

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 2ND DAY OF NOVEMBER 2015/11TH KARTHIKA, 1937

CRL.A.No. 2107 of 2005 ()

AGAINST THE ORDER/JUDGMENT IN Cr1.L.P.694/2005 of HIGH COURT OF KERALA
DATED 30-11-2005

&

AGAINST THE JUDGMENT IN ST 1502/2000 of J.M.F.C.-II, THRISSUR,
DATED 16-01-2003

APPELLANT(S) /COMPLAINANT:

K.C.RAJESH, S/O.CHANDRASEKHARAN,
KUNDYAIL HOUSE, VALAPPAD P.O., THRISSUR DISTRICT.

BY ADV. SRI.DILIP J. AKKARA

RESPONDENT(S) /ACCUSED/STATE:

1. T.K.SANTHAKUMAR, S/O. THOPPIL KESAVAN,
PUTHENPIDIKA P.O., THRISSUR DISTRICT.
2. THE STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

R1 BY ADVS.SRI.N.SUBRAMANIAM
SRI.M.S.NARAYANAN

R2 BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26.10.2015,
THE COURT ON 02-11-2015 DELIVERED THE FOLLOWING:

SS

K. RAMAKRISHNAN, J.

Crl. Appeal No.2107 of 2005

Dated this the 2nd day of November, 2015

JUDGMENT

Complainant in S.T.No.1502/2000, on the file of the Judicial First Class Magistrate Court-II, Thrissur, is the appellant herein. The case was taken on file by the magistrate on the basis of a private complaint filed by the complainant under Section 138 of the Negotiable Instruments Act, (hereinafter called 'the Act').

2. The case of the complainant in the complaint was that, the accused borrowed a sum of ₹55,000/- from the complainant and in discharge of that liability, he had issued Ext.P1 cheque drawn on District Co-operative Bank Ltd., Vadanappally Branch. The cheque when presented was dishonoured for the reason 'funds insufficient' in the account of the accused vide Ext.P2 dishonour memo and this was intimated to the complainant by his banker vide Ext.P3 letter. The complainant issued Ext.P4 notice vide

Ext.P5 postal receipt and the same was received by the accused evidenced by Ext.P6 postal acknowledgment. He had not paid the amount. So he had committed the offence punishable under Section 138 of the Negotiable Instruments Act. Hence the complaint.

3. When the accused appeared before the court below, the particulars of offence were read over and explained to him and he pleaded not guilty. In order to prove the case of the complainant, the complainant himself was examined as PW1 and Ext.P1 to P6 were marked on his side. After closure of the complainant's evidence, the accused was questioned under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that, there was no transaction between the complainant and the accused and he was a subscriber of the chitty conducted by M/s.Lakshmi Chittis and Finances and when he bid the chitty, a blank

signed cheque was given to them and the same was closed and misusing the cheque, the present complaint has been filed. In order to prove his case, the accused himself was examined as DW1 and Exts.D1 to D3 were marked on his side. After considering the evidence on record, the court below came to the conclusion that, notice was issued out of time and as such the complaint is not maintainable and the accused is entitled to get acquittal and acquitted him under Section 255(1) of the Code of Criminal Procedure. Aggrieved by the same, the present appeal has been preferred by the appellant /complainant along with Leave Petition Crl.L.P.No.694/2005 and the application was allowed and the leave was granted and then the appeal was admitted.

4. Heard Sri.Dilip J. Akkara, counsel appearing for the appellant and Sri.N.Subramanian, counsel appearing for the 1st respondent and Sri. Jibu P. Thomas, Public Prosecutor appearing for the 2nd respondent/ State.

5. The counsel for the appellant submitted that, the court below was not justified in holding that the notice issued is not proper and in fact the intimation was dated 12.07.1999. Notice was issued on 27.07.1999 and if the date of receipt of the intimation is excluded, then the notice is within time. Sending notice on the last date of expiry of time is proper and it will be deemed to be sent within time. So on that ground, the order of acquittal passed is not correct. Further the evidence adduced will go to show that the accused had not rebutted the presumption and his evidence is not sufficient to come to the conclusion that the cheque was not given to the complainant, but to some chitty company and misusing that cheque, the present complaint was filed. So the order of acquittal passed by the court below is not proper and court below ought to have convicted the accused and sentenced him for the offence under Section 138 of the Negotiable Instruments Act.

