

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE**

CRIMINAL APPEAL NO.904 OF 1998

M.Shantilal & Co.)
a partnership firm, having its office at)
30/C.P.Tank Road, Mumbai, (through its)
partner Mr.Sunil I.Shah)Appellant
(Org.Complainant)

V/s.

1. Abbaji Maruti Jadhav)
having his office at Ashopalav Complex)
part 2, Shop No.3, Chharwada Road,)
Vapi, Dist. Valsad (Gujarat) and r/o.)
Prakash Sadan, Room No.3, Rachigam)
Road, Vapi-396 191, Dist. Valsad (Gajarat)....Org.Accused

2. The State of Maharashtra)....Respondents

Mr.N.M.Nadar i/by Mr.S.V.Marwadi for appellant.
Ms.Anamika Malhotra APP for respondent no.2-State.
None for respondent no.1-original accused.

**CORAM : K.R.SHRIRAM,J
DATE : 14.11.2019**

ORAL JUDGMENT :-

1. This is an appeal impugning an order and judgment dated 16.9.1998 passed by the Addl. Chief Metropolitan Magistrate, 40th Court, Girgaon, Mumbai in a trial for commission of an offence punishable under Section 138 of the Negotiable Instruments Act 1881.

2. The complainant who is the appellant herein was an unpaid vendor. The complainant claims to have supplied various quantities of paints during the period 1992 and indisputably the last supply was on or about 30.6.1992. Seven bills for a total sum of Rs.1,38,897/- was raised on the accused.

On 15.5.1997 almost 5 years after the last supply was made, the accused issued cheque bearing no.548403 for Rs.1,38,897/- which cheque was dishonoured on the same day, i.e., 15.5.1997 on the ground "account closed". The complainant therefore sent notice to the accused vide Advocate's Notice dated 23.5.1997 which has been received by the accused and the accused has replied denying liability, which reply was received after the complaint was filed. But since no reply was received within 15 days as contemplated under Section 138 of the Negotiable Instruments Act, 1881, this complaint was filed.

3. The particulars of the offence was read over to the accused and explained to the accused who pleaded not guilty and claimed to be tried. During the trial, complainant has examined himself and produced 10 documents. During the cross-examination, two further documents have come on record, one of which is reply received by the complainant to the statutory notice after filing of the case. Another document is summons issued under Section 91 of Cr.P.C. to the

bankers which also consists of 5 letters signed by the Manager of the bank.

4. Apart from various arguments which I find have been raised in the written submissions by the Advocate for the accused and the complainant, the main thrust of the accused was that the last transaction was on 30.6.1992, cheque was issued on 15.5.1997 and hence the debt or the liability to the complainant is time barred. And as it is time barred, it is no more a legally enforceable debt or other liability as required under Section 138 of the Negotiable Instruments Act 1881 and hence the complaint was not tenable. The trial Court in view of this legal point raised by the accused, decided to consider whether the debt or the liability in question was legally enforceable and only if the answer to that issue was in the affirmative, felt the need to consider whether the complainant has proved the ingredients of offence punishable under Section 138 of the Negotiable Instruments Act 1881. The trial Court relying on the judgment of a single Judge of the Andhra Pradesh High Court in the case of ¹***Girdhari Lal Rathi Vs. P.T.V.Ramanujachari & Anr.*** concluded that in case a cheque is issued for a time barred debt and it is dishonoured, the accused cannot be convicted under Section 138 of the Negotiable Instruments Act simply

1 1998 Bank Journal 127 Equivalent citations : 1997 (1) ALT Cri 509, 1998 (94) CompCas 139 b AP

on the ground that debt was not legally enforceable. In view of this conclusion, the trial Court did not consider whether the complainant has proved the ingredients of offence punishable under Section 138 of the Negotiable Instruments Act 1881 and dismissed the complaint. This is the order that is impugned in this appeal.

5. The accused has not been appearing for quite some time. The Court notings² indicate that warrant of arrest under Section 390 of Cr.P.C. is duly executed and original accused has been released on bail. There is an Advocate Mr.Tushar Joshi who had entered appearance for the accused and his name also appeared in the cause list today. He is not present either.

6. Mr.Nadar appearing for appellant submitted that the Division Bench of our Court in ²***Dinesh B.Chokshi Vs. Rahul Vasudeo Bhatt & Anr.*** has taken a view contrary to the view taken by Andhra Pradesh High Court. Mr.Nadar submitted that Division Bench has held that once a cheque is drawn for discharge of a time barred debt, it creates a promise which becomes an enforceable contract and therefore, it cannot be said that the cheque is drawn in discharge of debt or liability which is not legally enforceable. Mr.Nadar submitted

² 2012 ALL MR (Cri) 3656

that therefore, the impugned judgment has to be set aside and the Court should remand the matter back to the trial Court for hearing the arguments on the issue whether the complainant has proved the ingredients of offence punishable under Section 138 of the Negotiable Instruments Act 1881.

Ms.Malhotra, APP also concurred with the submissions made by Mr.Nadar.

7. I have considered the judgment in Dinesh B. Chokshi (supra) . On the basis of a referral order passed by a learned single Judge, the Hon'ble the Chief Justice passed an administrative order directing that all similar matters should be placed before the Division Bench to decide the two questions viz.:-

(i) Does the issuance of a cheque in repayment of a time barred debt amounts to a written promise to pay the said debt within the meaning of Section 25(3) of the Indian Contract Act, 1872 ?

(ii) If it amounts to such a promise, does such a promise, by itself, create any legally enforceable debt or other liability as contemplated by Section 138 of the Negotiable Instruments Act, 1881 ?

