



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 08.08.2019

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

Crl A(MD)No.75 of 2013

Senthilkumar ... Appellant / Respondent /
(as per the amendment cause title) Complainant

Vs.

P.Swaminatha Pillai ... Respondent / Appellant /
Accused

Prayer : This Criminal Appeal is filed under Section 378 (4) of Criminal Procedure Code, to call for the records relating to the judgment dated 19.11.2012 made in C.A No.57 of 2011 on the file of the III Additional District & Sessions Judge, Tiruchirappalli setting aside the judgment of conviction and sentence dated 06.06.2011 made in C.C No.4 of 2006 on the file of the Judicial Magistrate No.III, Tiruchirappalli and set aside the same and restore the conviction and sentence imposed by the trial court on the accused.

For Appellant : Mr.K.Doraisami, Senior Counsel
for M/s.Muthumani Doraisami

For Respondent : Mr.Senthilkumar

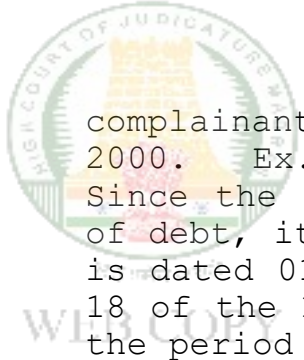
JUDGMENT

The appellant in this appeal is the complainant in C.C No.4 of 2006 on the file of the Judicial Magistrate No.III, Tiruchirappalli. It is a case arising under Section 138 of the Negotiable Instruments Act. The respondent was the accused. The respondent had issued a cheque for a sum of Rs.5,98,302/-. The said cheque was dishonored on presentation. After following the statutory formalities, the appellant's father filed C.C No.4 of 2006. The case ended in conviction vide judgment dated 06.06.2011. Questioning the same, the respondent filed C.A No.57 of 2011. The appellate court by judgment dated 19.11.2012 allowed the appeal and acquitted the respondent. Challenging the same, this appeal came to be filed.

2.Heard the learned Senior Counsel appearing for the appellant and the learned counsel appearing for the respondent.

<https://hcservices.ecourts.gov.in/hcservices/>

3.The appellate court noted that even according to the



complainant, the debt was incurred by the accused during the year 2000. Ex.P1 is the letter of undertaking issued on 01.04.2004. Since the acknowledgement was made after three years from the date of debt, it is without any legal consequence. The complaint cheque is dated 01.09.2005 and it was issued on 30.08.2005. As per Section 18 of the Limitation Act, the acknowledgement should be made within the period of limitation prescribed for making claim. The appellate court after following the decisions rendered in 2009 (3) MWN (crl.) DCC 31 (Kamatchi & others vs. M/s.Arkaa Medicament and another) and 2009 (1) MWN (Crl,) DCC 61 (Kumaraguru Finance vs. M.Ganesan) held that a cheque issued towards liquidating a time barred debt will not fall within the purview of Section 138 of the Negotiable Instruments Act. It concluded that the cheque in question was not having legally enforceable debt and hence would fall outside the ambit of Section 138 of the Negotiable Instruments Act. In that view of the matter, the conviction and sentence passed by the trial court was set aside.

4.As rightly pointed out by the learned Senior Counsel appearing for the complainant/appellant, the issue ought not to be viewed through the prism of Section 18 of the Limitation Act. The relevant provision is Section 25 of the Indian Contract Act, 1872. Section 25 of the Indian Contract Act reads as follows :

"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

(1)it is expressed in writing and registered under the law for the time being in force for the registration of [documents], and is made on account of natural love and affection between parties standing in a near relation to each other ; or unless

(2)it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or 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.

In any of these cases, such an agreement is a contract.

Explanation 1.Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.



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Explanation 2. An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations :

(a).....

(b).....

(c).....

(d).....

(e) A owes 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."

5. This provision was the subject matter of interpretation in a number of decisions. The Hon'ble Division Bench of the Madras High Court in the decision reported in AIR 1975 Madras 333 (N. Ethirajulu Naidu vs. K.R. Chinnikrishnan Chettiar) brought out the distinction between an acknowledgement under Section 18 of the Limitation Act, 1963 and a promise within the meaning of Section 25(3) of the Contract Act in the following terms :

"...Both have the effect of creating a fresh starting point of limitation, if they are in writing signed by the party or his authorised agent. But while an acknowledgment under the Limitation Act in order to be valid, must be made before the expiry of the period of limitation, a promise under Section 25, Sub-section (3) of the Contract Act, to pay a debt may be made after the debt has become barred by limitation. Ex. A. 1 which purports to be an account stated, may conceivably amount to an acknowledgment, but it is of no avail to the plaintiff because it is an acknowledgment of a time-barred debt. As it contains no express words promising to pay a time-barred debt, it will not avail the plaintiff either. In Jethibai v. Putlibai (1912) 14 BOM LR 1020, an account stated has been held to be a mere acknowledgment, as distinguished from a promise to pay under Section 25 (3) of the Indian Contract Act."

