



BEFORE THE MADURAI BENGH OF MADRAS HIGH COURT

Reserved on : 15.10.2019

Pronounced on : 23.10.2019

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

CRL.O.P (MD) No.3847 of 2018

and

Crl.M.P. (MD) No.1868 of 2018

WEB COPY

Joseph Fernando

... Petitioner/A2

Vs

Charles

... Respondent/Complainant

PRAYER: Criminal Original Petitions filed under Section 482 of Cr.P.C, praying to call for the records in C.C.No.232/2017 on the file of the Fast Track Court, Judicial Magistrate Level, Tuticorin and quash the same against this petitioner.

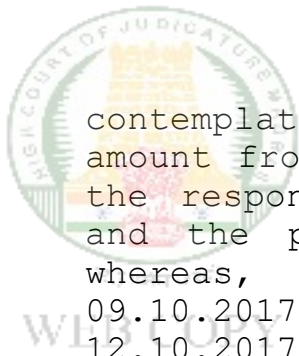
For Petitioner : Mr.K.A.Raamakrishnan

For Respondent : Mr.A.Thiruvadikumar

O R D E R

This petition has been filed to quash the proceedings as against these petitioner in C.C.No.232/2017 on the file of the Fast Track Court, Judicial Magistrate Level, Tuticorin, having been taken cognizance for the offences under section 138 of the Negotiable Instrument Act.

2.The learned counsel appearing for the petitioner submitted that the respondent lodged a complaint alleging that the petitioner has purchased fish on various dates from the year 2016 and liable to pay a sum of Rs.1,80,000/-. On demand, the petitioner issued a cheque for the said sum and the same was presented for collection and it was returned dishonoured for the reason insufficient funds on 11.09.2017. Thereafter, the respondent issued statutory notice to the petitioner on 16.09.2017 and it was returned only with an endorsement left India on 28.09.2017. Hence, the respondent filed the complaint and the same has been taken cognizance in C.C.No.232 of 2017 for the offence under Section 138 and 141 of the Negotiable Instrument Act. He further submitted that the complaint filed only as against the company and represented by his Managing Director and as such, it is not maintainable for the reason that non joinder of other Directors of the A1 company. He further submitted that the statutory notice issued on 16.09.2017 was returned on 28.09.2017. The provision under Section 138 of the Negotiable Instruments



contemplates 15 days mandatory period for returning of the cheque amount from the date of receipt of the said notice. According to the respondent, the statutory notice was returned on 28.09.2017 and the period of 15 days has been completed on 13.10.2017, whereas, the respondent filed the complaint as early as on 09.10.2017 and the learned trial Judge had taken cognizance on 12.10.2017 itself. Therefore, the very complaint itself is a premature one and it is not permitted under law and hence, the complaint is not maintainable. He also relied upon the following decisions in support of his contention:

"1.K.Bhaskaran V. Sankaran Sankaran Vaidhyan Balan & Another reported in **CDJ 1999 SC 590.**

2.Yogendra Pradap Singh Vs. Savitri Pandey reported in **(2015) 1 SCC (Cri) 226.**

3.Judgement passed in **Crl.O.P.Nos.4735 and others of 2015** dated **31.07.2015** of this Court.

4.K.G.Kailasanathan Vs. Sajish Babu reported in **2013(1) DCR 264.**

5.Econ Antri Ltd., V. Rom Industries Ltd. reported in **2013(2) MWN (Cr.) DCC 175 (SC).**

6.Arpit Jhanwar Vs. Kamlesh Jain reported in **2012(2) MWN (Cr.) (DCC) 59 (Mad,).**

7.Judgment in **Crl.A.No.767 of 2007** of the **Hon'ble Supreme Court of India** dated **18.05.2007** in **C.C.Alavi Haji Vs. Palapetty Mohammed and another."**

3.Per contra, the learned counsel appearing for the respondent submitted that the petitioner is arraigned as A2 and he is the Managing Director of A1. The accused persons have purchased fish from the respondent to the tune of Rs.1,80,000/- in the year 2016. To settle the said amount, the petitioner issued cheque and on instructions, it was presented for collection on 08.09.2017 and the said was returned dishonoured for the reason in sufficient funds on 11.09.2017. The respondent caused legal notice on 16.09.2017 and the same was returned with an endorsement as left India on 25.09.2017 insofar as A1 is concerned and on 28.09.2019 insofar as A2 is concerned. After completion of 15 days, on 09.10.2017, the complaint was presented and the sworn statement has been taken only on 12.10.2017. Thereafter, the trial Court taken cognizance for the offences under Section 138 r/w 141 of the Negotiable Instrument Act, as against the accused persons and issued summons. Therefore, the complaint filed only after giving 15 days mandatory period as contemplated under the provisions of the Negotiable Instrument Act to the accused persons and lodged the complaint. Though the complaint was filed on 09.10.2017, sworn statement recorded only on 12.10.2017. Admittedly, the returned cover has been received insofar as the 1st accused is



concerned on 25.09.2017 and insofar as the 2nd accused is concerned on 28.09.2017.

