



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.01.2021

PRONOUNCED ON : 04.02.2021

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CORAM:

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

A.S.NO.988 OF 2009

AND

M.P.NO.1 OF 2009

1. Rasipuram Lorry Owner's Association,
Rep. by its President,
Old Bus Stop, Rasipuram,
Namakkal District.
 2. Rasipuram Lorry Owner's Association,
Rep. by its Secretary,
Old Bus Stop, Rasipuram,
Namakkal District.
- ... Appellants/Defendants

/versus/

M.Velayutham,
S/o.Late Manickam,
Yuvaraj Lodge Palace Shop,
Town Bank Street,
Rasipuram, Namakkal.

... Respondent/Plaintiff

Prayer:

Appeal Suit is filed under Order 41 Rule 1 r/w Section 96 of C.P.C., as against the judgment and decree dated 16.07.2009 made in O.S.No.97 of 2005 on the file of the Additional District Court/Fast Track Court, Namakkal.

For Appellants : Mr.N.Manokaran

For Respondent : Mr.G.Prakash

J U D G M E N T

This Appeal suit is preferred by the defendants in the suit, assailing the money decree passed against them by the



Trial Court.

2. Pleadings in brief:

Plaint

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The plaintiff is a businessman residing at Rasipuram Town. The defendants are President and Secretary of Rasipuram Lorry Owners Association. The plaintiff and defendants are known to each other. The Rasipuram Lorry Owners Association is running a Petrol bunk at Rasipuram. The affairs of the petrol bunk is administered through the defendants. For the urgent financial requirement of the petrol bunk, the defendants borrowed hand loan of Rs.6,00,000/- from the plaintiff on 20.11.2002. When the plaintiff demanded back the loan amount, the defendants issued a cheque bearing No.657002 dated 28.11.2002 for Rs.6,00,000/- of Canara Bank, Rasipuram assuring that, sufficient balance is available in the account. The cheque was presented on 11.12.2002 for collection. The cheque returned on the same day with endorsement "Not arranged for. Exceeds arrangement and Payment stopped by the drawer". The plaintiff met the defendants and informed them about the bouncing of the cheque. The defendants promised to pay the money soon. Next day, on 12.12.2002, the defendants came to the plaintiff house and asked him to come to the Office of the Lorry Owners Association with the cheque and get the cash. Believing their words, the plaintiff went to the Office of the defendants. At the defendants Office, the defendants and three others forcible took the cheque and the bank intimation slip from him. They told him that the money will be paid only after verification of the accounts and till then, the plaintiff should not trouble them demanding the money. They refused to give back the cheque and the bank slip. The attempt of the plaintiff to get back his money through one A.K.B.Chinnaraj, Treasurer of the Lorry Owners Association and others failed. Hence, on 14.12.2002, the plaintiff gave a Criminal complaint at Rasipuram Police Station against the defendants and requested the police to get back the original cheque and bank intimation slip taken forcible by the defendants from him. The defendants handed over the cheque to the Inspector of Police, Rasipuram. However, the Inspector did not hand over the cheque to the plaintiff on the pretext that, the defendants had given to him two cheques, one blank cheque and another cheque drawn in favour of the plaintiff. He will handover both the cheques and refused to handover the cheque drawn in the name of the plaintiff separately.

3. Narrating these facts, the plaintiff issued notice dated 21.12.2002 to the defendants and demanded to repay the money or to face legal consequence. The defendants gave a reply through their Lawyer vide reply notice dated 30.12.2002 with



false allegations. The plaintiff had proceeded against the defendants with the photocopy of the cheque under Section 138 of Negotiable Instrument Act, before the Judicial Magistrate Court at Rasipuram. In the said private complaint, miscellaneous petition filed against the Inspector of Police, Rasipuram, for production of original cheque which was left in his custody. In the said petition, the Inspector of Police, in his counter stated that, he had returned the cheque to the second defendant. Therefore, another Miscellaneous Petition was filed against the second defendant for production of the original cheque. To escape from the liability, the second defendant averred that, he has handed over the cheque to the plaintiff. Therefore, the plaintiff filed Criminal Revision Petition before the High Court. The High Court in CrI.R.C 1161 of 2003 granted leave to proceed with the private complaint under Negotiable Instrument Act with the Secondary Evidence namely the photocopy of the cheque. The other documents relevant to the suit were filed before the Magistrate Court in C.C.No.408 of 2003 hence, leave sought to file the photocopy of those document for the present with an undertaking that the certified copies from the Magistrate Court will be obtained and produced later.

4. With these pleadings, suit filed for a money decree against the defendants for Rs.8,16,000/- (Rs 6,00,000/- towards principle and Rs.2,16,000/- towards interest at the rate of 12% from the date of return of the cheque i.e. 11.12.2002 till date of presenting the suit i.e. 11.12.2005).

