

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.02.2015

CORAM

THE HON'BLE MR.JUSTICE S. MANIKUMAR

Criminal Revision Petition No.1166 of 2014
M.P.No.1 of 2014

S.Saravana Kumar

.. Petitioner

Vs.

R.Srinivasan

.. Respondent

Prayer:- Petition filed under Section 397 r/w. 401 of Cr.P.C, praying to set aside the order passed by the learned Principal Sessions Judge, Krishnagiri, made in Criminal Appeal No.13 of 2012, dated 08.10.2013, confirming the order of the learned Judicial Magistrate, Fast Track Court, Hosur, made in S.T.C.No.10 of 2011, dated 05.01.2012.

For Petitioner : Mr.N.Jothi,
for Mr.M.C.Govindan

For Respondent : Mr.V.R.Anna Gandhi

O R D E R

Criminal revision case is filed against the judgment made in Criminal Appeal No.13 of 2012, dated 08.10.2013, on the file of the Principal Sessions Judge, Krishnagiri, confirming the judgment, made in S.T.C.No.10 of 2011, dated 05.01.2012, on the file of the learned Judicial Magistrate, Fast Track Court, Hosur, by which, the petitioner has been found guilty, for the offence, under Section 138 of the Negotiable Instruments Act and sentenced to undergo simple imprisonment for a period of six months and to pay compensation of Rs.6,00,000/- to the complainant, in default of payment, undergo simple imprisonment for another period of one month.

2. It is the case of the complainant that the petitioner/accused has borrowed a sum of Rs.3,50,000/- in the year 2007 and thereafter, on 12.09.2009, borrowed a further sum of Rs.5,00,000/-. The petitioner/accused promised him to repay the same, in the month of January, 2009. After demand, on 20.12.2009, the petitioner/accused has issued a cheque bearing No.267388, dated 20.12.2009, for a sum of Rs.5,00,000/-. Cheque was presented in State Bank of India, Hosur, on 13.01.2010, for encashment. The said cheque was returned on 15.01.2010, for the reason, "Account Closed". Therefore, the complainant has issued a notice to the

petitioner/accused on 10.02.2010. Statutory notice was received by the petitioner/accused on 22.02.2010. But the petitioner/accused has not chosen to pay the amount. Therefore, a complaint, under Section 138 of the Negotiable Instruments Act, was filed and the same was taken on file in S.T.C.No.10 of 2011.

3. Complaint has been taken on file in S.T.C.No.10 of 2011. The complainant has examined three witnesses. He has marked Ex.P1 - Original Cheque bearing No.267388, dated 20.12.2009, Ex.P2 - SBI Bank Return Memo, dated 15.01.2010, Ex.P3 - Legal Notice, dated 10.02.2010, Ex.P4 - Acknowledgement Card, Ex.P5 - Pay in Challan, dated 05.11.2007, Ex.P6 - Pay-in-Slip (ICICI Bank), dated 10.11.2007, Ex.P7 - Pay-in-Slip (ICICI Bank), dated 12.11.2007, Ex.P8 - Pay-in-Challan (ICICI Bank), dated 16.11.2007, Ex.P9 - Pay-in-Slip (ICICI Bank), dated 15.11.2007, Ex.P10 - Pay-in-Challan (ICICI Bank), dated 17.11.2007, Ex.P11 - Pay-in-Challan (ICICI Bank), dated 16.11.2007, Ex.P12 - Pay-in-Challan (ICICI Bank), dated 17.11.2007, Ex.P13 - Account Statement, dated 30.06.2011 and Ex.P14 - Account Statement, dated 30.06.2011. The petitioner/accused examined has himself as DW.1. No document has been marked.

4. After considering the averments, oral and documentary evidence, by judgment, dated 05.01.2012, the learned Judicial Magistrate, Fast Track Court, Hosur, has convicted under Section 138 of the Negotiable Instruments Act, 1881 and sentenced under Section 225(ii) Cr.P.C., to undergo simple imprisonment for a period of six months and to pay compensation of Rs.6,00,000/- to the complainant, in default of payment, undergo simple imprisonment for another period of one month. As stated supra, the said judgment has been confirmed on appeal.

