

HON'BLE SRI JUSTICE S.V.BHATT

CRIMINAL PETITION No.8298 OF 2017

ORDER:

Heard Mr.D.Bhaskar Reddy for petitioner.

The petitioner on 26.02.2016 filed complaint under Sections 190 and 200 of Criminal Procedure Code read with Sections 138 and 142 of the Negotiable Instruments Act against the 1st respondent herein.

The petitioner filed CrI.M.P.No.1090 of 2016 under Section 142 (b) of the Negotiable Instruments Act praying for condoning 266 days in filing the complaint. The learned IV Additional Chief Metropolitan Magistrate through order dated 05.08.2016 dismissed CrI.M.P.No.1090 of 2016 and the petitioner filed CrI.R.P.No.69 of 2016 before the VII Additional District & Sessions Judge, Vijayawada. The learned Sessions Judge through order dated 31.05.2017 after examining the record and after recording independent findings dismissed the Criminal R.P.No.69 of 2016. Hence the petition under Section 482 of Criminal Procedure Code.

Mr.Bhaskar Reddy contends that the Metropolitan Magistrate and the Sessions Court have illegally and erroneously exercised the jurisdiction and discretion conferred on them by Section 142(b) of the Negotiable Instruments Act. According to him, the Metropolitan Magistrate has not properly considered or appreciated the very reason stated or proved by the petitioner. The omission is evident from non-consideration of medical certificate filed by petitioner showing the illness of the petitioner for

two spells i.e. 28.05.2015 to 31.10.2015 and 01.11.2015 to 25.02.2016. Adverting to the findings recorded by the Sessions Court, the contention urged is that though reference to the medical certificate is made the reasons given for rejecting the certificates are unsatisfactory which has resulted in miscarriage of justice attracting the jurisdiction of this Court under Section 482 of the Criminal Procedure Code. The counsel places strong reliance on the decisions in *P.S.Aithala v. Ganapathy N.Hedge*¹ and *Orissa Rural Housing & Development Corporation Ltd. v. Raj Kishore Joshi*² and contends that the delay ought to be considered reasonably in the interest of justice keeping in view a commercial transaction involved in the complaint etc. The portions on which reliance is placed by the counsel are excerpted hereunder:

In P.S.Aithala's case:

A specific provision has been inserted during 2002 under [Section 142](#) of N.I. Act which enables the Court to exercise its discretion and to entertain the complaint by condoning the delay and take cognizance of the offence. The explanation of the complainant is that he had been to his native place and also that his mother was sick. Even assuming that there is 13 days delay in filing the complaint whether such a delay was with a view to harass the accused or with any other deliberate cause has not been considered by the trial Court. Only on the technical ground stating that the delay has not been satisfactorily explained, it has rejected the petitions. Although the application for limitation was considered at the time of final disposal but the matter was not considered on merits on the ground that the complaint itself is not maintainable. When a huge amount is involved and also contentions are raised by the

¹ 2008 Cri.L.J.1545

² 2010 Cri.L.J.1766

respondent that there is a material alteration, it is the matter of appreciation of evidence by the trial Court at the time of disposal of the matter on merits and the very delay of 13 days would not be of much consequence. In the ratio laid down by the Orissa High Court in the judgment reported in 1993 Crimes 3485: 1993 Cri LJ 1751, the Orissa High Court in the similar situation referring to the decision of the Apex Court was of the view that the application under [Section 5](#) of the Limitation Act can be maintained. When there is hardly 13 days delay and by a supporting affidavit the complainant had filed such an application, the trial Court ought to have taken reasonable view in the matter in condoning the delay. Despite the fact that due to some exigencies the complainant could not file the complaint in time, when a specific proviso is provided under [Section 142\(b\)](#) of the N.I. Act to condone the delay, the said delay could be condoned in the interest of justice having regard to the nature of transaction and the amount involved and also having regard to the difficulties expressed. The filing of the civil case by itself will not take away the right accrued to the complainant when it is otherwise could be considered. The decision relied upon by the learned Counsel for the respondent reported in 1998 Cri.L.J. 906 referred to above, is of no help to him at this stage and he can very well cite this judgment at the time of consideration of the matter on merits.

