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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 01ST DAY OF MARCH, 2021

BEFORE

THE HON'BLE MR.JUSTICE ASHOK G. NIJAGANNAVAR

CRIMINAL APPEAL NO.838 OF 2011 (A)

BETWEEN:

M NAGAPPA,
S/O KARIBASAPPA,
AGED ABOUT 66 YEARS,
R/AT NO.2233/D-9,
NAVEEN NILAYA,
2ND MAIN, 6TH CROSS, NEAR
2ND BUS STOPM BAPUJI VIDYA NAGAR,
DAVANAGERE - 577 005. ...APPELLANT

(BY SRI GURURAJ JOSHI, ADVOCATE)

AND:

MOHAMAD ASLAM SAVANUR,
S/O ABDUL REHAMAN,
HEALTH INSPECTOR,
CITY MUNICIPALITY COUNCIL,
DAVANAGERE - 577 005. …RESPONDENT

(BY SRI RAMAKRISHNA, ADVOCATE FOR
SRI M.R.HIREMATHAD, ADVOCATE)

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THIS CRIMINAL APPEAL IS FILED UNDER SECTION 378(4) CR.P.C PRAYING TO SET ASIDE THE ORDER DT: 05.07.2011

PASSED BY THE PRL. SR. CJ AND CJM, DAVANAGERE IN C.C.NO.1575/2009 –ACQUITTING THE RESPONDENT / ACCUSED FOR THE OFFENCE P/U/S 138 OF N.I.ACT.

THIS APPEAL COMING ON FOR FINAL HEARING THIS DAY, THE COURT DELIVERED THE FOLLOWING PHYSICAL HEARING:

JUDGMENT

This appeal is directed against the judgment and order of acquittal dated 05.07.2011 passed in C.C.No.1575/2009, whereby the respondent-accused is acquitted for the offence punishable under Section 138 of Negotiable Instruments Act, (hereinafter referred to as N.I.Act) and also praying to pass an order to convict the accused for the offence punishable under Section 138 of N.I.Act.

2. The brief facts of the case are that the appellant-complainant and the respondent-accused were known to each other. The appellant-complainant had given a loan of Rs.1,50,000/- to the respondent-accused for his family necessities through a cheque bearing No.146341 for a sum of Rs.1,00,000/- drawn on Canara Bank, P.J.Extension, Davanagere, and also paid a sum of Rs.50,000/- in cash. The respondent-accused, having failed to pay the amount within a reasonable time, had issued three

cheques bearing Nos.981735, 981736 and 981737 dated 01.03.2006, 01.04.2006 and 01.05.2006 respectively, for a sum of Rs.50,000/- each, drawn on Laxmi Villas Bank, Davanagere Branch. The said cheques were presented to bank for encashment but they were dishonoured and returned with an endorsement "funds insufficient". The appeliant-complainant got issued legal notice dated 22.05.2006, but it was returned with a shara "not claimed". Since the respondent-accused failed to repay the loan amount, the appellant-complainant filed a private compliant under Section 200 Cr.P.C. for the offence punishable under Section 138 N.I.Act. On recording the sworn statement, the case was registered at C.C.No.1575/2009. The charges were read over, but the accused denied the same and claimed to be tried. The complainant got himself examined as P.W.1 and documents were marked as per Exs.P-1 to P-14. The respondent-accused has not led any evidence, but a letter issued by TATA AIG Life Insurance Company Ltd., is got marked as Ex.D-1 during the course of cross-examination, D.W.1.

3. The trial Court, on analysis of the evidence adduced by the appellant-complainant, arrived at a factual finding that the

respondent-accused had duly issued cheques in question for a sum of Rs.50,000/- each in favour of the appellant-complainant in discharge of a debt or liability. The cheques, were presented to the Bank for payment within the time of validity, but the cheques were returned unpaid for want of funds in the account of the respondent-accused in the bank on which the cheques were drawn.

However, the trial Court was of the opinion that appellant-complainant ought to have issued a notice under Certificate of Posting (COP) in addition to the notice sending through Registered Post with Acknowledgment Due (RPAD). With the said observation, the trial Court has come to the conclusion that the contention of the appellant-complainant that he intimated the respondent-accused regarding dishonour of the cheque leads to suspicion as the P.W.1 has also admitted in the cross-examination to a suggestion made by the respondent-accused that the appellant-complainant has not sent the legal notice to his correct address. Further it is observed that the appellant-complainant has not sent the legal notice to the respondent-accused under certificate of posting, there is no presumption of proper service of notice to the respondent-accused and has further held that the appellant-complainant has failed to

prove that he had intimated the respondent-accused regarding dishonour of cheques and nothing on record that respondent-accused has received intimation. With these observations, the complaint came to be dismissed. Being aggrieved by the said order of acquittal, the appellant-complainant is before this Court.

