

IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 121 of 2002

Vishal Dalmia

Vs.

Gour Chandra Sarkar.

For the Appellant/Complainant : Ms. Rita Datta.

For the Opposite Party/Accused : Ms. Pushpita Saha.
(from the State panel)

Heard on : 17.08.2022

Judgment on : 05.09.2022

Shampa Dutt (Paul), J.:

This appeal is directed against judgment and order dated 30.01.2002 passed by the learned Judge, 10th Bench, City Sessions Court, Calcutta in Criminal Appeal No. 62 of 2000 setting aside the judgment and order of conviction and sentence dated 30.08.2000 passed by the learned Metropolitan Magistrate, 5th Court, Calcutta in Complaint Case No. C-869/1997 and thereby the Sessions Court acquitted the respondent from the charge levelled against him.

The appeal has been filed on the ground that the notice of intimation of the dishonoured cheque was admittedly received by the appellant/complainant on 29.01.1997. The notice under Section 138 N.I. Act was issued on 11.02.1992 and received by the respondents/accused on 12.02.1997. The period within which the respondent should have paid the amount of the dishonoured cheque i.e. **within 15 days of receipt of the notice** which is 27.02.1997 **(though this Court finds that the date should be 28.02.1997)** as the date of intimation of the dishonoured cheque is to be excluded from the period of 15 days). The appellant submits that the cause of action arose on 28.02.1997 i.e. on the next date after 27.02.1997 (12+15=27) and the complaint was filed within one month i.e. 29.03.1997 (though it is seen that the cause of action arose on 01.03.1997) 13.2+15=28.2.97, cause of action rises on 01.03.1997 as (February 1997 had 28 days) 12.02.1997 and 28.02.1997 is to be excluded. It is further case of the appellant/complainant that the learned Sessions Judge came to the wrong conclusion that the case

should have been filed on/or before 26.03.1997 as there has been an error in calculation and hence the judgment and order under this appeal being erroneous is liable to be set aside.

Findings with reason

It is seen that the learned Metropolitan Magistrate vide his judgment dated August 30, 2000 in Complaint Case C-869/1997 held that the accused in discharge of his liability issued a cheque bearing number 475603 dated 27.01.1997. The cheque was deposited by the petitioner but was dishonoured with the remark "insufficient fund". The dishonoured memo from the bank was received by the petitioner on **29.01.1997**. The petitioner through his lawyer sent a demand notice to the accused under Section 138 of the Negotiable Instrument Act, 1881 on **11.02.1997** (within 15 days of receiving intimation). The accused person duly acknowledged the said demand notice on 12.02.1997 but failed to pay the amount of the dishonoured cheque.

The defence case before the learned Magistrate was of innocence and that the provisions of Section 138 of the N.I. Act had not been duly complied. Exhibit '4' is the cheque bearing number 475603 dated 27.01.1997. Exhibit '6' is the bank's memo dated 29.01.1997 by which the dishonour of the cheque was intimated. Exhibit '7' is the demand notice dated 11.02.1997.

The complainant was examined **prosecution witness no. 1** as (PW-1) and submits that Exhibit '4' was admittedly issued by the accused person in

discharge of his liability and it shall be presumed so unless the contrary is proved.

Prosecution witness no. 2 and **prosecution witness no. 3** are bankers who have corroborated the case of the petitioner and the complainant in respect of the dishonor of the cheque.

Section 138 of the N.I. Act, 1881 is quoted hereinbelow:-

“138. Dishonour of cheque for insufficiency, etc., of funds in the account.

— Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for 19 [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, 20 [within fifteen days] (case of 1997–

15 days) of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.— *For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.”*

The learned Magistrate held that the notice dated 11.02.1997 was received by the accused on 12.02.1997. Admittedly, the cheque was dishonoured on 29.01.1997 and it is seen that the notice was duly sent within the statutory period under Section 138(b) of the N.I. Act. The complaint was filed on 29.03.1997 (28th March, 1997 was a Holiday being “Good Friday”). The learned Magistrate held that the case was filed within one month from the date of cause of action i.e. 28.02.1997 (though it should be 01.09.1997, 13.02.1997+15 days=28.2.97, 12.02.1997 & 28.02.1997 are to be excluded. As such cause of action arose on 01.09.1997, as the month of February 1997 had 28 days).

