IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

MONDAY, THE 06TH DAY OF JULY 2015 / 15TH ASHADHA, 193

CRL.A.No. 1094 of 2011

AGAINST THE JUDGMENT IN ST 259/2008 of JUDICIAL MAGISTRATE OF FIRST CLASS -X, THIRUVANANTHAPURAM DATED 04-08-2009

APPELLANT/COMPLAINANT:

M/S.SREE GOKULAM CHIT & FINANCE COMPANY(P)LTD
COLLECTION CENTRE, ATTUKAL SHOPPING COMPLEX,
EAST FORT, THIRUVANANTHAPURAM
REPRESENTED BY PRASANTH G.S.
S/O.GOPALAKRISHNAN PILLAI,
WORKING AS LEGAL ASSISTANT, DIVISIONAL OFFICE,
T.C.4/1037(2)(3) KAWDIAR,
THIRUVANANTHAPURAM-695 003

BY ADVS.
SRI.K.S.BABU
SMT.N.SUDHA

RESPONDENTS/ACCUSED & STATE:

1 SRI.SATHYAKUMAR.C
S/O.SRI.CHAKRAPANI.J,
KATTUKATHALA,
NADUTHATTU VEEDU,
ANTHIYOOR, KOZHODU,
THANNIMOODU P.O.

2 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM

BY ADVS.
R2 BY PUBLIC PROSECUTOR SMT. P.MAYA
R1 BY SRI.M.S.UNNIKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06.07.2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

JUDGMENT

The complainant, in an unsuccessful prosecution against the first respondent herein under section 138 of the Negotiable Instruments Act, assails the order of acquittal passed by the Court of Judicial First Class Magistrate-X, Thiruvananthapuram in S.T.No.259 of 2008, in this appeal. The complaint filed by the appellant herein which was taken on file and registered as S.T.No.259 of 2008 against the first respondent/accused after complying with all the procedures. The said complaint was filed with the following allegations:-

2. The first respondent/accused issued Ext.P1 cheque dated 26.11.2007 in discharge of a legally enforceable debt due to the complainant/appellant for ₹2,21,000/- and the said cheque on presentation for encashment was bounced on account of paucity of funds in the account maintained by the first respondent/accused. Thereupon, a statutory notice intimating the first respondent/accused regarding the dishonour of the cheque calling upon him to pay the amount due was issued

within the statutorily prescribed period. Despite its receipt, the first respondent/accused failed to pay the amount within the permissible period. On due process, the first respondent/accused appeared before the court and the particulars of the offence were read out and explained to him and he pleaded not guilty. To prove the charge against the first respondent/accused, the appellant herein got examined one Sanalkumar, Legal Assistant working in the complainant company as PW1. It is to be noted that the complaint was filed by one Sajithkumar, in his capacity as Assistant Legal Officer of the complainant company. Exts.P1 to P8 were marked on the side of the complainant. After the closure of the evidence of the complainant, the first respondent/accused was examined under section 313, Cr.P.C and he denied all the incriminating circumstances put to him. Ext.D1 was got marked through PW1. No other evidence was adduced on his side. It was after appreciating the evidence that the learned Magistrate arrived at the conclusion that the appellant herein had failed to establish the guilt conclusively. In fact, the trial court found that no evidence whatsoever was let in, to establish that the demand in writing was made in tune with the statutory provision under section 138(b), NI Act within the statutory period. In such circumstances, the trial court found that there was no demand in terms of such provision and therefore, it could not be said that the accused has committed the offence under section 138, NI Act and consequently, the first respondent/accused was acquitted under section 255(1) Cr.P.C. Hence, this appeal.

