REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1077 OF 2009
[Arising out of SLP (Crl.) No. 7797 of 2007]

Sivakumar …Appellant

Versus

Natarajan …Respondent

J U D G M E N T

S.B. SINHA, J :

1. Leave granted.

2. This appeal is directed against a judgment and order dated 03.02.2007 passed by the Madurai Bench of the Madras High Court in Crl. Revision No. 849 of 2005 whereby and whereunder the Criminal Revision application filed by the appellant herein was dismissed affirming the judgment of the learned Principal Session Judge, Trichrapalli dated 08.11.2005 passed in Crl. A No. 87/2005, preferred against the judgment dated 03.05.2005 in CC No. 69/2004 by the learned Judicial Magistrate III, Tiruchirapalli.

3. On or about 14.08.2003, appellant borrowed a sum of Rs. 1,00,000/- for the purpose of his business as loan from the complainant - respondent. The said amount was to be repaid within a period of three months. On or about 20.11.2003 the appellant handed over a cheque bearing No. 0652756 dated 27.11.2003 for a sum of Rs. 1,00,000/- in favour of the respondent. The said cheque was presented by the complainant for collection to his banker namely UCO Bank, Trichy Main Branch on 27.11.2003. It was dishonoured with the remarks "insufficient funds" on 2.12.2003. Information thereabout was received by the respondent on 3.12.2003.

4. On 02.01.2004, the respondent issued a legal notice to the appellant calling upon him to pay the amount in question within 15 days from the date of the receipt of the notice. Admittedly, the appellant neither sent a reply to the said notice nor paid the amount due.

Respondent thereafter filed a complaint petition against the appellant under Section 138 of the Negotiable Instruments Act, 1881 (for short "the Act") before the Judicial Magistrate No. III, Tiruchirapalli.

5. The learned Judicial Magistrate III convicted the appellant under Section 138 of the Act and sentenced him to undergo one year's simple imprisonment and a fine of Rs. 5000/- and in default thereof to undergo further six months of simple imprisonment. He was also directed to pay a sum of Rs. 1,00,000/- as compensation to the respondent under section 357(1) of the Code of Criminal Procedure.

6. Aggrieved thereby and dissatisfied therewith, appellant preferred an appeal before the Principal Session Judge, Tirchirapalli, which was dismissed.

7. Appellant filed a revision application thereagainst before the High Court, which by reason of the impugned judgment has been dismissed.

Appellant is, thus, before us.

8. Before proceeding further, we may place on record that subsequent to the passing of the impugned judgment, a settlement has been entered into by and between the appellant and the respondent wherein it has been stated:

> "At this juncture, with the consensus of both the parties, on the assurance of the 2nd party, the 2nd party shall receive a sum of Rs. 30,000/- from the 1st party and shall not take any action against the judgment rendered by the court and there shall be no interest over the issue before or after the settlement and as such we both have signed in the presence of the witnesses. 2nd party has also consented to issue a receipt for having received the said amount to the 1st party."

9. The core question which arises for consideration is as to whether the notice dated 2.01.2004 was issued within the stipulated period of thirty days from the date of receipt of intimation of the dishonour of cheque.

Section 138 of the Act reads as under:

> "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 a term which may extend 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, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
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> (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."

10. By reason of the provisions of the Act, a legal presumption in regard to commission of a crime has been raised. The proviso appended thereto, however, states that nothing contained in the main provision would apply unless conditions specified in clauses (a), (b) and (c) thereof are complied with. Clauses (a), (b) and (c) of the proviso, therefore, lay down conditions precedent for applicability of the main provision. Section 138 of the Act being penal in nature, indisputably, warrants strict construction.

In M/s. Harman Electronics (P) Ltd. & Anr. v. M/s. National Panasonic India Ltd. [2008 (16) SCALE 317], this Court held:

> "8. The proviso appended thereto imposes certain conditions before a complaint petition can be entertained.
>
> 9. Reliance has been placed by both the learned Additional Sessions Judge as also the High Court on a decision of this Court in K. Bhaskaran v. Sankaran Vaidhyan Balan and Anr.. This Court opined that the offence under Section 138 of the Act can be completed only with the concatenation of a number of acts, namely, (1) Drawing of the cheque, (2) Presentation of the cheque to the bank, (3) Returning the cheque unpaid by the drawee bank, (4) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice. It was opined that if five different acts were done in five different localities, any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the Act and the complainant would be at liberty to file a complaint petition at any of those places. As regards the requirements of giving a notice as also receipt thereof by the accused, it was stated:
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> > '18. On the part of the payee he has to make a demand by "giving a notice" in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from

> the date of such "giving", the travails of the prosecution would have been very much lessened. But the legislature says that failure on the part of the drawer to pay the amount should be within 15 days "of the receipt" of the said notice. It is, therefore, clear that "giving notice" in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address.'
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> *** *** ***

14. It is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of a cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence under Section 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in the provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a

> cause of action but communication of the notice would."