Written statement of the defendants:-

5. The 1st defendant has filed written statement and same adopted by the 2nd defendant. According to the defendants, the suit is not maintainable since it is barred by limitation. The suit is liable to be dismissed for non-joinder of the necessary party viz., the Lorry Owner Association. The averment that the defendants borrowed Rs.6,00,000/- on 20.11.2002 from the plaintiff as hand loan and on 27.11.2002 gave cheque dated 28.11.2002 to discharge the loan are denied. If the said averment made in the plaint is true, then the plaintiff need not have waited till 11.12.2002 to present the cheque for collection. In fact, blank signed cheque was left with one Sankar, the Manager of the Petrol Bunk to use it in case of emergency. Mr.Sankar, died on 10.12.2002. The said Sankar is a close family friend of the plaintiff. The blank signed cheque stolen and been misused by the plaintiff by filling up his name and amount. The allegation that the cheque and the bank intimation slip was forcible taken from the plaintiff by the defendants is false and invented story of the plaintiff. The reason stated for not producing the original cheque is false. The suit filed based on the photocopy of the Negotiable



Instrument is not maintainable.

6. The Trial Court, based on the pleadings framed the following issues:-

1). Whether the plaintiff is entitled for the money claimed in the suit?

2). Whether the suit is barred by limitation?

3). What relief the plaintiff is entitled?

7. To prove his case the plaintiff has filed proof affidavit in lieu of Chief examination and mounted the witness box subjecting himself for cross examination. 14 documents relied and marked as Ex.A-1 to Ex.A-14. In defence, the 2nd defendant has filed his proof affidavit in lieu of Chief examination and mounted the witness box subjecting to cross examination. 4 documents relied and are marked as Ex.B-1 to Ex.B-4.

8. Regarding the limitation, the Trial Court held that the cheque dated 28.11.2002 was issued for discharging the existing debt. It was presented for collection on 11.12.2002. Cause of action to file suit arise on date of dishonouring i.e., 11.12.2002. The three years period of limitation end on 10.12.2005. Since, 10th and 11th of December 2005 fell on a Saturday and Sunday respectively, being public holidays, the suit presented on the next working day i.e., 12.12.2005 is not barred by limitation.

9. The plea of the plaintiff regarding issuance of cheque to discharge the hand loan and its dishonour on presentation. The criminal complaint given on 14.12.2002 against the defendants for snatching the original cheque by force, the order of the High Court in Criminal Revision Petition permitting the plaintiff to proceed against the defendants under section 138 of Negotiable Instrument Act with the photocopy of the cheque were all held to be proved and the Trial Court concluded that there is no evidence rebuttal placed by the defendants to prove the fact that blank signed cheque was stealthily taken away by the plaintiff and misused to file the suit without any liability to pay. Having found all the issues in favour of the plaintiff, the Trial Court decreed the suit.

10. In the appeal, the case of the defendants is that, the suit is on lost Negotiable Instrument. The plaintiff has not complied with the requirements of law as per Section 65 of the Indian Evidence Act for adducing secondary evidence. The Trial



Court erred in holding the suit is not barred by limitation. The suit initially filed against individuals as Officer bearers of the Lorry Owners Association, later amended deleting the name of the individuals. The amendment is fatal to the case of the plaintiff. The plaintiff failed to ascertain the signatory of the cheque. Regarding the signatory of the Cheque, the plaintiff has taken different plea in the suit and another in the Criminal complaint. The Trial Court ought to have taken note of this inconsistency and dismissed the suit as not proved. The Trial Court failed to note that the cheque in question was stolen from the table drawer of the Association. Taking advantage of the demise of its Manager Sankar on 10.12.2002, the plaintiff and others came to the bunk and taken away the signed cheques. The stolen cheque was presented later. The facts admitted by the plaintiff during the cross examination not given due consideration by the Trial Court.

11. The Learned Counsel for the appellant submitted that the Trial Court failed to consider that the plaintiff has not proved the existing debt. No evidence to show the plaintiff have financial capacity to lend Rs.6,00,000/- or he lend Rs.6,00,000/- to the Office bearers of the Association. The presumption under Section 118 of the Negotiable Instrument Act, wrongly drawn against the defendants. The Limitation of three years for recovery ought to have reckoned from the date of the cheque and not from the date of dishonour. The Trial Court erred in misunderstanding the provisions of Limitation Act. The limitation commences from the date on which the payment falls due and not from the date on which right to sue accrues. In the instant case, even assuming the cheque was issued to discharge the existing debt, the payment fall due on the date the cheque bear i.e., 26.11.2002.

