BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 30.11.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

CRL.O.P.(MD)No.3835 of 2016
and
Crl.M.P(MD)Nos.1930 & 1931 of 2016
and
Crl.M.P(MD)No.5399 of 2016

V.Mohamed Khadar ... Petitioner/Accused

-Vs-

T.Venugopal ... Respondent/Complainant

PRAYER: Criminal Original petition is filed under Section 482 of Criminal Procedure Code, to call for the records relating to the case in S.T.C.No.353 of 2015 pending on the file of the Fast Track Court No.II, (Magistrate Level) Madurai and quash the same as illegal.

For Petitioner : Mr.M.Mohamed Rafi
For Respondent : Mr.R.Suriya Narayanan

O R D E R

This Criminal Original Petition is filed by the accused in S.T.C.No.353 of 2015 on the file of the Fast Track Court No.II, (Magistrate Level), Madurai to quash the proceedings.

2.The respondent filed a private complaint against the petitioner for an offence punishable under Sections 138 and 142 of Negotiable Instruments Act on 24.04.2015.

3.It is the case of the complainant that the petitioner is working as an Assistant Executive Engineer in Tamil Nadu Electricity Board. It is further stated in the complaint that under the guise of friendship, the accused requested the complainant to arrange for a loan of Rs.9,00,000/- for constructing a new Chimney in his bricks chamber and that he gave a sum of Rs.9,00,000/- to the accused, by borrowing the amounts from his friends circle. It is further stated that the petitioner has agreed to pay interest at the rate of 18%, but he did not pay either the principal or the interest and that the complainant was paying interest to his friends from where he has made arrangements for money, which has been paid to the accused. The complainant has stated that a sum of Rs.17,55,675/- is due to him from the petitioner as on 24.09.2014.

4.The complainant in his complaint has further stated that the amount was acknowledged by the petitioner on 07.02.2015 and with a view to discharge the same, he made a promise to the complainant and gave a post dated cheque bearing No.880161, dated 20.03.2015 drawn on Andhra Bank, South Masi Street Branch, Madurai as a security for a sum of Rs.17,55,675/-.

5.It is further stated that he has presented the cheque for collection through his Bank (Central Bank of India, Madurai) on 23.03.2015 and that to his shock and surprise, the cheque was returned with an endorsement as “Funds Insufficient”. Thereafter, following legal notice, the complainant has preferred a complaint under Section 138 and 142 of the Negotiable Instruments Act.

6.The learned counsel appearing for the petitioner submitted that even according to the complainant, the amount of Rs.9,00,000/- was paid by the complainant in June 2009. Hence, when the petitioner issued cheque in the year 2015, it is not a legally enforceable debt. It is further submitted that the complainant has not pleaded or proved that the cheque was issued for an existing debt or liability. It is further contended that Section 138 of Negotiable Instruments Act will not be attracted. It is contended that the petitioner has given a post dated cheque bearing No.880161, dated 20.03.2015 on 07.02.2015.

7.The learned counsel for the petitioner further relied on para-4 of the petition and pointed out that the complainant himself has admitted that the cheque was issued only for security purpose for a sum of Rs.17,55,675/-. It is therefore, suggested that the petition under Section 138 of Negotiable Instrument Act is not maintainable as the cheque, even according to the complainant, was not given with a promise to be presented for collection. The learned counsel for the petitioner relied upon the judgment of this Court reported in the case of ***Rajendra Finance v S.Alosius Thairiyanatham reported in 2005(1) CTC 416*** wherein the same issued was considered. In paragraph-9 of the said judgment it has been held as follows:-

> “9. To attract Debt or Liability under Sec.138 N.I. Act, the Cheque ought to have been 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. In this case, Ex.P.1-Cheque is said to have been issued in discharge of Ex.P5-Promissory Note dated 8.1.1990. Case of the Complainant is that the Accused borrowed sum of Rs.50,000 in the year 1990 under Ex.P.5 Promissory Note, for the discharge of which, the Accused had issued Ex.P.1 in the year 1995. (Ex.P.1 dated 20.02.1995). To attract the liability under Sec.138, N.I.Act, “existing debt or liability” is to be proved. Admittedly, the debt is of the

year 1990. Existing debt or subsisting liability of the Accused is not proved by the Complainant. The demand between 1990 and 1995 or acknowledgment on the debt has not been produced to show the subsistence of the debt. Since the Complainant has not proved the existing debt or liability, learned Trial Magistrate held that the penal provisions of Sec.138, N.I.Act would not be attracted. It is also to be pointed out that Ex.P5-Promissory Note has been jointly executed by the Accused and his Brothers-S.Alousius, S.Gerard, S.Eugene, S.Edwin and S.Maria Josphine. Thus, the liability of the Accused arising under Ex.P.5- Promissory Note is a joint liability along with his Brothers and Sister. While so, the liability arising under Ex.P.5 cannot be solely attributed to the Respondent/Accused. The Complainant has also not clearly stated the circumstances under which the demand was made for a lapse of five years and the circumstances under which Ex.P.1- Cheque was issued."