6. On the other hand learned counsel for the

first respondent submitted that the court below was justified in relying on the decision reported in **Madhu v. Omega Pipes Ltd (1994 (1) KLT 441)** to come to the conclusion that notice issued is out of time and rightly acquitted the accused. Further the evidence adduced will go to show that he had rebutted the presumption and the order of acquittal is perfectly justifiable and does not call for any interference.

7. Heard the Public Prosecutor also.

8. The case of the complainant in the complaint was that accused borrowed a sums of ₹55,000/- and issued Ext.P1 cheque in discharge of that liability. The case of the accused is one of total denial. His case was that he was a subscriber of a chitty conducted by M/s.Lakshmi chitts and Financiers and when he auctioned the chitty, his blank signed cheque was obtained as security and when the chitty company was closed, misusing the cheque given, the present complaint was filed through the complainant. Once

the issuance of the cheque is denied, then the burden is on the complainant to prove the execution of the cheque and also the transaction. In order to prove the case of the complainant, the complainant himself was examined as PW1 and he deposed in support of his case in the complaint. He denied the suggestion that the blank signed cheque given to M/s.Lakshmi Financiers was misused and the present complaint was filed.

9. It is true that the accused himself had gone to the witness box and adduced evidence and produced Exts.D1 to D3 to prove his case. But all those things will go to show that he was subscriber to a chitty conducted by M/s.Lakshmi chits and financiers and nothing more. There is no evidence adduced on the side of the accused to prove any connection for the complainant with any of the persons conducted the chitty. Further he did not send any reply to the notice issued by the complainant when the cheque was dishonoured as well. So under the circumstances, it can be

safely concluded that the accused had failed to prove his case and the presumption under Section 139 of the Act has not been rebutted as once the signature in the cheque is admitted, then the burden is on the accused to prove the circumstances under which his cheque had reached the hands of the complainant. The evidence adduced on the side of the accused is not sufficient to discharge that burden. So under the circumstances, it can be safely concluded that Ext.P1 cheque was given to the accused in discharge of a legally enforceable debt for the amount due to the complainant from the accused.

10. The fact that the cheque was dishonoured for the reasons 'funds insufficient' and the complainant had issued notice and that was received by the accused, etc., were not in dispute. The court had relied on the decision reported in **Madhu v. Omega Pipes Ltd., (1994(1) KLT 441)** and came to the conclusion that notice must be issued within 15 days of receipt of intimation and in this case the

notice was issued on the 15th day of receipt of intimation as such it is out of time.

11. The question as to whether the date of receipt of intimation from the bank regarding dishonour has to be excluded for the purpose of computing the period of 15 days for sending notice is the question to be considered in this case. For that purpose, it is necessary to consider Section 138 of the Act and Section 9 of the General Clauses Act are to be understood, which read as follows:

Section 138 of the Act:

138. Dishonour of cheque for insufficiency, etc., of funds in the account.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extended to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(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 drawyer of the cheque, [within thirty 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.

Explanation- For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability.]

Section 9 of the General Clause Act:

9. Commencement and termination of time.

(1) In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from", and, for the purpose of including the last in a series of days or any other period of time: to use the word "to".

(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.

12. In Section 9 of the General Clauses Act, it has been stated that in any central Act or regulation made

after the commencement of this Act, it shall be sufficient for the purpose of excluding the first in a series of days or any other period of time to use the word “from” and for the purpose of including the last series of days or any other period of time to use the word “to”. In the commentaries it has been observed, where a statute fixes only the terminus a quo of a state of things which is envisaged as to last indefinitely, the common law rule obtains that fractions of a day ought to be neglected and in such cases the statute or regulation or order takes effect from the first moment of the day on which it is enacted or passed, that is to say, from midnight of the day preceding the day on which it is promulgated: where on the other hand, a statute delimits a period marked both by a terminus a quo and a terminus ad quem, the former is to be excluded and the latter to be included in the reckoning. So in a case where the act provides that things will have to be done within a particular period commencing from a particular date and ending with

particular date then common rule says the former has to be excluded (see **Munnalal v. Manakchand (AIR 1950 Madhya Bharat 119 and I.M.Lall v. Gopal Singh (AIR 1963 Punjab 378)**).

