IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 13.06.2022

Judgment Pronounced on : 21.06.2022

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Crl.A.No.541 of 2019

M/s. Radha Exports India Pvt. Limited
Rep. by its Authorised Signatory Manager,
H.Sundararaman
.. Appellant / Complainant

Versus

1. Vishwanathan

2. M/s. Vishwa Vijay Granites
Rep. by its Proprietor S.Vishwanathan

.. Respondents / Accused 1 & 2

Prayer: Criminal Appeal is filed under Section 378 of Cr.P.C., to call for the records in C.A.No.110 of 2018 on the file of the learned XVIII Additional Sessions Judge, Chennai, dated 05.01.2019 and set aside the same and further pleased to confirm the judgment delivered by the Trial Court in C.C.No.8685 of 2007 on the file of the learned Metropolitan Magistrate, Fast Track Court-III, Saidapet, Chennai, dated 14.03.2018.

For Petitioner : Mr.R.Vivekananthan
For Respondents: Mr.B.R.Shankaralingam

JUDGMENT

By a judgment, dated 14.03.2018, the learned Magistrate, Fast Track Court-III, Saidapet, Chennai in C.C.No.685 of 2007 convicted the respondents for an offence under Section 138 of the Negotiable Instruments Act, 1881 and the first respondent/accused was sentenced Simple Imprisonment for six months and both the accused were directed to pay the cheque amount as compensation under Section 357 of the Code of Criminal Procedure. On an appeal by the accused persons, by a judgment, dated 05.01.2019 in Crl.A.No.110 of 2018, the learned XVIII

Additional Sessions Judge, Chennai upturned the finding of guilt and acquitted the accused, as against which, the present appeal is filed.

2. In the appeal, it is the contention of the respondents/accused that there was no valid Power of Attorney/Authorisation, filed along with the complaint, which is filed on behalf of the Corporate entity and therefore, the said document, technically being erroneous, the complaint ought to have been dismissed. It is the second contention that the complainant failed to prove that there was any legal enforceable debt towards the issue of cheque as the alleged liability in the complaint is time barred. Of the said contentions, the lower Appellate Court found that the Ex.P-7, Authorisation is valid and correct, but, however, accepted the case of the respondents/accused on the appreciation of the evidence on record that the accused have raised probable defence as to the time barred debt and the complainant did not let in any further evidence to prove that the debt was within the period of limitation and acquitted the accused. Apart from the above two contentions, yet another legal submission that the notice, calling for the cheque amount due, is not issued within a period of thirty days, as mandated under Section 138 of the Negotiable Instruments Act, 1881, is also raised before this Court.

3. Heard Mr.R.Vivekananthan, learned Counsel appearing for the appellant and Mr.B.R.Shankaralingam, learned Counsel appearing for the respondent.

4. Mr.R.Vivekananthan, learned Counsel appearing for the appellant would submit that the contention that the notice was not issued within a period of thirty days time is incorrect because in the instant case as per the evidence available on record, the complainant came to know that the cheques were dishonoured only on 10.08.2007. Therefore, according to him, the period of thirty days have to be calculated by excluding 10.08.2007 i.e., counting from 11.08.2007. If counted from 11.08.2007, the thirty days period expires on 09.09.2007 and 09.09.2007, being falling under Sunday, as per Section 10 of the General Clauses Act, 1897, the notice which is issued on the next working day is perfectly in order and therefore, he would submit that the said contention is without any merits.

5. He would further submit that the appellant/complainant had the benefit of presumption under Section 139 of the Negotiable Instruments Act, 1881 and the Trial Court misread the complaint as if it has been admitted that the liability is of the year 2003 whereas it is categorically stated that it is continuing liability and therefore, he would submit that a clear reading of complaint as well as evidence on record, it would be

clear that the agreement was not placed on record and there was no clear-cut date on which the liability arose, which was placed on record in the Trial Court and therefore, the accused had to conclusively prove that the liability was of the year 2003 itself and when there is a presumption in favour of the complainant, the lower Appellate Court ought not to have acquitted the respondent and interfered with the correct judgment of the Trial Court.

6. Per contra, Mr.B.R.Shankaralingam, learned Counsel appearing on behalf of the respondent would submit that in this case, still the technical objection, as to the flaws in the Power of Attorney as well as the resolution, holds good, but, however, would submit that in view of the findings of the lower Appellate Court, they would not press the said technical objection. The learned Counsel would further submit that the complainant has categorically admitted in the complaint that the post-dated cheques were issued in the year 2003 itself. The serial numbers of the cheques are the consecutive numbers. On a reading of the complaint, it would be clear that the liability is of the year 2003 and if it is from a subsequent date, it should be the complainant who has to categorically plead the same in the complaint and when the complainant himself has the agreement copy and he has not produced the same before the Trial Court, the respondent have raised a probable defence of time barred debt, which is rightly considered by the lower Appellate Court and submitted that there is nothing in this appeal so as to upturn the finding of acquittal into one of conviction.