In Orissa Rural Housing & Development Corporation's case:

Section 138 of the Act provides for penalty for dishonour of cheque for insufficiency, etc. of funds in the account of the drawer. In clause (a) to the proviso to the section, it is provided that nothing contained in that section shall apply unless the cheque has been presented to the Bank within a period of six months from the date,; on which it was drawn or within the period of its validity, whichever is earlier. In clause (b) of the said proviso, it is further provided that Section 138 of the Act shall not be attracted unless the payee or the holder in due course of the

cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque within 30 days of receipt of information by him from the Bank regarding the return of the cheque as unpaid. Clause (c) provides that such penal provision shall not be attracted unless, the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice. Section 142 of the Act provides that no Court shall take cognizance of an 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, and that 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. It is further provided that cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he has sufficient cause for not making a complaint within such period. Admittedly, the cheque was dishonoured and intimated to the complainant on 24-12-2005. On 4/5-1-2006, the complainant sent demand notices as envisaged under Section 138(b) of the Act. One such notice was served on the accused on 14-1-2006, for which I. C. C. No. 902 of 2006 has been initiated. So the accused had the opportunity of making payment of the same within the next 15 days i.e. by 29-1-2006. For computing the period of 15 days, the day on which the notice was served on the accused has to be excluded. Therefore, in this case the cause of action as envisaged under Section 138(c) arises on 30-1-2006. Thus, in this case the complaint should have been filed on or before 2nd March, 2006. But the complaint has been filed on 23-3-2006, which indicates that there is delay of 21 days. In I. C. C. No. 901 of 2006, notice was received by the accused on 21-1-2006. He was required to make the payment by 5-2-2006. Again he failed to do so. The complaint case should have been initiated on 8-3-2006. As the complaint case has been initiated or filed

by 23-3-2006, there is delay of 14 days. The question that now arises, whether the complainant has shown sufficient cause for condoning such delay in filing the complaint. Section 5 of the Limitation Act, 1963, which is *pari materia* with the proviso to Section 142 of the Act, provides that any appeal or application may be admitted after the prescribed period if the appellant or the applicant satisfies the Court that he has sufficient cause for not making the appeal or making the application within such period. This provision came up for consideration of the Hon'ble Apex Court in the case. Collector, Land Acquisition, Anantanag and another v. Mst. Katiji and others, (1987) 2 SCC 107 : (AIR 1987 SC 1353). The Apex Court has held that it is common knowledge that the Apex Court has been making a justifiably liberal approach in such matter instituted before it, but the message does not appear to have percolated down to all the other courts in the hierarchy. The Apex Court further observed that such a liberal approach is adopted on principle as it is realized that ordinarily a litigant does not stand to benefit by lodging an appeal late. Rather, he runs a serious risk. It is further held that refusing to condone the delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated, as against this, when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties. The apex Court also ruled that a pedantic approach should not be adopted and the doctrine "Every day's delay must be explained" must be applied in a rational common sense pragmatic manner. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. Further, the Apex Court held that it must be grasped that judiciary is respected not on account of its power to legalize injustice on technical

grounds but because it is capable of removing injustice and is expected to do so. In the said case, the Hon'ble Supreme Court has further observed that the doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner and there is no warrant for according a step-motherly treatment when the 'State' is the applicant praying for condonation of delay. The Apex Court further noted that in fact experience shows that on account of an impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file- pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant-non-grata status. The Court, therefore has to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause".

At the outset, this Court would like to remark that the proposition of law for which reliance on these two decisions is made is well settled and the decisions relied on by the petitioner are in the scheme of Section 142(b) of the Negotiable Instruments Act. But, the proposition of law laid down in the decisions has to be appreciated in the fact situation of a case in which the prayer for condonation of delay is made by a party. Before summarizing the reasons for not condoning the delay this Court prefers to excerpt the sufficient cause stated by petitioner in Paragraph No.7 of the affidavit dated 26.02.2016.

