

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.11.2019

Pronounced on : 16.12.2019

CORAM

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

A.No.4088 of 2017 & A.No.750 of 2017 in CS.No.75 of 2017
and
Crl.O.P.No.27379 of 2016 &
Crl.M.P.No.13939 & 13940 of 2016 & 15581 of 2017

M.P.Farook

... Applicant / petitioner

Vs

K.Sasikumar

... respondent / respondent

Prayer in A.No.4088 of 2017: This application has been filed under Order XIV Rule 8 and under Order VII Rule 11 read with Order VI Rule 16 and Section 151 of CPC to reject the plaint in C.S.No.75 of 2017.

Prayer in Crl.O.P.No.27379 of 2016: Criminal Original Petition filed under Section 482 Cr.P.C., to call for the records in C.C.No.5257 of 2016 pending on the file of the XVIII Metropolitan Magistrate Court at Saidapet, Chennai and quash the same.

For applicant : Mr.Ravikumar Paul, S.C.,
for M/s.Paul and Paul
For petitioner : Mr.N.R.Elango, S.C.,
for Mr.D.Muthukumar,
For respondent : Mr.M.Fazulul Haq,
for M/s.Juris & Justia

Common Order

Since the issue involved in both the application and the quash petition is same, they are taken up together and disposed of by this common order.

2. The brief facts of the case would run thus:

i) The respondent herein as plaintiff instituted a suit in C.S.No.75 of 2017 against the applicant herein seeking direction for payment of Rs.1,00,51,250/- together with interest. A private complaint under Section 138 of Negotiable Instrument Act is filed in C.C.No.5257 of 2016 to punish the petitioner herein for dishonour of the cheque.

ii) The case of the respondent herein is that on 30.03.2007, the applicant / petitioner herein availed two loans, one for a sum of Rs.20,00,000/- by cash and another Rs.30,00,000/- by cheque. At that time, he agreed to repay the loan amounts with interest. It is his further case, that the applicant / petitioner repaid Rs.6,50,000/- till 10.05.2008 towards the first loan and on 20.02.2016, he paid another Rs.20,000/-, and the balance amount

was Rs.46,60,000/-. Insofar as the second loan is concerned, the applicant repaid a sum of Rs.32,75,000/- till 30.04.2011 and further sum of Rs.30,000/- was paid by way of cash on 22.03.2016 and the outstanding amount for the second loan as on 30.06.2016 was Rs.46,90,000/-.

iii) The respondent herein would claim that his father, passed away on 29.12.2013. Subsequently, after repeated requests, the applicant / petitioner herein had issued three cheques, on 10.06.2016, totally for a sum of Rs.80,00,000/- in Cheque Nos.002959, 002960 and 002962. The cheques were presented on 13.06.2016 and they returned unpaid on 14.06.2016 for the reason "account closed". Thereafter, a legal notice dated 08.07.2016 was issued demanding payment of the money due and after receiving reply from the applicant dated 26.07.2016, the private complaint and the suit have been filed.

3. The defendant in the Civil Suit and the accused in the private complaint has come up with this application to strike off the plaint under Order 7 Rule 11 CPC and to quash the private complaint by invoking Section 482 of the Criminal Procedure Code on the sole ground that the proceedings are barred by limitation.

4. Heard Mr.Ravikumar Paul, learned Senior Counsel appearing for M/s.Paul and Paul, learned counsel for the defendant in the suit and Mr.N.R.Elango, learned Senior Counsel appearing for Mr.D.Muthukumar, learned counsel for the accused in the criminal case and Mr.M.Fazulul Haq, learned counsel appearing for M/s.Juris & Justia, learned counsel for the respondent and perused the materials available on record.

5. The learned Senior Counsels appearing for the applicant / petitioner would argue that the applicant / accused had availed financial help from the father of the respondent Mr.Balan during March 2007. At that point of time, three cheque leaves bearing Nos.002959, 002960 and 002962 drawn on State Bank of Travancore, Besant Nagar Branch, were handed over to him as security. He repaid the entire amount during the year 2011. It is further stated that the said Balan is a family friend of the applicant for several years and hence no steps were taken to get back the above mentioned cheque leaves.