7. As far as the limitation for the purposes of issue of notice is concerned, he would submit that the words used by the Section 138 of the Negotiable Instruments Act, 1881 is 'within thirty days' from the date of dishonour of the cheque. If it has to be within thirty days, then it has to be on 29th day. Therefore, he would submit that even excluding the date on which the complainant had knowledge, still the notice ought to have been issued on the 29th day and therefore, the last date expired on 8th December, 2007. Thus he would submit that legal notice was not issued in time and therefore, the accused is entitled for acquittal on the said ground also.

8. I have considered the rival submissions made on either side and perused the material records of the case and I am of the view that the following questions arise for consideration in this appeal:-

> (i) Whether or not the notice of calling for payment issued by the complainant is within the limitation period of thirty days, as mandated under Section 138 of the Negotiable Instruments Act, 1881?

(ii) Whether the lower Appellate Court erred in acquitting the respondent by accepting the probable defence of time barred debt?

Question No.I:-

9. The contention of the learned Counsel for the respondent that just because the word used is within the thirty days, the notice has to be issued on 29th day is incorrect and hence rejected. When the statute grants thirty days time for the complainant to issue notice, the same cannot be read as twenty nine days. The manner in which the period of thirty days has to be counted is no longer res integra as the Hon'ble Supreme Court of India, in the judgments of Simranpal Singh Suri Vs. State and Another[1], M/s Rayapati Power Generation Pvt Ltd. Vs. Indian Renewable Energy Agency (LTD)[2], Saketh India Ltd. Vs. India Securities Ltd.,[3], Econ Antri Ltd. Vs. Rom Industries Ltd.,[4], had clearly held that the date, on which the complainant got the notice of the factum as to the return of the cheque, has to be excluded. It is useful to quote the relevant paragraphs of the said judgments of the Hon'ble Supreme Court of India:-

" Simranpal Singh Suri Vs. State and Another

7. The aforesaid principle of excluding the day from which the period is to be reckoned is incorporated in Section 12(1) and (2) of the Limitation Act, 1963. Section 12(1) specifically provides that in computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded. Similar provision is made in sub-section (2) for appeal, revision or review. The same principle is also incorporated in Section 9 of the General Clauses Act, 1897 which, inter alia, provides that in any Central Act made after the commencement of the General Clauses Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word

1 2021 SCC Online Del 236

2 CRL.M.C. 2438/2021 and CRL.M.A. 16048/2021

3 (1999) 3 SCC 1

4 (2014) 11 SCC 769

"from" and for the purpose of including the last in a series of days or any other period of time, to use the word "to".

8. Hence, there is no reason for not adopting the rule enunciated in the aforesaid case which is consistently followed and which is adopted in the General Clauses Act and the Limitation Act. Ordinarily in computing the time, the rule observed is to exclude the first day and to include the last. Applying the said rule, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of 15 days from the date of the receipt of the notice by the drawer expires. The period of 15 days in the present case expired on 14-10-1995. So cause of action for filing complaint would arise from 15-10-1995. That day (15 th October) is to be excluded for counting the period of one month. Complaint is filed on 15-11-1995. The result would be that the complaint filed on 15 th November is within time."

10. In M/s Rayapati Power Generation Pvt Ltd. Vs. Indian Renewable Energy Agency (LTD) (cited supra), it is held thus :

" 17. In view of Econ Antri (Supra), a decision albeit rendered in relation to Section 138(c) and Section 142(b) N.I. Act, it is discernible that the words 'of' and 'from' used under Section 138 N.I. Act do not imply different meanings. It is safe to infer that the use of the word „of" in Section 138(b) N.I. Act does not imply either that the day on which information regarding dishonour of cheque is received by the complainant from the bank is to be included while computing the limitation period for issuance of a valid legal notice. The legal position, as culled out from the judicial dicta referred to hereinabove, is that while computing the limitation period of 30 days prescribed under Section 138(b) N.I. Act for issuance of a valid legal notice, the day on which intimation is received by the complainant from the bank that the cheque in question has been returned unpaid has to be excluded."

