

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.01.2015

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

Cr1.R.C.No.308 of 2010

Jaya Raghavaa Colour,
Amman Nagar, Komarapalayam
rep. By is Proprietor
K.G.Manickam

...Petitioner/Complainant

Vs

1. Euro Impex
by its Managing Partner
29-C, Pugalur Road,
Karur - 1.

2. V.Ravikumar
3. Sumathi
4. Shanmugam
5. Manoj

...Respondents/Accused 1 to 5

Criminal Revision filed under sections 397 and 401 of Criminal Procedure Code to set aside the order dated 19.11.2009 made in C.M.P.No.4378 of 2008 in unnumbered C.C.No. of 2008, by the learned Judicial Magistrate, Bhavani.

For Petitioner : Mr.R.Prabhakar
for Mr.N.Manokaran

For Respondents 1 to 3 : Mr.A.Thiyagarajan

O R D E R

Being aggrieved by the dismissal of CMP No.4378 of 2008 in unnumbered C.C.No.---/2008 on the file of the learned Judicial Magistrate, Bhavani, the present Criminal Revision Case has been filed. CMP No.4378 of 2008 is an application to condone the delay of 23 days in filing the complaint under Sections 142 of the Negotiable

Instruments Act, 1881.

2. As per the supporting affidavit to Section 5 Application, filed under Sections 138 and 142 of the Negotiable Instruments Act, 1881, the petitioner is the sole Proprietor of Jaya Raghavaa Colours, Amman Nagar, Kumarapalayam. Out of business transactions, respondents have been alleged to have borrowed Rs.4,86,000/- and cheque bearing No.458581 dated 28.06.2008 drawn on Dena Bank, Madurai Branch, given for discharge of loan amount was returned, as dishonoured. Lawyers notice dated 30.07.2008 was returned on 04.08.2008 as "left". As the petitioner was bedridden due to viral fever, he could not present the complaint, within the prescribed period. Hence, CMP No.4378 of 2008 has been filed to condone the delay of 23 days in filing the complaint.

3. Respondents have opposed the application. It was also contended by the learned counsel for the respondents that in another criminal proceedings in C.C.No.131 of 2008 on the file of the learned Judicial Magistrate, Bhavani, the petitioner was appearing during the relevant period, when the complaint ought to have been filed. Therefore, he submitted that the reason assigned in the supporting affidavit for condonation that the petitioner was suffering from viral fever and bedridden, was false.

4. Upon perusal of the records, the learned Judicial Magistrate, Bhavani, found that the petitioner had appeared before the same Court in connection with C.C.No.131 of 2008 on 19.09.2008 and subsequently on 26.09.2008 and that the reason assigned that he was suffering from viral fever and bedridden, is not supported by any medical certificate. The Court below has held that the reasons adduced by the petitioner, was not substantiated and hence, dismissed the CMP No.4378 of 2008.

5. Placing reliance on R.Gandhimathi and two others Vs. Bank of India, Dharmapuri Branch, rep. by its Senior Manager, Vijayaragaran, Dharmapuri, reported in 2007 (4) CTC 524, Mr.R.Prabhakar, learned counsel for the petitioner submitted that the object of incorporating Section 142 of the Negotiable Instruments Act, 1881, is to protect the interest of the drawee of the cheque, when sufficient cause is shown for condonation. He further submitted that even if there is any technical or curable defect, Courts have always leaned in favour of the drawee of the cheque. Considering the quantum of amount involved, learned counsel for the petitioner submitted that once the cause of illness, has been explained by the complainant, the same ought to have been considered. According to him, the bonafide reason

shown by the petitioner, has not been considered in proper perspective, by the learned Judicial Magistrate, Bhavani. For the reasons stated supra, he prayed to set aside the impugned order.

6. Per contra, by inviting the attention of this Court to the record of proceedings in C.C.No.131 of 2008 on the file of the learned Judicial Magistrate, Bhavani, learned counsel for the respondent submitted that he has no quarrel over the proposition that if the reason assigned, in not making the complaint within prescribed period, is satisfactory, then the Court below, for condonation is bound to condone the delay. But, if the statement made before the Court below for condonation, is found to be false, then, it does not satisfy the requirement "sufficient cause". He reiterated that during the relevant period when the complaint ought to have been filed, the petitioner had appeared before the Court below in connection with another Crl. Case viz., C.C.No.131 of 2008. it is also his further contention that the cause of illness was not substantiated. For the reasons stated supra, he prayed for dismissal of the complaint.