5. Assailing the correctness of the judgments and inviting the attention of this Court to Sections 138(b) and 142 of the Negotiable Instruments Act, 1881, Mr.N.Jothi, learned counsel for the petitioner submitted that as per the requirement under the above provisions, statutory notice to the drawer of the cheque, should be issued within 30 days, from the date of dishonour of cheque. According to him, though the respondent/complainant has marked Ex.P3 - Legal Notice, dated 10.02.2010, postal receipt, to prove the exact date of sending the notice, has not been produced before the trial Court and that therefore, the respondent/complainant has failed to discharge the burden that he has acted within the meaning of Section 138(b) of the Negotiable Instruments Act, 1881. He also submitted that the Office copy of the notice, can always be anti-dated, changed, modified, altered or interpolated, according to the convenience of the parties and that is why, the respondent has not chosen to file the postal receipt, as to when, it was accordingly sent.

6. Learned counsel for the petitioner/accused further submitted that it may not take 10 days for serving a registered notice, on the drawer of the cheque. According to him, even if the distance between

the drawer and drawee, is far, it would not take more than four days, for service of a registered notice. He therefore submitted that to bring it within the prescribed period of limitation of 30 days, for sending the notice, from the date of dishonour of cheque, the complainant has filed only the Office copy of the notice, dated 10.02.2010, without postal receipt of sending the notice and that the said aspect has not been adverted to, by both the Courts below. He submitted that both the Courts below have failed to consider that the cause of action, within the meaning of Sections 138 and 142 of the Negotiable Instruments Act, 1881, arises only when the mandatory requirement are satisfied under the Act. In support of the above contention, he placed reliance on a decision of the Apex Court in Kamlesh Kumar v. State of Bihar reported in 2014 (1) MWN (Cr.) (DCC) 41 (SC).

7. Per contra, inviting the attention of this Court to the xerox copy of the postal acknowledgement, enclosed in the typed set of papers and the averments made in the complaint, Mr.V.R.Anna Gandhi, learned counsel for the respondent submitted that the cheque presented on 13.01.2010 in State Bank of India, Hosur Branch, was returned with a Memo, dated 13.01.2010 and that the same was served on the complainant on 15.01.2010, stating that the account was closed by the petitioner/accused. Thereafter, a statutory notice, dated 10.02.2010, was sent to the petitioner/accused. According to him, merely because the date of sending the statutory notice is not visible, it cannot be contended that notice was not sent within the prescribed period of 30 days, from the date of dishonour of cheque.

8. It is also the contention of the learned counsel for the respondent that when the statutory notice was served on the petitioner/accused, there was no reply from him. There was no pleading or evidence, in this regard, before the Courts below. Even in the Memorandum of Grounds of appeal in Criminal Appeal No.13 of 2012, on the file of the Principal Sessions Judge, Krishnagiri, the abovesaid issue was not raised. Only before this Court, the petitioner/accused has raised a contention that the statutory notice was not issued, within 30 days, from the date of dishonour of cheque.

9. According to the learned counsel for the respondent, grounds raised for the first time before this Court, was never an issue, before the Courts below and therefore, finding fault with the lower Courts, for not considering the abovesaid aspect, is untenable and consequently, to be rejected. He also submitted that in the absence of any reply, evidence adduced, either oral or documentary, by the petitioner/accused, raising the said fact, before the Courts below, grounds raised in this revision case for the first time, is without any basis and for the reasons, stated supra, prayed to sustain the conviction and sentence imposed on the petitioner and consequently, dismiss this criminal revision case.

10. Heard the learned counsel for the parties and perused the materials available on record.

11. Before advertizing to the rival contentions, this Court deems it fit to extract Sections 138 and 142 of the Negotiable Instruments Act, 1881,

"138. Dishonor of cheque for insufficiency, etc., of funds in the accounts:-

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 honor 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 extend to one year, or with fine which may extend 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 drawer of the cheque, within fifteen 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.

142. Cognizance of offences:-

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138;

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138."

12. The sole issue called upon to adjudicate in this revision case, is whether, the defacto complainant has sent the statutory notice, within 30 days, from the date of dishonour of cheque and whether there is a cause of action, enabling the learned Judicial Magistrate, Fast Track Court, Hosur, to take the case on file.

13. Complaint, as deduced from the judgment in S.T.C.No.10 of 2011, dated 05.01.2012, on the file of Judicial Magistrate, Fast Track Court, Hosur, discloses that a sum of Rs.5,00,000/- has been received as hand loan from the respondent, on various dates, as stated supra and that on 20.12.2009, the petitioner/accused issued a cheque, bearing No.267388, dated 20.12.2009, of HDFC Bank, Hosur, for a sum of Rs.5,00,000/-, towards discharge of the loan.