Section 142(b) of the N.I. Act, 1881 is quoted hereunder:-

142. Cognizance of offences. — *Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—*

(a);

(b) such complaint is made within one month of the date on which the cause of action arises under clause.

(c) of the proviso to section 138.

[Provided that the cognizance of a complaint may be taken by the Court after the pre-scribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.]

From the above Section, it is clear that the complaint can be filed within one month of the cause of action. In this case, the notice was received on 12.02.1997 and the payment was to be made within 15 days i.e. by 28.02.1997. As the date for receipt of notice was 12.02.1997, is to be excluded. And cause of action arose on 01.09.1997 (12.02.1997 and 28.02.1997 to be excluded).

The month of February 1997 had 28 days. So from 01.09.1997, once month (30 days) shall be within 30.03.1997. Admittedly, 28.03.1997 was a holiday being Good Friday and the case was filed on 29.03.1997 i.e. within the statutory period as laid down under Section 138 of the N.I. Act and considering the materials and evidence on record convicted the accused/respondent accordingly.

On appeal, the learned Sessions Judge, 10th Bench, City Sessions Court in Criminal Appeal No. 62 of 2000 vide judgment dated 30.01.2002, set aside the judgment of conviction and sentence passed by the learned Metropolitan

Magistrate, 5th Court, Calcutta dated 30.08.2000. It was held by the learned Sessions Judge that as the notice was received on 12.02.1997, the 15 days expired on 26.02.1997. (Totally erroneous as ever if 12.02.1997 is included it falls on 27.02.1997).

It is found that the calculation which starts from here is totally wrong. It is well-settled principle and also held by the Supreme Court in several cases that the date of receipt of intimation is to be excluded i.e. 12.02.1997 is to be clearly excluded from the calculation. Accordingly, the period from 13.02.1997 shall be counted with 15 days and the date shall be 28.02.1997 so the first date when cause of action arose to file the complaint in this case, was 01.09.1997 (February 1997 has 28 days).

The Sessions Judge held that the complaint should have been filed on/or before 26.03.1997 which in view of the error in calculation in the first instance led to all other calculations being wrong. The Sessions Judge while considering the facts in respect of the calculation done by him held that no cognizance can be taken of offence on the complaint if it is not filed within the statutory period of one month.

Proviso to Section 142(b) of the said Act lays down the provision for condonation of delay, if any, which admittedly in the present case was not done.

The Sessions Judge holding that the Court cannot take cognizance as it is not within the statutory period of one month allowed the appeal and set

aside the judgment and order of conviction and sentence of the learned Magistrate.

It is clearly seen by this Court that the learned Magistrate was correct in his computation of the period of one month while considering the date of filing the complaint and took cognizance therein though the complaint had more time as 12.02.1997 and 28.02.1997 are to be excluded.

Admittedly, the accused received notice on 12.02.1997. The period of 15 days for making the payment of the amount of dishonoured cheque has to be calculated from 13.02.1997 and ends on 28.02.1997 and cause of action arose on 01.09.1997 (February 1997 has 28 days) and thus the compliant had time till 30.09.1997. The complaint has been filed on 29.03.1997. Learned Magistrate rightly held that 28.03.1997 was a holiday on the ground of “Good Friday” and as such the law provides that the next day has to be taken as the date for computation. Accordingly, it is seen that the complaint filed before the Court was within the statutory period as provided under Section 142(b) of the N.I. Act.

Conclusion

In view of the aforesaid findings, the judgment/order of the learned Sessions Judge, 10th Bench, City Sessions Court, passed on 30.01.2002 is erroneous and is accordingly set aside.

This is a case of the year 1997 (more than 25 years) as such the interest of justice will be met if the order of sentence dated 30.08.2000 passed by the Ld. Metropolitan Magistrate, 5th Court, Calcutta is modified by setting aside the sentence of imprisonment and the amount of fine be increased.

The judgment and order of conviction and sentence dated 30.08.2000 passed by the learned Metropolitan Magistrate, 5th Court, Calcutta is hereby **modified to the following extent and affirmed.**

That the accused is hereby directed to pay a fine of Rs. 1.5 lakh i.d. to suffer imprisonment for three months.

The appeal being CRA 121 of 2002 stands allowed.

Lower court records along with a copy of this judgment be sent down at once to the learned Trial Court for information and necessary action, if any.

Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Shampa Dutt (Paul), J.)