6. The learned Senior counsels would further argue that admittedly in respect of the loan availed in cash, the last payment was made on

10.05.2008, so the limitation for that loan expired on 10.05.2011 and for the second loan, the last payment was on 30.04.2011 and the limitation got expired on 30.04.2014. According to the learned Senior Counsels, no amount was paid on 20.02.2016 and 22.03.2016 as alleged by the respondent, however, even assuming such payments have been made, it would not amount to revival of the original cause of action. It is their contention that the cheques were not issued for legally enforceable debt and therefore the suit and the criminal proceedings are liable to be quashed. In support of the above contentions, the following decisions are relied upon:-

- i) M.Danabal vs. R.Senthil Rajan in Crl.R.C.No.492 of 2014, dated 12.09.2019*
- ii) Sasseriyil Joseph vs. Devassia reported in CDJ 2000 Ker HC 129*
- iii) Sasseriyil Joseph vs. Devassia reported in CDJ 2001 SC 1423*
- iv) S.Kamatchi and others vs. M/s.Arkaa Medicament reported in 2009 (3) MWN (Cr.) DCC 31*
- v) Saman Dharman vs. S.Natarajan reported in CDJ 2012 MHC 1637*

7. Per contra, learned counsel for the respondent by referring the counter filed by the respondent would contend that the claim is not barred by limitation. He further added that the petitioner / applicant admitted availing loans from the father of the respondent in the year 2007 and the defence that

he repaid the entire loan amount during 2011 is a question of fact and it is disputed by the respondent herein. This disputed question of fact can be decided only after trial. It is further submitted that in view of the part payments of the loan amounts in 2016 both the proceedings were in time and prayed for dismissal of the application and the quash petition by placing reliance on the following decisions:

- i) Padma Vathy and another vs. State NCT of Delhi and another reported in CDJ 2017 DHC 144*
- ii) P.R.Gopal vs. S.Balasubramanian reported in CDJ 2016 MHC 4559*
- iii) Butta Singh vs. Mukhtiar Singh reported in CDJ 2011 PHC 306*
- iv) A.V.Murthy vs. B.S.Nagabasavanna reported in CDJ 2002 SC 155*
- v) Satish Jayantilal Shah vs. Pankaj Mashruwala reported in CDJ 1996 GHC 118*
- vi) Kishan Rao vs. Shankargouda reported in MANU/SC/0669/2018*
- vii) Bir Singh vs. Mukesh Kumar reported in MANU/SC/0154/2019*
- viii) Rohitbhai Jivanlal Patel vs. State of Gujarat and others reported in MANU/SC/0393/2019.*

8. The only issue that arises for consideration in these cases is whether the claim of the respondent is barred by limitation.

9. According to the respondent, the applicant / petitioner availed two loans on 30.03.2007. The applicant repaid part of the amount till 10.05.2008 and 30.04.2011. The part payments made on 20.02.2016 and 22.03.2016 for both the loans respectively would extend the period of limitation.

10. It is the contention of the learned Senior Counsels for the applicant that the payments alleged to have been made in the months of February 2016 and March 2016 would not revive the period of limitation since the amounts were said to have been paid only after expiry of the limitation.

11. For ready reference, Section 18 in the Limitation Act is extracted hereunder:

"18. Effect of acknowledgment in writing.—(1) Where, before the expiration of the prescribed period for a suit of application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. (2) Where the

writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received. Explanation.—For the purposes of this section,—(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right; (b) the word “signed” means signed either personally or by an agent duly authorised in this behalf; and (c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.”

12. A bare perusal of the above Section would show that a fresh period of limitation would commence from the time where before expiry of the prescribed period for a suit or application, an acknowledgment of liability has been made. But in the matter on hand, as per the provisions of the Limitation Act, the period of limitation for both the loans got expired on 09.04.2011 and 29.03.2014 respectively. Even assuming that cash payments were made on 20.02.2016 and 22.03.2016 and the cheques were issued on 10.06.2016, everything had taken place after the period of limitation.

13. "i) In *M.Danabal vs. R.Senthil Rajan* in Crl.R.C.No.492 of 2014, dated 12.09.2019, this Court has observed as follows:-

"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."

ii) In *Sasseriyl Joseph vs. Devassia* reported in CDJ 2000 Ker HC 129, the Kerala High Court has held as follows:-

