

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.03.2018

DELIVERED ON : 13.12.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.496 of 2011

Srinivasulu ... Appellant /Complainant

Vs

Parthasarathi ... Respondent/Accused

Prayer: Criminal Appeal filed under Section 378 of the Criminal Procedure Code, to set aside the order of acquittal dated 21.06.2011 of the learned III Additional Sessions Judge, Chennai in C.A.No.86 of 2010 against C.C.No.12831 of 2003 on the file of Vth M.M. Egmore dated 28.04.2010 and reverse the same and allow the appeal.

For Appellant : Mr.A.Thirumaran

For Respondent : Mr.M.Devaraj
for Mr.N.Iyyakannu

JUDGMENT

The Appellant preferred this appeal against the order of acquittal dated 21.6.2011 wherein the Learned III Additional Sessions Judge reversed the finding of the Trial Court in C.A.No.86 of 2010 against C.C.No.12831 of 2003 on the file of learned Vth Metropolitan Magistrate, Egmore, Chennai.

2.Brief case of the Appellant;

That the appellant/complainant was approached by the respondent/accused for financial assistance in order to develop his travel agency business and meet out his other family commitments. The appellant/complainant had believed the respondent/accused and had lent him a sum of Rs.10,00,000/- on 6.6.1998 as hand loan. The respondent/accused has received the said loan and had executed two promissory notes evidencing the receipt of the said loan and at the time of receipt of the hand

loan aforesaid the respondent/accused had agreed to repay the amount aforesaid along with interest at the rate of 1.5%. The said promissory notes were marked as exhibits before this Hon'ble Court to prove the existence of legally enforceable debt/liability on the part of the respondent/accused due to the appellant/complainant.

3. That the appellant/complainant was initially paid interest for a few months and thereafter failed to pay interest and later upon repeated requests and demands from the side of the appellant/complainant, the respondent/accused had on 1.7.2003 agreed at Rs.23,36,000/- towards principal and interest due and had issued a cheque bearing number 423026 drawn on State Bank of India, Kumbakonam branch for a sum of Rs.23,36,000/- towards the principal and interest from the date of default payment in settlement and discharge of the liability aforesaid. The appellant/complainant had presented the aforesaid cheque for collection and realization on 21.7.2003 with his bankers, State Bank of Travancore, Anna Nagar East and the impugned cheque was returned on 24.7.2003 with an endorsement "Not Arranged for" and an intimation slip was issued by the bankers of the appellant/complainant to that effect on 27.7.2003. The appellant/complainant has also marked as evidence before this Hon'ble Court, the returned cheque, returned memo and intimation slip. Thereafter the appellant/complainant issued statutory notice as contemplated under the provisions of section 138 of Negotiable Instruments Act on 8.8.2003 demanding the respondent/accused to pay the amount covered by the cheque within 15 days from the date of receipt of the said notice and the said notice was received by the respondent/accused on 28.8.2003. The notice and the acknowledgement card indicating the receipt of the notice by the respondent/accused had also been marked as exhibits.

4. That the respondent/accused has upon receipt of the said notice under the provisions of Negotiable Instrument Act caused a reply notice dated 28.8.2003. In the said reply notice, the respondent/accused denied the contents of the notice. However he had admitted that he received only Rs.9,00,000/- on 6.6.1998 from the appellant/complainant and had agreed to repay the same with 9% interest and that he had executed two blank promissory notes and issued two cheques drawn on State Bank of India, Kumbakonam branch for a sum of Rs.5,00,000/- and Rs.4,00,000/- respectively. Furthermore, the respondent/accused had alleged that the entire transaction was arranged by one Mr. Raja, who was the son in law of the appellant/complainant and after 3 months from the date of receipt of the said loan, the respondent/accused had discharged the said loan with interest in the presence of said Mr. Raja and therefore the respondent/accused was not legally liable to repay the amount and further the cheques aforementioned and promissory notes were