11. In Saketh India Ltd. Vs. India Securities Ltd., (cited supra), it is held that :

" 7. The aforesaid principle of excluding the day from which the period is to be reckoned is incorporated in Section 12(1) and (2) of the Limitation Act, 1963. Section 12(1) specifically provides that in computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded. Similar provision is made in sub-section (2) for appeal, revision or review. The same principle is also incorporated in Section 9 of the General Clauses Act, 1897 which, inter alia, provides that in any Central Act made after the commencement of the General Clauses Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from" and for the purpose of including the last in a series of days or any other period of time, to use the word "to".

8. Hence, there is no reason for not adopting the rule enunciated in the aforesaid case which is consistently followed and which is adopted in the General Clauses Act and the Limitation Act. Ordinarily in computing the time, the rule observed is to exclude the first day and to include the last. Applying the said rule, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of 15 days from the date of the receipt of the notice by the drawer expires. The period of 15 days in the present case expired on 14-10-1995. So cause of action for filing complaint would arise from 15-10-1995. That day (15th October) is to be excluded for counting the period of one month. Complaint is filed on 15-11-1995. The result would be that the complaint filed on 15th November is within time."

12. Again in Econ Antri Ltd. Vs. Rom Industries Ltd., (cited supra) the Hon'ble Supreme Court held as follows :

> "42. Having considered the question of law involved in this case in proper perspective, in the light of relevant judgments, we are of the opinion that Saketh [Saketh India Ltd. v. India Securities Ltd., (1999) 3 SCC 1 : 1999 SCC (Cri) 329] lays down the correct proposition of law. We hold that for the purpose of calculating the period of one month, which is prescribed under Section 142(b) of the NI Act, the period has to be reckoned by excluding the date on which the cause of action arose. We hold that SIL Import, USA [SIL Import, USA v. Exim Aides Silk Exporters, (1999) 4 SCC 567 : 1999 SCC (Cri) 600] does not lay down the correct law. Needless to say that any decision of this Court which takes a view contrary to the view taken in Saketh [Saketh India Ltd. v. India Securities Ltd., (1999) 3 SCC 1 : 1999 SCC (Cri) 329] by this Court, which is confirmed by us, do not lay down the correct law on the question involved in this reference. The reference is answered accordingly."

13. Therefore, in this case, the 10^{th} Day of August, 2007 has to be excluded and the thirty days have to be counted from 11.08.2007. If counted from 11.08.2007, the 30^{th} day falls on 09.09.2007, which is Sunday as per the Calendar produced before this Court and agreed by both sides learned Counsel. Therefore, if the last day of the limitation falls on a Sunday, as per Section 10 of the General Clauses Act, 1897, it is open for the complainant to issue notice in the next working day as it would not have been possible for him to post his notice on 09.09.2007, which is being a Sunday. Therefore, I reject the submissions made by the learned Counsel for the respondent in this regard and I hold that the demand notice is issued well within the period of limitation and answer the question accordingly.

Question No.II:-

14. In order to determine the question No.II as to the time barred debt, it is essential to extract the relevant averments in the complaint which are paragraph Nos.3, 4 and 5, which are as follows:-

> " 3. The Complainant states that based on the assurances and representations made by the first accused and upon perusal of some of the Lease agreement entered into between

the second accused and the quarry owners, the complainant had accepted the offer of supply of Grey Granites from the second accused. Subsequently, the complainant had entered into an agreement dated 09/04/2003 with the second accused.

4. The complaint states that the second accused had failed to supply the said materials regularly as promised inspite of the advance amount paid by the complainant, as on date both of the accused are due a sum of Rs.59,41,902/-(Rupees Fifty Nine Lakhs Forty One Thousand Nine Hundred and Two only).

5. The complainant states that they have repeatedly contacted both the accused to either supply the materials or return the amount advanced by them, to which the first accused has sought for some time to return the amount and gave 7 post dated cheques in Nos.716181 to 716184 each for a sum of Rs.9,00,000/-[Rupees Nine Lakhs only], Cheque No.716188 for a sum of Rs.6,41,902/-[Rupees Six Lakhs Forty One Thousand and Nine Hundred and Two Only], Cheque No.716189 for a sum of Rs.8,00,000/-[Rupees Eight lakhs only] and cheuqe No.716190 for a sum of Rs.9,00,000/-[Rupees Nine Lakhs only] all drawn on M/s. Syndicate Bank, Ilakal Branch, Bagalkot District, Karnataka totaling a sum of Rs. 59,41,902/-(Rupees Fifty Nine Lakhs Forty One Thousand Nine Hundred and Two only)."