"6. The only question that arises for consideration in this appeal is whether the respondent who issued the cheque in question in discharge of a time barred debt is liable under Section 138 of the Negotiable Instruments Act. In this case, the complainant had admitted that the loan was advanced to the accused in January, 1988 and the cheque was issued in February, 1991. Thus, by the time the cheque was issued, the debt was barred by limitation since there was no valid acknowledgement of the liability within the period of limitation. According to the learned counsel for the appellant, the promise made by the accused to repay the time barred debt would come within the purview of Section 25(3) of the Indian Contract Act. No doubt, the promise to pay a time barred cheque (debt) is valid and enforceable, if it is made in writing and signed by the person to be charged therewith. But, it is clear from Section 138 of the Negotiable Instruments Act that in order to attract the penal provisions in the bouncing of a cheque in Chapter XVII, it is essential that the dishonoured cheque should have been issued in

discharge, wholly or in part, or any debt or other liability of the drawer to the payee. The explanation to Section 138 defines the expression debt or other liability as a legally enforceable debt or other liability. The explanation to Section 138 reads as under :-

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

iii) The Hon'ble Apex Court in *Sasseriyl Joseph vs. Devassia* reported in CDJ 2001 SC 1423, it has been observed as follows:

"Sessions Judge, Thalassery in Criminal Appeal No.212 of 1992 holding inter alia that the cheque in question has been issued by the accused for due which was barred by limitation of the penal provision under Section 138 of the Negotiable Instrument Act is not attracted in the case.

On the facts of the case available on records and the clear and unambiguous provision in the explanation to Section 138 of the Negotiable Instrument Act, the judgment of the lower appellate court as confirmed by the High Court is unassailed.

Therefore, the special leave petition is dismissed."

iv) In *S.Kamatchi and others vs. M/s.Arkaa Medicament* reported in

2009 (3) MWN (Cr.) DCC 31, this Court has held thus:-

"19.It has already been pointed out that as per the explanation given under Section 138 of the Negotiable Instruments Act, 1881, the cheque in question must be given only in respect of legally

enforceable debt or other liability. In the instant cases, the debt mentioned in every complaint has become time barred on the date of issuance of the cheque in question. Further no valid acknowledgement of debt has been established on the side of the complainants. As per Section 19 of the Limitation Act, a debt should be acknowledged within the period of limitation. In the instant cases, as taunted earlier, even though it has been contended on the side of the appellants that the accused have paid interest, no document has been forthcoming to that effect. Further a time barred debt cannot be construed as a legally enforceable debt. Under the said circumstances, the Court can safely come to a conclusion that the cheques in question have not been given in respect of legally enforceable debts and on that score alone, all the complaints are liable to be dismissed.

...

...

24. Since this Court is of the considered view that a time barred debt would not come within the meaning of a legally enforceable debt and since the same view has been taken by the High Courts of Andharpradesh and Kerala as per the decisions mentioned supra, this Court is not in a position to rely upon the decision rendered by the Karnataka High Court reported in (III) 2007 BC 752 Karnataka (S.Parameshwarappa and another Vs. S.Choodappa). Therefore, viewing from any angle, the entire contentions urged on the side of the appellants/complainants cannot be accepted."

14. This Court while dealing with the time barred debt observed that there must be a distinct promise to pay the money and the promise must be in the form of writing signed by the concerned person or his authorised agent. But in this case, admittedly, no such written promise produced by the complainant. In ***Saman Dharman vs. S.Natarajan reported in CDJ 2012 MHC 1637***, this Court has held as follows:

"13. It is an admitted fact that Section 25(3) of the said Act deals with time-barred debt. From a close reading of the said Section, it is made clear that with regard to payment of time barred debt, there must be a distinct promise to pay either wholly or in part of the same. Further the promise must be in writing either signed by the person concerned or by his duly appointed agent. To put it in short, unless a specific contract in the form of novation is created with regard to payment of time barred debt, Section 25(3) of the said Act cannot be invoked. At this juncture, the Court has to look into the vital distinction between "promise to pay and acknowledgement of debt" under the Limitation Act."

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15. It is the contention of the learned counsel for the respondent that the limitation is a question of fact and law and it can be decided only

after trial. It is also contended that Order 7 Rule 11 CPC has conferred drastic power in the Court to terminate Civil action at the threshold and it cannot be exercised in a case like this. In support of the contention, he relied on the following decision:-

P.V.Guru Raj Reddy and others vs. P.Neeradha Reddy and others reported in MANU/SC/0132/2015

"5. Rejection of the plaint under Order VII rule 11 of the CPC is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order VII rule 11, therefore, are stringent and have been consistently held to be so by the Court. It is the averments in the plaint that has to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under Order VII rule 11, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. It is only if the averments in the plaint ex facie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situations, the claims will have to be adjudicated in the course of the trial.