not returned by the appellant/complainant and when the respondent/accused demanded the same, the appellant/complainant had informed him that the said cheques and promotes would be handed over to the said Raja who is also the brother in law of the respondent/accused, and that the said Raja and the respondent/accused were both in travel agency business and used to retain each other's cheque and that the respondent/accused had delivered bank cheques duly signed by the respondent/accused bearing Nos. 423026, 423027, 935844 and 935845 all drawn on state bank of India , Kumbakonam Branch to the said Mr.Raja during the year 1998. The respondent/accused had further alleged in the said reply notice that the said Mr.Raja was having transaction with the appellant/complainant and had borrowed a huge sums from the appellant/complainant and there was a dispute between the appellant/complainant and the said Raja and that appellant/complainant had given the cheques and other documents signed by the respondent/accused available with Mr.Raja and that blank signed cheques taken by the appellant/complainant was filled up by the appellant/complainant and a false claim was made against the respondent/accused and that the said Raja had given a letter to the appellant/complainant mentioning the above aspects. Therefore the respondent/accused had denied the liability and issuance of cheque. Further, the respondent/accused had also claimed the interest was much higher and in contravention with the provisions of section 7 of the Tamil Nadu Money Lenders Act 1957.

5.The appellant/complainant had filed his proof affidavit and had marked the promissory notes as Exhibit-P1, the returned cheque as Exhibit-P2, return memo as Exhibit-P3, intimation memo as Ex-P4, Statutory notice as Exhibit-P5, the acknowledgement card as Exhibit-P6. Furthermore the appellant/complainant had reiterated what has been stated in the complaint and proof affidavit during his cross examination. Furthermore, the abovesaid in whose presence the entire transaction and events were alleged to have happened, appeared before this Court as PW2 and has stated that he knew about the transaction, and he knew that the respondent/accused had borrowed a sum of Rs.10,00,000/- at 1.5% interest per month and that he had executed promissory notes and that he had signed as a witness for the said promissory note and that the cheque in question was issued by the respondent/accused at the time of settlement of the dues and denied the rest of the contentions of the respondent/accused.

6.The respondent/accused examined himself as DW1. The contention of the respondent/accused is that he did not borrow Rs.10,00,000/- and that he borrowed only a sum of Rs.9,00,000/- and that he used to hand over filled promissory notes and cheques with Raja and in the said instance the said cheque and promissory note were handed over to PW2 who have colluded with the appellant/complainant and the said transaction had given

arise to the present complaint. Furthermore it is submitted that the respondent/accused had not preferred any complaint before the Police or any Court that his cheques and promissory notes were misused by the appellant/complainant and PW2 and no legal notice was issued in this regard.

7.The learned V Metropolitan Magistrate, Egmore, Chennai upon hearing the case in C.C.No.12831 of 2003 passed an order on 28.4.2010 convicting the accused for the commission of offences under the provisions of section 138 of N.I. Act.

8.Aggrieved by the order of conviction in C.C.No.12831 of 2003 dated 28.4.2010, the respondent/accused preferred an appeal in C.A.No 86 of 2010 before the Learned III Additional Sessions Judge at Madras. The Learned III Additional Sessions Judge, vide his impugned order in C.A.No 86 of 2010 set aside the order of the Learned V Metropolitan Magistrate dated 28.4.2010 convicting the accused and allowed the appeal filed by the respondent / accused and acquitted him.

9.Rival Submissions;

The learned counsel for the appellant submits that the impugned order of the Learned III Additional Sessions Judge has failed to apply its judicial mind and has passed the impugned order in a mechanical and routine manner and also against equity, principles of Natural justice.

10.The learned counsel for the appellant submits that the impugned order of the Learned III Additional Sessions Judge failed to take notice of the fact that the respondent/accused has successfully been evading the moneys due to the appellant/complainant for a long period of time.