12. The Learned Counsel further submitted that Ex.A-1 is the photocopy of the cheque. It is a secondary evidence. Law requires before admitting secondary evidence, the pre-conditions laid under Section 65 of the Evidence Act to be satisfied. In the instant case, the plaintiff had not satisfied those pre-conditions. The order passed by the High Court in CrI.R.C.No.1161 of 2003 without notice to the defendants is applicable only to the Criminal proceedings pending in C.C.No.408 of 2003 on the file of Judicial Magistrate, Rasipuram. The leave granted to accept photocopy of the cheque in the Criminal proceedings shall not be taken advantage in the Civil proceedings without compliance of Section 65 of Indian Evidence Act. More particularly, when the order in Criminal Revision is passed without notice.

13. In support of his submission, the Learned Counsel for the Appellant rely upon the following judgments:-



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1. U. Sree vs. Srinivas reported in 2013 (2) SCC 114.
2. Vijay vs. Laxman and another reported in 2013 (3) SCC 86.
3. Basalingappa vs. Mudibasappa reported in 2019 (5) SCC 418.

14. Per contra, the Learned Counsel for the respondent/plaintiff submitted that, the Trial Court judgment is unassailable. It is based on proven facts and law. The defendants have not disputed the fact that the subject cheque belongs to their account and it bears their signatures. It is admitted and proven fact that the said cheque was dishonoured on presentation. In the Criminal proceedings initiated for dishonouring of cheque, the High Court permitted to adduce secondary evidence namely the photocopy of the cheque being satisfied that the original cheque is not in the possession of the payee (the respondent herein). In the plaint, the loss of original cheque pleaded and the Court in the given facts and circumstance accepted the secondary evidence and marked as Ex.A-1. The defendants have extensively cross examined P.W-1 about the whereabouts of the original cheque.

15. The specific case of the plaintiff in the plaint as well as in his testimony regarding the original cheque was that, he was called for settling the due by the defendants and believing their words went to the Office of the defendants on 12.12.2002. The defendants forcible took away the cheque and informed, they will pay the money after verifying the account. The plaintiff gave police complaint about this and the police got back the cheque from the defendants but did not return it to him. In C.M.P.No.703 of 2003 filed before the Judicial Magistrate Court. The Inspector of Police, in response to the petition to produce the original cheque stated that, he has handed over the original cheque to 2nd defendant. Under these circumstances, the High court granted permission to proceed with the Criminal prosecution under Section 138 of Negotiable Instrument Act, based on the photocopy of the cheque. The defendants never challenged that order before the Hon'ble Supreme Court. The certificate copy of the depositions of the witnesses in the said criminal case, the petitions filed for production of document are marked as exhibits, so as to establish the defendants are liable to pay the cheque amount along with the interest from the date of dishonour of the cheque. In respect of limitation, the Learned Counsel defended the Trial Court view that the limitation commences only from the date of dishonour when the cause of action to sue accrues under Article 113 of the Limitation Act.



16. In support of this view, the Learned Counsel for the respondent referred the judgment of the Karnataka High Court rendered in P.Mohan -vs- Basavaraju reported in AIR 2003 Karnataka 213.

17. Point for determination:-

Whether the limitation for the suit based on a dishonoured cheque commence from the date of cheque or date of dishonour and whether in this case the plaintiff had satisfied the foundational requirement to adduce secondary evidence to sustain the suit on a lost negotiable instrument?

18. This suit under appeal is on lost Negotiable Instrument. Order VII Rule 16 of C.P.C., prescribes the procedure how a suit founded upon a lost Negotiable Instrument to be laid. The said procedure reads as below:-

Order VII Rule 16: Suits on lost negotiable instruments:-

"Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with plaint."

19. In the plaint at paragraph No.11, the circumstances under which the Negotiable Instrument namely the original of Ex.A-1 cheque got lost is narrated and the undertaking as contemplated under Order VII Rule 16 of C.P.C is also given by the plaintiff. Therefore, this Court finds no violation of procedure so far as in Order VII Rule 16 of C.P.C is concern.

20. The Learned Counsel for the appellant referring the contradictions in the notice Ex.A-5, plaint paragraph Nos.7, 10 and 11 and the deposition of P.W-1 in respect of the original cheque contended that, there is inconsistency in the evidence. In the notice dated 21.12.2002 issued by the Lawyer on the



instruction of the plaintiff, it is stated that after the police complaint dated 14.12.2002, the original cheque was returned back to the plaintiff on 17.12.2002. In the plaint, a different stand taken stating the original is not in his possession. The plaintiff is not certain whether the original cheque is with him or with the 2nd defendant or with the Inspector of Police. Thus, his case that the original cheque was forcibly taken away from plaintiff itself an imaginary story hard to believe. When the issuance of cheque for existing debt itself is doubtful, the presumption under Section 118 Negotiable Instrument Act, ought not to have drawn.

