

BAIL SLIP

That the Appellant/Accused namely V.G.Srinivasan, S/o.P.Govindaraj, was released on bail as per order of this Court dated 23.01.2017 in Crl.MP.No.1111 of 2017 in Crl.RC.No.94 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.12.2020

PRONOUNCED ON : 30.12.2020

CORAM

THE HONOURABLE MR.JUSTICE G.CHANDRASEKHARAN

CRL.R.C.NO.94 OF 2017

AND

MP.NOS.1111 & 1112 OF 2017

V.G.Srinivasan ... Petitioner

Vs.

D.Srinivasalu ... Respondent

Prayer:

This Criminal Revision petition is filed against the judgment of the learned III Additional Sessions Judge, Vellore at Tirupattur made in C.A.No.19/2013 dated 17.09.2016 confirming the conviction and sentence passed by the learned Additional District Munsif cum Judicial Magistrate, Ambur, made in CC.No.80 of 2012 dated 26.06.2013.

For Petitioner : Mr.T.R.Ravi

For Respondent : Mr.Sharath Chander
for Mr.V.Raghavachari

O R D E R

This Criminal Revision Petition is filed against the judgment of the learned III Additional Sessions Judge, Vellore, in CA.No.19/2013 is confirmed with the judgment of the learned Additional District Munsif cum Judicial Magistrate, Ambur in CC.No.80 of 2012.

2. The respondent as a complainant filed a complaint under

Sections 138, 141, 142 of Negotiable Instruments Act read with 200 of Cr.P.C. The case of the complainant/respondent is that the petitioner/accused borrowed a sum of Rs.4,50,000/- from him to meet his urgent needs and promised to discharge the said amount within two months. The petitioner issued a cheque bearing No.183911 dated 17.11.2011 drawn in favour of Indian Overseas Bank, Periyankuppam. The respondent presented the cheque for collection through Corporation Bank on 02.03.2012. The cheque was returned as "Funds Insufficient" on 04.03.2012. The respondent received a return memo on 04.03.2012. The petitioner issued the cheque only to evade payment and to cheat the respondent. The respondent issued legal notice to the petitioner on 31.03.2012 through RPAD and courier services. The petitioner received the notice through courier service on 02.04.2012 and the notice sent through RPAD was returned as "Addressee Left", on 07.04.2012. The notice sent to the office address was returned as "closed". Even after the receipt of the notice, the petitioner neither paid the amount nor replied within 15 days of receipt of the notice. Therefore this complaint.

3. After the petitioner entered appearance before the Trial Court, he was questioned with regard to the substance of accusation against him. Petitioner denied the accusation and demanded trial. During the trial, PW.1 to PW.3 were examined on the side of the respondent. Exs.P.1 to P.11 had been marked. On the side of the petitioner, he was examined as DW.1 and Exs.D1 and D2 were marked. On considering the oral and documentary evidence, the learned Additional District Munsif cum Judicial Magistrate, Ambur found the accused guilty under Section 138 of the Negotiable Instruments Act and sentenced him to undergo simple imprisonment for one year with payment of Rs.4,50,000/- as compensation to the respondent. Against the said judgment, the petitioner preferred the appeal before the III Additional Sessions Judge, Vellore at Tirupattur in C.A.No.19 of 2013. The learned Sessions Judge after re-evaluating and re-appreciating the oral and documentary evidence found that there is no infirmity in the judgment of the Trial Court and it did not require any interference and dismissed the said appeal. Against the said judgment, this Criminal Revision Petition is filed.

4. The point for consideration is that whether the judgment of learned Additional Sessions Judge in C.A. No.19 of 2013 suffers from any illegality or impropriety or incorrectness necessitating interference by this Court?

5. The learned counsel for the petitioner advanced one important legal submission with regard to filing of the complaint before the Trial Court before the accrual of cause of

action. According to the learned counsel for the petitioner, the cheque concerned in this case was dated 17.11.2011. The return memo of the dishonour of the cheque was dated 04.03.2012. The legal notice was dated 31.03.2012. As per Ex.P.5 Acknowledgement, the notice was received by the petitioner on 02.04.2012. The petitioner was given 15 days time for paying the cheque amount as per Ex.P.3 notice. Notice was received on 02.04.2012. The date of receipt of notice i.e., 2.4.2012 has to be excluded for reckoning 15 days time. 15 days time expires only on 17.04.2012. The complaint ought to have been filed only on 18.04.2012. Therefore, the learned counsel for the petitioner submitted that the filing of the complaint on 17.04.2012 is not maintainable. In support of his argument, he placed the judgment reported in (2014) 3 MWN (Cr.) DCC 65 (SC) (Yogendra Pratap Singh Vs. Savitri Pandey and another).

