



Crl.RC.No.20 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.06.2024

CORAM:

THE HONOURABLE **MR. JUSTICE M.DHANDAPANI**

Crl.RC.No.20 of 2024

and

Crl.MP.No.189 of 2024

N.V.Selvam

...Petitioner

Vs.

Xavier

...Respondent

Criminal Revision case filed under Section 397 r/w 401 of Cr.P.C, to set aside the order dated 10.03.2022 made in CMP.No.4556 of 2018 in STC.No.396 of 2017 passed by the Fast Track Court, Magistrate Level at Poonamalee, Chennai.

For Petitioner : Mr.Dhanaram Ramachandran
for M/s.D.R. Law Associates

For Respondent : Mr.S.Aswin Karthikeyan

ORDER

This Criminal Revision case has been filed seeking quashment of the order dated 10.03.2022 made in CMP.No.4556 of 2018 in STC.No.396 of 2017 by the Fast Track Court, Magistrate Level at Poonamalee, Chennai.



CrI.RC.No.20 of 2024

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2. The case of the petitioner is that, the petitioner/complainant initiated proceedings under Section 138 of the Negotiable Instruments Act against the respondent/accused in CC.No.1249 of 2014 before the learned VIII Metropolitan Magistrate, George Town, Chennai, stating that, during March 2013, the accused borrowed a sum of Rs.38,00,000/- and towards repayment of the borrowed amount, he issued a cheque bearing No.624999 dated 26.08.2013. When the said Cheque was presented by the petitioner for collection on 04.10.2013, the same was returned with an endorsement “Funds insufficient” and when the same was intimated to the respondent/accused, he requested the petitioner to represent the same during 3rd week of November 2013, pursuant to which, when the petitioner re-presented the above said cheque on 19.11.2013, once again the same was returned with an endorsement “Account closed”. Thereafter, the petitioner issued a legal notice dated 25.11.2013 calling upon the respondent to repay the amount borrowed by him, however, the accused failed to repay the cheque amount. Hence, the complaint.

3. The said complaint in CC.No.1249 of 2014 was subsequently



Crl.RC.No.20 of 2024

transferred to the file of the learned Fast Track Judge, Magistrate Level, Poonamallee on the ground of jurisdiction and the same was renumbered as STC.No.396 of 2017. Thereafter, summons were issued to the respondent and the matter was moved to the trial stage. At this stage, the petitioner realised that there was a delay of seven (7) days in filing the complaint from the date of cause of action and thereby, the petitioner filed a condone delay petition in CMP.No.4556 of 2018 in STC.No.396 of 2017. However, the said condone delay petition was dismissed, vide impugned order dated 10.03.2022 on the ground that the trial court has no jurisdiction to entertain the condone delay petition after taking cognizance. Challenging the same, the present revision has been filed.

4. Learned counsel for the petitioner submitted that even when there is a delay in filing the complaint, if the petitioner is able to explain the reason for the said delay, the trial court if satisfied with the reason, shall very well condone the delay by entertaining the petition and in order to substantiate his claim, the learned counsel for the petitioner relied upon Proviso to clause (b) of Section 142 of the Negotiable Instruments Act



which clearly holds that *the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.* However, the trial court failed to properly appreciate the said fact and had mechanically dismissed the condone delay petition.

5. He further relied upon the decision rendered by this Court in the case of ***G.Ventakesan (died) and Ors. Vs. Kamala*** in ***Crl.RC.No.599 of 2010 dated 22.07.2015***, wherein, this Court has held hereunder:

“5. I heard the counsel for both sides, perused the order passed by the Trial Court and other material records placed. No doubt, at the time when the complaint under Section 138 of The Negotiable Instruments Act was filed by the husband of the first petitioner, it was not accompanied by any petition for condonation of delay. The trial Court also entertained the complaint filed by the husband of the first petitioner, without taking note of the delay in filing the complaint. Further, the trial Court also taken cognisance of the complaint. However, only during the course of trial in the complaint, especially during cross examination, a question was raised as regards the delay in filing the complaint. Thereafter, the petitioners have filed the present petition for condonation of delay of 10 days in filing the complaint. Thus, it could be seen that there is an error on the part of the trial Court in entertaining the complaint even though there was delay of 10 days in filing the complaint.