Keeping in view the aforementioned legal principle, interpretation of clause (b) of the proviso appended to Section 138 of the Act has to be considered.

11. We may, however, at the outset notice that both clauses (a) and (b) of the proviso appended to Section 138 of the Act employed the term "within a period". Whereas clause (a) refers to presentation of the cheque to the bank within a period of six months from the date on which it is drawn, clause (b) provides for issuance of notice "to the drawer of the cheque within thirty days of the receipt of information". The words "within thirty days of the receipt of information" are significant. Indisputably, intimation was received by the respondent from the bank on 3.12.2003.

The Parliament advisedly did not use the words 'from the date of receipt of information' in Section 138 of the Act. It is also of some significance to notice that in terms of Section 9 of the General Clauses Act, 1897, whereupon reliance has been placed by the High Court, the statute is required 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".

The departure made from the provisions of Section 9 of the General Clauses Act by the Parliament, therefore, deserves serious consideration.

12. Indisputably, the notice was issued on the 31st day and not within a period of thirty days from the date of receipt of intimation from the bank. If Section 9 of the General Clauses Act is not applicable, clause (b) of the proviso appended to Section 138 of the Act was required to be complied with by the respondent for the purpose of maintaining a complaint petition against the appellant.

In Munoth Investments Ltd. v. Puttukola Properties Ltd. and Another [(2001) 6 SCC 588] construing clause (a) of the proviso appended to Section 138 of the Act, this Court held:

> "5. In our view, the High Court committed material irregularity in not referring to the aforesaid evidence which was recorded by the Metropolitan Magistrate. Section 138(b) of the Act inter alia provides that the payee has to make demand for the payment of money by giving a notice "to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid". So fifteen days are to be counted from the receipt of information regarding the return of the cheque as unpaid. In the present case, it is the say of the complainant that the cheque was presented for

> encashment on 12th; it was returned to the Bank on 13th and information was given to the complainant only on 17th, as 14th, 15th and 16th were Pongal holidays. The learned counsel fairly pointed out that in the complaint it has been stated that the complainant had received intimation with regard to the return of the said cheque from his banker on 13-1-1994. However, he submitted that this is an apparent mistake and for explaining that mistake the appellant has led the evidence before the trial court. Undisputedly, he pointed out that in the State of Tamil Nadu, 14-1-1994 to 16-1-1994 there were Pongal holidays and, therefore, the appellant came to learn about the dishonour of his cheque on 17-1-1994."

We, with respect, agree with the approach of the learned Judges.

13. Our attention has furthermore been drawn to a decision of the Kerala High Court in K.V. Muhammed Kunhi v. P. Janardhanan [1998 Crl. L.J. 4330], wherein construing proviso (a) appended to Section 138 of the Act, a learned Single Judge held:

> "…A comparative study of both the Sections in the Act and the General Clauses Act significantly indicate that the period of limitation has to be reckoned from the date on which the cheque or instrument was drawn. The words 'from' and 'to' employed in Section 9 of the General Clauses Act are evidently clear that in cases where there is an ambiguity or suspicion with reference to the date of commencement of period of limitation in any Act or special enactment, the words 'from' and

> 'to' employed in Section 9 of the General Clauses Act can be pressed into service.."

[See also K.C. Nanu v. N. Vijayan and Anr. 2008 (1) KLJ 327]

We are in agreement with the aforementioned view.

14. Mr. B. Balaji, learned counsel appearing on behalf of the respondent, however, would contend that the appellant having entered into a settlement in terms whereof he had deposited a sum of Rs. 30,000/- and an assurance having been given that no action would be taken against the judgment rendered by the High Court, this Court should not exercise its discretionary jurisdiction under Section 136 of the Constitution of India to interfere with the impugned judgment. We fail to persuade ourselves to agree with the aforementioned submission.

15. Appellant has a fundamental right of liberty in terms of Article 21 of the Constitution of India. Liberty of the appellant, therefore, could not have been taken away except in accordance with the procedure established by law.

Principles of 'Estoppel' or 'Waiver' would not, therefore, apply in the instant case.

In any event, the respondent himself has backed out from the aforementioned settlement. He, therefore, cannot be permitted to take a different stand.

16. Having, however, regard to the facts and circumstances of the case, we, in exercise of our jurisdiction under Article 142 of the Constitution of India, direct that as the civil liability of the appellant stands admitted, the said sum received by the respondent need not be refunded.

17. For the reasons aforementioned, the impugned judgment cannot be sustained, which is set aside with the aforementioned directions. The appeal is allowed.

…….J.
[S.B. Sinha]

……J.
[Asok Kumar Ganguly]

New Delhi;
May 15, 2009