IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.09.2019

Delivered on : 12.09.2019

CORAM :

THE HONOURABLE MR. JUSTICE P.N. PRAKASH

Crl. R.C. No.492 of 2014

M.Danabal ... Revision Petitioner/Appellant/Accused

Vs.

R.SenthilRajan ... Respondent/Respondent/Complainant

Criminal Revision Case filed under Section 397 r/w. 401 Cr.P.C., praying to set aside the judgment in C.A.No.6 of 2009, passed by the Additional Sessions Judge, Karaikal, on 20.10.2009, confirming the judgment dated 28.04.2009 in S.T.R.No.1028 of 2007 on the file of the Judicial Magistrate Court No.II, Karaikal.

For Petitioner : Mr.K.S.Karthik Raja

For Respondent : M/s.Achari and Antoni Associates

O R D E R

This Criminal Revision Case has been filed to set aside the judgment dated 20.10.2009, passed by the Additional Sessions Judge, Karaikal, in C.A.No.6 of 2009, confirming the judgment dated 28.04.2009, passed by the Judicial Magistrate Court No.II, Karaikal, in S.T.R.No.1028 of 2007.

2.For the sake of convenience, the petitioner and the respondent will be referred to as accused and complainant, respectively.

3.It is the case of the complainant that the accused borrowed Rs.40,000/- in January, 2001 and agreed to repay the amount on demand with interest @ 12 % p.a. Towards the said liability, the accused issued a cheque dated 16.11.2006 for Rs.50,000/-, which when presented by the complainant, was dishonoured on the ground of insufficiency of funds on 17.11.2006. The complainant issued a statutory demand notice dated 28.11.2006, which was received by the accused on 01.12.2006. Since the accused did not comply with the demand, the complainant initiated a prosecution in S.T.R.No.1028 of 2007 in the Judicial Magistrate Court No.II, Karaikal, for the offence under Section 138 of the 'Negotiable Instruments Act' ('N.I. Act' for brevity), against the accused. The complainant examined himself as P.W.1 and also examined one Pitchandi as P.W.2. On the side of the complainant, Exhibits P1 to P4 were marked. When the accused was questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against him, he denied the same. The accused examined himself as D.W.1 and marked Exhibits D1 and D2. After hearing either side and considering the evidence on record, the trial Court, by judgment dated 28.04.2009 in S.T.R.No.1028 of 2007, convicted the accused of the offence under Section 138 of the N.I. Act and sentenced him to undergo two years Simple Imprisonment and to pay a compensation of Rs.1,00,000/- (Rupees one lakh only) to the complainant, in default, to undergo Simple Imprisonment for six months.

4.The appeal in C.A.No.6 of 2009, filed by the accused, challenging the conviction and sentence, was dismissed by the Additional Sessions Judge, Puducherry at Karaikal, on 20.10.2009.

5.Challenging the concurrent findings of the Courts below, the accused is before this Court.

6.Heard Mr.K.S.Karthik Raja, learned counsel for the accused and Mr.Achari for M/s.Achari and Antoni Associates, learned counsel for the complainant.

7.Mr.K.S.Karthik Raja submitted that, even according to the complainant, the debt was of the year 2001 and the impugned cheque was given in the year 2006 and hence, the prosecution, which has been founded on a time barred debt is illegal.

8.Per contra, Mr.Achari submitted that the accused had not raised this point either in the trial Court or in the appellate Court and therefore, he is precluded from raising this plea before this Court.

9.Admittedly, the period of limitation for filing a suit is three years from the date of the debt. In this case, the debt was in January 2001 and the period of limitation expired in January 2004. In the opinion of this Court, since a plea of limitation is a legal issue based on proved facts, it can be raised at the revision stage also.

10.To appreciate the rival contentions, it may be necessary to extract the averments in the complaint.

"1.The Accused herein borrowed a sum of Rs.40,000/- on January 2001 from the complainant to start a computer business and the Accused also agreed to repay the loan on demand with interest at the rate of 12% per annum.

2.The complainant submits that after getting the money the accused did not pay either principal nor interest and the interest for 5 years 11 months have accumulated to a sum of Rs.28,400/- so, the accused is liable to pay total amount of Rs.68,400/- and on the request of the accused the complainant deducted a sum of Rs.18,400/- towards interest from the total amount of Rs.68,400/- and as a result the accused is liable to pay a sum of Rs.50,000/-.

3.The complainant submits that on 16.11.2006 in order to discharge his legal liability and debt the accused issued a cheque dated 16.11.2006 for Rs.50,000/- bearing Cheque No.28301 dated 16.11.2006 payable at Indian Overseas Bank, Karaikal, from his account."

Even during trial, the aforesaid stand was scrupulously maintained by the complainant and it is not the case of the complainant that, either before the expiry of the period of limitation or thereafter, the accused had given something in writing, acknowledging the debt.