13. This has been considered in the decision reported in **Krishnankutty Nair v. Ashokan (2005(1) KLT 537)** and held that the date on which cause of action for doing certain thing starts has to be excluded and the right to proceed against will start from the next day of that date. Further in the decision reported in **Ravi v. Kuttappan (2007 (3) KLT 31)**, it has been observed that notice can be issued even on the 15th day of receipt of intimation. If such a notice is issued on the 15th day even then the notice is proper and valid. Further in the decision reported in **Premish Verma v. Lokesh Sharma (2008 (2) KLT (SN) 18 Case No.21)**, the High Court of Chattisgarh had an occasion to consider the similar question and came to the conclusion that the date on which the payee or holder

in due course has received the intimation regarding dishonour from the bank has to be excluded while reckoning the period of 30 days within which the payee is required to give notice in writing. But in the decision reported in **Sivakumar v. Natarajan [(2009) 13 SCC 623]**, the Supreme Court has considered the question how the time will have to be reckoned for issuing notice under Section 138(b) of the Act and observed that non use of the word 'from' before the words 'receipt of information' and word 'to' in clause (b) indicating departure from Section 9 of the General Clauses Act is significant and in such cases the date of receipt of the intimation is not entitled to be excluded and the time will have to be reckoned from that date for the purpose of sending notice and notice sent on the 31st day is out of time. In that case, the intimation regarding dishonour was received on 03.12.2003 and the notice was issued on 02.01.2004, which was said to be out of time.

14. But in a subsequent decision of the apex court in **Rameshchandra Ambalal Joshi v. State of Gujarat and Another [(2014) 11 SCC 759]**, while considering the question as to how the period of 30 days has to be reckoned for filing complaint, considering the decision of the apex court in Sivakumar's case (supra) held that Section 9 of the General Clauses Act will apply in such cases and the first day has to be excluded and the cause of action for doing a particular act mentioned under that Section will start only from the next day of the right accrued to the party.

15. But in a later decision, three judges bench of the Hon'ble Supreme Court considered the question regarding how the words occurring in Section namely "of", "from", "after", "within" occurring in Section 138(a), (c) and 142(b) of the Negotiable Instruments Act has to be considered and whether for the purpose of computing the limitation, the first day has to be excluded or not in the

decision reported in **Econ Antri Limited v. Rom Industries Limited and Another [(2014) 11 SCC 769]**

and held as follows:

Though limitation Act, 1963 is not applicable, held, General Clauses Act, 1897 applies to NI Act, 1881 in view of S.9(2) of 1897 Act – Contention that word “of” occurring in Ss.138(c) and 142(b) is to be interpreted differently as against the word “from” occurring in S.138 proviso(a), rejected since the words “of”, “from” and “after”, in a given case, may mean the same thing – Thus, held, Saketh India Ltd., (1999) 3 SCC1 correctly lays down the law- View in SIL Import, USA, (1999) 4 SCC 567 overruled – Reference answered accordingly – General Clauses Act, 1897 – S.9 – Limitation Act, 1963 – Ss. 12(1) & (2) – Held, not applicable to NI Act, 1881.

The issue in the present case was on a reference for reconsideration of the judgment in Saketh India Ltd., (1999) 3 SCC 1 wherein the question of law that arose for consideration was whether for calculating the period of one month which is prescribed under Section 142(b) of the NI Act, the period has to be reckoned by excluding the date on which the cause of action arose? The issue was referred in view of variance between the view expressed by the Supreme Court in Saketh India Ltd., case and in SIL Import, USA, (1999) 4 SCC 567.

