THE HONOURABLE SRI JUSTICE N. TUKARAMJI

CRIMINAL APPEAL No.612 of 2016

ORDER:

The complainant preferred this appeal challenging the judgment of acquittal in the Criminal Appeal vide Crl.A.No.267 of 2014 dated 20.04.2016 passed by the I Addl. Metropolitan Sessions Judge at Hyderabad whereby the judgment of conviction under Section 138 of the Negotiable Instruments Act (for short "the NI Act") and sentence passed in C.C.No.203 of 2013 dated 03.03.2014 on the file of XXII Special Magistrate, Hyderabad was inversed.

2. For the sake of convenience, the parties are hereinafter referred as per their array before the trial Court.

3. The factual matrix is that, the complainant and the accused entered into a Memorandum of Understanding/Ex.P1 on 09.04.2010, in respect of land transaction and as per the terms, the accused issued a cheque bearing No.035605, dated 15.06.2010 for Rs.7,50,000/-. Subsequently, the accused requested the complainant to return that cheque and issued another cheque/Ex.P2 bearing No.019705, dated 05.01.2011 for Rs.7,50,000/-, drawn on A.P. Janatha Co-operative

Urban Bank Ltd. The complainant presented the cheque in his bank i.e., Axis Bank Ltd., Secunderabad for realization, however the same was dishonoured and returned with a memo/Ex.P3 dated 06.07.2011 with an endorsement "Funds Insufficient". Thereupon, the complainant got issued statutory notice/Ex.P4 dated 03.08. 2011 but as the accused failed to respond, filed the complaint.

4. The trial Court on considering the material held that the complainant had established that the cheque/Ex.P-2 issued by the accused towards legally enforceable debt and recorded guilt and convicted the accused for the offence under Section 138 of the NI Act and sentenced him to undergo simple imprisonment for two years.

5. Aggrieved thereby, the accused preferred appeal vide Crl.A.No.267 of 2014. The appellate Court having regard to the material held that cheque presented was beyond the period of limitation and acquitted the accused.

6. Aggrieved by the impugned judgment of acquittal of the appellate Court, the complainant preferred the present appeal contending that the appellate Court ought to have considered that the cheque was presented on the drawee's bank (recipient of the cheque)

on 04.07.2011 within six months period. However, the appellate Court erred in calculating the 180 days i.e., within the period of limitation against the settled propositions. Further, the appellate Court should have considered the fact elicited from the accused that his nearest relative is at the helm of affairs of his bank, thus by using influence got with held the cheque for two days and returned on 06.07.2011 as such the contention on limitation does not hold up. Therefore, prayed for setting aside the impugned judgment of acquittal and to restore the judgment of conviction passed by the trial Court.

7. Learned counsel for the accused submits that the presentation of cheque should be within its validity period. In this case, though the cheque was presented in the bank of the complainant on 04.07.2011 but the cheque reached the bank of accused on 06.07.2011 which is beyond the validity period of the cheque. Thus, the appellate Court had rightly acquitted the accused.

8. The accused cited the authorities of the Hon'ble Supreme Court and pointed out the following aspects. In *Shri Ishar Alloy Steels Ltd vs Jayaswals Neco Limited*[1] it is held that the drawee bank is the payee in

[1] 2001(3) SCC 609

which cheque was drawn shall reach for encashment within its validity period.

9. In *Rameshchandra Ambalal Joshi vs State Of Gujarat & Anr*[2], it is held that the calculation of the period of 6 months as prescribed under section 138 of the NI Act is that the cheque should reach the drawee within six months from its drawer. Further, the calculation of the period of six months as prescribed under Section 138 of the NI Act shall be month wise, by excluding the first day and including the last day of the last month.

10. In *Smt. Sangita W/o. Ajay Shah Vs. Sukrant S/o. Harilal Shah*[3] by referring to the dictum of *Dashrath Rupsingh Rathod Vs. State of Maharashtra and another*[4] held that, there is a difference between processing of cheque for the purpose of making payment and giving nod or approval to the processing branch for payment. The branch which processes the cheque in the sense obtains approval for payment of the branch where funds are actually and physically held and makes the payment can only be called as the processing or facilitator branch. Such a direction can be given and is given only to the branch where the

[2] 2014(2) ALT (Crl.) 10 SC
[3] Crl.W.P.No.951 of 2014
[4] Crl.A.No.2287 of 2009

account is actually opened and maintained and funds are physically held on behalf of the accused shall only be a drawee bank.

11. In these rival positions, the issue to be determined is:

> *"Whether the presentation of the cheque/Ex.P2 was within its period of validity?"*

12. The provision of Section 138 of the NI Act specifies that, nothing contained in this Section shall apply under the cheque has been presented to the bank within a period of six months from the date lon which it is drawn or within the period of its validity, whichever is earlier.

13. The undisputed facts as per the complainant are that the cheque/Ex.P2 dated 05.01.2011 was presented in his bank on 04.07.2011 under the counter foil/Ex.P1 and the cheque was returned unpaid under cheque return memo/Ex.P3 dated 06.07.2011 of the accused bank.