4.He further submitted that the notice was sent as early as on 16.09.2017 itself. Insofar as the 1st accused is concerned, legal notice was returned as unclaimed and insofar as the 2nd accused is concerned, legal notice was returned with and endorsement left India. Therefore, the endorsement has made by the post office within two or three days from the date of registered post of the legal notice. But, it was received by the respondent only on 25.09.2017 and 28.09.2017 respectively. Therefore, the 15 days time has been sufficiently granted to the accused persons to return the cheque amount. Therefore, he contended that the complaint is very much maintainable and it is not premature one. He also submitted that if at all the petitioner is interested to settle the amount, he could have very well settled the amount immediately after receipt of summons in C.C.No.232 of 2017. However, even after receipt of the summons, he never appeared before the trial Court and as such, the bailable warrant has been issued as against the petitioner and it is pending. Since the petitioner did not approach this Court with clean hands, he is not entitled to the relief sought for and hence, he prayed for dismissed of this petitioner. He relied on the following decisions to support his contentions:

"1.C.C.Alavi Haji Vs. Palapetty Muhammed and another reported in **(2007) 3 Supreme Court Cases (Cri) 236.**

2.M/s.Ajeet Seeds Ltd. V. Gopala Krishnaiah reported in **2015-1-L.W. (Crl.) 445."**

5.Heard the learned senior counsel appearing for the petitioner and the learned counsel appearing for the respondent and perused the materials available on records.

6.The petitioner is arraigned as A2 in C.C.No.232 of 2017 initiated by the respondent for the offences punishable under Sections 138 and 141 of the Negotiable Instrument Act. The respondent averred in his complaint that the accused purchased fish to the tune of Rs.1,80,000/- and towards the discharge of their liability, they issued cheque for the said sum. The said cheque was presented for collection and the same was returned with an endorsement with funds insufficient on 21.08.2017 and immediately informed the same to the petitioner and the other accused and on instructions, again, the cheque was presented for collection on 08.09.2017. Again, it was returned dishonoured on 11.09.2017 with an endorsement with insufficient funds. Thereafter, on 16.09.2017, the respondent caused legal notice to the accused persons and both the accused did not receive the same. Insofar as the 1st accused is concerned, the legal notice was returned with an



endorsement unclaimed and insofar as the 2nd accused is concerned, the legal notice was returned with an endorsement left India and both the notices were returned to the hands of the respondent on 25.09.2017 and 28.09.2017 respectively.

7. The main ground raised by the petitioner is that the complaint itself is a premature one, since the petitioner was not given 15 days mandatory period to show his interest to settle the matter. The statutory notice was issued on 16.09.2017 to both the accused persons. Both the notices were returned on 25.09.2017 and 28.09.2017 respectively. Thereafter, the complaint has been lodged on 09.10.2017. When a notice is returned by the Sendee as unclaimed or other reason, such days would be the commencing date in reckoning the period of 15 days contemplated in clause (c) to the provision of Section 138 of the Negotiable Instrument Act. Of course, such reckoning would be without prejudice to the right of the drawer of the cheque to show that he had no knowledge that the notice was brought to his address. But, in the case on hand, the petitioner, even after receipt of the summons from the trial Court, did not take any steps to return the cheque amount to the petitioner.

8. Further, it is also seen that the respondent already presented the cheque on 18.09.2017 and the same was returned on 21.08.2017 and it was duly informed to the petitioner herein and on instructions, again, it was presented for collection on 11.09.2017. Therefore, the respondent was well aware of the presentation of the cheque by the petitioner and also well aware of the fact that the cheque presented by the respondent was returned dishonoured. It shows that the petitioner wantonly evaded the service of notice and in fact, the 1st accused refused to receive the notice and the same was returned unclaimed as early as on 25.09.2017.