The submission that the word “of” occurring in Sections 138(c) and 142(b) of the NI Act is to be interpreted differently as against the word “from” occurring in Section 138(a) of the NI Act, and thus, for the purposes of Section 142(b), which prescribes that the complaint is to be filed within 30 days of the date on which the cause of action arises, the starting date on which the cause of action arises should be included for computing the period of 30 days, is rejected. The principle laid down in Tarun Prasad Chatterjee, (2000) 8 SCC 649 would have a bearing on the present case since in that case also the Limitation Act was not applicable.

Referring to Section 9(1) of the General Clauses Act, 1897, the Supreme Court held that it shall be sufficient for the purpose of excluding the first in a series of days or any other period of time, to use the words "from" and, for the purpose of including last in a series of days or any other period of time, to use the word "to". The Supreme Court observed that the said Section 9 gives statutory recognition to the well-established principle applicable to the construction of statute that ordinarily in computing the period of time prescribed, the rule observed is to exclude the first and include the last day.

In Tarun Prasad Chatterjee, (2000) 8SCC 649, it was observed that "in order to apply Section 9 of the GCA, 1897, the first condition to be fulfilled is whether a prescribed period is fixed "from" a particular point. When the period is marked by terminus a quo and terminus ad quem, the canon of interpretation envisaged in Section 9 of the General Clauses Act, 1897 requires the exclusion of the first day. The words "from" and "within" used in Section 81(1) of the RP Act, 1951 (in question in that case) do not express any contrary intention." Thus, it was concluded that a conjoint reading of Section 81(1) of the RP Act, 1951 and Section 9 of the General Clauses Act, 1897 leads to the conclusion that the first day of the period of limitation is required to be excluded for the convenience of the parties. As the Limitation Act is held to be not applicable to the NI Act, drawing parallel from Tarun Prasad Chatterjee case where the Limitation Act was held not applicable, with the aid of Section 9 of the General Clauses Act, 1897, it can be safely concluded in the present case that while calculating the period of one month which is prescribed under Section 142(b) of the NI Act, the period has to be reckoned by excluding the date on which the cause of action arose. Thus, it is not possible to hold that the word "of" occurring in Sections 138(c) and 142(b) of the NI Act is to be interpreted differently as against the word "from" occurring in Section 138(a) of the NI Act and that for the purpose of Section 142(b), which prescribes that the complaint is to be filed within 30 days of the date on which the cause of action arises, the starting day on which the cause of action arises should be included for computing the period

of 30 days. The words “of”, “from”, and “after” may, in a given case, mean really the same thing. The word “of” is sometimes the equivalent of “after”.

Thus, it is held that Saketh India Ltd., I(1999) 3 SCC 1 lays down the correct proposition of law. For the purpose of calculating the period of one month, which is prescribed under Section 142(b) of the NI Act, the period has to be reckoned by excluding the date on which the cause of action arose. Further, SIL Import, USA, (1999) 4 SCC 567 does not lay down the correct law. Needless to say that any decision of the Supreme Court which takes a view contrary to the view taken in Saketh India Ltd., case by the Supreme Court, which is confirmed now, do not lay down the correct law on the question involved in this reference. The reference is answered accordingly.

16. It was held in the decision that there is no difference between the words “of” and “from” mentioned in the sections and there is no necessity to give a different meaning and different interpretation for the purpose of computing the period of limitation and they will have to be treated as alike having same meaning and held that in such cases Section 9 of the General Clauses Act will apply and the first day of starting point of cause of action has to be excluded and it will have to be reckoned from the next day of starting point of cause of action for computing the period of limitation for doing certain action mentioned under the

Section. Though it was decided for the purpose of considering the question for the purpose of period mentioned in clause (a) and (c) of Proviso to Section 138 and Section 142(b) of the Act, the same principle can be extended to the period mentioned in Clause(b) of Proviso to Section 138 of the Act as well for the purpose of issuing notice. Since the point considered in **Sivakumar v. Natarajan [(2009) 13 SCC 623]**, has been differently considered by the three Judges Bench in **Econ Antri Limited v. Rom Industries Limited and Another [(2014) 11 SCC 769]**, that will prevail as it is a subsequent larger bench decision on the question of computation of period of limitation where the words “of” and “from” were used in the same section and whether any different interpretation is required for that purpose and whether Section 9 of the General Clause Act in such cases will be applied and held that Section 9 will applied and it will have to be interpreted in the same manner giving the same

meaning.