11.The learned counsel for the appellant submits that the contention of the trial Court in allowing the appeal filed by the accused is that the cheque was issued in respect of a time barred debt or liability. The issue has been dealt with in CDJ 2007 Kar HC 093 wherein it has been held that "there is no legal bar for the debtor agreeing to pay the time barred debt. No fresh consideration is required for debtor's promise to pay the time barred debt. There is moral obligation on the accused, who is none other than the friend of the complainant, to refund the loan amount. It would be useful to refer to the observation made by Lord Mansfield, in *Hawkers vs Saunders* (1782) 98 ER 1091 which read as under:

"Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. A fortiori, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no Court of law or equity can enforce, and promises, the honesty and rectitude of the

thing is a consideration. If a man promises, to pay a just debt, the recovery of which is barred by the Statute of Limitations; or if a man, after he comes of age, promises to pay a meritorious debt contracted during his minority, but not for necessities or if a bankrupt, in affluent circumstances after his certificate, promises to pay the whole of his debts, or if a man promises to perform a secret trust, or a trust void for want of writing by the Statute of Frauds.

In such and many other instances, though the promise gives a compulsory remedy, where there was none before either in law or equity, yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind are a sufficient consideration."

12.The Hon'ble Apex Court in A.V.Murthy Vs B.S.Nagabasavanna, has made an observation in para 5 of the judgment as under:

"... Under section 118 of the act, there is a presumption that until the contrary is proved, every negotiable instrument was drawn for consideration. Even under section 139 of the act, it is specifically stated that it shall be presumed, unless the contrary is proved that the holder of a cheque received the cheque of the nature referred to in section 138 of discharge, in whole or in part, of any debt or other liability. It is also pertinent to note that under sub section (3) of section 25 of the Indian 1972, a promise, made in writing and signed by the person to be charged therewith or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of units, is a valid contract."

13.The Hon'ble Division Bench of the Kerala High Court in Radhakrishnan case, following the ratio laid down in the A.V.Murthy's case supra, held that when a person writes, signs and delivers a cheque to another it is an acknowledgement of a legally enforceable liability and therefore, if the cheque is dishonoured such a person shall not be entitled to plead that at the time of his writing the cheque the claim had become barred by limitation and thus he is not liable to be punished under section 138 of the Act.

14.The complainant has not disputed his signature on the dishonoured cheques in question. Therefore, they constitute an agreement or promise by the debtor to pay the time barred debt, since the accused has not paid the cheque amounts in spite of demand made by the complainant the accused has committed an

offence under section 138 of the N.I. Act. The learned Magistrate has committed an error in dismissing the complaint and recording an order of acquittal in favour of the accused.

15. It is submitted by the learned counsel for the appellant that when a debt has become barred by limitation, there is also section 25(3) of the Contract Act, by which a written promise to pay, furnishes a fresh cause of action. In other words, what clause (3) of section 25 of the Indian Contract Act in substance does is not to revive a dead right, for the right is never dead at any time, but to resuscitate the remedy to enforce payment by suit, and if the payment could be enforced by a suit it means that it still has the character of legally enforceable debt as contemplated by the explanation below section 138 of N.I. Act. The issuance of a cheque is a promise to pay in writing as per section 25(3) of the Indian Contract Act 1872, matures into an enforceable contract, which can be enforced by filing a Civil Suit. If a suit could be filed pursuant to a promise made in writing and signed by the person to be charged therewith as contemplated by clause (3) of section 25 of the law of contract, then, the debt becomes legally enforceable and if a cheque is given in payment of such debt is dishonoured and subsequently, the statutory notice is not complied with then the person making the promise in writing and issuing the cheque, would still be liable to be punished under Section 138 of N.I. Act.

16. The learned counsel for the Appellant submits that the accused has not proved that the impugned cheque in question was not issued in discharge of legally enforceable debt or liability. He has taken a stand that the cheque in question was handed over to PW2 as early as 1998 and PW2 conspired and handed over the same to the complainant. However, it can nowhere be seen that the accused had initiated any criminal or civil action against PW2 or the complainant in this regard. This would go on to show that the accused had voluntarily issued the cheque in question in order to discharge the said liability. Considering the fact that there were no other transactions between the complainant and the accused and considering the fact that this was only the subsisting by the accused to the complainant and further inference would be that the accused has revived the limitation by issuing the impugned cheque in question.