9. In this regard, the learned counsel appearing for the petitioner relied on the judgment of the Hon'ble Supreme Court in ***Yogendra Pradap Singh Vs. Savitri Pandey*** reported in ***(2015) 1 SCC (Cri) 226***, wherein, the Apex Court has held as follows:

"42. Section 142 of the NI Act prescribes the mode and so also the time within which a complaint for an offence under Section 138 of the NI Act can be filed. A complaint made under Section 138 by the payee or the holder in due course of the cheque has to be in writing and needs to be made within one month from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. The period of one month under Section 142 (b) begins from the date on which the cause of action



has arisen under clause (c) of the proviso to Section 138. However, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within the prescribed period of one month, a complaint may be taken by the Court after the prescribed period. Now, since our answer to question (i) is in the negative, we observe that the payee or the holder in due course of the cheque may file a fresh complaint within one month from the date of decision in the criminal case and, in that event, delay in filing the complaint will be treated as having been condoned under the proviso to clause (b) of Section 142 of the NI Act. This direction shall be deemed to be applicable to all such pending cases where the complaint does not proceed further in view of our answer to question (i). As we have already held that a complaint filed before the expiry of 15 days from the date of receipt of notice issued under clause (c) of the proviso to Section 138 is not maintainable, the complainant cannot be permitted to present the very same complaint at any later stage. His remedy is only to file a fresh complaint; and if the same could not be filed within the time prescribed under Section 142(b), his recourse is to seek the benefit of the proviso, satisfying the Court of sufficient cause. Question (ii) is answered accordingly."

10. In the decision of **K.G.Kailasanathan Vs. Sajish Babu** reported in **2013(1) DCR 264**, the Kerala High Court has held as follows:

"10. It was held by this Court in **Chacko v. Joseph MANU/KE/0086/2003 : 2003 (2) K.L.T. 1:**

Normally the presumption of deemed service can and need be drawn only when the notice sent by the complainant is received back by him without service. Of course there may be exceptional cases where the complainant sleeps over his rights and does not make enquiries about the notice sent by him. If within a reasonable time the notice is not returned, the complainant is certainly expected to make enquiries. If he does not draw the presumption of due service at the appropriate time by being indifferent to his own rights, such a complainant may not be justified in insisting that the presumption of due service can be drawn only if and when he gets the notice sent by him returned to him unserved. But in all other cases where the notice sent is returned to the sender within a



reasonable time, such sender will be obliged to invoke the presumption of due service only on the date on which the sender receives back the returned notice.

It was further observed:

In actual practice I find that the postal authorities do show such indulgence to addressees who make request to retain such articles till such date when the addressee will be able to receive it. In these circumstances according to me it would be puerile to expect a sender to invoke the presumption of due service even before he realises and is satisfied that there is no actual service. Otherwise, a sender will have to be at the post office of destination making enquiries as to whether the notice sent by him has been served or not and whether he should invoke the presumption of due service. That cannot of course be the law. It would be unjust, inequitable, unreasonable and perverse to expect the complainant to invoke the presumption of due service even before he is satisfied reasonably that such notice has not actually been served. The interpretation that the presumption of due service will arise only when the sender gets back the returned notice does appear to me to be just, reasonable, equitable and practically prudent."

11. In the case of **Econ Antri Ltd., V. Rom Industries Ltd.** reported in **2013(2) MWN (Cr.) DCC 175 (SC)**, the Hon'ble Supreme Court of India, has held as follows:

"22. In view of the above, it is not possible to hold that the word 'of' occurring in Section 138(c) and 142(b) of the N.I. Act is to be interpreted differently as against the word 'from' occurring in Section 138(a) of the N.I. Act; and that for the purposes of Section 142(b), which prescribes that the complaint is to be filed within 30 days of the date on which the cause of action arises, the starting day on which the cause of action arises should be included for computing the period of 30 days. As held in *Ex parte Fallon* (1793) 5 Term Rep 283 the words 'of', 'from' and 'after' may, in a given case, mean really the same thing. As stated in *Stroud's Judicial Dictionary*, Vol. 3 1953 Edition, Note (5), the word 'of' is sometimes equivalent of 'after'.

23. Reliance placed on *Danial Latifi* is totally misplaced. In that case the Court was concerned with Section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986. Section 3(1)(a) provides



that a divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the Iddat period by her former husband. This provision is entirely different from Section 142(b) of the N.I. Act, which provides that the complaint is to be made 'within one month of the date on which the cause of action arises'. (Emphasis supplied).