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

8. Before advertng to the rival contentions let me have a cursory look on the provisions. Section 138 and 142 of the Negotiable Instruments Act, 1881, relevant for the purpose of this case are extracted hereunder.

"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 provision of this Act, be punished with imprisonment for a term which may be extended to two years, 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 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 purposes 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:

Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period;

(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."

9. Cheque dated 28.06.2008, alleged to have been issued for Rs.4,86,000/- has been returned dishonoured. As per the complaint, lawyer's notice dated 30.07.2008 is stated to have been acknowledged on 04.08.2008. Within 30 days from the date of receipt of the returned cover, the petitioner ought to have filed the complaint. The reason assigned in the supporting affidavit, is that the petitioner was bedridden due to viral fever and therefore he could not file the complaint within the prescribed time. He has also submitted that the cause was beyond his control, and that there was no negligence.

10. Record of proceedings in another C.C.No.131 of 2008 on the file of the learned Judicial Magistrate, Bhavani, in which the petitioner was stated to have appeared regularly, and during which period the complaint under Section 135 of the Negotiable Instruments Act, 1881, ought to have been filed, reads as follows:

"17.04.08:

Complainant absent, u/s.256 Cr.P.C. filed and allowed. Accused A1 firm A2 present. Copies given for questioning by 21.04.2008.

21.04.08:

Both are present. A1 firm A2 present. A2 examined about the offence made out and he denied the offence. For complainant side evidence by 13.6.2008.

13.6.08

Complainant absent. 256 Cr.P.C., petition filed and allowed. Accused present. Posted for complainant side evidence by 18.7.08.

18.7.08

Accused present. Judicial Magistrate is C.L. Call on 22.8.08.

22.8.08

Complainant absent. Accused absent. 256, 317 Cr.P.c., petition allowed. Posted for complainant side evidence by 19.9.08.

19.9.08

Complainant present. Accused present. Posted for complainant side evidence 26.9.08.

26.9.08

Complainant & Accused present. Complainants side proof affidavit filed. Exp.1 to 7 marked. Posted for cross of PW1 by 10.10.08."

11. First of all, the reason assigned by the petitioner that he was bedridden due to viral fever and the cause was beyond his control and that he was prevented from filing the complaint within the prescribed period, is not true. The complainant is very much present in the Court during the prescribed period within such time the complaint ought to have been filed. In the light of the record of proceedings extracted supra, cause of illness cannot be accepted. As rightly pointed out petitioner has made a false statement before the Court below. Even taking it for granted that he was bedridden due to viral fever, no medical certificate or document has been filed to substantiate the cause shown. Intention of the legislature, to benefit the drawee of the cheque, cannot be lost sight of, but, at the same time, the delay caused in presenting of the complaint, cannot be condoned, for mere asking. It is the duty of the complainant to satisfy the Court that he had sufficient cause for not making complaint within the prescribed period.

12. In R.Gandhimathi and two others Vs. Bank of India, Dharmapuri Branch, rep. by its Senior Manager, Vijayaragaran, Dharmapuri, reported in 2007 (4) CTC 524, petition for condonation was filed alongwith the complaint but the accompanying affidavit was not filed. When the Court below took cognizance of the complaint, for deciding the same, a quash petition was filed under Section 482 of the Code of Criminal Procedure. While adjudging the issue as to whether the lower Court was correct in taking cognizance of the complaint, in the absence of the accompanying affidavit, for the condone delay petition, this Court in R.Kanthimathi's case held that non filing of an affidavit alongwith the petition, seeking for the condonation of delay, alongwith the complaint, is only a procedural defect and curable. Observing as above, quash petition filed was dismissed, giving liberty to the respondent/complainant to file an affidavit setting out the reasons for the delay in filing the complaint and that the trial Court was directed to provide opportunity to accused to raise their defence.