8. However, from the reading of the judgment, it is to be noted that a specific finding is rendered by this Court stating that the existing debt or liability of the accused is not proved by that case, by the complainant. It is to be noted that the said judgment was rendered by this Court in C.A.No.682 of 1997, which was preferred as against the dismissal of the petition by the trial Court in favour of the accused by acquitting him. Hence, it is to be noted that after full-fledged trial, this Court on appreciation of facts sustained the finding of the trial Court stating that the existing debt or liability has not been proved. It is open to the petitioner to raise this aspect as a defence and the complainant also may lead evidence whether the cheque which was issued by the petitioner was in respect of existing liability or debt. It is still open to the complainant that the debt was acknowledged and it is not a time barred debt.

9.Yet another judgment was relied upon by the learned counsel for the petitioner. The learned Single Judge of this Court in the case of ***Sangeetha v. A.Raja reported in (2015) 2 MLJ (Crl) 1*** wherein this Court in paragraph 11 held as follows:-

"11.Considering the Article 28 and 34 of the Limitation Act and also the decision stated supra, I am of the view that in the loan agreement, it is stated as 11 months for repayment of loan. So, after 11 months from Ex.P.6/Loan Agreement dated 02.02.2003 only, the cause of action arose. The cheque/Ex.P1 has been issued on 27.03.2006, i.e., well within three years as per Article 28 and 34 of the Limitation Act. The Trial Court has wrongly acquitted the accused on the ground that cheque/Ex.P1 has been issued for time barred debt. Since the Trial Court has not properly appreciated the legal position and also the document/Ex.P.6, I am of the view that the judgment of acquittal is perverse. Therefore, the judgment of acquittal

passed by the trial Court is hereby set aside."

10.It has been noted that the cheque which is the subject matter of the proceedings was held to be issued within three years as per Article 28 and 34 of the Limitation Act. Since the Trial Court has wrongly acquitted the accused on the ground that the cheque Ex.P1 therein has been issued for a time barred debt, it has been held by this Court that the Trial Court has not properly appreciated the legal position. From this, the learned counsel for the petitioner wants to draw a inference that unless the cheque is issued within three years, as per Article 28 and 34 of Limitation Act, a proceedings under Section 138 of Negotiable Instruments Act is not sustainable. Assuming that, the arguments of the learned counsel for the petitioner is true and supported by the said judgments, this Court is of the view that the matter is for evidence as the complainant in this case should be given an opportunity to establish his case as to whether the cheque issued by him was for the existing liability or existing debt. Finally, the learned counsel for the petitioner relied upon a judgment of this Court in the case of ***C.Ponnusamy v. Chinnamman Constructions & Ors reported in I (2015) BC 308 (Mad.)***, wherein the learned Single Judge of this Court has held as follows:-

> "54.Furthermore, the jurisdiction of a Court of Law to take congnizance of an offence under Section 138 of the Negotiable Instruments Act, after expiry of the period of limitation under Section 473 of the Cr.P.C., has no application whatsoever to a proceeding under Chapter 17 of the Negotiable Instruments Act and Section 5 of the Limitation Act is not applicable, in the considered opinion of this Court."

Section 473 of Cr.P.C., reads as follows:-

> "473.Extension of period of limitation in certain cases:- Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice."

11.It is true that Section 473 of Cr.P.C., or Section 5 of the Limitation Act has no application to a petition filed under Section 138 of Negotiable Instruments Act. However, it is not the case of the petitioner in this case that the petition filed under Section 138 of Negotiable Instruments Act is barred by limitation. Hence, the petitioner cannot advance his argument to sustain this petition by referring to these judgments. Apart from that, the petitioner has not raised any other legal grounds except denying certain factual allegations filed in the petition. This Court has already found that the question of limitation or the issues that are now raised by the petitioner that the cheque is not issued for the existing liability or debt is a matter for evidence and the petitioner may succeed after trial and he is at liberty to produce evidence and especially, that the cheque issued by the petitioner in this case is not for any existing liability or debt.

12.It is to be noted that there is a general principle that limitation bars only the remedy and does not extinguish the right. But Section 27 of Limitation Act is an exception to this general principle. As per Section 27 of Limitation Act as the determination of the period of limitation for instituting a suit for possession of any property, his right to such property is extinguished. But there is no corresponding provision applicable to debt. As it has been held in many cases, a debt does not ceases to be due, because it cannot be recovered. If a person agrees to discharge a time barred debt, the same can be a valid promise supported by consideration. The above position can be deduced from the well accepted principles. In such circumstances, the first judgment cited by the learned counsel for the petitioner requires reconsideration. Since this Court has distinguished the judgments on facts, it is not necessary in this case to go further into this legal issue. As a result the Criminal Original Petition is dismissed. However, no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CS-II)

/True Copy/

Sub Assistant Registrar

To

The Judicial Magistrate,
Fast Track Court No.II,
(Magistrate Level) Madurai.

+ 1 CC TO Mr.M.MOHAMED RAFI, ADVOCATE IN SR No. 90834

AM
TE/SV-MMS/SAR-3 : 29/01/2018 : 5P/3C

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