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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.448 OF 1999

Dhimant Mehta
Residing at 10/A, Nirmala Niketan,
S.V. Road, Santa Cruz (W),
Mumbai 400 054.

..Appellant.

V/s.

1. M/s. Ramdil Resorts P. Ltd.
having their resorts at
Hermitage Monestary,
Ludwick Road,
Mahabaleshwar-6,
2. Dilip J. Doshi,
3. Smt. Ramola D. Doshi,
Directors of the above
Company, having their
Residential Address at
22, Gold Coin Society,
Tardeo, Mumbai – 400 034.

4. State of Maharashtra

..Respondents.

Mr.Yashpal Thakur, Amicus Curiae for the appellant.

Mr.Abdul Kader Millwala for respondent Nos.1 to 3.

Mrs.A.A. Takalkar, APP for the respondent-State.

CORAM : MRS.SWAPNA JOSHI, J.

RESERVED ON : 2ND SEPTEMBER, 2016

PRONOUNCED ON : 7TH SEPTEMBER, 2016.

JUDGMENT

1. The present appeal has been preferred by the original complainant against the judgment and order dated 8th July, 1999 in Case No. 103/ S/1993 passed by the learned Additional Chief Metropolitan Magistrate, IV Court, Girgaum, Mumbai thereby allowing the application filed by respondent Nos.1 to 3 / original accused Nos.1 to 3 for dismissal of the complaint under section 138 of the Negotiable Instruments Act and for their acquittal.

2. As the complainant and his counsel remained absent, Mr.Yashpal Thakur, the learned counsel pleaded the case of the complainant as *Amicus Curiae*.

3. I have heard the learned counsel Mr. Thakur, Mr. Millwala, the learned counsel for respondent Nos.1 to 3 and the learned APP for the respondent State.

4. I have gone through the impugned judgment and order passed by the learned Additional Chief Metropolitan Magistrate and perused the record of the case.

5. Brief facts of the case are that in all five cheques were issued by accused in favour of the complainant, including three cheques which are subject matter of the present case i.e. cheques dated 30th

December, 2012 for Rs.3,30,000/-, 30th January, 1993 for Rs.2,50,000/- and 28th February, 1993 for Rs.2,50,000/-. All the cheques were dishonoured. A statutory demand notice was issued by the complainant on 14th May, 1993 to the accused. The accused requested the complainant to redeposit the cheques dated 30th December, 2012 for Rs.3,30,000/-, 30th January, 1993 for Rs.2,50,000/- and 28th February, 1993 for Rs.2,50,000/-. Pertinently, those cheques were also dishonoured. Hence another statutory demand notice was sent by the complainant on 28th June, 1993 to the accused. A complaint was filed against accused persons on the basis of this notice.

6. I have perused the evidence of the complainant. In his cross-examination, the complainant has admitted that he had issued notice on 14th May, 1993 which is a statutory demand in respect of the five cheques issued by the accused, including the cheques in question, after they were dishonoured. Out of those five cheques, three cheques which are in dispute were redeposited and again the same were dishonoured.

7. Mr.Thakur, the learned counsel for the complainant appointed by this Court to espouse the cause of the complainant argued that it is a pure question of law involved in this case. He submitted that the learned trial Court has proceeded to drop the proceedings at the stage of cross-examination of PW3 which is not permissible under the law. Mr.Thakur invited my attention to the provisions of Section 258 of The Code of Criminal Procedure, 1973 and submitted that the learned Magistrate has erred in disposing the complaint in this way. The second contention of Mr.Thakur is that the trial Court has acquitted the accused by relying upon the decision of the Hon'ble Supreme Court in

the case of **Sadanand Bhadran V/s. Madhvan Sunil Kumar** reported in (1998) SCC 514 which was a good law at the relevant time. However, Mr. Thakur contended that now the said judgment has been overruled and he, therefore, prayed for remand of the matter back to the trial Court.

8. Per contra, Mr. Millwala, the learned counsel for the original accused argued that the learned trial Court has passed an order on an application filed by the accused to drop the proceedings. In that case, at the most the accused could have been discharged. He submitted that the complainant should have filed a revision against the said order. Mr. Millwala, the learned counsel however did not dispute that the provisions of section 258 are not applicable to the case in hand. According to the learned counsel, the learned Magistrate has rightly passed the order of acquittal of the accused and the trial Court has rightly applied the law in the case of *Sadanandan Bhadran (supra)*.

9. Heard the learned counsel for the parties and carefully perused the record of the case. Admittedly, the learned Magistrate in the midst of the trial had entertained application filed by the accused for dropping the proceedings. It is not clear as to under what provisions of law, the learned Magistrate passed an order of dropping the proceedings and acquitted the accused. The learned Magistrate passed the following order :-

“Application given by accused is granted.

The case is dismissed and accused are acquitted. ”

10. Section 258 of the Code of Criminal Procedure reads as

under :-

“258. Power to stop proceedings in certain cases--

In any summons-case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case release, the accused, and such release shall have the effect of discharge.”

11. Admittedly, the provisions of section 258 of the Code of Criminal Procedure are not applicable to the summons case instituted upon a complaint. The learned Magistrate has passed the order at the stage of recording of evidence.

