

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Acquittal Appeal No.120 of 2012

Judgment Reserved on : 2.7.2019

Judgment Delivered on : 15.7.2019

Dr. Vijay Singh Gupta, S/o Late Bahadur Singh Gupta, aged about 65 years, R/o Kutchahari Road, Behind Police Station, Apapura, P.S. Durg Sadar, Tahsil and District Durg, Chhattisgarh — **Dead, Through Legal Representatives:**

1. Bharti Gupta, Wd/o Late Vijay Singh Gupta, aged about 70 years,
2. Milind Gupta, S/o Late Vijay Singh Gupta, aged about 43 years,
3. Skand Gupta, S/o Late Vijay Singh Gupta, aged about 41 years,

All are R/o Kutchahari Road, Apapura, P.S. Durg, Tahsil and District Durg, Chhattisgarh

---- Appellants

versus

Shri Suresh Kothari, S/o Aaskaran Kothari, R/o Near Tripti Lodge, Jawahar Chowk, Durg, permanent resident of Parakh Chowk Sanichari Bazaar Durg, Tahsil and District Durg, Chhattisgarh

--- Respondent

For Appellants	:	Shri P.R. Patankar and Shri Vedant Bhelonde, Advocates
For Respondent	:	Shri Shobhit Mishra, Advocate

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

1. The instant appeal has been preferred against the judgment dated 24.4.2012 passed by the Judicial Magistrate First Class, Durg in Complaint Case No.351 of 2012, whereby the Respondent/accused has been acquitted of the charge framed under Section 138 of the Negotiable Instruments Act, 1881 (henceforth 'the NI Act').
2. This appeal was filed by Complainant Vijay Singh Gupta. During

pendency of the appeal, he died and his legal representatives have been brought on record.

3. Facts of the case, in brief, are that both deceased Complainant/Appellant Vijay Singh Gupta and acquitted accused/Respondent Suresh Kothari were well acquainted with each other. On 10.1.2006, on demand made by the Respondent/accused, the deceased Complainant gave him cash of Rupees Ten Lakhs. As a refund, the Respondent gave a cheque bearing No.332906 of Central Bank of India to the Complainant. Again, when the Respondent was in need of money, the Complainant gave him cash of Rupees Ten Lakhs on 10.2.2006. As a refund, the Respondent gave a cheque bearing No.332097 of Central Bank of India to the Complainant. The Complainant presented both the cheques for encashment on 29.6.2006. On 30.6.2006, the Bank informed the Complainant about non-availability of sufficient fund in the account of the Respondent. On 11.7.2006, the Complainant sent a legal notice to the Respondent through registered post, which was delivered to the Respondent on 13.7.2006. But, despite receiving the notice, the money was not refunded to the Complainant. Thereafter, the Complainant filed a complaint case before the Judicial Magistrate First Class, Durg on 29.8.2006. On 8.1.2007, the Court ordered issuance of notice to the Respondent/accused by registered and ordinary modes. During pendency of the said complaint case, on 9.12.2010, Counsel for the Complainant filed an application for condonation of delay in filing the complaint case making a submission that the complaint case should have been filed on 28.8.2006, but the same was filed on 29.8.2006 and due to the *bona fide* mistake there was

a delay of 1 day in filing the complaint case. On 4.3.2011, the Judicial Magistrate First Class, Durg rejected the application for condonation of delay. While passing the order, the Judicial Magistrate First Class observed that the Complainant was already examined and cross-examined before the Court. There seems to be a genuine reason for delay of 1 day in filing the complaint case and the delay seems to be a mistake on the part of the Counsel for the Complainant. It was further observed that it is also true that a party should not suffer for the mistake of his Counsel, but allowing the application for condonation of delay at this stage would mean going back to the preliminary stage of the case. It was also observed that the case has already been registered on 8.1.2007 and the Court does not have power to review its own order. Therefore, despite there being the fact that the Complainant should not suffer for the *bona fide* mistake on the part of his Counsel, the application for condonation of delay moved at this stage cannot be allowed by the Court and the Judicial Magistrate First Class fixed the case for examination of other witnesses of the Complainant. Thereafter, on 24.4.2012, vide the impugned judgment, the Judicial Magistrate First Class dismissed the complaint case on the ground of 1 day's delay and acquitted the Respondent/accused. Hence, this appeal.

4. Learned Counsel appearing for the legal representatives of the deceased Appellant/Complainant submitted that proviso to Section 142(1)(b) of the NI Act empowers the Court to condone delay in filing the complaint case. In this case, the Court directed for registration of the case and notice was also issued to the Respondent/accused. It impliedly means that the Court had

already condoned the delay in filing the complaint case. He further submitted that no objection was raised to the condonation of delay by the Counsel for the Respondent/accused or by the accused himself and as such the Respondent/accused cannot be set free only due to 1 day's delay in filing the complaint case. He further submitted that during pendency of the trial also, for condonation of delay, an application had been moved by the Complainant, which was rejected vide order dated 4.3.2011. At that time also, the Court had observed that the Complainant had a genuine reason of Counsel's mistake for 1 day's delay in filing the complaint case and the party should not suffer for the delay on the part of his Counsel. But, the Court rejected the said application only on the ground that the Court (Judicial Magistrate First Class) has no power to review its own order. He further submitted that even thereafter the Trial Court continued the trial and finally vide the impugned judgment dated 24.4.2012 the complaint case has been dismissed only on the ground of 1 day's delay and the accused has been acquitted, which is not proper.