3. I have heard the learned counsel for the appellant, the learned counsel for the first respondent and the learned Public Prosecutor. It is to be noted that in this proceedings, the appellant filed Crl.M.A.Nos.3622 and 3651 of 2015 under section 391, Cr.P.C. Along with Crl.M.A.No.3622 of 2015, Annexure-I certificate dated 26.11.2011 issued from the Corporation Bank, Vellayambalam Branch, Thiruvananthapuram was sought to be produced and marked. Along with Crl.M.A.No.3651 of 2015, a photocopy of the intimation memo dated 5.12.2007 allegedly issued by the Corporation Bank, Vellayambalam Branch was sought to be marked as Annexure-I. I will deal with the said

applications at the appropriate time, a little later. As noticed hereinbefore, the appellant sought to prove the charge against the first respondent/accused under section 138, NI Act by examining Sri.Sanalkumar, a Legal Assistant attached to the company as PW1. Exts.P1 to P8 were got marked. PW1 deposed to the effect that he filed a proof affidavit in lieu of chief examination in tune with the pleadings in the complaint. He deposed that Ext.P1 cheque was issued by the first respondent/accused and that it was bounced on its presentation for encashment for the reason that 'funds insufficient'. He would also depose that subsequently, Ext.P3 demand notice dated 3.1.2008 was issued. Ext.P2 dated 5.12.2007 is the dishonour memo which the appellant obtained regarding the return of the cheque as unpaid. He would also depose that the intimation regarding the same was received from the bank only on 10.12.2007. Ext.P4 is the postal receipt revealing the fact that the demand notice was despatched on 9.1.2008. Ext.P5 is the cover containing the original of Ext.P3 notice which was returned unserved. Exts.P2, P4 and P5 would reveal that the cheque was bounced and returned on 5.12.2007 and the notice was sent on 9.1.2008. In the light of the said evidence the trial court took note of the fact that Ext.P1 cheque was bounced and returned on 5.12.2007 going by Ext.P2 dishonour memo. Ext.P3 is dated 3.1.2008. It was despatched only on 9.1.2008 and the said notice was issued beyond the prescribed period of 30 days. Section 138(b), NI Act provides that a 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 thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. A perusal of the provisions under section 138, NI Act would reveal that it is the starting point for the prosecution of the drawer under section 138 in case after the receipt of such a notice under section 138(b) he fails to effect payment within 15 days as contemplated under section 138(c). Therefore, it is evident that the said fact could not be left for presumption and it is a matter to be proved as it is virtually the starting point of the cause of action. Hence, knowing the actual date on which information from the bank regarding the return of cheque as unpaid, was received by the payee or the holder in due course who made the complaint and the date on which he issued a demand in writing as contemplated under section 138(b) the starting point of the period under section 138(c) could not be calculated. In other words, going by the provisions under section 138(c) of the NI, Act the period of 15 days commences from the date of receipt of notice under 138(b). In such circumstances, in a case where a demand was not made within the statutorily prescribed period under section 138(b) a payee or a holder in due course cannot successfully launch a prosecution against a drawer alleging commission of offence under section 138, NI Act. In a case where the payee or the holder in due course presented the cheque for collection through his bank and a dishonour memo was received by that bank from the drawyee bank pursuant to its receipt and intimation regarding the return of the cheque as unpaid, shall have to be issued by the said bank to the payee or the holder in due course. In such cases the intimation which was received from his bank is bound to be produced by the payee or holder in due course who makes a complaint against the drawyer alleging commission of offence under section 138 NI Act. If the payee or the holder in due course fails to establish that the notice was issued within the statutorily prescribed period under section 138(b) a successful prosecution of the drawyer for the offence under section 138 is impossible. In this case, evidently, Ext.P2 dishonour memo alone was produced. It is dated 5.12.2007. Ext.P3 lawyer notice is dated 3.1.2008. But at the same time, Ext.P4 postal receipt would reveal that Ext.P3 was despatched only on 9.1.2008. In such circumstances, for the purpose of calculating the period of limitation the date on which the complainant received the intimation should have been established. True that the learned counsel for the appellant contended that PW1 deposed to the effect that it was sent on 10.10.2007. Though the appellant stated in the affidavit that he received an intimation regarding the dishonour of the cheque on 10.12.2007 no documents to establish the same were produced. The trial court taking into account the failure on the part of the complainant/appellant to produce the intimation which he received from the bank for the purpose of calculating the period of limitation to consider whether a demand in writing as contemplated thereunder was issued within the said prescribed period, took note of the dates appeared in Exts.P2 and P4. In the absence of the intimation, on such calculation it was found that since Ext.P2 is dated 5.12.2007 and the notice was sent only on 9.1.2008 there was no proper demand in writing in accordance with the provisions under section 138(b) and therefore, the first respondent could not be said to have committed the offence under section 138, NI Act. Evidently, it was held as such, as an offence under section 138 NI Act could be allegedly committed by a drawyer only if he fails to effect payment of the amount covered by the cheque in question within a period of 15 days from the date of receipt of notice under section 138(b). In such circumstances, if there was no proper notice under section 138(b) or if it was sent beyond the period prescribed under section 138(b) there could not be a valid notice in writing under section 138(b) and in such circumstances, there would not be any question of commission of offence by the drawyer under section 138(b). A perusal of the impugned order would reveal that it is taking into account the said circumstances that the learned Magistrate held that there was no proper demand strictly in terms of section 138(b) from the complainant and therefore, the accused could be held acquitted for the commission of offence under section 138 NI Act.

