



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 10.08.2017

CORAM

THE HON'BLE MR.JUSTICE S.S.SUNDAR

Cr1.O.P.(MD) No.10515 of 2017

and

CRL.M.P(MD) Nos.7189 and 7190 of 2017

R.Justin Deva Arul Dhas

...Petitioner/Sole Accused

-vs-

A.Darwin

...Respondent/Complainant

Prayer: Criminal Original Petition filed under Section 482 of Cr.P.C., praying this Court to call for the records in connection with the complaint in S.T.C.No.99 of 2015, on the file of the District Munsif-cum-Judicial Magistrate, Eraniel, Kanyakumari District and to quash the same.

For Petitioner : M/s.R.Russel Raj

O R D E R

This Criminal Original Petition is to quash the proceedings in S.T.C.No. 99 of 2015, on the file of the District Munsif-cum-Judicial Magistrate, Eraniel, Kanyakumari District.

2.Heard the learned counsel for the Petitioner and perused the materials placed before this Court.

3.The case of the Petitioner is that the respondent has preferred a complaint. According to the Petitioner, the complainant has stated in his complaint as if the Petitioner had borrowed a sum of Rs.4 lakhs from the respondent on 7.8.2015 and that a post-dated cheque, dated 7.8.2015 was handed-over by the Petitioner to the complainant for the said amount of Rs.4 lakhs. The further case of the Petitioner is that the complainant issued a notice stating that when the cheque was presented for collection as directed by the Petitioner, it was returned with an endorsement as 'no funds available'. It was admitted by the respondent that the information was given to him on 8.9.2015 and the respondent also issued a registered legal notice to the Petitioner on 23.09.2015. The Petitioner states that the cause of action arose on the date of issue of notice. Hence the learned counsel for the Petitioner further submitted that the case which was filed on 21.12.2015 is barred by the period of limitation. He refers to Section 142 of Negotiable Instruments Act, which reads as follows:



''142.Cognizance of offences;- Not withstanding 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;

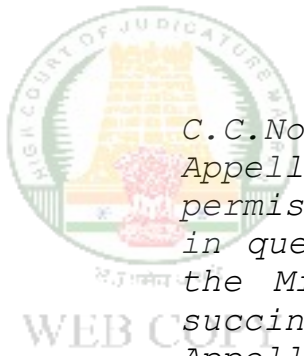
(provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complaint satisfies the Court that he had sufficient cause for not making a complaint within such period;)

(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)''

4.The learned counsel for the Petitioner submitted that the complaint was filed beyond the period of one month from the date on which the cause of action arose as per Clause © of the Proviso to section 138 of Negotiable Instruments Act. The learned counsel himself admitted that a proviso has been introduced to Section 142 (1)(b) whereby the cognizance of the complaint can be taken by the Court even after the prescribed period, if the complainant satisfied the Court that he had sufficient cause for not making the complaint within such period. The question whether the complaint has been preferred within the period of limitation is a matter to be decided on the facts of each case. Merely because the respondent has not filed a petition to condone the delay, it cannot be concluded that such option would never be exercised by the complainant and this Court also is not in a position to appreciate the contention of the Petitioner that, the trial Court ought to have dismissed the application on the question of limitation. The power of Court to exercise its discretion in terms of proviso to Section 142(1)(b) of Negotiable Instruments Act, is a matter to be decided depending upon facts and this Court cannot rule out the possibility at this stage.

5.The learned counsel for the Petitioner relied on a judgement of this Court in **Crl.A.No.679 of 2009, dated 14.08.2014 (C.Ponnusamy .vs. Chinnamman Constructions, represented by its Partner S.D.Ramasamy, Son of C.Deivasigamani, Dr.Arumugam Residence (Upstairs), R.S.Road,Perundurai Town, Erode District and two others)**, wherein, it has been held as follows:

''84.....Unfortunately, he had filed the complaint in C.C.No.182 of 2006 on the file of the trial Court on 17.11.2006. In effect, there was a delay of two days in preferring a complaint. Only, when the main case arguments were heard and when it was posted for judgement at that time only Criminal M.P.No.1113 of 2006 in



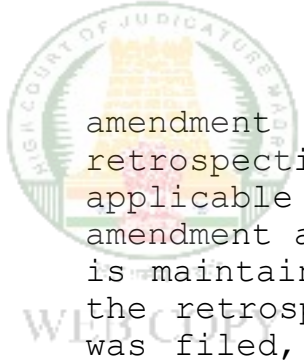
C.C.No.182 of 2006 was filed on behalf of the Appellant/Complainant before the trial Court praying for permission to that Court to condone the delay of two days in question. Very rightly, the trial Court had dismissed the Miscellaneous Petition as a belated one. To put it succinctly, the complaint filed by the Appellant/Complainant in C.C.No.182 of 2006 on the file of the trial Court under Section 138 and 142 of the Negotiable Instruments Act, 1881, was barred by limitation. Consequently, the Criminal Appeal fails.''