5. Learned Counsel appearing for the Respondent/accused supported the impugned judgment of the Trial Court.
6. I have heard Learned Counsel appearing for the parties and perused the record with due care.
7. With regard to condonation of delay in filing a complaint, the proviso to clause (b) of sub-section (1) of Section 142 of the Negotiable Instruments Act, 1881 reads as under:

“142. Cognizance of offences.—(1) 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.”

8. While dealing with the issue in **2013 AIR SCW 597 (MSR Leathers v. S. Palaniappan)**, the Supreme Court observed as follows:

“26. The proviso referred to above now permits the payee to institute prosecution proceedings against a defaulting drawer even after the expiry of the period of one month. If a failure of the payee to file a complaint within a period of one month from the date of expiry of the period of 15 days allowed for this purpose was to result in 'absolution', the proviso would not have been added to negate that consequence. The statute as it exists today, therefore, does not provide for 'absolution' simply because the period of 30 days has expired or the payee has for some other reasons deferred the filing of the complaint against the defaulter.”

9. In **2014 AIR SCW 4637 (Pawan Kumar Ralli v. Maninder Singh Narula)**, the Supreme Court observed thus:

“20. However, when the issue of limitation has come up for the first time before the High Court, it ought to have dealt with the same on merits as per Proviso to Section 142(b) of the Act. The said Proviso appended to clause (b) of Section 142 of the Act was inserted by the Negotiable Instruments (Amendment

and Miscellaneous Provisions) Act, 2002 and the legislative intent was, no doubt, in order to overcome the technicality of limitation period. The Statement of Objects and Reasons appended to the Amendment Bill, 2002 suggests that the introduction of this proviso was to provide discretion to the Court to take cognizance of offence even after expiry of the period of limitation [See *MSR Leathers v. S. Palaniappan* (2013) 1 SCC 177] : (AIR 2013 SC (Cri) 490 : 2013 AIR SCW 597). Only with a view to obviate the difficulties on the part of the complainant, Parliament inserted the proviso to clause (b) of Section 142 of the Act in the year 2002. It confers a jurisdiction upon the Court to condone the delay [See *Subodh S. Salaskar v. Jayprakash M. Shah* (2008) 13 SCC 689] : (AIR 2008 SC 3086 : 2008 AIR SCW 5176).

22. In the peculiar facts and circumstances of the case, while keeping in mind the legislative intent and the specific plea of the appellant raised in the grounds for the Special Leave Petition that he should have been allowed to move an application for condonation of delay before the Trial Court as the respondent has not suffered any prejudice by reason of 25 days delay, we strongly feel that the appellant should not have been deprived of the remedy provided by the Legislature. In fact, the remedy so provided was to enable a genuine litigant to pursue his case against a defaulter by overcoming the technical difficulty of limitation. Hence, the High Court has committed an error by not considering the issue of limitation on merits.”

- 10.** On examination of the facts of the present case in the light of above observations, I find that it is not in dispute that demand notice was sent on 11.7.2006 and the said notice was received to the Respondent/accused on 13.7.2006 and, therefore, the complaint case should have been filed by 28.8.2006, but the same was filed on 29.8.2006. At that time, for condoning the delay of 1 day, no application was moved by the Complainant with the complaint case. On 8.1.2007, after recording of evidence under Section 200 of the Code of Criminal Procedure, the Judicial

Magistrate First Class ordered to register the case and took cognizance of the offence. From the record of the Trial Court, it also reveals that during pendency of the case, at the stage of recording of statements of other witnesses of the Complainant, the Complainant himself moved an application under Section 5 of the Limitation Act for condonation of 1 day's delay in filing the complaint case. Vide the order dated 4.3.2011, the Judicial Magistrate First Class rejected the said application for condonation of delay only on the ground that he has no power of review of his own order. He also observed that there was a genuine reason for 1 day's delay in filing the complaint case and the same seems to be a mistake of the Counsel for the Complainant and also observed that a party should not suffer for the mistake of his Counsel. Despite that, the Judicial Magistrate First Class rejected the application under Section 5 of the Limitation Act and further proceeded in the case and after recording of other evidence and completion of the trial, vide the impugned judgment dated 24.4.2012, dismissed the complaint case only on the ground of 1 day's delay and acquitted the accused.

11. In the peculiar facts and circumstances of the case, while keeping in mind the legislative intent, in order to meet the ends of justice, it would be appropriate to allow the Appellants/legal representatives of the deceased Complainant to file a fresh application for condonation of delay before the Trial Court. Accordingly, the Appellants are permitted to move an application for condonation of delay before the Trial Court and if such an application is filed, the Trial Court shall consider the same on its own merits without getting influenced by the previous order of the Trial Court dated

4.3.2011 rejecting the earlier application for condonation of delay and thereafter shall pass fresh appropriate orders on the said application. If the delay is condoned, the complaint case shall be heard and decided afresh on its own merits in accordance with law. The impugned judgment dated 24.4.2012 is set aside.

12. Consequently, the appeal is allowed in the aforesaid terms.
13. Record of the Court below be sent back along with a copy of this judgment forthwith for information and necessary compliance.

Sd/-

(Arvind Singh Chandel)
JUDGE