6. In the present case, reading the plaint as a whole and proceeding on the basis that the averments made therein are correct, which is what the Court is required to do, it cannot be said that the said pleadings ex facie discloses that the suit is barred by limitation or is barred under any other provision of law. The claim of the plaintiffs with regard to the knowledge of the essential facts giving rise to the cause of action as pleaded will have to be accepted as correct. At the stage of consideration of the application under Order VII rule 11 the stand of the defendants in the written statement would be altogether irrelevant."

16. In the decisions relied on by the learned counsel for the respondent, except in **CDJ 2002 SC 155**, the issue of limitation did not arise for consideration. In **CDJ 2002 SC 155**, the Hon'ble Apex Court, while considering the facts, set aside the order rejecting the complaint filed under Section 138 of the Negotiable Instruments Act on the ground of limitation by noting the fact that in the balance sheet produced by the complainant, loan was referred thereunder. The decisions relied on by the learned counsel for the respondent are factually distinguishable. Hence, this Court is unable to agree with the submission of the learned counsel for the respondent.

17. From the above discussion, it is clear that the suit has been filed on a time barred debt and there was no legally enforceable liability for filing the criminal complaint. Hence, I am of the considered view that the applicant / petitioner is entitled to succeed in these cases. In that view, the plaint in CS.No.75 of 2017 is rejected and the complaint in C.C.No.5257 of 2016 is quashed. Accordingly, A.No.4088 of 2017 in CS.No.75 of 2017 and Crl.O.P.No.27379 of 2016 are allowed. No costs. Consequently, A.No.750 of 2017, Crl.M.P.Nos.13939 & 13940 of 2016 & 15581 of 2017 are closed.

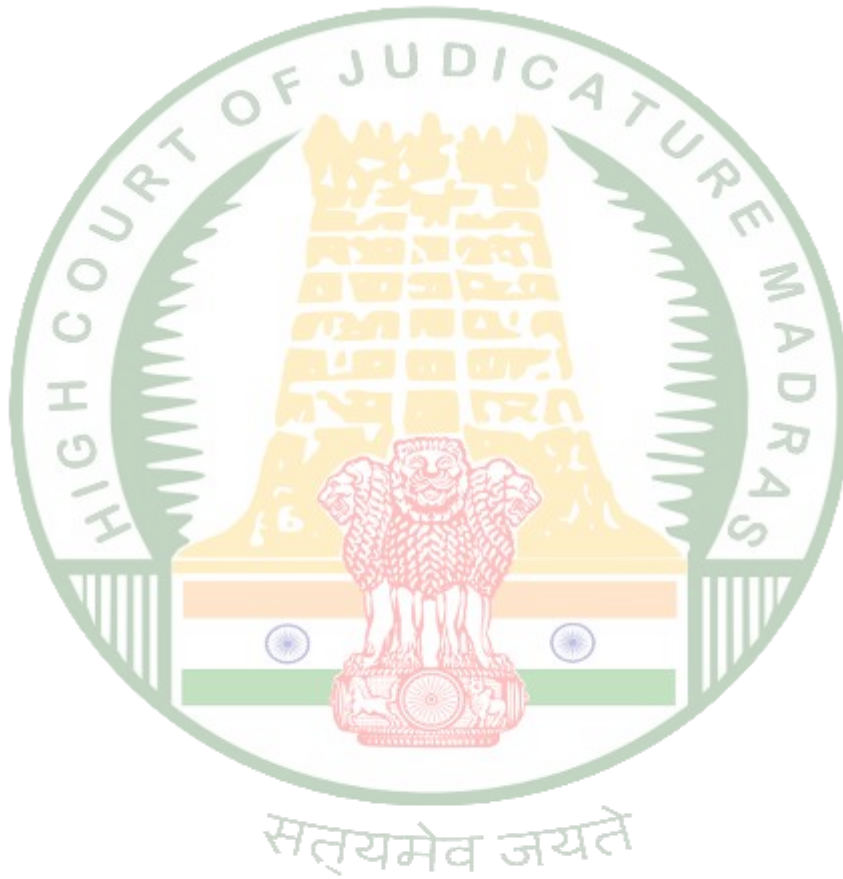
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pvs

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To

1. The XVIII Metropolitan Magistrate Court at Saidapet, Chennai
2. The Public Prosecutor, High Court, Madras.



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A.No.4088 of 2017 in CS.No.75 of 2017
and Crl.O.P.No.27379 of 2016

K.KALYANASUNDARAM.,J

pvs



Pre-delivery order in
A.No.4088 of 2017 in CS.No.75 of 2017
and Crl.O.P.No.27379 of 2016

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