11.Learned counsel for the complainant placed strong reliance on the following rulings in support of his contention that the issuance of the cheque by the accused amounted to acknowledgment of liability and therefore, the prosecution was not illegal.

i. Dinesh B. Chokshi v. Rahul Vasudeo Bhatt [2013 (2) Mh.L.J. 130]
ii. H.Narasimha Rao v. R.Venkataram [2007 Crl. L.J. 583]
iii. S.A.Mamman v. C.P.Gopalan Achari [(Kerala High Court) Crl.A.No.225 of 2002, dated 29.06.2010]
iv. Ramakrishnan v. Gangadharan Nair [(Kerala High Court) Crl.R.P.No.2622 of 2006, dated 08.08.2006]
v. A.R.M.Nizmathuallah v. Vaduganathan [(Madras High Court) Crl.O.P.(MD) No.22472 of 2004 dated 09.08.2007]

Learned counsel for the complainant further placed strong reliance on Section 25(3) of the 'Indian Contract Act, 1872', ('Contract Act' for brevity) and submitted that the issuance of the impugned cheque gave life to the debt.

12.Refuting the aforesaid contention, learned counsel for the accused cited the following rulings :

i. S.Kamatchi & others v. M/s.Arkaa Medicament, through its Managing Director, Mr.A.Dhanasekaran [2009 (3) MWN (Cr.) DCC 31]

ii. J.Shamlal v. G.Manoharan [2017-1-L.W. (Crl.) 45]

iii. R.B.Ramakrishnan v. A.Meena [MANU/TN/2689/2011]

13.Except A.R.M.Nizmathuallah (supra), other rulings relied upon by the learned counsel for the complainant are from other High Courts, which have only persuasive value. A.R.M.Nizmathuallah (supra), decided by a single Judge of this Court, arises under a quash petition under Section 482 Cr.P.C. and not after a full fledged trial. Therefore, this Court has not placed reliance on the said judgment.

14.The learned counsel for the complainant placed very strong reliance on the judgment of a Division Bench of the Bombay High Court in Dinesh B. Chokshi (supra), wherein, the following issues were framed and decided.

> "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 ?"

The Division Bench answered the reference by holding that, a cheque issued for discharge of a debt that was barred by the law of limitation is itself a promise, within the meaning of Section 25(3) of the Contract Act and therefore, the prosecution under Section 138 of the N.I. Act founded on such a cheque is maintainable. The Division Bench of the Bombay High Court has referred to two judgments of the Supreme Court, viz., National Insurance Company Limited v. Seema Malhotra and others [(2001) 3 SCC 151] and A.V.Murthy v. B.S.Nagabasavanna [(2002) 2 SCC 642].

15.Apart from the above, Mrs.P.Kritika Kamal, learned Government Advocate (Crl.), brought to the notice of this Court, a judgment of the Kerala High Court in Joseph v. Devassia [2001 Crl. L.J. 24], wherein, the learned single Judge has held that a prosecution under Section 138 of the N.I. Act on a time barred debt will not be saved by Section 25(3) of the Contract Act and that, the Supreme Court, in S.L.P. (Crl.) No.1785 of 2001, has affirmed the said judgment on 10.09.2001.

16.This Court gave its anxious consideration to the various submissions made at the bar.

17.As on date, there is no authoritative pronouncement of the Supreme Court on this aspect. The issue in National Insurance Company Limited (supra) arises under an insurance contract and not under a prosecution under Section 138 of the N.I. Act. In that case, the insured had entered into an insurance contract on 21.12.1993 and had died in a car accident on 31.12.1993. The cheque issued by the insured towards the premium got dishonoured on 10.01.1994. The Insurance Company repudiated the claim of compensation, that was made by the legal heirs of the insured. This repudiation was upheld by the Supreme Court in that case.

18.Coming to A.V.Murthy (supra), the complaint filed under Section 138 of the N.I. Act was quashed by the Sessions Court on the ground that the cheque impugned therein was issued, four years after the debt, which order was confirmed by the High Court of Karnataka. The Supreme Court reversed the orders passed by the High Court and the Sessions Court on the ground that the prosecution should not have been quashed at the threshold. It may be necessary to extract the relevant passage from that judgment.

> "5.As the complaint has been rejected at the threshold, we do not propose to express any opinion on this question as the matter is yet to be agitated by the parties. But, we are of the view that the learned Sessions Judge and the learned Single Judge of the High Court were clearly in error in quashing the complaint proceedings. ..."

In fact, in the said judgment, the Supreme Court has noticed that the accused had shown the debt in his audited Income Tax Returns, even after the expiry of the period of limitation, which was construed as an admission.