21. The above said contention are not in favour of the appellant in any manner. The plaintiff had proved to the core that the defendants Association cheque dated 28.11.2002 for Rs.6,00,000/- drawn in his favour was presented for collection on 11.12.2002 and the said cheque returned with endorsement exceeds arrangement and payment stopped by the drawer. Any contradiction regarding the present possessor of the original cheque will not be fatal for the plaintiff's case since those contradictions are not material contradiction to disbelieve the existence of the cheque issued in favour of the plaintiff. More so, to the statutory notice Ex.A-5 the defendants had replied through their Lawyer under Ex.A-7 dated 30.12.2002, that on 10.12.2002 when all the Officer bearers and member of the Association went to attend the funeral of Manager Sankar, the plaintiff along with one Palanisamy, owner of Gate Devi Wines came to the Association Office and threatened the staff by name Sakthivel and forcibly took away 7 signed blank cheques, Rs.20,000/- cash and other documents. The suit subject cheque is one among the 7 stolen cheque. In this connection, they have given complaint to the Rasipuram police. The defendants have not produced any evidence to show they gave complaint regarding theft of cheques nor examined the said Sakthivel in the suit. Particularly, when a serious crime of theft of cheques, document and cash alleged, the question arise why the defendants failed to give police complaint immediately or if complaint given, why they did not pursue action against the plaintiff. After 20 days of the alleged occurrence, for the first time, in reply to the statutory notice, the defendants have come out with the story of theft and that too not been proved through proper evidence. The certificate copy of the deposition of Sakthivel in the private complaint is marked as Ex.A-12. For appreciation of evidence in the civil case. The former statement of a witness in a Criminal proceedings have no relevancy in the present civil proceedings when Sakthivel availability to give evidence not in question.

22. The reputability of presumption under Section 118 (a) and Section 139 of Negotiable Instrument Act is clearly explained in Vijay -vs- Laxman and another reported in (2013) 3



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SCC 86, referring few other judgments of the Apex Court. The relevant passages are conveniently extracted as below:-

"24. Presumptions under Section 118(a) and Section 139 were held to be rebuttable on a preponderance of probabilities in *Bharat Barrel & Drum Mfg. Company. v. Amin Chand Payrelal* [(1999) 3 SCC 35] also where the Court observed:

"11....32....Though the evidential burden is initially placed on the defendant by virtue of Section 118 it can be rebutted by the defendant by showing a preponderance of probabilities that such consideration as stated in the pronote, or in the suit notice or in the plaint does not exist and once the presumption is so rebutted, the said presumption "disappears". For the purpose of rebutting the initial evidential burden, the defendant can rely on direct evidence or circumstantial evidence or on presumptions of law or fact. Once such convincing rebuttal evidence is adduced and accepted by the Court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the plaintiff who has also the legal burden."

25. In *Hiten P. Dalal v. Bratindranath Banerjee* [(2001) 6 SCC 16 : 2001 SCC (Cri) 960] this Court compared evidentiary presumptions in favour of the prosecution with the presumption of innocence in the following terms:

"22....Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against



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the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exists, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary."

23. In Basalingappa -vs- Mudibasappa reported in (2019) 5 SCC 418, the Hon'ble Supreme Court had summarised the principles regarding presumption and enumerated as below:-

"25. We having noticed the ratio laid down by this Court in the above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this Court in following manner:

"25.1. Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

25.2. The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the



26. Limitation:

The cheque dated 28.11.2002 issued to discharge the existing debt incurred on 20.11.2002. The said cheque presented for collection and got dishonour on 11.12.2002. The suit for recovery of money filed on 12.12.2002.

(i). Section 6 of the Negotiable Instrument Act, defines:- Cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand.

(ii). Section 5 of the Negotiable Instrument Act, defines:- Bill of Exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person for pay a certain sum of money only to or to the order of, a certain person or to the bearer of the instrument.

27. Under the Limitation Act, there is no specific Article prescribing limitation for suit based on dishonoured cheque. The Courts have drawn cue from Articles 19, 20, 35, 40 and 113 and had arrived at different conclusions in respect of fixing the commencement of limitation period for the suit on dishonoured cheque.

28. The Complaint shows the date of borrowing i.e., 20.11.2002 as the starting point for cause of action. According to the Learned Counsel for the appellant, the plaintiff ought to have pursued his relief within the period of Limitation. The dishonoured cheque cannot be construed as payment to save Limitation under Section 19 or 20 of the Limitation Act. In response to this submission, the Learned Counsel for the respondent rely upon P.Mohan -vs- Basavaraju case reported in (AIR 2003 Karnataka 213). In this judgment, the Learned Judge, after referring catena of judgments has held that the dishonoured cheque will save limitation. To arrive at proper conclusion, it is worth to extract the decision of various Court (discussed in P.Mohan case) in this regard. So same is reproduced below:-

"8. In support the contentions, the Counsel for the Appellant relied on the ruling of the Division Bench of the Bombay High Court in Chintaman Idhundiraj v. Sadguru Narayana Maharaj [AIR 1956 Bombay 553.]. In para 5 it is held thus:-

"5. Mr. Banaji on behalf of



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the plaintiff contends that the learned Trial Judge was in error in holding that the claim was barred by the law of limitation. Mr. Banaji says that the amount having been borrowed by Sri Narayan Maharaj on 12.7.1939 on his agreeing to repay it in October 1939, by acknowledgements and part payments made by cheques dated 25.9.1942 and 10.11.1944, the suit filed on 8.11.1947 must be regarded as within limitation.