4. This appeal was filed in 2011. Though this appeal was admitted on 25.7.2011, the aforesaid criminal miscellaneous applications were filed respectively on 1.7.2015 and 2.7.2015 carrying the aforementioned prayers. I have already adverted to the prayers made in the said applications. The learned counsel for the appellant contended that Ext.P7 and P8 were not properly considered by the learned Magistrate. Ext.P7 is dated 29.3.2004 which is an agreement allegedly executed between the appellant and the first respondent/accused. Ext.P3 is the ledger extract in relation to a chitty transaction.

5. As is evident from the prayers in the above mentioned criminal miscellaneous applications, as per the former Crl.M.A the petitioner seeks to produce and to get it marked as an additional

evidence and as per the latter criminal miscellaneous application the petitioner seeks to produce Annexure-I certificate, marked as such in Crl.M.A., as an additional evidence. In the context of the said contentions it is relevant to refer to section 391 of the Code of the Criminal procedure. A perusal of section 391, Cr.P.C would reveal that virtually, it is in the nature of an exception to the general rule and if the appellate court considers that additional evidence to be necessary, after recording the reasons the appellate court could take such evidence by itself or could direct evidence to be taken by a Magistrate or by a Court of Session or by a Magistrate when the appellate court is a High Court. The primary object of section 391, Cr.P.C is to prevent the failure of justice. Justice has to be viewed from the angle of both the parties. In such circumstances, considering the very scope and object of the powers under section 391, Cr.P.C it is incumbent on the appellate court to consider the question whether the party concerned had a fair opportunity to produce the evidence to establish the contention earlier and at any rate, the power is not to be exercised in a routine manner. The essence of such restrictions is to see that the exercise of power under section 391, Cr.P.C shall not result in filling up of a lacuna by a party concerned. There cannot be any doubt with respect to the position that an appellate court cannot remit the matter to the inferior court and thereby in such a manner to enable the party concerned to fill up the lacuna in the matter. In the said circumstances, essentially, the question to be considered in this case is whether the appellant herein had any opportunity to produce such documents. A perusal of the grounds raised in this appeal would reveal that there is absolute absence of any contention to the effect that the petitioner was deprived of an ample opportunity to adduce the evidence. Evidently, the appellant was afforded with ample opportunity. The legal assistant attached to the complainant was examined PW1 and through him Exts.P1 to P8 were marked. It is to be noted that originally, Exts.P1 to P6 were marked and Exts.P7 and P8 were marked subsequently. The appellant cannot be heard in such circumstances that no proper opportunity was afforded to adduce and establish the case. So also it cannot be heard to contend that the complainant was absolutely unaware about the relevancy of the documents or that such documents were not in his possession. The learned counsel for the appellant attempted to canvass the position that the original of the intimation received from the Bank regarding return of Ext.P1 cheque unpaid was lost. This fact assumes relevance in the context of the fact that what is sought to be adduced as an additional evidence through Crl.M.A No. 3651/2015 is the secondary evidence viz., a photocopy of an intimation dated 10.12.2007 allegedly issued by the Corporation Bank. Evidently, there is no case for the appellant that such a case was put forth before the trial court that the original of the intimation was lost. It is a fresh contention taken up in the appeal, it is also to be noted that this appeal was filed as early as on 2011 and no such contention was taken in the appeal or even thereafter within a reasonable time. It is only in the year 2015 that such a petition was filed. Yet another aspect that is to be looked into is that prior to the filing of Crl. M.A.No.3651/2015 another application viz., Crl.M.A.No.3622/2015 was filed by the appellant with the prayer to receive a certificate dated 26.7.2011 issued by the Corporation Bank marked as Annexure-1 thereunder, as additional evidence. With respect to the intimation which is marked as Annexure-1 in Crl.M.A.No.3651/2015 no factual foundation was laid before the trial court to the effect that its original was lost. That apart, a perusal of Annexure-I intimation would reveal that no individual seal or office seal has been affixed on Annexure-1. The learned counsel appearing for the appellant submitted that normally such seals would not be affixed in such an intimation. That cannot be a reason for the appellant to contend that at this stage such a document should be accepted as additional evidence. The inrodinate delay of about 7 years in the matter of production of such a document and going by the very nature of the said document would undoubtedly lead me to hold that it would be unsafe to accept such a document, at this distance of time, as an additional evidence

