

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22-07-2015

Coram

THE HONOURABLE MR. JUSTICE B. RAJENDRAN

Criminal Revision Case No. 599 of 2010
and
M.P. No. 1 of 2010

G. Venkatesan (died)

1. Kanagambal

2. Mariammal

3. Navaneetha Krishnan (Minor)

(Minor rep. by mother and natural
Guardian, Petitioner No.1)

All are represented by Power of Attorney
Agent B. Vijayan, Son of Balasubramanian
266/88, Kasthuribai Street
Kitchipalayam
Salem - 636 015

... Petitioner

Versus

Kamala

... Respondent

Criminal Revision Case filed under Sections 397 read with Sec. 401 of Cr.P.C. to set aside the Order dated 22.04.2010 passed in CMP No. 223 of 2010 in STC No. 3 of 2008 on the file of Judicial Magistrate No.III, Salem.

For Petitioners : Mr. P. Jagadeesan

For Respondent : Mr. A. Nagarathinam

ORDER

The legal heirs of the deceased Venkatesan, who has filed the above S.T.C. No. 3 of 2008 under Section 138 of The Negotiable Instruments Act, have come forward with this Criminal Revision Case challenging the order dated 22.04.2010 passed in CMP No. 223 of 2010 in STC No. 3 of 2008 by the learned Judicial Magistrate No.III, Salem. By the said order dated 22.04.2010, the trial Court dismissed the application filed by the petitioners under Section 142 of Cr.P.C. refusing to condone the delay of 10 days.

2. According to the petitioners, the husband of the first petitioner has given a sum of Rs.70,000/- to the respondent/accused as loan for meeting her urgent family expenditure. On receipt of the loan amount, the respondent/accused promised to repay the amount together with interest. When the husband of the first petitioner demanded the repayment of the amount, the respondent/accused issued a cheque dated 18.08.2005 for a sum of Rs.70,000/-. When the cheque was presented for encashment, it was dishonoured for want of funds on 23.08.2005. The husband of the first petitioner therefore sent a notice on 24.08.2005, which was received by the respondent/accused on 05.09.2005. On receipt of the notice, the accused/ respondent sent a reply notice dated 26.09.2005 containing false and frivolous averments. Thereafter, the complainant viz., the husband of the first petitioner, filed the above said S.T.C. No. 3 of 2008 under Section 138 of the Negotiable Instruments Act. Pending the S.T.C. No. 3 of 2008, the husband of the first petitioner and also the complainant died on 12.07.2008. On his death, the petitioners were impleaded as legal heirs in S.T.C. No. 3 of 2008. During the course of trial, the power of attorney, representing the petitioners, examined himself as a witness on 11.12.2009 and he was cross-examined on 16.12.2009. When the complaint was posted for defence witnesses, the present petition has been filed under Section 142 (b) of The Negotiable Instruments Act to condone the delay of 10 days in filing the complaint.

3. The learned counsel for the petitioner would contend that only at the time of trial in the complaint, it came to light that there was a delay of 10 days in filing the complaint. Even during the cross-examination, the power agent representing the petitioners have given reasons for not filing the complaint in time. Even the Court below has entertained the complaint and the trial in the complaint has commenced. Therefore, only to cure the defect, the present petition has been filed. In any event, adequate reasons have been assigned in the petition filed under Section 142 of The Negotiable Instruments Act for the delay in filing the complaint. The delay is not huge or unexplained and therefore, the Court below ought to have allowed the application as prayed for.

4. On the contrary, the learned counsel for the respondent would contend that the application under Section 142 of The Negotiable Instrument Act has been filed without a petition supporting the affidavit. The present petition has been filed to fill up the lacuna. The complaint was filed in the year 2008 and after lapse of two years, the present application has been filed that too after cross-examination of the witnesses. The trial Court has assigned valid reasons for not entertaining the application for condone the delay of 10 days and therefore he prayed for dismissal of the Criminal Revision Case.