6. The next submission made by the learned counsel for the petitioner is on the merits of the case. It is submitted by the learned counsel for the petitioner that there is absolutely no evidence as to when and where the amount of Rs.4,50,000/- was given to the petitioner by the respondent. In fact, the respondent was running a chit and the petitioner was a subscriber. The cheque which was given in the chit transaction is used for filing this case. There is no independent witness to prove the alleged borrowing by the petitioner from the respondent. Income tax return was not filed. The respondent failed to prove the legally enforceable debt or liability and also the fact that the cheque was issued to discharge the legally enforceable debt or liability. Basing his submissions on these lines especially on the maintainability of the complaint before the accrual of the cause of action, the learned counsel for the petitioner prayed for dismissal of the complaint by allowing this Criminal Revision Petition.

7. Per contra, the learned counsel for the respondent submitted that both the courts below have given concurrent findings. There is presumption in favour of the holder of the cheque, unless the contrary is proved, that the holder of the cheque received the cheque for discharge, in whole or part or any debt or other liability. The respondent produced Ex.P.1 to Ex.P.11 documents, examined himself as a witness and two more witnesses. He clearly demonstrated that the petitioner borrowed a sum of Rs.4,50,000/- from the respondent and issued cheque for discharging the debt and when the cheque was presented for collection, it was returned for the reason that there was no sufficient funds in the account of the petitioner. The petitioner did not produce any material to show that there was chit transaction between him and the respondent and the cheque was issued in the chit transaction. The other contention of the learned counsel for the petitioner that no

Income Tax return was filed to show the lending of the money and the loan transaction is not a ground for rejecting the case of the respondent, when the respondent was able to prove the loan transaction, issuance of cheque for discharging the loan transaction and return of the cheque for the reason that there was no sufficient funds. With regard to the filing of the complaint before the accrual of the cause of action, the learned counsel for the respondent submitted that the petitioner has not taken this defence before the First Appellate Court. However, as seen from the judgment of the Trial Court, the Trial Court has given reason for taking the case on file. There was specific reference in the judgment that the complaint was filed on 17.04.2012 and returned and then was taken on file on 09.12.2012. Therefore, the submission made on behalf of the petitioner before the Trial Court that cognizance was taken before the completion of 15 days of receipt of notice was rightly answered by the learned Trial Judge and that the finding cannot be re-visited now. Therefore, the learned counsel prayed for dismissal of the Revision Petition.

8. With regard to the presumption under section 138 of Negotiable Instruments Act and the burden of proof cast on the accused, the learned counsel for the petitioner relied on the ruling reported in (2019) 4 SCC 197 [Bir Singh Vs. Mukesh Kumar] for the position that:

"23. The presumption under Section 139 of the Negotiable Instruments Act is a presumption of law, as distinguished from presumption of facts. Presumptions are rules of evidence and do not conflict with the presumption of innocence, which requires the prosecution to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law and presumptions of fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact as held in Hiten P. Dalal.

9. The learned counsel for the petitioner also relied on ruling reported in (2019) 18 SCC 106 (Rohitbhai Jivanlal Patel Vs. State of Gujarat and another) for the same position, it is observed as follows.

"22. The result of discussion in the foregoing paragraphs is that the major considerations on which the trial Court chose to proceed clearly show its fundamental error

of approach where, even after drawing the presumption, it had proceeded as if the complainant was to prove his case beyond reasonable doubt. Such being the fundamental flaw on the part of the trial court, the High Court cannot be said to have acted illegally or having exceeded its jurisdiction in reversing the judgment of acquittal. As noticed hereinabove, in the present matter, the High Court has conscientiously and carefully taken into consideration the view of the trial court and after examining the evidence on record as a whole, found that the findings of the trial court are vitiated by perversity. Hence, interference by the High Court was inevitable, rather had to be made for just and proper decision of the matter".