24. We may, at this stage, note that learned Counsel for the Appellant relied on State of Himachal Pradesh where, while considering the question of computation of three months' limitation period and further 30 days within which the challenge to the award is to be filed, as provided in Section 34(3) and proviso thereto of the Arbitration Act, this Court held that having regard to Section 12(1) of the Limitation Act, 1963 and Section 9 of the General Clauses Act, 1897, day from which such period is to be reckoned is to be excluded for calculating limitation. It was pointed out by counsel for the Respondents that Section 43 of the Arbitration Act makes the Limitation Act, 1963 applicable to the Arbitration Act whereas it is held to be not applicable to the N.I. Act and, therefore, this judgment would not be applicable to the present case. We have noted that in this case reliance is not merely placed on Section 12(1) of the Limitation Act. Reliance is also placed on Section 9 of the General Clauses Act. However, since, in the instant case we have reached a conclusion on the basis of Section 9 of the General Clauses Act, 1897 and on the basis of a long line of English decisions that where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded, it is not necessary to discuss whether State of Himachal Pradesh is applicable to this case or not because Section 12(1) of the Limitation Act is relied upon therein."

In the all above cases, the Hon'ble Supreme Court of India held in respect of service of notice as contemplated under Section 138 of Negotiable Instrument Act. In the case on hand, the issue is whether the complaint filed by the respondent is a premature or not? Therefore, the above judgments are not applicable to the case on hand.

12. The learned counsel appearing for the respondent relied upon the judgment of the Hon'ble Supreme Court of India in **C.C. Alavi Haji Vs. Palapetty Muhammed and another** reported in **(2007) 3 Supreme Court Cases (Cri) 236**, where the Hon'ble Supreme Court of India held in para 17, as follows:

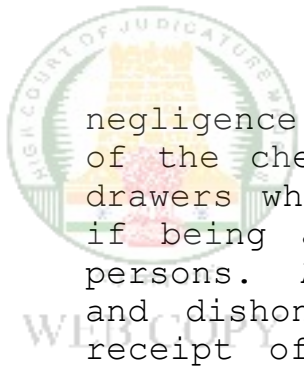
"17. It is also to be borne in mind that the

requirement of giving of notice is a clear departure



from the rule of Criminal Law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the G.C. Act and Section 114 of the Evidence Act. In our view, any other interpretation, of the proviso would defeat the very object of the legislation. As observed in Bhaskarans case (supra), if the giving of notice in the context of Clause (b) of the proviso was the same as the receipt of notice a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act."

13. In the above case, though the Supreme Court held on other issue, categorically laid down the purpose for issuance of notice. In the present case, on instructions, the respondent presented the cheque on 17.08.2017 and the same was returned with an endorsement insufficient funds. It was duly informed to the petitioner and on further instructions, again, the said cheque was presented for collection on 19.08.2017. Therefore, the petitioner had fully knowledge about the presentation of the cheque and also dishonour of the said cheque. The purpose for the statutory notice that One can also conceive of cases where a well intentioned drawer may have inadvertently missed to make necessary arrangements for reasons beyond his control, even though he genuinely intended to honour the cheque drawn by him. The law treats such lapses induced by inadvertence or negligence to be pardonable, provided the drawer after notice makes amends and pays the amount within the prescribed period. It is for this reason that Clause (c) of proviso to Section 138 provides that the section shall not apply unless the drawer of the cheque fails to make the payment within 15 days of the receipt of the said notice. To repeat, the proviso is meant to protect honest drawers whose cheques may have been dishonoured for the fault of others, or who may have genuinely wanted to fulfil their promise but on account of inadvertence or



negligence failed to make necessary arrangements for the payment of the cheque. The proviso is not meant to protect unscrupulous drawers who never intended to honour the cheques issued by them, if being a part of their modus operandi to cheat unsuspecting persons. As stated above, the petitioner well aware of the return and dishonor of the cheque issued by him and even after the receipt of summons from the Court, he did not take any steps within a period from the date of receipt of summons to make payment to the respondent.

14. Therefore, he can not obviously contend that he was not given sufficient opportunity to settle the amount to the respondent herein. Therefore, the points raised by the petitioner is negatived the petition to quash the proceedings initiated under Section 138 of N.I.Act is nothing but clear abuse of process of Court and it is liable to be dismissed.

15. Accordingly, this criminal original petition is dismissed. Consequently, connected miscellaneous petition is closed. Since the calender case is of the year 2017, the Fast Track Court, Judicial Magistrate Level, Tuticorin is directed to dispose of the case in C.C.No.232 of 2017, within a period of six months from the date of receipt of a copy of this order.

Sd/-

Assistant Registrar ()

// True Copy //

Sub Assistant Registrar (CS)

Arul

To

The Fast Track Court,
Judicial Magistrate Level,
Tuticorin.

+1 CC to M/s.A.THIRUVADI KUMAR, Advocate (SR-94179[F] dated 24/10/2019)

+1 CC to M/s.KU.RAAMAKRISHNAN, Advocate (SR-94335[F] dated 24/10/2019)

Order made in

CRL.O.P (MD) No.3847 of 2018

23.10.2019