IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.11.2017

CORAM :

THE HONOURABLE MR.JUSTICE **P.N. PRAKASH**

Crl.A.No.800 of 2013

Power Soaps Ltd.
having business at R.S.No.94/1
Sembiapalayam Village
Korkadu Post, Puducherry - 605 110
Rep. by its Authorized Signatory
Mr.Sunjay Madaan. ... Appellant

Vs.

C.L.Muthiah ... Respondent

Criminal Appeal filed under Section 378 (4) Cr.P.C. to set aside the order of acquittal passed by the learned III Additional District and Sessions Judge, Puducherry in C.A.No.42 of 2011 dated 30.09.2013 reversing the judgment passed by the Judicial Magistrate No.I, Puducherry in C.C.No.516 of 2008 dated 06.07.2011; convict and sentence the respondent/accused herein and award suitable compensation to the appellant/complainant.

For Appellant	:	Mr.S.M.Ramasubramaniam for Mr.R.Baskar
For Respondent	:	Mr.S.Prabhakaran Senior Counsel for Mr.Ma.Gouthaman

JUDGMENT

This appeal has been filed against the judgment dated 30.09.2013, passed in C.A.No.42 of 2011 by the III Additional District and Sessions Judge, Puducherry, reversing the judgment passed by the Judicial Magistrate No.I, Puducherry in C.C.No.516 of 2008 dated 06.07.2011.

2. For the sake of convenience, the appellant and the respondent will be referred to as the complainant and the accused.

3. The previous avatar of Power Soaps Limited was Narmadha Chemicals Private Limited and the impugned transaction with the accused had taken place when the complainant Company was Narmadha Chemicals Private Limited. This aspect is not in dispute between the parties.

4. It is the case of the complainant that they are into the manufacture of soda ash and they had supplied soda ash to the accused, vide Invoice Nos.4560, 4561, 4562, 4563 and 4564 for a total value of Rs.22,68,297/- during November 2007. When the complainant demanded the payment for the supplies, the accused had issued the three impugned cheques bearing Nos.404233 [Ex.P.4] for Rs.8 lakhs; 404234 [Ex.P.5] for Rs.8 lakhs and 404235 [Ex.P.6] for Rs.6,68,297/- [Total valued at Rs.22,68,297/-], all dated 15.03.2008, drawn on Hongkong and Shanghai Banking Corporation Limited in favour of Narmadha Chemicals Private Limited. The complainant presented the three cheques on 26.03.2008 and the same were dishonoured on the ground of "Insufficient funds". The factum of dishonour was intimated to the complainant on 29.03.2008, vide Ex.P.8. Thereupon, the

complainant issued a statutory notice dated 10.04.2008 under Section 138 of the Negotiable Instruments Act to the accused.

5. At this juncture, it may be relevant to state the travel details of the statutory notice, as could be seen from the postal endorsement found on the returned cover. The complainant had engaged an Advocate from Puducherry, who has sent the notice by Registered Post with Acknowledgement Due on 12.04.2008 to the Anna Nagar East address of the accused. There is a seal of the Anna Nagar East Post Office showing the date as 15.04.2008, from which, one can discern that the same was handled by the said Post Office on that date. The Postman has redirected the notice to the Purasawalkam address of the accused on 16.04.2008. Thereafter, the notice has been dealt with by Purasawalkam Post Office and the Postman there has attempted to serve the notice on the accused on 19.04.2008 and 21.04.2008, but in vain. The Postman has endorsed "Absent 19.04.2008 and 21.04.2008". Thereafter, the Postman has endorsed "I.D. Intimation Delivered on 22.04.2008" and on 30.04.2008, the unclaimed cover has reached the Puducherry Post Office, as could be seen from the postal seal thereon and thereafter, the Advocate, who sent it must have obviously got it back. The complainant filed the complaint on 12.06.2008 against the accused under Section 138 of the Negotiable Instruments Act before the Judicial Magistrate No.I, Puducherry and the same was taken on file as C.C.No.516 of 2008.

6. On the appearance of the accused, he was furnished with the copy of the complaint and he was questioned about the substance of the accusation, which he denied.

7. To prove the case, one Sanjay Madaan [P.W.1] was examined on behalf of the complainant and 11 exhibits were marked. When the accused was questioned under Section 313 Cr.P.C. about the incriminating circumstances appearing against him, he denied the same. The accused examined himself as D.W.1 and marked 42 exhibits.