6. The Hon'ble Supreme Court in the decision reported in (2001) 3 SCC 151 (National Insurance Co. Ltd., vs. Seema Malhotra and others), had to decide whether the insurer would be liable to the insured himself or his legal heirs when the cheque issued by the insured towards the first premium account was dishonored due to insufficient funds in his account. While answering the issue, the following principle was laid down :



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"17. In a contract of insurance when the insured gives a cheque towards payment of premium or part of the premium, such a contract consists of reciprocal promise. The drawer of the cheque promises the insurer that the cheque, on presentation, would yield the amount in cash. It cannot be forgotten that a cheque is a Bill of Exchange drawn on a specified banker. A Bill of Exchange is an instrument in writing containing an unconditional order directing a certain person to pay a certain sum of money to a certain person. It involves a promise that such money would be paid."

7. In the decision reported in 2007 (5) CTC 488 (A.R.M. Nizmathullah vs. Vaduganathan), a learned Judge of this Court held as follows :

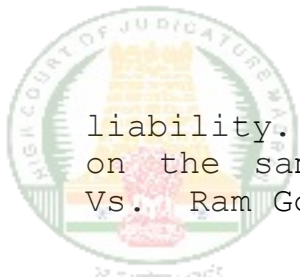
"8. In view of Section 25(3) of the Act, when a debt has become barred by limitation, a written promise to pay, furnishes a fresh cause of action. Section 25(3) of the Act in substance does is not to revive a dead right, for the right is never dead at any time, but to resuscitate the remedy to enforce 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 under Section 138 of the Act. In view of the illustration (e), the cheque becomes a promise made in writing, to pay under Section 25(3) of the Act.

9. When a similar question arose, it was answered by the Division Bench of Kerala High Court reported in 2005 STPL (DC) 82 Ker (Dr. K. R. Ramakrishnan v. Dr. K.K. Parthsaradhy), wherein, it is held in paragraph 26 that:

"26. ...It is held that:

(1) When a person issues a cheque, he acknowledges his liability to pay. In the event of the cheque being dishonoured on account of insufficiency of funds he will not be entitled to claim that the debt had become barred by limitation and that the liability was not thus legally enforceable. He would be liable for penalty in case the charge is proved against him."

8. I must also note that the Bombay High Court in the decision reported in (2008) CrL LJ 657 (Vijay Ganesh Gondhlekhar Vs. Indranil Jairaj Damale) observed that the cheque directs the bank to pay the bearer the sum mentioned in the cheque. As such it becomes a promise in favour of the payee within the meaning of Section 25(3) of the Indian Contract Act. Once it becomes a fresh promise, fresh period of limitation of 3 years would begin to run from the date of cheque. Hence the liability would certainly be a legally enforceable



liability. The decision of the Hon'ble Calcutta High Court is also on the same lines. (2012(2)CLJ(CAL)516 Ram Chandra Singh Chouhan Vs. Ram Gopal Sharma).

9. Applying the ratio laid down by the Hon'ble Supreme Court in the decision reported in (2001) 3 SCC 151 (National Insurance Co. Ltd., vs. Seema Malhotra and others), I have to necessarily hold that the decisions of this Court reported in (2009) (3) MWN (Cr.) DCC 31 (S.Kamatchi v. M/s.Arkaa Medicament) and 2009 (1) MWN (Cr1,) DCC 61 (Kumaraguru Finance vs. M.Ganesan) do not represent the correct legal position and that as rightly held by His Lordship Mr. Justice T. Sudanthiram in A.R. Nizmathuallah vs. Vaduganathan (2007 (5) CTC 488), a cheque being in the nature of a promise even if issued towards a time barred debt would fall within the ambit of Section 138 of the Negotiable Instruments Act.

10. After clarifying the legal position, this Court suggested to the learned counsel on either side to amicably resolve the issue. I am glad to note that the parties to the litigation rose to the occasion and submitted that the appellant/complainant will give a quietus to the issue upon receiving a sum of Rs.10.00 lakhs from the respondent herein. It will be towards full and final settlement of all the claims of the complainant against the accused. The learned counsel for the respondent undertakes that the respondent will pay a sum of Rs.10.00 lakhs. A sum of Rs.6.00 lakhs will be paid within a period of one month from the date of receipt of a copy of this order. The balance amount of Rs.4.00 lakhs will be paid in the month of February, 2020. Upon receiving the said sum of Rs.10.00 lakhs, the complainant undertakes to withdraw the civil suit filed by him in this regard. Since the parties have compounded the matter between themselves, the appeal stands disposed of on the above terms.

Sd/-

Assistant Registrar (CO)

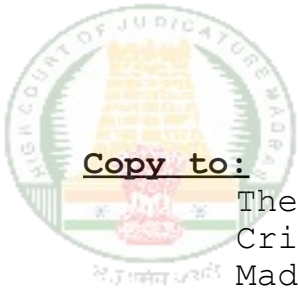
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Sub Assistant Registrar (CS)

To

1. The III Additional District & Sessions Judge, Tiruchirappalli.

2. The Judicial Magistrate No. III, Tiruchirappalli.

**Copy to:**

The Section Officer, (2 Copies)
Criminal Section (Records)
Madurai Bench of Madras High Court,
Madurai.

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+1 CC to M/s.T.SENTHIL KUMAR, Advocate (SR-80812[F] dated
09/08/2019)

+1 CC to M/s.MUTHUMANI DORAISAMI, Advocate (SR-81050[F] dated
09/08/2019)

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