13. The above proposition of law cannot be disputed. Facts of the reported case is inapposite to the case on hand. Non-filing of an affidavit alongwith the petition for condonation has been held as curable defect. But that would not mean that the Court below should

automatically condone the delay, without considering the sufficiency of the reasons assigned. That is why, while declining the quash proceedings, at paragraph No.18 of the judgment in R.Kanthimathi's case, this Court has held that the respondent/complainant therein, shall file an affidavit setting out the reasons for the delay in filing the complaint and that the trial Court, thereafter, shall provide opportunity to the petitioners/accused to raise any defence, by way of filing counter and if the Court satisfies that there are adequate and cogent reasons to condone the delay, the same can be decided on merits.

14. In Nataraj @ T.Natarajan Vs. P.Venkatachalam, reported in 2008 (1) CTC 503, a complaint was filed with a delay of 10 days without condone delay petition, and affidavit. Magistrate taking cognizance of the case, issued process. Quash petition was filed contending inter alia that the cognizance taken by the learned Magistrate was invalid, in the absence of a petition to condone delay duly supported with affidavit. At paragraph No.8 of the order, this Court held as follows:

"8. Therefore, this Court is of the considered view that ends of justice will be met if the order of the learned Magistrate taking cognizance of the complaint and issuing process to the petitioner is set aside and the matter is remitted back to the learned Magistrate. The learned Magistrate shall give an opportunity to the respondent/complainant to file a petition to condone the delay of 10 days in filing the complaint and if any such petition is filed, notice should be ordered to the petitioner herein and after giving an opportunity of hearing to him appropriate orders should be passed in the petition seeking condonation of delay. If the delay is condoned then the learned Magistrate can take cognizance of the complaint and proceed further in accordance with law."

In Nataraj's case also the same view has been reiterated.

15. In Pawan Kumar Ralli Vs. Maninder Singh Narula reported in 2014 (142) AIC 25 (SC), the Hon'ble Supreme Court, while exercising the extraordinary jurisdiction of Article 142 of the Constitution of India, restored the Criminal proceedings before the trial Court, and permitted the appellant therein, to file an application for condonation of delay before the trial Court and if such an application is filed, directed the trial Court to consider the same on its merits, without being influenced by any observations made by the Apex Court.

16. In all the three judgments cited by the learned counsel for the petitioner, Court below has been directed to exercise its judicial discretion, while considering the cause shown by the complainant, as to whether the reasons shown are satisfactory.

17. Reverting to the case on hand, as stated supra, when the complainant was very much present in the same Court, in connection with another criminal case, in which he is a party and appeared in many hearings as extracted supra, he has adduced false reasons stating that he was bedridden and thus prevented from filing the complaint, within the prescribed period. No medical certificate or document has been filed to substantiate illness. If the reasons adduced, are not substantiated with any valid documents and on the contra, it is found to be false, exercise of discretion by the Court below in dismissing the delay excuse petition, cannot be said to be improper, warranting interference by this Court. Lack of banafide is per se apparent on the face of the record of proceedings extracted supra. Procedural defects can be cured. Nobody can dispute the beneficial nature of Negotiable Instruments Act, 1881. Quantum of amount involved is immaterial. But, for exercising the jurisdiction under Section 142(b), the complainant has to satisfy the Court that he had sufficient cause for not making the within the prescribed period.

18. In the light of the above discussion, this Court is of the view that there is no material illegality or impropriety, in the exercise of jurisdiction by the Court below, warranting interference. Impugned order made in CMP No.4378 of 2008 dated 19.11.2009 is sustained and this Criminal Revision case is dismissed.

Sd/-
Assistant Registrar(J)

//True Copy//

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Sub Assistant Registrar

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To

1. The Judicial Magistrate,
Bhavani.

2. -Do- Through The Chief Judicial Magistrate,
Erode.

1 CC to Mr.N.Manokaran, Advocate SR.No. 4172

1 CC to Mr.A.Thiyagarajan, Advocate SR.No. 3931

Cr1.R.C.No.308 of 2010

TS (CO)
PSI (20.03.2015)



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