5. I heard the counsel for both sides, perused the order passed by the Trial Court and other material records placed. No doubt, at the time when the complaint under Section 138 of The Negotiable Instruments Act was filed by the husband of the first petitioner, it was not accompanied by any petition for condonation of delay. The trial Court also entertained the complaint filed by the husband of the first petitioner, without taking note of the delay in filing the complaint. Further, the trial Court also taken cognisance of the complaint. However, only during the course of trial in the complaint, especially during cross-examination, a question was raised as regards the delay in filing the complaint. Thereafter, the petitioners have filed the present petition for condonation of delay of 10 days in filing the complaint. Thus, it could be seen that there is an error on the part of the trial Court in entertaining the complaint even though there was delay of 10 days in filing the complaint.

6. It is seen from the application filed under Section 142 of The Negotiable Instruments Act that the complainant issued a statutory notice to the accused/respondent, which was received by her on 05.09.2005. On receipt of the notice, the accused/respondent sent a reply notice dated 26.09.2005. Thereafter, the complainant was bed ridden during September and October 2005 due to serious ailment. On 15.10.2005, the complainant appointed his power agent to file the complaint under Section 138 of The Negotiable Instruments Act and accordingly the complaint was filed. However, the power agent himself suffered severe ailment and he was bed-ridden from 15.10.2005 to 30.10.2005. As the statutory notice was received by the accused/respondent on 05.09.2005, the complaint ought to have been instituted on or before 19.10.2005, but it was filed only on 31.10.2005. Therefore, in the application for condoning the delay, reasons have been given by the power agent of the deceased complainant for condoning the delay of 10 days in filing the complaint. Of course, the present petition has been filed during the course of trial in the complaint to condone the delay in filing the complaint.

7. In an identical case, this Court passed an order dated 18.12.2014 passed in Crl.OP No. 6944 of 2009 (A. Rahamathullah @ Moulana vs. P.A.K. Manoharan) wherein this Court following the order passed by the Honourable Supreme Court held that in the facts and circumstances of that case, such an application filed after the very complaint itself was entertained, has to be considered liberally. It was further held that it may be appropriate for the lower Court to consider the claim of the applicant therein and to proceed further in accordance with law. In Para No.13 and 14 it was held as follows:-

"13. In Sarah Mathew vs. Institute of Cardio Vascular Diseases (2014) 2 SCC 62, the Honourable Supreme Court has held that for computing the period

of limitation, the crucial date shall be the date of presentation of the complaint. If the date of presentation of the complaint is beyond the period of limitation prescribed under Section 142 of The Negotiable Instruments Act, as I have already concluded, it is absolutely necessary for the complainant to explain such delay by showing sufficient cause. In the case on hand, admittedly, no such petition was filed and no such explanation was offered. But, the lower Court, without noticing that there was a delay in presenting the complaint, has inadvertently taken cognisance. Had the lower Court noticed the delay, it would have called upon the respondent herein to explain the delay. Thus, there was some error on the part of the lower Court.

14. Now, the question is whether, for the inadvertent error committed by the lower Court, the respondent should be allowed to suffer? In this regard, I may refer to the observations of the Honourable Supreme Court in State of Madhya Pradesh vs. Pradeep Kumar and another (2000 (IV) CTC 343 wherein in para-12, the Honourable Supreme Court held as follows:-

'It is true that the Pristine Maxim Vigilantibus Non Dormientibus Jura Subveniunt (Law assists those who are vigilant and not those who sleep over their rights). But even a vigilant litigant is prone to commit mistakes. As the aphorism "to err is humane" is more practical notion of human behaviour than an abstract philosophy, the unintentional lapse on the part of a litigant should not normally cause the doors of the judicature permanently closed before him. The effort of the Court should not be one of finding means to pull down the shutters of adjudicatory jurisdiction before a party who seeks justice, on account of any mistake committed by him, but to see whether it is possible to entertain his grievance, if it is genuine.