12. In the instant case, the complainant has issued two demand notices first one on 14th May, 1993 in respect of five cheques and has redeposited the three cheques out of those five cheques, which were again dishonoured. The complainant issued the second demand notice on 28th June, 1993. The complainant has filed the present complaint on 11th August, 1993. As per the provisions of section 138 of the Negotiable Instruments Act, the complainant is supposed to file the complaint on failure of the drawer of a cheque to pay the amount dues within 15 days from the receipt of the demand notice and the complainant is supposed to file the complaint within a period of one

month from the expiry of 15 days. So far as the case of the accused is concerned, since the first notice was issued on 14th May, 1993 the complainant ought to have filed the complaint by the end of June, 1993 as per the limitation prescribed under section 138 of the Negotiable Instruments Act. However, the present complaint is filed by the complainant on 11th August, 1993 based on the second notice dated 28th June, 1993, which is time barred.

13. The learned Magistrate has acquitted the accused by relying upon the decision of the Hon'ble Supreme Court in the case of *Sadanandan Bhadran V/s. Madhvan Sunil Kumar* reported in (1998) 6 SCC 514. In the said judgment, it is held that the limitation to file the complaint would commence from first default and notice sent and the limitation would not commence from second default. The Hon'ble Apex Court in the case of **MSR Leathers V/s. S.Palaniappan and Anr.** reported in (2013) 1 Supreme Court Cases 177 in para Nos.15 and 16 held as under :-

“ 15. Sadanandan Bhadran’s case (supra) holds that while a second or successive presentation of the cheque is legally permissible so long as such presentation is within the period of six months or the validity of the cheque whichever is earlier, the second or subsequent dishonour of the cheque would not entitle the holder / payee to issue a statutory notice to the drawer nor would it entitle him to institute legal proceedings against the drawer in the event he fails to arrange the payment. The decision gives three distinct reasons why that should be so. The first and the foremost of these reasons is the use of the expression “cause of action” in Section 142(b) of the Act

which according to the Court has been used in a restrictive sense and must therefore be understood to mean that cause of action under Section 142(b) can arise but once. The second reason cited for the view taken in the Sadanandan Bhadran's case (supra) is that dishonour of a cheque will lead to commission of only one offence and that the offence is complete no sooner the drawer fails to make the payment of the cheque amount within a period of 15 days of the receipt of the notice served upon him. The Court has not pressed into service the doctrine of "waiver of the right to prosecute" but held that the failure of the holder to institute proceedings would tantamount to "absolution" of the drawer of the offence committed by him. The third and the only other reason is that successive causes of action will militate against the provisions of Section 142(b) and make the said provision otiose. The Court in Sadanandan Bhadran's case (supra) held that the failure of the drawer / payee to file a complaint within one month resulted in forfeiture of the complainant's right to prosecute the drawer/payee which forfeiture cannot be circumvented by him by presenting the cheque afresh and inviting a dishonour to be followed by a fresh notice and a delayed complaint on the basis thereof.

16. With utmost respect to the Judges who decided Sadanandan Bhadran's case (supra) we regret our inability to fall in line with the above line of reasoning to hold that while a cheque is presented afresh the right to prosecute the drawer, if the cheque is dishonoured, is forfeited only because the previous dishonour had not resulted in immediate prosecution of the offender even when a notice under clause (b) of proviso to Section 138 had been served

upon the drawer. We are conscious of the fact that Sadanandan Bhadran's case (supra) has been followed in several subsequent decisions of this Court such as in Sil Import, USA V. Exim Aides Silk Exporters, Bangalore (1999) 4 SCC 567, Uniplas India Ltd. and Ors. V/s. State (Govt. of NCT Delhi) and Anr. (2001) 6 SCC 8, Dalmia Cement (Bharat) Ltd. V/s. Galaxy Traders & Agencies Ltd. and Anr., (2001) 6 SCC 463, Prem Chand Vijay Kumar V/s. Yashpal Singh and Anr., (2005) 4 SCC 417, S.L.Constructions and Anr. V/s. Alapati Srinivasa Rao and Anr., (2009) 1 SCC 500, Tameshwar Vaishnav V. Ramvishal Gupta (2010) 2 SCC 329."

14. Thus, the Hon'ble Supreme Court was pleased to overrule the decision in the case of Sadanandan Bhadran's case (supra) and observed that the complaint filed on the basis of second default would also be maintainable.

15. Significantly, the learned Magistrate has acquitted the accused. Hence, the remedy available to the complainant is to prefer an appeal against the judgment of acquittal under the provisions of Section 378 (4) of the Cr. P.C. Revision is certainly not maintainable. So also in case of summons case, provision of discharge is not available. Being a private complaint, as discussed above, the provisions under section 258 of the Cr.P.C. are not applicable to the facts of the present case.

16. In view of the abovesaid legal position, it would be necessary to remand the matter back to the learned Magistrate to reconsider the judgment passed by the Hon'ble Supreme Court and decide the case afresh in accordance with the law.

17. Before parting with the judgment, this Court appreciates the assistance rendered by the learned Amicus Curiae.

- (i) The appeal is allowed;
- (ii) The judgment and order dated 8th July, 1999 passed by the learned Additional Chief Metropolitan Magistrate, Girgaum Court, Mumbai in case No.103/S/1993 is hereby quashed and set aside and the matter is remanded back to the trial Court to decide the matter afresh after taking into consideration the judgment passed by the Hon'ble Supreme Court **MSR Leathers V/s. S. Palaniappan and Anr.** reported in (2013) 1 Supreme Court Cases 77.

(MRS.SWAPNA JOSHI, J.)