6. It is seen from the application filed under Section 142 of The Negotiable Instruments Act that the complainant issued



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Crl.RC.No.20 of 2024

a statutory notice to the accused/respondent, which was received by her on 05.09.2005. On receipt of the notice, the accused/respondent sent a reply notice dated 26.09.2005. Thereafter, the complainant was bed ridden during September and October 2005 due to serious ailment. On 15.10.2005, the complainant appointed his power agent to file the complaint under Section 138 of The Negotiable Instruments Act and accordingly the complaint was filed. However, the power agent himself suffered severe ailment and he was bed-ridden from 15.10.2005 to 30.10.2005. As the statutory notice was received by the accused/respondent on 05.09.2005, the complaint ought to have been instituted on or before 19.10.2005, but it was filed only on 31.10.2005.

Therefore, in the application for condoning the delay, reasons have been given by the power agent of the deceased complainant for condoning the delay of 10 days in filing the complaint. Of course, the present petition has been filed during the course of trial in the complaint to condone the delay in filing the complaint.

7. In an identical case, this Court passed an order dated 18.12.2014 passed in Crl.OP No. 6944 of 2009 (*A. Rahamathullah @ Moulana vs. P.A.K.Manoharan*) wherein this Court following the order passed by the Honourable Supreme Court held that in the facts and circumstances of that case, such an application filed after the very complaint itself was entertained, has to be considered liberally. It was further held that it may be appropriate for the lower Court to consider the claim of the applicant therein and to proceed further in accordance with law. In Para No.13 and 14 it was held as follows:-

"13. In *Sarah Mathew vs. Institute of Cardio Vascular Diseases* (2014) 2 SCC 62, the



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CrI.RC.No.20 of 2024

Honourable Supreme Court has held that for computing the period of limitation, the crucial date shall be the date of presentation of the complaint. If the date of presentation of the complaint is beyond the period of limitation prescribed under Section 142 of The Negotiable Instruments Act, as I have already concluded, it is absolutely necessary for the complainant to explain such delay by showing sufficient cause. In the case on hand, admittedly, no such petition was filed and no such explanation was offered. But, the lower Court, without noticing that there was a delay in presenting the complaint, has inadvertently taken cognisance. Had the lower Court noticed the delay, it would have called upon the respondent herein to explain the delay. Thus, there was some error on the part of the lower Court.

14. Now, the question is whether, for the inadvertent error committed by the lower Court, the respondent should be allowed to suffer? In this regard, I may refer to the observations of the Honourable Supreme Court in *State of Madhya Pradesh vs. Pradeep Kumar and another* (2000 (IV) CTC 343 wherein in para-12, the Honourable Supreme Court held as follows:-

'It is true that the *Pristine Maxim Vigilantibus Non Dormientibus Jura Subveniunt* (Law assists those who are vigilant and not those who sleep over their rights). But even a vigilant litigant is prone to commit mistakes. As the aphorism "to err is humane" is more practical notion of human behaviour than an abstract philosophy, the unintentional lapse on the part of a litigant should not normally cause the doors of the judicature



permanently closed before him. The effort of the Court should not be one of finding means to pull down the shutters of adjudicatory jurisdiction before a party who seeks justice, on account of any mistake committed by him, but to see whether it is possible to entertain his grievance, if it is genuine.

8. The learned counsel for the revision petitioner also placed reliance on the decision of this Court in (**Nataraj @ T. Natarajan vs. P. Venkatachalam**) **2008 (1) CTC 503**. In that case, this Court had an occasion to consider a case where the complaint was filed only with a Petition to condone the delay of 10 days in filing the complaint without filing an affidavit. However, the trial Magistrate took cognisance of the complaint and issued process. In such circumstance, this Court remanded the matter back to the trial Court and to issue process afresh with a direction to the complainant to file a fresh petition with affidavit for condonation of delay. Useful reference can be made to the order passed by this Court in para Nos. 6 to 9, which reads as follows:-

"6. I have carefully considered the above submissions made by the learned counsel for the petitioner. In the decision reported in *Dr. S. Magalingam vs. A. Ganesan*, 2006 (2) CTC 307, the correctness of entertaining a Special Leave Petition in an Appeal filed against the acquittal after the expiry of the period of limitation without a Petition seeking condonation of delay was considered. It has been held in the said decision that the order passed in the Special Leave Petition without condoning the delay in preferring such Application and the order admitting the Appeal is liable to be recalled. The learned Judge has also observed that the respondent (complainant) in the



WEB COPY



CrI.RC.No.20 of 2024

Complainant filed for an offence under Section 138 of the Negotiable Instruments Act, will have to be given an opportunity to try a chance by filing an application under Section 5 of the Limitation Act for condoning the delay in preferring the Special Leave Petition.