14. Notice, dated 10.02.2010, reads that the petitioner/accused has instructed the respondent/complainant to present the cheque, in the 2nd week of January, 2010 and agreed to repay the interest on Rs.5,00,000/- on the subsequent date. Accordingly, on 13.01.2010, cheque, dated 20.12.2009, has been presented in State Bank of India, Hosur Branch. The Drawer Bank, HDFC Bank, Hosur, had returned the cheque, unpaid, with an endorsement, dated 13.01.2010, stating that the account was closed. According to the respondent/claimant, intimation was received from his bank, viz., State Bank of India, Hosur, on 15.01.2010. Thereafter, statutory notice, dated 10.02.2010, was issued to the petitioner/accused, calling upon him to pay a sum of Rs.5,00,000/-, due on the abovesaid cheque, within a period of 15 days, from the date of receipt of the notice.

15. Material on record further disclose that though notice has been acknowledged on 22.02.2010, the petitioner/accused has not chosen to send any reply. The respondent/complainant has marked Ex.P1 - Original Cheque bearing No.267388, dated 20.12.2009, Ex.P2 - SBI Bank Return Memo, dated 15.01.2010, Ex.P3 - Legal Notice, dated 10.02.2010, Ex.P4 - Acknowledgement Card. At this juncture, this Court deems it fit to extract the oral testimony of PW.1, respondent/complainant,

“நான் இந்த மனுவின் புகார் தாரார். எனது முதல் விசாரணையை பொறுத்து ஒரு நிரூபண வாக்குமூலம் தாக்கல் செய்துள்ளேன். நான் இந்த வழக்கில் நான் தாக்கல் செய்துள்ள ஆவணங்களை கீழ்க்கண்டவாறு குறியீடு செய்ய வேண்டுகிறேன். 20.12.2009ம் தேதியிட்டு எதிரியால் எனக்கு வழங்கப்பட்ட ஒதுர் கிளை எச்.டி.எஃப்.சி வங்கி காலோலை எண்.267388 மா.சா.ஆ.1 ஆகவும், 13.01.2010ம் தேதியிட்டு எதிரியின் வங்கியால் எனக்கு வழங்கப்பட்ட காலோலை திரும்ப தம் மேற்குறிப்ப, ம.சா.ஆ.2 ஆகவும், 10.02.2010ம் தேதியிட்டு எதிரிக்கு நான் அனுப்பிய சட்ட அறிவிப்பின் அலுவலக நகல் ம.சா.ஆ.3 ஆகவும், அஞ்சல் ஒப்புகை அட்டை ம.சா.ஆ.4 ஆகவும் குறியீடு செய்ய வேண்டுகிறேன். எதிரியின் மீது மாற்று முறை ஆவணச்சட்டத்தின் படியும், இ.த.ச. பிரிவு, 357ன் கீழும் தக்க நடவடிக்கை எடுக்க வேண்டுகிறேன்.”

16. Reading of the evidence of the complainant shows that there is no cross-examination on the aspect of date of issuance of the statutory notice, marking of any postal receipt and acknowledgement. Factum of receipt of information by the complainant, regarding intimation of dishonour of cheque, from the drawer bank, viz., HDFC Bank, Hosur, on 15.01.2010, has not been disputed, nor there was any question, in the cross-examination of the complainant.

17. Though Mr.N.Jothi, learned counsel submitted that deliberately, the respondent/complainant has not filed the postal receipt, the proof, for sending the statutory notice, within the prescribed time and further submitted that there is always a possibility of the Office Copy of the Notice, be anti-dated, changed, modified, altered or interpolated, to suit the convenience of the complainant, so as to give an impression that he has satisfied the mandatory requirement of issuing the legal notice, within 30 days, from the date of dishonour of cheque, as provided for, under Section 138(b) of the Negotiable Instruments Act, 1881, the petitioner/accused has not raised any such objection before the lower Courts.

18. From the perusal of the appellate Court judgment in Criminal Appeal No.13 of 2012, dated 08.10.2013, on the file of the Principal Sessions Judge, Krishnagiri, it could be deduced that the petitioner/accused has assailed the correctness of the judgment and sentence imposed in S.T.C.No.10 of 2011, dated 05.01.2012, on the file of the learned Judicial Magistrate, Fast Track Court, Hosur, on the grounds, inter alia that there is no legally enforceable debt; lower Court has not given the petitioner/accused, an opportunity to prove his case; there was no transaction between the parties, but the transaction was only through one Mr.Vijayakumar, partner of the petitioner/accused in Mars Enterprises, but the said Vijayakumar was not heard. That apart, some other grounds have also been raised.

19. As stated supra, before this Court, learned counsel for the petitioner confined his submission, only to the aspect of date of issuance of statutory notice and the further contention that it was not done, within 30 days from the date of dishonour of cheque. Ex.P2 is the SBI Bank Return Memo, dated 15.01.2010. As per Section 138(b) of the Negotiable Instruments Act, a statutory notice, in writing, has to be issued to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. In the case on hand, according to the complainant, statutory notice has been issued on 10.02.2010.