We are unable to accept that contention. There is in our view no acknowledgement of liability merely by giving a cheque which is dishonored, and a cheque which is dishonored cannot be regarded as part payment within the meaning of Section 20, Limitation Act. Reliance was sought to be placed upon judgment of the Calcutta High Court in Kedar Nath v. Dinobandhu Saha (1916) cal 580.

In that case, Sir Lawrence Jenkins, Chief Justice, delivering the judgment of Court held that if a cheque is delivered to a payee by way of payment and is received as such, it operates as a payment subject to a condition subsequent that if upon due presentation the cheque is not paid, the original debt revives. It was further held that where such a cheque is signed by the debtor and paid in part payment of the principal of a debt, the cheque being subsequently honoured, the proviso to Section 20 of the Limitation Act has been complied with.

It is evident from the judgment in 'Kedar Nath's case (A) that a cheque was given in part-payment, it was received in part-



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payment and the cheque was honoured and the Court held in that case that the requirement of the proviso to Section 20, Limitation Act was complied with. In the present case the cheque was dishonored and when it was dishonored, the amount of the cheque cannot be regarded as part-payment of the principal.

It is true that when a cheque is delivered to a payee in whole or part satisfaction of a liability and it is accepted the delivery of the cheque and acceptance thereof would be regarded normally as conditional satisfaction of the liability, and if the cheque is dishonored, the original debt which was conditionally satisfied would be deemed to be revived.

By the delivery of the cheque dated 25.9.1942 it may be that the debt due by Narayan Maharaj was conditionally satisfied. But when the cheque was dishonored, there was a revival of the debt and the suit had to be filed within the normal period of limitation. In our view, the learned trial Judge was right, in holding that the claim for the amount of Rs. 35,000 on the original debt was barred by the law of limitation."

9. The Ruling of the Punjab and Haryana High Court in Northern India Finance Corporation (P) Ltd. v. R.L. Soni [AIR 1973 P & H 35.] . The relevant portion of para 5 it is held thus:

"5. I have no doubt in my mind that if the cheque had been encashed and if the cheque could be treated to be of the respondent, this would have



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amounted to part payment within the meaning of Section 19 of the Limitation Act, and would have saved the suit from getting barred by time. If, however, the cheque is not honoured, it cannot be said that the amount represented by the cheque has been "paid" by the drawer to the payee. Section 19 starts with the words where payment on account of a debt or of interest" is made before the expiration of the prescribed period "by the person liable to pay the debt" or by his agent duly authorised in this behalf. As already stated, I will assume that G.S. Bakshi was the duly authorised agent of the respondent for making the payment on behalf of the respondent to the company. But the cheque having, however been dishonoured, it cannot be said that any payment at all was made by anybody to the company by that cheque."

In the light of the ratio laid down in the decisions, it is contended that the issuance of a dishonoured cheque cannot be construed as a part payment to save the limitation under Section 19 or 20 of the Limitation Act. Besides the plaintiff has to base his claim on the original cause of action for recovery of the debt i.e. the date of handloan and that remedy should have been pursued within the period of limitation, the issuance of cheques can at the best offer as a piece of evidence to corroborate the original cause of action and does not constitute a cause of action by itself to institute a suit.

10. Per Contra, the Counsel for the respondent relied on the ruling of this



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Court in Surendra v. Smt. Padma [ILR 2000 Kar 579.], it is held thus:

"8. Here in this case, the Court below not examined the plaint properly and ignored from considering the material allegations, plaintiff's case is that defendant borrowed the money, no doubt in 1991. His further case is that defendant gave the cheque in payment of that amount, thereafter he changed the dates and, later on when the cheques were presented to the Bank for payment on 8th September and 9th of September 1992, the Bank dishonored the cheques on 8th September with endorsement to the effect, insufficient funds in the account and the other on 9th of September that, the account-holder is dead. So this cheque and the cause of action for the suit and valuation of claim in the suit have also been given on the basis of amount of cheque which defendant had given and which Bank had dishonored. It appears to be that this is a cheque for recovery of amount which is the subject-matter of cheque and which cheque has been dishonored, past history of the transaction may be different, but here the cause of action which is alleged to have been accrued on 8th and 9th September 1992, is really on the basis and on the ground that the amount of the cheque has been not paid by the Bank. In this view of the matter, in my opinion this is a suit for recovery of amount, on the basis of the cheque given by the defendant which have been refused by the Bank and, such a suit is not covered by any of the Articles given in the Schedule. To the present case, Article 19 will not be applicable to this case and



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Article 19 having not been applicable and, as no other Article has been pointed out to be applicable, in my opinion the suit which is governed by Article 113 of schedule to Limitation Act which provides that in suit, for which no limitation is provided else where in the Schedule, 3 years period from the date when the right to sue accrues and right to sue in such a case, will arise only after the cheque is dishonored and will accrue only after the date the cheque is dishonored by the Bank. That calculating limitation from 8th or 9th of September 1992, suit was filed on 29.5.1995, has been well within time from the date of cheque being dishonoured."

