the legal notice was sent through registered post at the same address where, subsequently, the

accused was served and, therefore, the trial Court has wrongly held that it is not proved that the notice Ex.C3 was served on the respondent at her

proper address.

Counsel for the appellant has further submitted that in the statement of the respondent recorded under Section 263(g) Cr.P.C. for setting up of plea of

defence, the accused has not denied issuance of cheque to the appellant and has also not denied her signature. The only defence set up is that the

cheque was given as a security and the appellant has claimed exaggerated amount.

It is further submitted that the mere fact that the notice was not signed by his counsel does not invalidate the notice when the same was sent at the

correct address of the respondent and it contains the complete detail of the facts and the demand for payment of the money on account of dishonour

of the cheque in dispute.

Counsel for the appellant has, thus, submitted that the trial Court has wrongly held that the ingredients constituting the offence under Section 138 of

the Act are not proved from the evidence led by the appellant.

In reply, counsel for the respondent has submitted that a perusal of the zimni orders/interim orders passed by the trial Court for effecting the service of

the respondent-accused shows that the service was not effected as per the aforesaid summons and the case was thereafter adjourned for effecting

the service of the respondent through non-bailable warrants.

Counsel for the respondent has further submitted that a perusal of the notice Ex.C3 shows that it is not signed by the counsel for the appellant who

had issued the notice on his behalf and, therefore, it is not a legal notice in the eyes of law.

Counsel for the respondent has further submitted that the cheque was issued as a security which has been misused by the counsel for the appellant by

showing the exaggerated amount and therefore, the appellant has failed to prove that a valid legal notice as required under Section 138 of the Act was

sent to the accused person as well as it is not proved that the same was served on the respondent-accused.

Learned counsel for the respondent has relied upon the judgment of Bombay High Court in 2008 AIR (Bombay) 201 Bank of Baroda, Bombay Vs.

Shree Moti Industries, Bombay and others to submit that where a party has failed to lead evidence showing the dispatch of demand notice or receipt

thereof and the notice produced on Court record were photocopies without signature of the advocate, the notice cannot be said to be a legal notice.

Counsel for the respondent has further relied upon the judgment of Rajashthan High Court in 2013(5) R.C.R. (Civil) 334

Ramesh Chandra Baregama Vs. Ramesh Chandra Joshi to submit that it has been held that the notice demanding payment sent by lawyer, if not

signed, is not a valid notice as per Section 94 of the Instruments Act.

In reply, counsel for the appellant has relied upon the judgment of Madras High Court in 2004(2) DCR 233 C.N. Harikrishnan Vs. Kinetic Finance

Ltd., Represented by its Authorized Signatory, Mr. P. Iyyappan Raj; Judgment of Karnataka High Court in 1996(3) R.C.R. (Criminal) 415,

Satyanarayana Gowda Vs. B. Rangappa; Judgment of Calcutta High Court in 2011(6) R.C.R. (Criminal) 676 Barendra Kumar Bera Vs. Santanu@

Chottan Mukherjee; judgment of Kerala High Court in 2005(2) R.C.R. (Criminal) 347 Janardhanan Vs. Jayachandran; judgment of Calcutta High

Court in 2011(6) R.C.R. (Criminal) 376 Barendra Kumar Bera Vs. Santanu @ Chottan Mukherjee, to submit that in a case where an advocate omits

to sign a demand notice issued under the provisions of the Negotiable Instruments Act, the unsigned notice, if received by the accused, is admissible

and valid.

Counsel for the appellant has, thus, submitted that it has been held in these judgments that non-signing of a legal notice sent under Section 138 of the

Act, cannot be held to be an invalid notice as Section 138(b) of the Act does not contemplate that the notice should be signed by a party, if the author

of the notice is identifiable.

After hearing counsel for the parties and going through the Lower Court record, I find merit in the present appeal.

Firstly, it is not disputed by the respondent-accused that she had issued the cheque in favour of the appellant and she is the signatory of this cheque.

No defence evidence was led by the respondent-accused to prove her plea that the cheque was in fact, issued as a security and in the absence of any

such defence evidence, the evidence led by the appellant-complainant is sufficient to hold the presumption in favour of the drawer of the cheque as

per Section 138 of the Act.

Secondly, a perusal of the statement of the respondent under Section 263(g) Cr.P.C. for setting up of her plea of defence shows that neither the

issuance of cheque is denied nor the signatures are denied. Even the borrowing of a friendly loan from the appellant is not denied.

Thirdly, the respondent-accused has only set up a plea that instead of Rs.68,000/-, she has only borrowed Rs.15,000/-, however, no defence evidence

was led to prove the said fact.

Fourthly, the trial Court has recorded a finding that in defence evidence, the accused examined herself as DW-1 however, a careful perusal of the trial

record shows that no such statement was made.

Fifthly, the finding recorded by the trial Court that since the notice was not signed by the counsel for the appellant and therefore, it is not a legal notice,

is liable to be set aside as the appellant has proved from the postal receipt as Ex.C4 that he has sent the notice at the residential address of the

respondent-accused. Moreover, no suggestion was given to the appellant in his cross-examination that the respondent never received the notice. As

per record, the husband of the accused as well as the accused herself, at one point of time, immediately after filing of the complaint, were served at

the same residential address as given in the complaint. Therefore, the finding recorded by the trial Court that the notice is not proved to be served on

the accused is not placed on the proper appreciation on the record.