8. The learned counsel for the revision petitioner also placed reliance on the decision of this Court in (Nataraj @ T. Natarajan vs. P. Venkatachalam) 2008 (1) CTC 503. In that case, this Court had an occasion to consider a case where the complaint was filed only with a Petition to condone the delay of 10 days in filing the complaint without filing an affidavit. However, the trial Magistrate took cognisance of the complaint and issued process. In such circumstance, this Court remanded the matter back to the trial Court and to issue process afresh with a direction to the complainant to file a fresh petition with affidavit for condonation

of delay. Useful reference can be made to the order passed by this Court in para Nos. 6 to 9, which reads as follows:-

"6. I have carefully considered the above submissions made by the learned counsel for the petitioner. In the decision reported in Dr. S. Magalingam vs. A. Ganesan, 2006 (2) CTC 307, the correctness of entertaining a Special Leave Petition in an Appeal filed against the acquittal after the expiry of the period of limitation without a Petition seeking condonation of delay was considered. It has been held in the said decision that the order passed in the Special Leave Petition without condoning the delay in preferring such Application and the order admitting the Appeal is liable to be recalled. The learned Judge has also observed that the respondent (complainant) in the Complainant filed for an offence under Section 138 of the Negotiable Instruments Act, will have to be given an opportunity to try a chance by filing an application under Section 5 of the Limitation Act for condoning the delay in preferring the Special Leave Petition.

7. It is no doubt true that in this case the Complaint has been filed after a delay of 10 days and cognisance had been taken and process ordered to be issued, when admittedly the Complainant had not filed a Petition to condone the delay and without the Court condoning the delay. If there is any delay in filing a Complaint, the Complainant should file an application the learned Magistrate should issue notice to the respondent, after giving an opportunity of hearing to him and thereafter considering the cause shown for the delay, the learned Magistrate should satisfy himself first and pass appropriate orders by accepting or rejecting the Petition, but the said procedure has not been followed by the learned Magistrate in this case. By the failure on the part of the Court below to follow such a procedure, the valuable right of the petitioner is affected. At the same time, it has to be pointed out that had the Court below pointed out to the complainant that the Complaint could not be taken on file without a Petition being filed to condone the delay, the Complainant would have filed a petition seeking condonation of delay.

8. Therefore, this Court is of the considered view that ends of justice will be met if the order of the learned Magistrate taking cognisance 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 cognisance of the complaint and proceed further in accordance with law.

9. However, the contention of the learned counsel for the petitioner that if the impugned order of the learned Magistrate is set aside and liberty is given to the respondent to file a petition to condone the delay and even if the delay is condoned, the learned Magistrate cannot take cognisance of the complaint because that will amount to entertaining a Complaint on a second cause of action is untenable since there is absolutely no question of arising of a second cause of action in this case."

9. In the light of the above decisions rendered by this Court and the order passed by the Honourable Supreme Court in Sarah Mathew vs. Institute of Cardio Vascular Diseases (2014) 2 SCC 62 and having regard to the reasons assigned in the application for condonation of delay to condone the delay of 10 days in filing the complaint, I hold that the complainant has satisfactorily explained the delay of 10 days in filing the complaint and the Court below ought to have accepted the explanation offered for such delay. Accordingly, the order dated 22.04.2010 passed in CMP No. 223 of 2010 in STC No. 3 of 2008 on the file of Judicial Magistrate No.III, Salem is set aside. The Criminal Revision Case is allowed. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(J)

//True Copy//सत्यमेव जयते

Sub Assistant Registrar

rsh

To

The Judicial Magistrate No.III
Salem.

+1cc to M/s.P.Jagadeesan, Advocate, S.R.No.37566

+1cc to M/s.A.Nagarathinam, Advocate, S.R.No.37091

CrI. R.C.No. 599 of 2010

RSK(CO)

CA(03/09/2015)