20. Before the Courts below, had the petitioner/accused raised a plea that the statutory notice was not issued, within the statutory period of 30 days and established the same, by either oral and documentary evidence and if the said plea made, was not refuted by the respondent/complainant by adducing evidence, both oral and documentary, then it would be a fit case to draw any adverse inference, against the complainant, for non-production of the postal

receipt. It is to be noted that there was no reply to the statutory notice. Nor the petitioner/accused has cross-examined the complainant on this aspect. He has also not adduced any oral evidence, in this regard.

21. In *Kamlesh Kumar v. State of Bihar* reported in 2014 (1) MWN (Cr.) (DCC) 41 (SC), relied on by the learned counsel for the petitioner/accused, initially the cheque was presented on 25.10.2008. Drawer of the cheque did not accede to the demand. The complainant did not choose to file a complaint, under Section 138 of the Negotiable Instruments Act. Instead, he choose to present a cheque once again on 10.11.2008. Thereafter, legal notice, dated 17.12.2008 was sent. There was no response and hence, a complaint, dated 07.01.2009, was filed. The crucial question posed before the Supreme Court was that on what date, the complainant received the information about the dishonour of cheque. As per Section 138(b) of the Act, for demand for the payment of money, a notice in writing, should be given 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. As per the version of the complainant, he himself had stated that he had gone to the Bank for encashing the cheque on 10.11.2008 and found that because of unavailability of sufficient balance in the account, the cheque was bounced and that therefore, a contention was raised that when he had the knowledge of the dishonour of cheque on 10.11.2008, statutory notice, dated 17.12.2008, issued after the expiry of 30 days, from the date of dishonour, would not give rise to a cause, to file a complaint. On the above facts, at Paragraph 11, the Supreme Court, held as follows:

"11.It is thus clear that period of limitation is not to be counted from the date when the cheque in question was presented in the first instance on 25.10.2008 or the legal notice was issued on 27.10.2008, inasmuch as the cheque was presented again on 10.11.2008. For the purposes of limitation, in so far as legal notice is concerned, it is to be served within 30 days of the receipt of information by the drawee from the bank regarding the return of the cheque as unpaid. Therefore, after the cheque is returned unpaid, notice has to be issued within 30 days of the receipt of information in this behalf. That is the period of limitation provided for issuance of legal notice calling upon the drawer of the cheque to make the payment. After the sending of this notice 15 days time is to be given to the noticee, from the date of receipt of the said notice to make the payment, if that is already not done. If noticee fails to make the payment, the offence can be said to have been committed and in that event cause of action for filing the complaint would accrue to the complainant and he is given one month time from the date of cause of action to file the complaint."

Assertion of the complainant therein that he had the knowledge of

dishonour of cheque and since the statutory notice was issued, much after 30 days, the Supreme Court held that the complainant therein did not send the legal notice, within 30 days, from the date of dishonour of cheque.

22. Reverting to the case on hand, it could be seen that as per Ex.P2 - SBI Bank Return Memo, dated 15.01.2010, dishonour of cheque was intimated to the complainant on 15.01.2010 and within 30 days, from the abovesaid date, statutory notice, dated 10.02.2010, has been issued to the petitioner/accused. The petitioner/accused has not adduced any evidence, with regard to the allegations of anti-date, change, alteration or interpolating to dislodge the complaint, on the grounds that there was no cause of action, under Section 138 of the Negotiable Instruments Act, 1881. The above judgment relied on by the learned counsel, on the facts and circumstances of the said case, though affirms the statutory provisions, with due respect, it cannot be said to be apposite to the facts of the present case on hand.

23. As rightly contended by the learned counsel for the respondent/complainant that in the absence of any plea, raised in the lower Courts or evidence adduced or even a reply, regarding the date of issuance of notice, it cannot be said that the petitioner has not satisfied the requirements, contemplated under Sections 138 and 142 of the Negotiable Instruments Act, 1881. For the reasons, stated supra, this Court finds no merits, warranting interference.

24. In the result, the Criminal Revision Case is dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

skm

To

1. The Principal Sessions Judge,
Krishnagiri.

2. The Judicial Magistrate,
Fast Track Court, Hosur.

1 cc to Mr..M.C.Govindan ,Advocate, SR.No.8190

1 cc to Mr.V.R.Anna Gandhi ,Advocate, SR.No.7769

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pmk.17.2.2015