The Judgement relied upon by him cannot be applied in this case. This Court in the said judgement has categorically observed that the Petition to condone the delay had already been dismissed by the trial Court on the ground that such petition was filed belatedly at the time of pronouncement of judgement. Hence the judgement relied upon by the learned counsel for the Petitioner has no application to the facts of the present case, especially when this Court in the judgement has dismissed the appeal filed by the complainant as against the order dismissing the Calendar Case.

6.The learned counsel for the Petitioner further relied upon another judgement of this Court in **Cr1.O.P.No.12167 of 2005, dated 20.7.2009(S.Janaki .vs. R.Thiagarajan)**, wherein, this Court has held as follows:

'9.In view of the law laid down by the Honourable Supreme Court, the proviso to Clause(b) of Section 142 of the Negotiable Instruments Act has been inserted, conferring jurisdiction upon the Court to condone the delay, in case if the complaint was not filed within the limitation period of 30 days in terms of the proviso appended thereto. As the said provision has been held to be a substantive provision and not a procedural one, the complaint being filed beyond the period of limitation, it cannot be entertained by allowing the respondent to file an application after it has been taken cognizance of by the learned Magistrate.....'.

7.Unfortunately, in the above said case, this Court has relied upon the judgement of the Honourable Supreme Court in the case of **S.Salaskar .vs. Jayaprakash M.Shah and another reported in AIR-2008-SC-3086**.The question before the Honourable Supreme Court was with regard to the retrospective application of amendment, which was introduced in the year 2002. After the insertion of proviso to Section 142(1)(b), the question before the Honourable Supreme Court was whether the amendment to section 142(1)(b) is substantive or procedural. If the amendment is substantive, then it cannot be given any retrospective effect. If the amendment is procedural, then the provision can be taken as one which was there in existence from the inception and it can be given retrospective effect. It was held by the Honourable Supreme Court that the



amendment is substantive and that therefore, it cannot be given retrospective effect. This only show that the amendment is not applicable to a case where the complaint was filed before the amendment and hence in such a case, no petition to condone the delay is maintainable. In the present case, the issue is not relating to the retrospective application of the amendment. When the complaint was filed, it is true that the complainant can file a petition to condone the delay. Merely because such petition is not filed along with the complaint, it cannot be said that such application can never be filed.

The next issue that was raised by the learned counsel for the Petitioner is relying upon the judgement of the Kerala High Court in the case of ***Themuvatupuzha .vs. State, dated 20.12.2002***, wherein, the Kerala High Court has held as follows:

'15. So the issuance of a statutory notice in terms of Section 138 of Negotiable Instruments Act, by which the holder of the cheque/complainant shall inform the drawer of the cheque with all clarity, incorporating essential particulars of the dis-honoured cheque like the cheque number, account number, name of the bank and date of the cheque and the reason for dis-honour of such cheque is a condition precedent, particularly when, in the body of Section 138 of the Negotiable Instruments Act and in the various clauses of the proviso, references are made to the 'cheque', which is clear from the emphasis given while I quoted the above section. But no hard and fast rule can be laid down, while answering the question, and whether the accused is prejudiced due to the absence of any such details mentioned above with respect to the cheque in question, CrI.A.No.255 of 2003:-18-:

depends upon the facts and circumstances of each case. Giving account number, to which the dis-honoured cheque pertained, in the statutory notice cannot be treated as valid and legal in terms of proviso 'b' to Section 138 of the Negotiable Instrument Act. Without issuing such a statutory notice, the drawer of such cheque will not be in a position to enjoy his right and remedies as envisaged by the proviso 'b' and 'c' to Section 138 of Negotiable Instruments Act and resultantly, he is likely to be visited with civil and criminal liabilities or with both. Hence the notice contemplated by the above statute, as per clause 'b' of the proviso to section 138 of the Negotiable Instruments Act is a condition precedent, for entering into a conviction against the drawer of the cheque and such notice contemplated by the statute is not an empty formality. However, in this case, the number given in the statutory notice and in the complaint, is not with respect to the cheque, but is only the account number. Hence in the present case, no such statutory notice in terms of Section 138(b) is issued and therefore, according to me,



the learned Magistrate is fully justified in his finding.''

As per the judgement of the Kerala High Court, the requirement of Section 138 of Negotiable Instruments Act is reiterated. The requirement of notice was a point that was considered. It is stated in the said judgement that the details of the cheque should be given in the notice itself. However, it was also stated that the question as to whether the notice is proper or not, should be decided depending upon the prejudice that is alleged by the accused in the case. In this case, though the notice was given, it refers to the particulars of the cheque to the understanding of the accused, even in the reply notice, no specific prejudice that was actually pleaded by the accused either by stating that he was confused, or by stating that the details of the Cheque are insufficient to enable him to effectively defend the case. In such circumstances, the contention of the Petitioner to quash the proceedings cannot be sustained and thus the Criminal Original Petition fails.

8. Accordingly, the Criminal Original petition is dismissed. Consequently, connected Miscellaneous Petitions are dismissed.

Sd/-

Assistant Registrar (RTI)

/True Copy/

Sub Assistant Registrar

To

The District Munsif-cum-Judicial Magistrate,
Eraniel, Kanyakumari District.

VSN

JS/KP/SAR.4/28.08.2017/5P-2C

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