10. Before dealing with the merit of the case, it is better to consider the maintainability of this complaint in view of judgment of the Hon'ble Supreme Court reported in 2014 (3) MWN (Cr.) DCC 65 (SC) (cited supra). The reading of the judgment shows that two important questions had been taken up for consideration. They are,

(1) Can cognizance of an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 be taken on the basis of a complaint filed before the expiry of the period of 15 days stipulated in the Notice required to be served upon the drawer of the cheque in terms of Section 138(c) of the Act aforementioned? And

(ii) If answer to question no.1 is in the negative, can the complainant be permitted to present the complaint again notwithstanding the fact that the period of one month stipulated under Section 142(b) for the filing of such a complaint has expired?

11. After elaborately considering various judgment of Hon'ble Supreme Court as well as other High Courts, answer for question no.1 is that clause (c) of proviso to section 138 of Negotiable Instruments Act makes it clear that no complaint can be filed for an offence under 138 of Negotiable Instruments Act, unless the period of 15 days has elapsed. Any complaint before the expiry of 15 days from the date on which the notice has been served on the drawer is no complaint at all in the eye of law. The court is barred in law from taking cognizance of the complaint. It is not open to the court to take cognizance of the said complaint merely because on the date of consideration or taking cognizance thereof a period of 15 days from the date

on which the notice has been served on the drawer has elapsed. If the period described in clause (c) of proviso to Section 138 has not expired, there is no commission of an offence or accrual of cause of action for filing the complaint under Section 138 of Negotiable Instruments Act. Thus, the question No.1 was answered in negative that if the complaint is filed before the expiry of the period of 15 days stipulated in the notice, it could not be treated as complaint in the eye of law and the criminal proceeding initiated on such complaint is liable to be quashed.

12. In the case on hand, admittedly the petitioner had received the notice on 02.04.2012. For computing the period of 15 days, the date of receipt of notice i.e. 02.04.2012 has to be excluded. 15 days period expires only on 17.04.2012. The cause of action for filing the complaint arises only from 18.04.2012. However, in this case, the complaint was filed in the Court on 17.04.2012. The aforesaid ruling relied on the learned counsel for the petitioner squarely applies to the facts and circumstances of this case. Since the complaint was filed before the accrual of cause of action i.e, before the expiry of 15 days from the date of receipt of notice, this complaint cannot be considered as a complaint in the eye of law and criminal proceeding initiated on the basis of this complaint is liable to be quashed.

13. With regard to the next question as to whether the complainant be permitted to present the complaint again notwithstanding the fact that the period of one month stipulated under Section 142 (b) for the filing of such complaint has expired, it was answered 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 is condoned under the proviso to clause (b) of Section 142 of Negotiable Instruments Act. This direction shall be deemed to be applicable to all such pending cases. As it was held that complaint filed before the expiry of 15 days from the date of receipt of notice issued under clause (c) of 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 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 after satisfying the court with sufficient cause.

14. In view of the clear cut findings given to questions raised before the Hon'ble Supreme Court, this Court has no option except to allow the Criminal Revision Petition by setting aside the judgment of the courts below, for the reason that the

complaint was filed before the accrual of cause of action i.e., before the completion of 15 days from the date of receipt of notice.

15. Accordingly, this Criminal Revision Petition is allowed by setting aside the judgment of the learned III Additional Sessions Judge, Vellore in C.A.No.19 of 2013 which confirmed the Judgment of learned Additional District Munsif Court, Judicial Magistrate, Ambur in C.C. No.80 of 2012 on this legal position with an option to the respondent to file a fresh complaint before the Jurisdictional Magistrate, after satisfying the Court with sufficient cause for availing the benefits of proviso (b) to Section 142 of the Negotiable Instruments Act. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(Insp.Cell)

//True Copy//

Sub Assistant Registrar

drl

To

1. The Additional District Munsif cum Judicial Magistrate, Ambur,
2. The Chief Judicial Magistrate, Vellore.
3. The III Additional Sessions Judge, Vellore at Tirupattur.
4. The Superintendent, सतयमेव जयते Central Prison, Vellore.

+1cc to Mr.T.R.Ravi, Advocate, S.R.No.69

+1cc to Mr.V.Raghavachari, Advocate, S.R.No.43180

Cr1. R.C.No.94 of 2017
and MP.Nos.1111 & 1112 of 2017

MG(CO)
CS/03/02/2021