The ruling of the Supreme Court in Commissioner of Income Tax, Bombay South v. Ogale Glass Works Ltd. Ogalevadi [AIR 1954 SC 429.] may be usefully referred. In the said decision, the subtle distinction is made between a cheque (negotiable instrument) towards the payment of a past liability if accepted unconditionally as a full discharge of the liability, then the Negotiable Instruments itself would serve as a cause of action for basing a further action. Otherwise if the cheque issued is accepted conditionally that on realisation of the cheque a discharge of the liability is agreed upon, the claim to maintain an action on the basis of the original cause of action is not affected. In the case on hand, the pleadings and the evidence point out that the cheques were issued and accepted towards discharge of the liability. Therefore consequent dishonour would serve



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as a cause of action for the plaintiff to maintain the suit. That apart, the ruling of this Court in Surendra's case Surendra vs. Smt. Padma squarely applies to the facts on hand. Therefore both from the stand point of the date of dishonour of cheques the suit filed is within time."

29. When a case almost identical to the facts of the instant appeal came for consideration before the Hon'ble High Court of Delhi, in Ajanta Raj Proteins Private Limited & another vs. Himanshu Foods Private Limited reported in 2018 SCC Online Del 6874, Delhi High Court, after extensive analysis of law, has held that, the limitation will start only from the date of dishonor of cheque and not from the date of the cheque.

"16. The date of the cheque is 21st November, 2010. The return memo of HDFC Bank which quoted the remarks of Axis Bank is dated 10th May, 2011. The cheque issued by the Defendants was drawn on Axis Bank. The suit has been instituted on 8th May 2014. Thus, it is filed within three years of the date of dishonour of the cheque, but beyond three years from the date of cheque. The Defendant argues that the limitation has to be construed from the date of the cheque and not the date of dishonour."

17. The Defendants place heavy reliance on the judgment of the Learned Single Judge of this Court in Empire Home Appliances Pvt. Ltd. vs. Suraj Enterprises reported in 2016 SCC OnLine Del 3954, (dated 3rd May 2016 in R.F.A.No.208 of 2016) (hereinafter referred as, 'Empire Home Appliances'). In the said case, the Court held as under:-

"27. In the aforesaid light, there cannot be said to be any inconsistency in the judgments relied upon by the counsel for the appellant/plaintiff and the judgments to which his attention was drawn by me. Unlike the present case where the appellant/ plaintiff to bring the suit within limitation has to necessarily rely to Section



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18 and / or 19 for extension of limitation, Steel Authority of India Ltd. supra was not concerned therewith; that was a case of a suit for recovery of amount which was subject matter of cheque simpliciter. Similarly, Jhang Biradari Housing Residents Society supra as aforesaid was not a suit for recovery of money but a suit for declaration of title to immovable property and the period of limitation provided where for commences from the date when the right to sue first accrues. However the limitation for a suit for recovery of price of goods as the subject suits, does not commence from the date when the right to sue accrues but commences from the date of sale and delivery of goods and the extension of limitation by issuance of cheques which were dishonoured claimed by the appellant / plaintiff commences from the date when the acknowledgment was so signed and which can only be the date of the cheque and not the date of dishonour of cheque. To hold otherwise, would be doing violation to the language of Section 18. Moreover, the cheques subject matter of RFAs No. 209/2016, 210/2016 and 212/2016 were returned with the endorsement of "Account Closed."

"18. The Defendants also placed reliance on the Division Bench judgment of this Court in Ashok K. Khurana v. M/s. Steelman Industries reported in A.I.R 2000 Del 336, which differentiates between ante-dated and post-dated cheques and held that, in the case of ante-dated cheques, the limitation would begin from the date of the cheque and in the case of a post dated cheque, limitation would not begin until it can be presented for encashment. The other judgments relied upon by the Defendants have



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mostly been discussed in the above two judgments."