17. The learned counsel for the Appellant submits that the learned III Additional Sessions Judge has clearly stated that the respondent /accused has not produced any evidence to show that the amount of loan in question was returned to the appellant/complainant in para 12. Furthermore the learned III Additional Sessions Judge has also categorically held that the contention of the accused that PW2 had filed up the cheque in question and handed over the same to the complainant has not been proved. It is further been held by the learned III Additional Sessions Judge that the contention of the cheque in

question for Rs.23,36,000/- has been issued. Despite all this learned III Additional Sessions Judge has acquitted the accused on the ground that the debt has become time barred without considering the provisions of section 25(3) of the Contract Act.

18.The learned counsel for the appellant cited the following decisions:

- 1) Crl.O.P.(MD) No.22472 of 2004 dated 9.8.2007
- 2) Crl.O.P.No. 238 of 1996 dated 5.3.2003
- 3) 2013 STPL (DC) Bombay High Court
- 4) 2006 (2) MWN (CrO DCC 69 (Kerala)
- 5) 2002 (1) CTC 484
- 6) 2009 STPL(DC) 387 Bombay High Court
- 7) 2008 STPL(DC) 322 Bombay High Court
- 8) 2008 STPL(DC) 1321 Andhra Pradesh High Court
- 9) 2007 STPL(DC) 526 Karnataka High Court
- 10) 2006 STPL(DC) 731 Kerala High Court
- 11) 2000 STPL(DC) 380 Gujarat High Court

19.The learned counsel for the respondent supported the findings of the lower appellate Court and cited the following decisions of this Court:

- 1) Crl.A.No.496 of 2011 dated 1.7.2009
- 2) Crl.A.No.206 of 2002 dated 8.2.2002 (Hon'ble Supreme Court)

20.I heard Mr.A.Thirumaran, learned counsel for the appellant and Mr.M.Devaraj for Mr.N.Iyyakannu, learned counsel for the respondent and perused the entire materials available on record.

21.It would be necessary to reproduce Sections 138 and 142 of the N.I. Act which are as under:

"138.Dishonour of cheque for insufficiency, etc., of funds in the account:-

"Where any cheque 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, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that

bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this Section shall apply unless:

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) 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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) 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."

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xx xx xx

142. Cognizance of offences; Notwithstanding 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 complainant 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.]"

22. On a reading of the above Section 138 of the N.I. Act and the proviso, it is clear that in order to constitute an offence under Section 138 of the N.I. Act, the complainant is

obliged to prove the following ingredients:

(a) that the cheque was drawn for payment of an amount of money for discharge of a debt/liability and the cheque was dishonoured;

(b) the cheque should have been presented to the bank within six months of its issue or within the period of its validity whichever is earlier;

(c) payee should have made a demand for payment by registered notice after the cheque is returned unpaid within 15 days of receipt of dishonour memo from the bank;

(d) that the drawer should have failed to pay the amount within 15 days of the receipt of notice.

23. It is only when all the above four conditions are satisfied, a prosecution can be launched for the offence under Section 138 of the N.I. Act. After carefully reading the evidences on record in this case, the lower appellate Court rightly acquitted the respondent averring that the impugned cheque and the alleged transactions were not legally enforceable debt and the entire cause of action is time barred and the ingredients mentioned above were not found in favour of the appellant. The appellant cannot be permitted to build up an alternative plea on the evidence of the respondent/accused. The appellant must either stand or fall on his own showing.

24. In *Aruvelu and another vs. State rep. by the Public Prosecutor and another* [(2009) 10 SCC 206], the Hon'ble 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."

25. 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 and the lower appellate Court is right in reversing the conviction and acquitted the respondent.

26. In the result, this Criminal Appeal is dismissed.

Sd/-
Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

vs

To

1. The IIIrd Additional Sessions Judge, Chennai.

2. The Vth Metropolitan Magistrate,
Egmore, Chennai.

3. The Section Officer,
Criminal Section,
High Court, Madras.

+1cc to Mr. N. Iyya Kannu, Advocate, S.R.No. 86481

+1cc to Mr. A. Thirumaran, Advocate, S.R.No. 87528

Criminal Appeal No. 496 of 2011

AK (CO)
GN (10/01/2019)

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