6. Certain other aspects have also to be considered in this case. Ext.P8 is stated to be the ledger extract pertaining to the chitty transaction of the first respondent/accused with the complainant company. It is to be noted in this context that no

where in the complaint and also in the affidavit filed by PW1 in lieu of chief examination a specific contention was taken up to the effect that the liability or a debt of the first respondent, that is to discharge the liability arising out of a chitty transaction that he had issued Ext.P1 cheque. That apart, there can be no doubt with respect to the position that a mere production of a statement of account would not by itself, be a conclusive proof. In the light of the provisions under section 34 of the Indian Evidence Act entries in a books of accounts do not carry a presumption of correctness and therefore, in the light of the provisions under section 34 of the Indian Evidence Act entries in the books of accounts have to be shown as regularly kept in the course of business, even if produced before a court. At any rate such statements not alone would not be a sufficient to charge an accused with liability. I am also of the view that taking into account the fact that PW1 was only a legal assistant and in the affidavit filed in lieu of a chief examination and also in his examination nothing was brought out to show that he was a person who was dealing with the day today affairs of the bank with respect to the entries in books of accounts or dealing with any such accounts at the relevant point of time and he himself got no such a case the statement of accounts in Ext.P1 could not have been proved through him. Whatever that be, it is a fact that such documents were not actually proved by PW1 though Ext.P8 was produced. Taking into account all such aspects I am of the view that remitting the case to the court below for the purpose of taking additional evidence would undoubtedly enable the appellant to fill up the lacuna which cannot be permitted to happen by an appellate court by exercising the power under section 391, Cr.P.C. For all these reasons I am of the view that the above applications filed by the appellant herein for the purpose of adducing additional evidence cannot be accepted as it would definitely lead to filling up of lacuna. In such circumstances, the additional evidence sought to be produced as per Crl.M.A.Nos.3651/2015 and 3622/2015 cannot be received in to the file. Consequently, the said Crl.M.As are dismissed.

In this case as noticed hereinbefore, the court below after appreciating the evidence on record arrived at the conclusion that in the light of Ext.P2 Dishonour Memo, Ext.P3 lawyer notice and Ext.P4 postal receipt the appellant had failed to establish that he made a demand in writing for the payment of the amount covered by the cheque within the time stipulated under section 138(b) and going by such documents notice was issued beyond the statutorily prescribed period. Even if it is taken that the starting day of the course of action is liable to be excluded while by computing the period under section 138(b), it would not save the situation for the appellant in the facts and circumstances of this case, if the period is computed in the light of Exts.P2 to P4. In fact, the photocopy of the document was sought to be produced as an additional evidence to get over the same. In the light of the evidence discussed as above I have no hesitation to hold that this appeal lacks merit and it is liable to fail. Accordingly, it is dismissed.

Sd/-

C.T.RAVIKUMAR

spc/dlk **JUDGE**