8. The Division Bench came to the conclusion that a cheque is a promise within the meaning of sub section 3 of Section 25 of the Contract Act and what follows is, when a cheque is drawn, a debt

which is not enforceable only by reason of bar of limitation, the cheque amounts to a promise governed by sub section 3 of Section 25 of the Contract Act. Such promise which is an agreement, becomes exception to the general rule that an agreement without consideration is void. The Court held that though on the date of making such promise by issuing a cheque, the debt which is promised to be paid may be already time barred, but in view of sub-section 3 of section 25 of the Contract Act, the promise/agreement is valid and therefore, the same is enforceable. The Court went on to hold while answering the 2nd question that once it is held that the cheque drawn for discharge of a time barred debt, creates a promise which becomes enforceable contract, it cannot be said that the cheque is drawn in discharge of debt or liability which is not legally enforceable. Paragraph-15 and paragraphs 19 to 21 of the said judgment read as under :-

“15. On plain reading of [Section 13](#) of the said Act of 1881, a negotiable instrument does contain a promise to pay the amount mentioned therein. The promise is given by the drawer . Under [Section 6](#) of the said Act of 1881, a cheque is a bill of exchange drawn on a specified banker. The drawer of a cheque promises to the person in whose name the cheque is drawn or to whom the cheque is endorsed, that the cheque on its presentation, would yield the amount specified therein. Hence, it will have to be held that a cheque is a promise within the meaning of Sub-section (3) of [Section 25](#) of the Contract Act. What follows is that when a cheque is drawn to pay wholly or in part, a debt which is not enforceable only by reason of bar of limitation, the cheque amounts to a promise governed by the Sub-section (3) of [Section 25](#)

of the Contract Act. Such promise which is an agreement becomes exception to the general rule that an agreement without consideration is void. Though on the date of making such promise by issuing a cheque, the debt which is promised to be paid may be already time barred, in view of Sub-section(3) of [Section 25](#) of the Contract Act, the promise/agreement is valid and, therefore, the same is enforceable. The promise to pay time barred debt becomes a valid contract as held by the Apex Court in the case of A.V.Moorthy (supra). Therefore, the first question will have to be answered in the affirmative.

19. Under the Explanation to [Section 138](#), the debt or other liability referred to in the main Section has to be a legally enforceable debt or liability. Merely because a cheque is drawn for discharge, in whole or in part of the debt or other liability, [Section 138](#) of the said Act of 1881 will not be attracted. The provision will apply provided the debt or other liability is legally enforceable. Thus, [Section 138](#) will not apply to a cheque drawn in discharge of a debt or liability which is not legally enforceable. There may be several categories of debts or other liabilities which are not legally enforceable. A debt or liability is legally enforceable if the same can be lawfully recovered by adopting due process of law. The emphasis is on the fact that the debt or other liability must be a legally enforceable liability. A debt or liability ceases to be legally enforceable after expiry of the period of limitation provided in the law of limitation for filing a suit for recovery of the amount. Thus, a time barred debt by no stretch of imagination can be said to be a legally enforceable debt within the meaning of the explanation to [Section 138](#).

20. While recording our answer to the first Question, we have already held that a cheque issued for discharge of a debt which is barred by law of limitation is itself a promise within the meaning of Sub-section (3) of [Section 25](#) of the Contract Act. A promise is an agreement and such promise which is covered by [Section 25\(3\)](#) of the Contract Act becomes enforceable contract provided that the same is not otherwise void

under the *Contract Act*.

21. Therefore, while answering second Question, we are specifically dealing with a case of promise created by a cheque issued for discharge of a time barred debt or liability. Once it is held that a cheque drawn for discharge of a time barred debt creates a promise which becomes enforceable contract, it cannot be said that the cheque is drawn in discharge of debt or liability which is not legally enforceable. The promise in the form of a cheque drawn in discharge of a time barred debt or liability becomes enforceable by virtue of Sub- section (3) of [Section 25](#) of the Contract Act. Thus, such cheque becomes a cheque drawn in discharge of a legally enforceable debt as contemplated by the explanation to [Section 138](#) of the said Act of 1881. Therefore, even the second question will have to be answered in the affirmative.”

9. In the circumstances, once a cheque is drawn for discharge of a time barred debt, it creates a promise which becomes an enforceable contract and therefore, it cannot be said that the cheque is drawn in discharge of debt or liability which is not legally enforceable. Therefore, I am satisfied that the impugned judgment dated 16.9.1998 has to be set aside and is hereby set aside. The matter is remanded to the trial Court to decide, based on the evidence already recorded, whether the complainant has proved the ingredients of offence punishable under Section 138 of the Negotiable Instruments Act 1881.

10. The dispute relates to the year 1997. 22 years have since passed. Therefore, registry to return the record & proceedings to the

trial Court within two weeks. The matter be placed before the trial Court on 5.12.2019 for directions, on which date the complainant and the accused shall without fail, remain present before the trial Court either in person or through their duly authorized Advocate. The trial Court shall hear the matter for arguments and deliver its judgment as early as possible and in any event, on or before 15.2.2020.

11. A copy of this order be sent by the registry to the accused as well as his Advocate Mr.Tushar Joshi. It is the responsibility of Advocate Mr.Tushar Joshi to inform the accused about this order. The appellant is also at liberty to forward a copy of this order to both, the accused as well as Advocate Mr.Tushar Joshi.

12. Appeal accordingly stands disposed.

13. All to act on authenticated copy of this order.

(K.R.SHRIRAM,J)