Lastly, the judgments relied upon by the respondent-accused in Bank of Baroda's case (Supra) is distinguishable as in that case, only the photocopies

of the notices were produced without any proof of sending the same whereas in the instant case, the complainant has proved the postal receipt Ex.C4

to prove that notice was sent to the respondent-accused. Even otherwise, this judgment is arising out of a civil dispute where the proof of the

notice/document is distinguishable in case of a complaint under Section 138 of the Act. It has been held by Calcutta High Court in Barendra Kumar

Bera's case (Supra) as under:-

â€œAs held earlier, the notice contains all the ingredients of a requisite notice under section 138 (b) of the act. It contains the entire fact of the case of

the complainant as presented in the petition of complaint. Existence of debt, liability of the respondent to discharge the debt, issuance of cheques, fact

of dishonourment, demand to make payment were all given in the notice. Notice was properly addressed and stamped and it reached the sendee. The

sendee accepts the notice and in the trial all these facts have been put in evidence - oral and documentary and have not been or could not be denied.

The respondent did not deny the issuance of cheques of the amount given in the notice. What he denied is the amount of loan advanced which could

not meet with success in the trial. In such circumstances, it could not be said that omission to put signature of the lawyer in the notice is vital and for

that the notice has to be said invalid or illegal in the eye of law. I am emboldened by the judgment of the hon'ble supreme court in Sil Import v. Exim

Aides, reported in 1999 Cr. LI 2276: f1999(2) All India Criminal LR (S.C) 432, where their lordships observed as follows :

the upshot of the discussion is, on the date when the notice sent by fax reached the drawer of the cheque the period of 15 days (without which he has

to make the payment) has started running and on the expiry of that period the offence is complete unless the amount has been paid in the meanwhile.

Thus notice by fax was considered sufficient.

(15) The above decision of the Supreme Court which also has been referred to by the learned Magistrate gives rise to the reasoning that omission to

put signature in the notice is not fatal though notice no doubt has to be in writing. It may be sent by, telegram, it may be sent through fax or E-mail or

through modern devices. When the position is so, it entails that it need not be signed provided authorship is not disputed or identity of the person issuing

the notice is established or the drawer of the cheque is not misled or misguided. None of the situations does arise here. In such circumstances, it

cannot be said that omission to put an advocate's signature in the notice which has not been deliberate but mere accidental has been fatal to the case

of the appellant. In this connection, I am to refer to three decisions of three High Courts exactly on this point one of which has already been referred

to by the learned magistrate. This is Satyanarayanan Gowdav. B. Rungappa, reported in 1996 Cr.LJ 2264; 1997(3) All India Criminal LR (Ker.) 476.

Here the exact situation arose. A learned judge of the Karnataka High Court held that the Advocate by mistake missed to sign the notice under

Section 138 of the N.I. Act but that by itself would not lead to the conclusion that notice is invalid in the eye of law. Again the same question arose in

a decision in Janaradhan v. Jayachandran, reported in (2005)

2 Criminal Court Cases 590 (Kerala) [2005(2) All India Criminal LR (Ken) 5881, here also the same situation arose and the Kerala High Court held

that merely because the counsel concerned had failed to put his signature it cannot be held inadmissible because no prejudice has been caused to the

respondent. The Kerala High Court referred to an earlier decision of the said Court in Ahdurehim Sail v. Sahul Hameed, reported in 1981 KLT 289,

where it was not in question that Ext. B1 (notice) was issued by the landlord of the Advocate, the fact that it was not signed by the Advocate due to

inadvertence it would not make the notice invalid in any way. Again this exact point came for consideration in Madras High Court in the decision in

C.N. Hari Krishnan v. Kinetic Finance Ltd., reported in 2004 (2) DCR 233. Here also notice under section 138 (h) was not signed by the Counsel and

it was observed that where notice could be sent by fax or telegram, as I observed earlier, the fact that notice was not signed by the Counsel would not

be a ground for quashing of the proceeding. The point thus raised has to be answered in favour of the appellant.â€

Thus, the appellant has prima facie proved that he has served the notice to the respondent-accused, even if it was not signed by his Advocate.

It has been held by Karnataka High Court in Satyanarayana Gowda's case (Supra) that under Section 138(b) of the Act, there is no contemplation that

the notice should be signed by the party and the only requirement is that the same is duly served on the respondent.

The trial Court has held that since notice Ex.C3 does not bear signature of the complainant counsel, the same is not a legal notice as per Section 94 of

the Act. However, even as per Section 94 of the Act, there is no requirement that the notice should be signed by the party or the Advocate and what

is required under Section 94 of the Act is to prove the mode in which the notice may be given and the notice may be oral or written, and if written, it

be sent by post to inform the party to whom it is given that the instrument has been dishonorned.

Since in the present case, the respondent could not prove that she was not residing at the given address in the complaint where the notice was sent

through registered post as later on she was served at the same address, mere non-signing of the notice, does not invalidate notice even as per Section

94 of the Act.

For the reasons stated above, the appeal is allowed and the matter is remanded back to the trial Court for decision afresh after allowing the parties to

lead their evidence, in accordance with law.