8. After considering the evidence adduced by both sides, the trial Court, by judgment dated 06.07.2011 in C.C.No.516 of 2008, convicted the accused for the offence under Section 138 of the Negotiable Instruments Act and sentenced him to undergo six months Simple Imprisonment. Aggrieved by the said conviction and sentence, the accused preferred Crl.A.No.42 of 2011 before the Sessions Court. Not content with the quantum of sentence imposed, the complainant preferred Crl.R.P.No.4 of 2013 before the Sessions Court. Learned III Additional District and Sessions Judge, Puducherry, heard Crl.A.No.42 of 2011 and Crl.R.P.No.4 of 2013 and by a common judgment dated 30.09.2013, allowed the appeal filed by the accused and acquitted him of the charges and dismissed the criminal revision petition filed by the complainant. Aggrieved by the acquittal, the complainant is before this Court.

9. Heard Mr.S.M.Ramasubramaniam, learned counsel for the complainant and Mr.Prabhakaran, learned Senior Counsel on behalf of Mr.Ma.Gouthaman, learned counsel on record for the accused.

10. Learned counsel for the complainant submitted that the order of acquittal passed by the Sessions Court deserves to be interfered with, inasmuch as the Sessions Court has acquitted the accused on the ground that the prosecution has been filed beyond the period of limitation. The relevant paragraph from the order of the Sessions Court is as under:

> "16. So as per the above judgment, the 15 days period commenced from 22.04.2008 will fall on 07.05.2008 (period for payment of amount) and then 30 days for filing the complaint and totally the complaint should be filed within 45 days from the date of delivery of notice. As per the judgment reported in AIR 1999 Supreme Court 3762 and 2005(1) crimes 249, 2007 Cri.L.J.1129; the date of return as "unclaimed" in the date beginning for running the limitation. So the limitation starts from 22.04.2008 and ends on 07.06.2008. But the complaint was filed on 12.06.2008. So the complaint is barred by limitation. Eventhough, the complaint filed by one of the employee of the company and then it was ratified by authorisation and the cheque has proved of the due of demand to the complainant, but the complaint is filed after the limitation period is over, hence the complaint barred by limitation. So the judgment of the trial court is not correct, hence it is ordered to set aside the trial court judgment and accused acquitted."

[a] Learned counsel brought to the notice of this Court, Rule 37 of *Post Office Guide Part I (Rules and Regulations relating to the Inland Post) issued by Director-General of Posts*, which reads as under:

> **"37. Refusal of registered articles presented for delivery** – If the addressee, while refusing to take delivery on presentation of

> the registered article to him, makes an application in writing to the post office of delivery for the detention of the article or if the addressee is not found at the address given on the article, the article shall be detained in the post office for a period not exceeding 7 days from the date of its presentation to the addressee or from the date it is last sent out for delivery as the case may be. If the addressee fails to take delivery of the article from the post office within the said period of seven days, the article will be returned to the office of posting for delivery to the sender. The remark 'Refused' will be recorded on the article if the addressee fails to take delivery after requesting for detention."

[b] Learned counsel contended that in this case, the Postman has left intimation to the accused on 22.04.2008 and had waited for 7 days, as required under Rule 37 of *Post Office Guide Part I (Rules and Regulations relating to the Inland Post)* and only thereafter, has returned the cover to Puducherry Post Office, from where, the letter was despatched, which received the returned cover on 30.04.2008.

[c] Learned counsel contended that the Sessions Court ought not to have reckoned the date from 22.04.2008, but should have reckoned either from 29.04.2008, i.e., from the expiry of 7 days or at least from 30.04.2008, when the complainant came to know that the notice was not served on the accused.

11. Per contra, Mr.Prabhakaran, learned Senior Counsel for the accused placed strong reliance on the judgment of the Supreme Court in **K.Bhaskaran vs. Sankaran Vaidhyan Balan and another [(1999) 7 SCC 510]**, wherein, the Supreme Court, in paragraph 25, has held as under:

> "Thus, when a notice is returned by the sendee as unclaimed such date would be the commencing date in reckoning the period of 15 days contemplated in clause (*c*) to the proviso of Section 138 of the Act."