17. The same question was considered by this court in **Issac v. Reghunathan Chettiar (2015(3) KLT (SN) 42 Case No.56)** and held that date of receipt of intimation from bank has to be excluded for sending notice under Section 138(b) of the Act. If these principles are applied, then the cause of action for sending notice will start from the next day of receipt of the intimation from the bank, namely, 13.07.1999 as the intimation was received on 12.07.1999 and the notice was issued on 27.07.1999 on the 15th day of receipt of intimation which is within time. So the finding of the court below that the notice issued is out of time is not sustainable in law in view of the discussions made above and the order of acquittal of the accused passed by the court below on that ground is not sustainable and the same is liable to be set aside and it has to be held that the notice sent is within time.

18. In view of the finding of this court that the

evidence adduced on the side of the accused is not sufficient to rebut the presumption available under Section 139 of the Act, there is no necessity to remand the case for fresh disposal as evidence is already available on record. Further court below also found that the accused has failed to rebut the presumption and the complainant had proved the execution of the cheque and it was issued in discharge of a legally enforceable debt due from the accused to the complainant. The accused had no case that he paid the amount after receipt of notice. Once the complainant had proved that the accused had not paid the amount within 15 days of receipt of notice, then the offence under Section 138 of the Act is complete. So the finding of the court below that the accused is entitled to get acquittal is unsustainable in law in view of the discussions made above and the order of acquittal passed by the court below is liable to be set aside. So the order of acquittal passed by the court below is set aside and accused is found guilty for the offence under

Section 138 of the Negotiable Instruments Act and he is convicted thereunder.

19. As regards the question of sentence is concerned, the case is of the year 2000 and the cheque is for an amount of ₹55,000/-. In the decision reported in **Damodar S. Prabhu v. Sayed Babalal H. [JT 2010 (4) (S.C.)457]** the Supreme Court has held that, the case under Section 138 of the Negotiable Instruments Act is of civil nature but by introducing Section 138 in the Act, it has been given a criminal colour and the intention of the legislature is to see drawer is made to pay the amount to the payee. Further in the decision reported in **Somanath Sarkar v. Utpal Basu Mallick [2013(4) KLT 350 (S.C.)]**, the Supreme Court has held that cases under Section 138 of the Negotiable Instruments Act, there is no provision for payment of compensation as such but court has got power to impose double the cheque amount as fine and out of the fine, the quantum of compensation payable can be fixed

invoking 357(1)(b) of the Code of Criminal Procedure. Considering the fact that the case is of the year 2000, this court feels that fixing the fine amount of ₹60,000/- and imposing a default sentence of three months simple imprisonment and also substantive imprisonment till rising of the court and paying the entire fine amount if realised to be paid as compensation to the complainant will be sufficient and that will meet the ends of justice. So the accused is sentenced to undergo imprisonment till rising of the court and also to pay a fine of ₹60,000/-, in default to undergo simple imprisonment for three months. If the fine amount is realised the court below is directed to pay the entire fine amount to the complainant as compensation under Section 357(1)(b) of the code of Criminal Procedure. Three months time is granted to the accused to pay the amount, till then the execution of sentence is directed to be kept in abeyance.

So the appeal is allowed and the order of acquittal

passed by the court below is set aside and the accused is found guilty and convicted for the offence under Section 138 of the Negotiable Instruments Act and sentenced to undergo imprisonment till rising of the court and pay a fine of ₹60,000/- in default to undergo simple imprisonment for three months. If the fine amount is realised, the same be paid to the complainant as compensation under Section 357 (1)(b) of the Code of Criminal Procedure. Accused is granted time till 12.01.2016 to pay the amount, till then the execution of sentence is directed to be kept in abeyance.

Office is directed to communicate this judgment to the concerned court, immediately.

K. Ramakrishnan, Judge

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P.A. to Judge