19. On the other hand, the Respondent relied upon the judgment of the Division Bench of this Court in Rohini Strips v. Steel Authority of India Limited (dated 28th September, 2007 in F.A.O. (O.S) No. 380 of 2007) (hereinafter referred as 'Rohini Strips'). The Court was dealing with a suit under Order XXXVII of the C.P.C., wherein, leave to defend had been refused. The Learned Single Judge of this Court in Steel Authority (supra) had taken into consideration Article 35 of the Limitation Act and held as under:-

"...I am of the considered view that the limitation would commence to run from the date when the cheques in question were returned unpaid to the plaintiff. Since in this case the cheques in question were admittedly returned unpaid to the plaintiff on the ground 'not arranged for' on 01.6.2000, the present suit filed on 23.05.2003 is to be taken as filed within limitation. Hence, the objection regarding limitation taken by the defendants has no merit..."

20. The Division Bench in Rohini Strips (supra), observing that there was no illegality in the Single Judge's Order, notes that the cause of action did not arise till the cheques were dishonoured. The Court held:-

"4. We find no illegality in the aforesaid order. The cheques were given by the appellants to the respondent only on 16.3.2000. The aforesaid cheques were to be encashed after presentation in terms of Section 64 of the Negotiable Instruments Act, 1881. The cause of action in the suit was dishonour of the cheque and not merely issuance of the cheque. On



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the issue of cheque, the suit could not have been filed. Only on dishonour of the cheques that the right to sue accrued. The said cheques were returned back to the respondent unpaid on the ground "not arranged for" on 01.6.2000 and therefore, the period of limitation would start running from the said date. The suit was filed on 23.05.2003. The suit was within the limitation would start running from the said date. The suit was filed on 23.05.2003. The suit was within the period of limitation consequently, the aforesaid findings recorded by the Learned Single Judge in respect of the plea of Limitation cannot be said to be erroneous in any manner."

21. In the case of Order XXXVII of the C.P.C, a suit which is based on monetary instruments for recovery of amounts that are due and payable, the Court would have to see as to when the cause of action for filing of the suit arose. In a case like the present one, where there were a series of transactions between the parties and some amount remained outstanding, the giving of the cheque, which was given as a security, would not by itself construed the cause of action. It is only when the payment is not made and the person in whose favour, the cheque has been issued, seeks to encash the cheque and it is thereafter dishonoured, that the right to sue itself arises. Until and unless the cheque is dishonoured, the Plaintiff cannot maintain a suit under Order XXXVII of the C.P.C in case of a cheque. There could be a situation where a cheque which has been issued as security for a future payment would be presented only when amounts become due and payable in future. The law of limitation has been designed not to reject claims of parties but to only ensure that old claims are not re-agitated and there is a finality after a particular period.

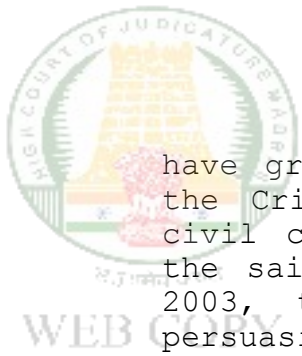


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22. In Rohini Strips (supra), the Court was dealing with an Order XXXVII suit where cheques were issued for price of goods. It is in the said context that the Division Bench of this Court clearly upheld the finding that the cause of action commences to run from the date when the cheques were returned unpaid. However, on the other hand in Empire Home Appliances (supra), the learned Single Judge has distinguished the judgment of Rohini Strips (supra). The facts in Empire Home Appliances (supra) are distinguishable from the facts of the present case inasmuch as, in the said case, the suits were not simpliciter suits for recovery based on a cheque. The suits there were based on supply of goods, receipt of goods, credit notes issued, and thus, a much more detail factual analysis was required therein.

23. In the present case, however, though the transaction between the parties relates to supply of skimmed milk powder, the suit is a simple suit under Order XXXVII of the C.P.C based on a cheque. The cheque was valid on the date it was presented. It was returned due to 'insufficient funds'. It is the Defendants' contention that the cheque for Rs.15,00,000/- has been issued as a security, however, there is no document to this effect. The Plaintiff simply submits that the cheque in question was dishonoured and that gave it a cause of action to file the suit for recovery. The cause of action arose only when the cheque was dishonoured and hence, the suit is filed within limitation."

30. To sum up, it is suffice to say, that a cheque is bill of exchange. The period of limitation is three years. Only the date of commencement of limitation differs based on the further transaction on the said instruments. Under Article 35 of the Limitation Act, the three years period commences from the date of the bill, provided there is no restriction in writing postponing the right to sue. Under Article 40, the right of the payee to sue the drawer of a bill of exchange dis-honoured by non-acceptance commences from the date of refusal to accept. Under Article 113 three years time commences from the date when



have granted by the High Court in Crl.R.C. No.1161 of 2003 in the Criminal proceedings will not perforce applicable to the civil case. Furthermore, the plaintiff has not even produced the said the order of High Court passed in Crl.R.C.No.1161 of 2003, to know the content of it and whether it has any persuasive value for accepting the secondary evidence.