“ I submit that I have to file the complaint within the statutory period of 30 days from the date of issuance of notice i.e. issued on 18-4-2015, the accused call me on 22-4-2015, but we are calculated the days from

19.4.2015. The complaint has to be filed on or before 4.6.2015 in the month of June as per the judgments of the Supreme Court of India, I have to file the complaint where the cheque was dishonoured i.e. the bank of Accused jurisdiction. I entrusted the file to the counsel in Chennai. But the counsel not filed the same within time subsequently. As per the Amendment Act, I have at liberty to file the same where the cheque was presented. I approached my counsel at Chennai and take back the file and because of my ill health I am unable to contact my counsel at Vijayawada to file the present case before the Hon'ble Court intime. As there is no negligence or willful default in presenting the case before the Hon'ble Court."

The explanation is considered by the trial Court and the following findings are recorded.

The reason for the delay as per the explanation offered in the petition is that as on June, 2015 as per the judgment of Hon'ble Supreme Court of India, the petitioner has to file complaint where the cheque was dishonoured i.e. Bank of Accused jurisdiction. As such, he entrusted the file to the counsel in Chennai, but his counsel did not file complaint within time. Thereafter, in view of the amendment to the Act, he has to file the complaint where the cheque was presented i.e. Complainant bank, as such, he has taken back the file from his counsel at Chennai, but because of petitioner's ill health, he could not contact Advocate at Vijayawada. The complaint is filed on 26.02.2016 with a delay of 266 days and the explanation offered by the petitioner/complainant, admittedly he did not file complaint at Chennai. There is no information when complainant has taken back the file from his counsel at Chennai. Further, he did not file

medical certificate to show that he suffered ill health. There is long delay of 266 days. It is the duty of petitioner to explain each day's delay with cogent reasons. In the instant case, the petitioner/complainant could not state sufficient reasons for the delay, as such, he is not entitled for the relief as prayed for. Under these circumstances, there is no prima facie ground made out by the petitioner/complainant to condone the delay of 266 days in submitting the complaint.

The learned Sessions Judge has examined the omissions pointed out by the petitioner in considering the prayer for condonation of delay and framed the following points for consideration:

- i. Whether the petitioner/complainant has proved sufficient cause for not making the complaint within the prescribed period?
- ii. To what relief?

and held that no complaint was made at Chennai and there is no information when the petitioner/complainant had taken back file from his counsel at Chennai. The petitioner is expected to state sufficient cause for not making complaint within the prescribed period. The petitioner filed two medical certificates showing that he suffered from severe low back pain from 28.05.2015. The ill-health of the petitioner/complainant has no relevancy in this application, for the simple reason, the petitioner failed to make complaint within the prescribed period at the original place as per law and that during the period of ill-health he was completely incapacitated from moving.

Now examining the case on hand with reference to the decisions on which reliance is placed by the petitioner, this Court is of the view that Paragraph No.7 of the affidavit does not explain reasons which prevented the petitioner from filing the complaint within the time stipulated by law and also the reasons for not moving in the matter for 266 days. The complaint is filed on the alleged dishonour of cheque and is a commercial transaction. Right to file a private complaint is conferred on the petitioner and at the same time to set in motion the process of prosecution diligence is expected. Alternatively, if there are *bona fide* circumstances which prevented the petitioner from filing application within time, the petitioner is required not only to state the reasons but satisfactorily show that these valid reasons prevented the petitioner from filing the complaint within the time prescribed by law. As contended by Mr. Bhaskar Reddy, if a petition filed to condone the delay is considered and accepted on mere assertions of a party, this Court is of the view that such procedure by the Court would be counterproductive to the very discretion and jurisdiction under Section 142(b) of the Negotiable Instruments Act. I do not see any reason to admit the quash petition. The criminal petition is dismissed.

S.V. BHATT, J

Date: 18.09.2017
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