7. It is no doubt true that in this case the Complaint has been filed after a delay of 10 days and cognisance had been taken and process ordered to be issued, when admittedly the Complainant had not filed a Petition to condone the delay and without the Court condoning the delay. If there is any delay in filing a Complaint, the Complainant should file an application the learned Magistrate should issue notice to the respondent, after giving an opportunity of hearing to him and thereafter considering the cause shown for the delay, the learned Magistrate should satisfy himself first and pass appropriate orders by accepting or rejecting the Petition, but the said procedure has not been followed by the learned Magistrate in this case. By the failure on the part of the Court below to follow such a procedure, the valuable right of the petitioner is affected. At the same time, it has to be pointed out that had the Court below pointed out to the complainant that the Complaint could not be taken on file without a Petition being filed to condone the delay, the Complainant would have filed a petition seeking condonation of delay.

8. Therefore, this Court is of the considered view that ends of justice will be met if the order of the learned Magistrate taking cognisance of the Complaint and issuing process to the petitioner is set aside and the matter is remitted back to the learned Magistrate. The learned Magistrate shall



WEB COPY



CrI.RC.No.20 of 2024

give an opportunity to the respondent/complainant to file a petition to condone the delay of 10 days in filing the Complaint and if any such Petition is filed, notice should be ordered to the petitioner herein and after giving an opportunity of hearing to him appropriate orders should be passed in the Petition seeking condonation of delay. If the delay is condoned then the learned Magistrate can take cognisance of the complaint and proceed further in accordance with law.

9. However, the contention of the learned counsel for the petitioner that if the impugned order of the learned Magistrate is set aside and liberty is given to the respondent to file a petition to condone the delay and even if the delay is condoned, the learned Magistrate cannot take cognisance of the complaint because that will amount to entertaining a Complaint on a second cause of action is untenable since there is absolutely no question of arising of a second cause of action in this case."

9. In the light of the above decisions rendered by this Court and the order passed by the Honourable Supreme Court in *Sarah Mathew vs. Institute of Cardio Vascular Diseases (2014) 2 SCC 62* and having regard to the reasons assigned in the application for condonation of delay to condone the delay of 10 days in filing the complaint, I hold that the complainant has satisfactorily explained the delay of 10 days in filing the complaint and the Court below ought to have accepted the explanation offered for such delay. Accordingly, the order dated 22.04.2010 passed in CMP No. 223 of 2010 in STC No. 3 of 2008 on the file of Judicial Magistrate No.III, Salem is set aside. The Criminal Revision Case is allowed. Consequently, connected miscellaneous petition is closed."

6. In view of the above, as the complaint is of the year 2014 which is



much after the insertion of 142 B of NI Act, by Act 55 of 2002 with effect from 06.02.2003, the trial court has power to entertain the condone delay petition filed by the petitioner, even after taking cognizance. However, the trial court without considering any of the above said facts had dismissed the condone delay petition filed by the petitioner retrospectively, which is wholly unsustainable and the same has to necessarily be interfered with. Accordingly, he prayed for appropriate orders.

7. Per contra, the learned counsel appearing for the respondent submitted that, admittedly, the trial court had taken cognizance without taking note of the delay of 7 days in filing the complaint by the petitioner and subsequently, a petition was taken out by the petitioner/complainant to condone the delay in CMP.No.4556 of 2018, which came to be dismissed by the trial court, since, no application for condonation of delay is maintainable after taking cognizance as a substantive law cannot be given retrospective operation. Hence, the trial court after properly considering the said fact had dismissed the condone delay petition filed by the petitioner which cannot be said to be erroneous. In order to substantiate his claim, the learned counsel



for the respondent further relied upon the decision of the Hon'ble Apex Court in the case of *Subodh S.Salaskar Vs. Jayprakash M.Shah and another* in *Crl.A.No.1190 of 2008 dated 01.08.2008* reported in *(2008) 13 Supreme Court Cases 689*. For better appreciation, the relevant paragraph is extracted hereunder:

“26. Ex facie, it was barred by limitation. No application for condonation of delay was filed. No application for condonation of delay was otherwise maintainable. The provisions of the Act being special in nature, in terms thereof the jurisdiction of the court to take cognizance of an offence under Section 138 of the Act was limited to the period of thirty days in terms of the proviso appended thereto. The Parliament only with a view to obviate the aforementioned difficulties on the part of the complainant inserted proviso to Clause (b) of Section 142 of the Act in 2002. It confers a jurisdiction upon the court to condone the delay. It is, therefore, a substantive provision and not a procedural one. The matter might have been different if the Magistrate could have exercised its jurisdiction either under Section 5 of the Limitation Act, 1963 or Section 473 of the Code of Criminal Procedure, 1976. The provisions of the said Acts are not applicable. In any event, no such application for condonation of delay was filed. If the proviso appended to Clause (b) of Section 142 of the Act contained a substantive provision and not a procedural one, it could not have been given a retrospective effect. A substantive law, as it is well-settled, in absence of an express provision, cannot be given a retrospective effect or retroactive operation.”

8. Heard learned counsel on either side and perused the material



CrI.RC.No.20 of 2024

documents placed on record.

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9. Admittedly, the petitioner/complainant initiated proceedings under Section 138 of the Negotiable Instruments Act against the respondent/accused in CC.No.1249 of 2014 before the learned VIII Metropolitan Magistrate, George Town, Chennai, which was subsequently transferred to the file of the learned Fast Track Judge, Magistrate Level, Poonamalee on the ground of jurisdiction and the same was renumbered as STC.No.396 of 2017 and cognizance was taken without condonation of delay of 7 days in filing the complaint from the date of cause of action and thereafter, summons were also issued to the respondent and the matter was moved on to the trial stage. At this stage, in order to cure the defect, the petitioner filed a condone delay petition under Proviso to clause (b) of Section 142 of the NI Act in CMP.No.4556 of 2018 in STC.No.396 of 2017 which came to be dismissed, vide impugned order dated 10.03.2022 on the ground that the trial court has no jurisdiction to entertain the condone delay petition.



10. The issue involved in the present revision is

Whether the trial court has jurisdiction to entertain the condone delay petition after the cognizance taken ?

11. It is case of the petitioner that as per Proviso to clause (b) of section 142 of NI Act, the trial court has jurisdiction to entertain the condone delay petition even after taking cognizance. On the other hand it is the case of the respondent that, the no application for condonation of delay is maintainable either before or after taking cognizance.

12. For better understanding, the relevant section is extracted hereunder:

“142. Cognizance of offences.—1[(1)] Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(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 prescribed period, if the complainant satisfies the Court that he had sufficient cause.



for not making a complaint within such period ”

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13. A perusal of the said proviso makes it clear that, as per Proviso to clause (b) of Section 142 of the NI Act, the trial court has jurisdiction to condone the delay in filing the complaint if sufficient cause is shown for the delay.

14. It is pertinent to note that the said proviso to clause (b) of Section 142 of the NI Act was inserted by Act 55 of 2002 with effect from 06.02.2003. Prior to the said date, there was no power available to the Magistrate to condone the delay in filing the complaint, however, subsequent to the insertion of the said proviso, the Magistrate is well within his jurisdiction to entertain the condone delay petition and decide the same on merits, if sufficient cause is shown for the delay.

15. In the case on hand, the complaint is of the year 2014 and as rightly pointed out by the learned counsel for the petitioner, the trial court is vested with jurisdiction to take up the petition for condonation of delay and decide the same on merits. However, without doing so, the trial court had



Crl.RC.No.20 of 2024

dismissed the condone delay petition filed by the petitioner without going into the merits of the case and had arrived at a conclusion that it lacks jurisdiction and thereby, dismissed the condone delay petition filed by the petitioner, which is not sustainable and the same has to be interfered with.

16. Accordingly, the impugned order is set aside and the matter is remanded to the trial court for fresh consideration. The trial court shall consider whether sufficient cause has been shown for the delay of seven days and pass appropriate orders in accordance with law, after affording sufficient opportunity to the petitioner and the respondent. The Criminal revision case stands allowed with the aforesaid observations and directions. Consequently, the connected Miscellaneous petition is closed.

28.06.2024

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Index : Yes/No
Speaking order : Yes/No
NCC : Yes/No

M.DHANDAPANI, J.



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Crl.RC.No.20 of 2024

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To

The Fast Track Court, Magistrate Level,
Poonamalee, Chennai.

Crl.RC.No.20 of 2024
and
Crl.MP.No.189 of 2024

28.06.2024

16/16