4. Heard Sri Gururaj Joshi, learned counsel for the appellant-complainant and Sri Ramakrishna, learned counsel appearing on behalf of Sri M.R.Hiremathad, learned counsel for the respondent-accused and perused the judgment and records.

5. Learned counsel for the appellant-complainant would contend that the trial Court has rightly came to the conclusion that the appellant-complainant has discharged his burden in proving the financial capacity to lend money, issuance of cheque by the respondent-accused, service of legal notice. All these findings have not been challenged, the only error committed by the trial Court is dismissing the complaint on the reason that notice was not sent under certificate of posting. The said finding of the trial Court is erroneous. The documentary evidence placed on record clearly goes to show that legal notice was sent through registered post

acknowledgment due. Ex.P-12 the envelope, which is returned as unclaimed, clearly goes to show that there was proper service of notice as required under Section 17 of General Clauses Act. However, the trial Court has failed to consider this aspect. Thus, it has resulted in miscarriage of justice. In support of the said contention, learned counsel has relied on the following decisions:

i. 2014 STPL 9253 SC [2014 (AIR (SCW) 4321] in the case of Ajeet Seeds Ltd. vs. K.Gopala Krishnaiah.

ii. 2013 STPL 2766 Karnataka in the case of M.S.Srikara Rao vs. H.C.Prakash.

iii. 2018 STPL 12982 Karnataka in the case of Prabhakar Shripati Hegde vs. B.V.Naik

6. Per contra, learned counsel for the respondent-accused supported the decision of the trial Court and further submitted that there are no valid grounds to interfere with the order passed by the trial Court. There is ample evidence on record to show that there was a transaction of insurance policy and respondent-accused has issued a cheque towards payment of premium in respect of the

policy taken by him that it is also the contention of respondent-accused there was a chit transaction between the accused and the complainant. Considering all these facts, the trial Court has rightly come to the conclusion that the appellant-complainant has intentionally issued legal notice to the wrong address and has managed to file a false case against the respondent-accused. There is no convincing evidence to show that the respondent-accused has committed the offence punishable under Section 138 of N.I.Act. Thus, the appeal deserves to be dismissed.

7. Having heard the submission of learned counsel for both side, the point that arise for consideration would be :

"Whether the trial Court was justified in acquitting the accused?"

8. In the present appeal, the legal principles regarding presumption to be drawn regarding service of legal notice to the respondent-accused is under consideration. Thus, it is necessary to ascertain whether there was proper service of notice as per the

procedure prescribed under Section 94 of Negotiable Instruments Act and the provisions of General Clauses Act.

9. Section 94 of Negotiable Instruments Act, 1881, reads as under:

> ***"94. Mode in which notice may be given.***—*Notice of dishonour may be given to a duly authorized agent of the person to whom it is required to be given, or, where he has died, to his legal representative, or, where he has been declared an insolvent, to his assignee; may be oral or written; may, if written, be sent by post; and may be in any form; but it must inform the party to whom it is given either in express terms or by reasonable intendment that the instrument has been dishonoured, and in what way, and that he will be held liable thereon; and it must be given within a reasonable time after dishonour, at the place of business or (in case such party has no place of business) at the residence of the party for whom it is intended.*
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> *If the notice is duly directed and sent by post and miscarries, such miscarriage does not render the notice invalid."*

10. Section 17 of General Clauses Act, 1897, reads as under:

> ***17. Substitution of functionaries.****(1) In any 31 [Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, to mention the official title of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed.*
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> *(2) This section applies also to all [Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.*

11. In the decision reported in 2014 STPL 9253 SC [2014 (AIR (SCW) 4321] in the case of *Ajeet Seeds Ltd. vs. K.Gopala Krishnaiah*, the Hon'ble Apex Court has held as under:

> *"14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further*

aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement 'refused' or 'not available in the house' or 'house locked' or 'shop closed' or 'addressee not in station', due service has to be presumed. [Vide Jagdish Singh Vs. Natthu Singh (1992) 1 SCC 647; State of M.P. Vs. Hiralal & Ors. (1996) 7 SCC 523 and V.Raja Kumari Vs. P.Subbarama Naidu & Anr. (2004) 8 SCC 74] It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

10. It is thus clear that Section 114 of the Evidence Act enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. Section 27 of the GC Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. It is not necessary to aver in the complaint that in spite of the return of the notice unserved, it is deemed to have

been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business."