14. In regard to the calculation of the period of six months, the authority of the Hon'ble Supreme Court in *Rameshchandra Ambalal Joshi vs State Of Gujarat & Anr* (supra) has explicated that the period of six months prescribed in Section 138 of the NI Act shall be reckoned by

excluding the first day of the drawal and by including the last day of the sixth month. Meaning thereby the six months period would expire on the last date of the corresponding month and in case if such day falls on public holiday, the last previous day shall be reckoned. Therefore, in this matter, as the cheque was drawn on 05.01.2011, the date of validity shall commence from the next day i.e., 06.01.2011. The six months would expire on the end of the day on 05.07.2011.

15. In effect, the pertinent question arises is '*what is the drawee bank* to which the cheque should reach within its validity period. As per the appellant, presentment of cheque in his bank would suffice as it is the drawee bank whereas the respondent/accused contends that the cheque should reach the bank of the drawer within the period of validity and the bank of the drawer shall be construed as drawee bank.'

16. The Section 7 of the NI Act defines the words 'drawer and drawee' as *"The maker of a bill of exchange or cheque is called the "drawer"; the person thereby directed to pay is called the "drawee"*. Meaning thereby the person who issues cheque is drawer and the recipient of cheque is drawee.

17. On this aspect, in the defence cited authority between *Shri Ishar Alloy Steels Ltd vs Jayaswals Neco Limited (supra),* the Hon'ble Supreme Court, in para Nos. 9 and 10 explained the drawyer and the drawee bank as hereunder:

> *"9. The use of the words "a bank" and "the bank" in the Section is indicator of the intention of the Legislature. The former is indirect article and the latter is pre-fixed by direct article. If the Legislature intended to have the same meanings for "a bank" and "the bank", there was no cause or occasion for mentioning it distinctly and differently by using two different articles. It is worth noticing that the word "banker" in Section 3 of the Act is pre-fixed by the indefinite article "a" and the word "bank" where the cheque is intended to be presented under Section 138 is pre-fixed by the definite article "the". The same Section permits a person to issue a cheuqe on an account maintained by him with "a bank" and makes him liable for criminal prosecution if it is returned by "the bank" unpaid. The payment of the cheque is contemplated by "the bank" meaning thereby where the person issuing the cheque has an account. "The" is the word used before nouns, with a specifying of particularising effect opposed to the indefinite or generalising force of "a" or "an". It determines what particular thing is meant; that is, what particular thing we are to assume to be meant. "The" is always mentioned to denote particular*

thing or a person. "The" would, therefore, refer implicitly to a specified bank and not any bank. "The bank" referred to in clause (a) to the proviso to Section 138 of the Act would mean the drawee-bank on which the cheque is drawn and not all banks where the cheque is presented for collection including the bank of the payee, in whose favour the cheque is issued.

10. It, however, does not mean that the cheque is always to be presented to the drawer's bank on which the cheque is issued. The payee of the cheque has the option to present the cheque in any bank including the collecting bank where he has his account but to attract the criminal liability of the drawer of the cheque such collecting bank is obliged to present the cheque in the drawee or payee bank on which the cheque is drawn within the period of six months from the date on which it is shown to have been issued. In other words a cheque issued by (A) in favour of (B) drawn in a bank named (C) where the drawer has an account can be presented by the payee to the bank upon which it is drawn i.e. (C) bank within a period of six months or present it to any other bank for collection of the cheque amount provided such other bank including the collecting bank presents the cheque for collection to the (C) bank. The non presentation of the cheque to the drawee-bank within the period specified in the Section would absolve the person issuing the cheque of his criminal liability under Section 138 of the Act, who shall otherwise may be liable to pay the cheque amount to the payee in a civil action initiated under the

> *law. A combined reading of Sections 2, 72, 138 of the Act would leave no doubt in our mind that the law mandates the cheque to be presented at the bank on which it is drawn if the drawer is to be held criminally liable. Such presentation is necessarily to be made within six months at the bank on which the cheque is drawn, whether presented personally or through another bank, namely, the collecting bank of the payee."*

18. Therefore, basing on the definitions of the drawyer and drawee in the Section 7 of the NI Act, their banks cannot be read as drawer bank or drawee bank for the purpose of Section 138 of the NI Act. For that reason, the bank where the cheque was presented physically for processing a cheque i.e., the bank of the drawer would be facilitating bank/processor and the bank where the cheque actually placed for approval and payment to the facilitating branch i.e., bank of the accused is the drawee bank.

19. In this position, by the admitted facts and the entries of the cheque return memo/Ex.P3 the cheque was presented at the drawee/accused bank on 04.07.2011 which is exceeding the prescribed six months. Hence, the cheque was rightly returned for being presented beyond its validity period.

20. In consequence, as the cheque was presented after lapse of the validity period, the prosecution under Section 138 of the NI Act cannot be sustained against the accused. Therefore, it shall be held that the appellate Court had properly considered the factual position and justly acquitted the accused. Thus, the judgment of acquittal dated 20.04.2016 in Crl.A.No.267 of 2014 dated 20.04.2016 deserves to be confirmed.

21. In the result, this appeal fails on merit and accordingly dismissed.

Miscellaneous petitions, pending if any, shall stand closed.

N. TUKARAMJI, J

Date:05.09.2022
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