12. Learned Senior Counsel for the accused emphasised on the word "unclaimed" and contended that the notice has remained unclaimed from 22.04.2008 and therefore, the first appellate Court was right in reckoning the period of limitation from 22.04.2008, whereas, learned counsel for complainant contended that the expression "such date" employed in paragraph 25 assumes significance and the words "such date" have not been expatiated in the said judgment.

13. This Court gave its anxious consideration to the rival submissions.

14. The Postal Rules govern all these aspects and Rule 37 clearly states that if the addressee is not found at the address given on the article, the article shall be detained in the Post Office for a period not exceeding 7 days from the date of its presentation to the addressee. This means that the Post Office is required to keep the unserved cover for a period 7 days from 22.04.2008, so as to enable the addressee to come and collect it. Thus, the addressee has got 7 days to collect the cover and only in the event of the addressee not collecting the cover within 7 days, can the cover be returned to the sender.

15. When the Rule provides a seven day period for the addressee to collect,

the Court cannot cut short the privilege and hold that the addressee ought to have collected it on 22.04.2008, as that would amount to placing fetters on a privilege that is given to the addressee. Therefore, this Court is of the view that the First Appellate Court was wrong in reckoning the period of limitation from 22.04.2008 and it should have reckoned the date from 30.04.2008.

16. The trial Court has correctly reckoned the period of limitation from 30.04.2008 and in the opinion of this Court, the Sessions Court has erred on this aspect. Of course, this discussion is of merely academic interest in the present context, because, amended provisions of the Negotiable Instruments Act permit even filing of condone delay applications for instituting a prosecution for an offence under Section 138 of the Negotiable Instruments Act. Unfortunately, for the complainant, condone delay provision was not available in the statute when the present prosecution was initiated. That apart, the Sessions Court was able to dwell on this aspect in detail, because, the postal seal on the covers and the endorsements of the Postman were decipherable in the present case. What if when the endorsements and postal seal are indecipherable? Admittedly, the Postman was not examined as a witness. Therefore, what has been held in this judgment cannot be applied as a thumb rule in all cases, in the absence of factual foundation.

17. It is seen that the Sessions Court has not discussed any other aspect and

has acquitted the accused on the sole ground of limitation. In an appeal against acquittal, the powers of this Court are not circumscribed and this Court has got the power to appreciate the evidence afresh and decide the appeal.

18. It is the case of the complainant that for the said 5 invoices referred to above, the three impugned cheques for Rs.22,68,297/- were issued by the accused. It is the specific defence of the accused that the accused was having dealings with the complainant over a period of time and had taken huge supplies from the complainant, in support of which, he has marked 39 invoices, including the 5 invoices in dispute. It is also the case of the complainant that the accused was not due any amount towards 34 invoices and the bone of contention was only with regard to the 5 invoices, viz., D35 to D39.

19. It is the specific contention of the accused that the goods covered by the 5 invoices were of inferior quality and that his buyers were refusing to take the same and that he spoke to Dhanapal, the Managing Director of the complainant's Company, who told him to return the goods, but on condition that the accused should give cheques as security.

20. It is trite that if the accused admits the execution of the cheque, the presumption under Section 139 of the Negotiable Instruments Act would extend backwards to include the debt also. However, this presumption can be rebutted

by the accused by preponderance of probability and not by proof beyond reasonable doubt, as held by the three Judge Bench in **Rangappa vs. Sri Mohan [(2010) 11 SCC 441].**

21. In this case, the accused, in the cross-examination of Sanjay Madaan [P.W.1], has attempted to show that he had sent a letter dated 14.01.2008 to the complainant enclosing the three impugned cheques as security and not towards the discharge of any liability. Sanjay Madaan [P.W.1] has denied the suggestion and therefore, the accused waived his right of silence under Section 315 Cr.P.C. and examined himself as witness and subjected himself to cross-examination by the complainant. In his evidence before the Court, the accused has stated that he was having dealings with the complainant Company for 10 years and had purchased soda ash from them to a tune of Rs.1.25 crores. He has further stated that in respect of soda ash covered by 5 invoices, his customers were refusing to take delivery, since the material was of inferior quality and therefore, he spoke to Dhanapal, the Managing Director of the complainant's Company, who told him to send the cheque as security for the said amount and also agreed to take back the soda ash and return the cheque. The accused has marked the photocopy of the letter [Ex.D.40] dated 14.01.2008, which reads as under:

"TO
NARMADHA CHEMICALS (P) LTD

PONDICHERRY
KIND ATT: Mr.DHANAPAL
Dear Sir,
We herewith enclose the following cheques being cheques Numbers 404233, 404234, 404235 drawn on HSBC Bank LTD., CHENNAI. As mutually agreed we use issuing the cheques for security purpose, and we will returning the goods (SODA ASH) within 30 days. Please accept the same and oblige. The actual quantity to be returned is 126 *mes* of SODA ASH. We request you not to present the cheques as we are making arrangements to return the material.

ENCL:
3 Cheque leaves vide no: 404 233, 404 234, 404 235 for the value of 22,68,297.

CHEQUES SENT THROUGH REGISTERED POST ALONG WITH THIS COVERING LETTER.

Yours faithfully
Global Chem
Sd/-
Proprietor"

22. At the time of marking of this letter, the complainant had objected to the photocopy. This Court perused Ex.D.40 that was marked in the trial Court. On a perusal of the same, it is seen that the letter has been handwritten and photocopied. It is not a typewritten letter or a computer print out. On the letter, the original postal Registered Post with Acknowledgement Due receipt bearing RLAD B 2199 shows that the addressee is "DHANAPAL, KARKADU, PIN : 605110." This is the Puducherry address of the complainant. He has also marked Ex.D41, the Postal Acknowledgement Due card, which shows that the letter has been received by the complainant.

23. Though the learned counsel for the complainant questioned the very

genuineness of this letter, this Court has no adequate grounds to disbelieve this letter, because the accused has questioned Sanjay Madaan [P.W.1] and has attempted to mark this letter through him and had failed, for the following reasons:

[a] the accused has handwritten a letter and has taken a photocopy for its file and has sent the original to the complainant. Thus, when the original is with the adverse party, the secondary evidence of the same is permissible in law.

[b] the original postal receipt shows the name of Dhanapal, the Managing Director of the complainant Company.

[c] the Acknowledgement Card has been marked as Ex.D.41, which shows that the letter has been received on 18.01.2008 by Narmadha Chemicals Private Limited, Puducherry, Karakadu.

24. Mr.Ramasubramaniam, learned counsel contended that when the accused had taken a plea that he had given the cheques only as security, it is for him to show that the goods under the invoice were actually returned to the complainant.

25. This Court is unable to agree with this submission, because in the cross-

examination of the complainant, he has stated that the goods were returned. That apart, it is the specific case of the complainant that the cheques were given only as the sale consideration towards the 5 invoices, whereas, it is the specific defence of the accused that he had paid for all the 35 invoices, but had not paid towards the 4 invoices because, the goods were of inferior quality. He has further satisfactorily shown that the impugned cheques were sent along with letter dated 14.01.2008 [Ex.D.40] on the request of Dhanapal, to be kept as security and in that letter, he had clearly agreed that he will return the soda ash within 30 days. Supposing he had not returned the soda ash within 30 days as agreed by him, then the complainant should have predicated their case on the admission of the accused in the letter dated 14.01.2008 [Ex.D.40], whereas, they have taken a stand that the cheques were issued only towards the 5 invoices. The complainant cannot be permitted to build up an alternative plea on the evidence of the accused. The complainant must either stand or fall on his own showing.

26. In **Arulvelu and another vs. State rep. by the Public Prosecutor and another [(2009) 10 SCC 206],** the Supreme Court has held as under:

> "**36.** Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment can not be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law."

27. When there are two views possible, one in favour of the accused and the other in favour of the complainant, the view favouring the accused would merit consideration in an appeal against acquittal.

28. In the result, this appeal is dismissed. The order of aquittal passed in C.A.No.42 of 2011 by the III Additional District and Sessions Judge, Puducherry is confirmed.

This Court expresses its appreciation to the learned counsel for complainant who has fairly placed on record all the evidence, both favourable and not favourable to him, so as to make the work of this Court easier.

28.11.2017

To

1.III Additional District and Sessions Judge, Puducherry.
2.The Judicial Magistrate No.I, Puducherry.

P.N.PRAKASH, J.

gms

Crl.A.No.800 of 2013

28.11.2017