12. On analysis of the evidence placed on record, trial Court has arrived at the factual finding that the respondent-accused had duly issued three cheques as per Exs.P-1, P-2 and P-3 for a sum of Rs.50,000/- each towards discharge of legally payable debt. The said cheques were presented to the bank for payment within the period of its validity, but the said cheques were dishonoured for want of funds and returned with an endorsement of bank "insufficient funds" in the account of respondent-accused in the bank on which the cheques were drawn. The statutory notice of dishonour was duly issued, to which there was no response from the respondent-accused. The trial Court has rightly came to the conclusion that the appellant-complainant had financial capacity to lend money. The trial Court has also rightly disbelieved Ex.D-1 which is envelope confronted during the evidence of D.W.1 on the reason that the respondent-accused has not placed cogent evidence

to show that the cheques issued by him in favour of the complainant is towards payment of premium. It is rightly held that when the accused admits Exs.P-1 to P-3 belongs to him and the signatures on the said cheques are also admitted by him, it is for the respondent-accused to prove that the said cheques were issued towards payment of premium installments of insurance policy. There is no plausible explanation by the respondent-accused as to why Exs.P-1 to P-3 were issued in the name of appellant-complainant.

13. In the present appeal, the trial Court has dismissed the complaint only on the reason that the legal notice issued through RPAD to respondent-accused was returned un-served as 'not claimed'. The postal cover sent through RPAD returned as not claimed does not mean due service of notice. Even during the course of cross-examination of P.W.1, nothing has been elicited regarding service of notice. When the appellant-complainant has not sent the legal notice to the respondent-accused under certificate of posting, there is no presumption of due service of notice to the respondent-accused. It is pertinent to note that the

respondent-accused has not placed rebuttal evidence to prove that the notice was not sent to the correct address and the respondent-accused was not working at the address shown in the envelope sent through legal notice. Ex.P-12 is the legal notice postal cover, the address shown in the said postal cover and the address shown in the cause title of the complaint are one and the same. The respondent-accused has not at all denied that he was working as Health Inspector at the City Municipality Council, Davanagere.

14. When a sender has dispatched the notice through registered post with correct address written on it, Section 27 of General Clauses Act could be profitably imported and in such a situation service of notice deemed to have been effected on the sender unless he proves that it was really not served and he was not responsible for such non-service. In the present case, there is no rebuttal evidence to show that the complainant has deliberately and intentionally sent the legal notice to the wrong address and the accused was not working at the place and address shown in the registered envelope.

15. The finding recorded by the Court below regarding service of notice through registered post holding that there is no proper service of notice is contrary to Section 138 of N.I.Act. In view of the ratio laid down in the aforesaid decisions, there is proper service of notice and there was no requirement to serve the notice under certificate of posting. The respondent-accused has failed to rebut the presumption by placing cogent and convincing evidence. Therefore, this Court is of the view that the findings recorded by the Court below cannot be sustained in law.

16. For the foregoing reasons, this Court proceed to pass the following:

ORDER:

i. Appeal is allowed.

ii. The impugned judgment and order of acquittal dated 05.07.2011 passed in C.C.No.1575/2009 on the file of Prl.Senior Civil Judge & CJM, Davanagere, is set-aside.

iii. The respondent-accused is convicted for the offence punishable under Section 138 of N.I.Act.

iv. The respondent-accused is directed to pay fine amount of Rs.1,60,000/- (Rupees One Lakh Sixty Thousand only). Out of the fine amount, a sum of Rs.10,000/- shall be remitted to State by way of fine and the remaining fine amount of Rs.1,50,000/- shall be paid to the appellant-complainant by way of compensation along with interest at the rate of 6% p.a. from the date of complaint till realization of the cheque amount.

v. The amount shall be deposited within eight weeks from the date of this order. In case of default, the appellant shall initiate proceedings.

Sd/-
JUDGE

BSR