33. In Ashok Dulichand v. Madahavlal Dube reported in (1975) 4 SCC 664, wherein, it has been held that;

"According to clause (a) of Section 65 of the Indian Evidence Act, secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it."

Thereafter, the Court addressed to the facts of the case and opined thus: -

"In order to bring his case within the purview of clause (a) of Section 65, the appellant filed applications on July 4, 1973, before the Respondent No.1 was examined as a witness, praying that, the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed photostat copy. Prayer was also made by the appellant that in case Respondent No.1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was, however, nowhere stated in the affidavit that the original document of which the photostat copy had been filed by the appellant was in the possession of Respondent No.1. There was also no other material on the record to indicate that the original document was in the possession of Respondent No.1. The appellant further failed to explain as to what were the circumstances under which the photostat copy was prepared and who was in possession of



the original document at the time its photograph was taken. Respondent No.1 in his affidavit denied being in possession of or having anything to do with such a document."

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34. In J. Yashoda v. K. Shobha Rani reported in (2007) 5 SCC 730, after analyzing the language employed in Sections 63 and 65 (a), a two-Judge Bench of the Hon'ble Supreme Court held as follows:-

"Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the section."

35. In M. Chandra vs. M.Thangamuthu and Other reported in (2010) 9 SCC 712, it has been held as follows:-

"It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasised that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party."

36. In H.Siddiqui (Dead) by Lrs. vs. A Ramalingam reported in [(2011) 4 SCC 240, while dealing with Section 65 of the Evidence Act, the Hon'ble Supreme Court, opined though the said provision permits the parties to adduce secondary evidence, yet such a course is subject to a large number of limitations.



In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It has been further held that mere admission of a document in evidence does not amount to its proof. Therefore, it is the obligation of the Court to decide the question of admissibility of a document in secondary evidence before making endorsement thereon.

37. In U.Sree -vs- Srinivas reported in A.I.R. 2013 SC 415 the Hon'ble Supreme Court referring all the above cases, held that, in the case at hand, the Learned Family Judge has really not discussed anything relating to foundational evidence. The High Court has only mentioned that when the letter was summoned and there was a denial, the secondary evidence is admissible. In our considered opinion, such a view is neither legally sound nor in consonance with the pronouncements of this Court and, accordingly, we have no hesitation in dislodging the finding on that score.

38. To add, yet another judgment of the Hon'ble Supreme Court rendered in Rakesh Mohindra -vs- Anita Beri and other reported in 2015(6) CTC 793 (SC) throw enough light to the point under consideration by these words:-

"The pre-conditions for leading secondary evidence are that such original documents could not be produced by the party relied upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original documents is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot accepted."

39. Thus, it is amply clear that, parties are not absolutely restrained from adducing secondary evidence. What is expected under laws is, before adducing secondary evidence plausible reason and factual foundation for laying secondary



evidence has to be established. On going through the pleadings and evidence in this case, san filing formal application to receive secondary evidence and no separate application or notice caused to the defendants for production of document, the plaintiff had laid the necessary factual foundation for adducing secondary evidence and had accounted for not producing the original cheque. The Defendants had not pleaded or proved that they were prejudiced by admitting secondary evidence. In this context, it is appropriate to refer the judgment of the Punjab and Harayana High court rendered by Hon'ble Justice K.Kannan (as he then was) following the Hon'ble Supreme Court judgement rendered in U.Sree -vs- Srinivas cited supra.

"In U. Sree Vs. U. Srinivas (2013) 2 SCC 114 referred to above the Supreme Court was referring to the foundation that would require to be laid before secondary evidence is taken as admissible. In the absence of foundation evidence as required under Section 65 of the Evidence Act, the Court said that it will be inadmissible. The Court however observed that even a mere admission of a document in evidence would not amount to its proof. Therefore, it is the obligation of the Court to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. There is no requirement to even file a petition for reception of secondary evidence. It is an essential rule of evidence that a justification which a person sets out at the time when the document is sought to be exhibited as evidence is tendered in the chief examination. (emphasis added) "

40. I concur the above view expressed by the Hon'ble Punjab and Haryana High Court.

41. In the result, the points for determination formulated are answered as below:-

The limitation for the suit based on a dishonoured cheque commences from the date of dishonour. The facts pleaded and proved discloses that the plaintiff had satisfied the foundational requirement to adduce secondary evidence to sustain the suit on a lost negotiable instrument. As a result, the Appeal Suit stands dismissed.



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42. Accordingly, this Appeal Suit is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

bsm

To

- 1.The Additional District Court/Fast Track Court, Namakkal.
- 2.The Section Officer, V.R.Section, High Court, Madras.

+1cc to Mr.M.Manokaran, Advocate, S.R.No.6037
+1cc to Mr.L.Chandrakumar, Advocate, S.R.No.6022

A.S.No.988 of 2009

CNR(CO)
PM/20/10/2021