19.Therefore, the aforesaid two judgments of the Supreme Court are not directly on the issue at hand. Three provisions of law should be borne in mind to decide this issue, viz., Section 18 of the Limitation Act, 1963, Section 25(3) of the Contract Act and Section 138 of the N.I. Act.

20.Under Section 18 of the Limitation Act, 1963, if an acknowledgment of liability is given before the expiry of the period of limitation, the period of limitation will stand further extended.

21.Consideration is an essential pre-requisite for a valid contract. Section 25 of the Contract Act carves out certain exceptions. We are now concerned about Section 25(3) of the Contract Act, which reads as under :

''25. Agreement without consideration, void, unless it is in writing and registered or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law.— An agreement made without consideration is void, unless —

...

(3) it is 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 suits.''

Illustration (e) to Section 25 reads as follows :

''25. ...

Illustration (e) : A owes B Rs.1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs.500 on account of the debt. This is a contract.''

From a reading of the above, it is clear that, in respect of a time barred debt, if the debtor gives a promise in writing signed by him to the creditor, then, it becomes a fresh contract, for which, consideration is not necessary and the original consideration would suffice. In the example given in Illustration (e), B can sue A only for Rs.500/- and in that suit, A cannot take a plea that no consideration was passed.

22.Bearing this in mind, this Court now proposes to analyse Section 138 of the N.I. Act, which is a penal provision which requires to be construed strictly. Explanation to Section 138 of the N.I. Act reads as follows :

"Explanation - For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

While interpreting a penal provision, the normal rule is that, the interpretation that favours the accused would merit consideration. Of course, there are certain exceptions to this rule. The object of Section 138 of the N.I. Act is to protect the interest of diligent payees in commercial transactions. By virtue of the explanation extracted above, the expression "debt" means legally enforceable debt. It is axiomatic that the cheque should have been issued for a legally enforceable debt. When a cheque is issued for a time barred debt, it does not satisfy this minimum requirement. That apart, a cheque is an instruction to the Bank of the payer to make payment to the payee and nothing more. It cannot be construed as a "promise made in writing and signed by the payer" so as to fall within the ambit of Section 25(3) of the Contract Act. Even by an extreme interpretation, if the issuance of a cheque for a time barred debt is construed as a promise in writing within the meaning of Section 25(3) ibid., then too, only a fresh contract is born. To say that the cheque which gave birth to a fresh contract resurrects a time barred debt and the dishonour of such a cheque entails prosecution of the drawer under Section 138 of the N.I. Act, is too large a pill for the penal law to swallow.

23.Before wrapping up, this Court is constrained to point out a printer's devil in Para No.12 of the judgment in J.Shamlal v. G.Manoharan (supra). In Para No.12, the learned Judge has relied upon the order passed by another learned Judge of this Court in K.Kumaravel v. R.P.Rathinam [AIR 2011 Madras 319] and has extracted a passaged therefrom, in which, a passage from A.V.Murthy (supra) has been extracted. In that extracted portion, the following sentence appears :

> “Likewise, a time barred debt is also not legally enforceable debt.”

However, this sentence is not available in the original judgment of the Supreme Court in A.V.Murthy (supra). Therefore, it is not known as to how this serious error had crept in. In fine, this Court is unable to persuade itself to agree with the Division Bench of the Bombay High Court in Dinesh B. Chokshi v. Rahul Vasudeo Bhatt (supra) and those lines of the judgments relied upon by the learned counsel for the complainant.

24.To sum up, the cheque in this case has been issued after the expiry of three years from the date of the debt and therefore, the debt in this case was not a legally enforceable debt when the cheque was issued. A fortiori the prosecution founded under Section 138 of the N.I. Act on such a cheque is not maintainable and the accused deserves to be acquitted.

25.In the result, this Criminal Revision Case is allowed and the judgment dated 20.10.2009, passed by the Additional Sessions Judge, Karaikal, in C.A.No.6 of 2009 and the judgment dated 28.04.2009, passed by the Judicial Magistrate Court No.II, Karaikal, in S.T.R.No.1028 of 2007, are set aside. The accused stands acquitted of the charge under Section 138 of the N.I. Act.

Registry is directed to send back the original records to the respective Courts below.

Sd/-

Assistant Registrar (Insp Cell)

//True Copy//

Sub Assistant Registrar

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Copy to :

1.The Additional Sessions Judge,
Puducherry at Karaikal.

2.The Judicial Magistrate No.II,
Karaikal.

Copy to

The Section Officer,
(Criminal Section), (Records),
High Court, Madras.

+1cc to Mr.K.S.Karthik Raja, Advocate, S.R.No. 78678
+1cc to Mr.Achari & Antony Associates, Advocate, S.R.No. 79426

Crl. R.C. No.492 of 2014

VG I(CO)
GN(30/09/2019)