15. Thus, it may be seen that the complaint is nebulous and does not specifically speak as to on which date the liability arose and it did not also specifically state that on what date, the seven post-dated cheques were handed over. It is, in this background, the lower Appellate Court considered the following evidence of P.W.1, which is extracted as follows:-

"09-04-2003 தேதியிட்ட ஒப்பந்தம் நீதிமன்றத்தில் தாக்கல் செய்யவில்லை. அந்த ஒப்பந்தத்தில் உள்ள உடித்துக்கள் பற்றி எனக்கு செரிய ம், நான் தாக்கல் செய்த புகாரில் பத்தி 5–ல் 7 போஸ்டேட்டட் செக்கில் 09/04/2003–லேயே கொடுக்கப்பட்டது என்று சொன்னால் அவ்வாறு சொல்லப்பட்டுள்ளது. அந்த 7 செக்கில் 2 செக்கை பயனபடுத்திதான் இந்த வழக்கு தாக்கல் செய்யப்பட்டுள்ளது என்று சொன்னால் சரிதான். அந்த காசோலைகள் 2 காசோலைகள் கால வரையறுக்கப்பட்டது என்று சொன்னால் எனக்கு அது பற்றி தெரியாது...."

16. The lower Appellate Court, then, considered the fact that all the seven cheques were of a consecutive serial numbers and even when the case is pending between the parties, with a delay of six years two other cheques with consecutive serial numbers as that of the subject matter cheque were issued. Considering the averments in the complaint, the lower Appellate Court construed it as if the complainant has stated that the seven cheques were issued at the time of agreement. The lower Appellate Court further considered the evidence of P.W.1, which is as follows:-

> "09/04/2003?ல் நான் கம்பெனியில் பணி செய்யவில்லை. 2007–ல் தான் தெரியும் என்று சொல்லியுள்ளேன். 2003 முதல் 2007 வரை வேறு நோட்டீஸ் அனுப்பவில்லை ஆனால் நேரில் ஆபிஸ்க்கு வந்தபோது சப்ளை செய்யவில்லை ஆனால் நேரில் ஆபிஸ்க்கு வந்தபோது சப்ளை செய்யவில்லை என்பதற்கு அன்டர்டேக்கிங் எழுதி வாங்கி உள்ளோம். அதை தாக்கல் செய்யவில்லை."

17. Therefore, taking into account the fact that the undertaking was also not filed and the agreement was also not produced, the lower Appellate Court held that the probable defence raising a doubt in the complainant's case has been brought on record by the accused which need not be proved beyond doubt, but, to the extent of preponderance of probability. The lower Appellate Court therefore accepted the case of the respondent/accused that they have, to the extent required, rebutted the presumption and acquitted the accused.

18. It may be seen from the above that such a view of the Appellate Court is a plausible view and this Court, in an appeal against an acquittal, cannot upturn the finding of the acquittal into conviction. The first submission on behalf of the petitioner that the complainant has not specifically stated as to the date of arising of the liability is to be accepted, then it is to be held that the complainant has not even discharged the intial onus so as to shift the burden on the accused. The complainant cannot plead that he did not produce the agreement and therefore the debt whether it is time barred is doubtful and therefore the accused had not proved the same as the burden on the accused is to the level of preponderance of probability and not proof beyond doubt.

19. The learned Counsel for the appellant would strongly rely upon Ex.P-11 wherein, pending the proceedings, a part amount was paid and undertaking was given for the rest by the respondent/accused. Firstly, an objection has been raised regarding marking of xerox copies of the said documents. There is no pleading or reasoning which is given by the complainant to resort to secondary evidence. The fact that the original copies are not available with them but is only with the accused is for

the first time argued before this Court. Second, the serial numbers of the cheques issued, as pointed out by the lower Appellate Court, also raises serious doubt as to this document. This apart, further legal submission was also raised on behalf of the learned Counsel for the appellant that when the debt was barred as on the date of the complaint, that is, the year 2007, a subsequent document, dated 12.09.2018, cannot be pressed into service to claim that the liability got revived, when as on date of the commission of the act complaint, that is the dishonour of cheque and non payment of cheque amount even after demand notice, there was no legally enforceable liability. Therefore, on a detailed consideration of the matter, this contention of the learned Counsel for the appellant does not merit acceptance. Therefore, this question is answered accordingly in favour of the respondent.

20. Therefore, finding no merits, the Criminal Appeal is dismissed.

Sd/-
Assistant Registrar(CS IV)

True Copy//
Sub Assistant Registrar

grs

To
1. The XVIII Additional Sessions Judge,
   Chennai.

2. The Metropolitan Magistrate,
   Fast Track Court-III,
   Saidapet, Chennai.

3. -do through- The Chief Metropolitan Magistrate,
   Egmore.

Copy to
The Section Officer,
Criminal Section Records,
High Court, Madras – 104.

+1cc to Mr.B.R.Shankaralingam, Advocate, S.R.No.37755

SKM[co]
NSK/01/07/2022