

Robinson D'Costa Vs. Nesbit D'Costa and Another

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Court : Mumbai

Decided On : Jul-21-2014

Judge : A.R. Joshi

Appeal No. : Criminal Appeal No. 36 of 2011

Appellant : Robinson D'Costa

Respondent : Nesbit D'Costa and Another

Judgement :

1. Heard rival arguments at length on this criminal appeal preferred by the original complainant challenging the judgment and order dated 2/11/2010 passed in Criminal Case No.200/OA/NI/08/E. By the said impugned judgment and order the present respondent no.1 was acquitted of the offence punishable under Section 138 of Negotiable Instruments Act, 1881. Being aggrieved by the said acquittal appellant/original complainant initially prayed for leave to file appeal and after the leave was granted preferred the present appeal.

2. At the threshold, it must be mentioned that the only ground on which the criminal complaint was dismissed, acquitting the respondent/accused was that the debt of Rs.6.00 lakhs was not legally enforceable at the time of issuance of the cheque.

3. Prior to discussing the rival arguments certain admitted factual position is mentioned as under:

In the present appeal, complainant and the accused/respondent no.1 are close friends and accused/respondent no.1 asked for loan of Rs.6.00 lakhs from the complainant, sometime in first week of July, 2004. As such, the cheque was given to the accused for Rs.6.00 lakhs and the amount was credited in the account of the accused on 10/07/2004 and accused withdrew that amount. On the same day, an agreement was entered into between complainant and the accused, wherein the terms of repayment were scheduled. Accused was to repay the amount within 2 years in 2 instalments of Rs.3.00 lakhs each. The first instalment was to be paid on or before 12/06/2005 and second on or before 12/06/2006. By way of collateral security promissory note of the same date was executed by the accused in favour of the complainant. Accused failed to repay the amount in time. As such, according to the complainant on 12/06/2006, a post dated cheque for Rs.6,00 lakhs drawn on Bank of Baroda was given by the accused to the complainant. On the said cheque date was mentioned as 10/07/2008. Said cheque was presented for encashment with the complainant Banker. It was subsequently returned by the Bank of the accused with endorsement refer to drawer, insufficient funds and account closed. Complainant personally wrote letter to the accused. On this, another promissory note was executed dated 19/08/2008 by the accused as a collateral security which was in furtherance of the earlier promissory note dated 10/07/2004. Thereafter, on 20/08/2008 legal notice was issued to the accused demanding the payment for the dishonoured cheque. The notice was duly served on the accused, but accused failed to make payment and hence complaint was lodged. Though certain defences were raised by the accused, he had admitted receiving the initial cheque of Rs.6.00 lakhs from the complainant and having entered into an agreement for repayment and execution of the promissory notes. He also admitted dishonour of the cheque on the grounds mentioned. He also admitted receipt of the legal notice dated 20/08/2008 and further came with a case that he had informed the complainant that he did not have the money and would pay after sometime. Also according to the respondent no.1/accused, he was not aware whether his account was closed. However, he accepted that there was no money in his account and he specifically came with a defence that the cheque which is of a date 10/07/2008 and which was dishonoured was given as and by way of guarantee. He did not examine himself or any witness on his behalf.

Complainant examined himself and one Branch Manger, PW2 and also produced relevant documents.

4. As mentioned earlier, the trial Court continued on the basis that the dishonoured cheque is of the date 10/07/2008 and, as such, it is beyond period of limitation of 3 years from accrual of the cause of action of repayment of the loan amount of Rs.6.00 lakhs. The trial Court dismissed the complaint on the premise that there was no legally enforceable debt or liability on the respondent no.1/accused inasmuch as the dishonoured cheque was given beyond the period of 3 years from accrual of the apparent cause of action for repayment of loan.

5. During the arguments, learned Counsel for the appellant placed reliance on the factual position and the substantive evidence of complainant/PW1 and answers given by him during cross-examination. It is brought to the notice of this Court that according to substantive evidence of PW1, the cheque which was dishonoured was given to the complainant by the accused on 12/06/2006, whereas subsequently during cross-examination, complainant had answered that the cheque was given to him on 10/07/2007, but with the date as 10/07/2008. By pointing out this factual position, it is strongly argued on behalf of the appellant by placing reliance on various authorities and mainly the authority, **(2012) 0 ALLMR (Cri) 3656** in the case of **Dinesh B. Chokshi V/s. Rahul Vasudeo Bhatt**. By placing reliance on this authority, it is argued on behalf of the appellant that if the cheque is issued towards repayment of time barred date it would revalidate the time barred cause of action as it is an enforceable promise as cheque is a promise within the meaning of sub-section 3 of Section 25 of Contract Act when the cheque is drawn to pay wholly or in part, a debt which is not enforceable only by reason of bar of limitation. It is further argued that such promise is an agreement and is exception to the general rule that agreement without consideration is void. By placing reliance on the said authority, it is submitted that the cheque which was subsequently dishonoured was in fact an acknowledgment of indebtedness by the respondent no.1/accused and that the period of limitation is extended and this is more so in view of provisions of Section 18 of Limitation Act. Section 18 of Limitation Act reads thus:

18. Effect of acknowledgment in writing.-

(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.-For the purposes of this section -

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;

(b) the word signed means signed either personally or by an agent duly authorised in this behalf; and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

The authority which is cited before this Court is of the Division Bench of this Court when the matter was referred to the Division Bench in view of the order of the Single Judge and as per the directions of the Hon'ble Chief Justice. The reference to the Division Bench was for deciding the two questions formulated by the learned Single Judge. For the sake of ready reference and with advantage, so far as the facts of the present case are concerned, the said two questions placed for the adjudication before the Division Bench and both answered in the affirmative are reproduced:

(i) Does the issuance of a cheque in repayment of a time barred debt amounts to a written promise to pay the said debt within the meaning of Section 25(3) of the Indian Contract Act, 1872?

(ii) If it amounts to such a promise, does such a promise, by itself, create any legally enforceable debt or other liability as contemplated by Section 138 of the Negotiable Instruments Act, 1881?

The observations of the Division Bench in the above cited decision are squarely applicable in the present matter, inasmuch as giving of a cheque dated 10/07/2008 amounts to written promise to pay the debt within the meaning of Section 25(3) of the Indian Contract Act and that such promise by itself create legally enforceable debt as contemplated by Section 138 of Negotiable Instruments Act, 1881. Now the question arises whether the said cheque having date 10/07/2008 can be considered as given within the limitation period contemplated by Article 19 of the Schedule 1 of the Limitation Act. In this context, Article 19 is also required to be read in juxtaposition of the provisions of Section 18 of the Limitation Act. Said Schedule 1 of Article 19 reads thus:

	Description of suit	Period of limitation	Time from which period begins to run
19	Money payable for money lent	Three years	When the loan is made.

6. In order to ascertain whether there was legally enforceable debt and whether the period of limitation was extended by way of giving of a cheque dated 10/07/2008, the evidence of PW1 is required to be scrutinized. At the costs of repetition, it must be mentioned that in the complaint it is stated that the said cheque was issued on 12/06/2006, but with future date of 10/07/2008, whereas in the cross-examination, he has answered that the said cheque was given to him on

10/07/2007. In fact, on this cross-examination, there is no further cross of the complainant suggesting that the said cheque was not given on 10/07/2007. So in the absence of any such cross-examination, it is required to be accepted that the said dishonoured cheque was given to the complainant either on 10/07/2007 or prior to that and, as such, this date is within the period of limitation, so far as recovery of the loan amount is concerned from the accused. In this context, it must be mentioned that the trial Court had fallen in an error in accepting that the said cheque dated 10/07/2008 though earlier given was not extending the period of limitation and thus the trial Court had again committed an error in holding that the loan amount though admittedly taken by the respondent no.1/accused and though admittedly he executed various documents including promissory notes was time barred and, as such, was not legally enforceable debt or other liability.

7. Another authority cited before the Court is **2006 (6) Bom.C.R. 874** in the case of **Narendra V. Kanekar V/s. Bardez Taluka Co-op. Housing Mortgage Society Ltd. and Anr.** Headnote (A) of the authority reads thus:

(A) Negotiable instruments Act, 1881, Sec. 138 - Contract Act, 1872, Sec. 25(3) - Dishonour of cheque - Cheque against recovery of loan amount - Complaint under section 138 of N.I. Act - Conviction - Challenged in revision - Confirmed - Challenged before High Court - Contention, cheque issued beyond period of limitation and no acknowledgment of debt in writing - Undertaking at most a right to file suit but not prosecution under section 138 of Act - Contra, undertaking or promise given by accused is legally enforceable under section 25(3) of Contract Act, therefore, debt is enforceable, observed, when debt has become barred by limitation, there is section 25(3) of Contract Act, a written promise to pay fresh cause of action - Held, in substance does is not to revive a dead right, right is never dead at any time, but to resuscitate remedy to enforce payment by suit, and if payment could be enforced by a suit, it means that it still has character of legally enforceable debt as contemplated by explanation below section 138 of N.I. Act. No merit in revision. Dismissed.

8. In view of the ratios propounded by the above authorities and mainly placing reliance on the Division Bench judgment of this Court in **Dinesh B. Chokshi**

(supra), it is held that right to recover the loan amount given to the respondent/accused was still continuing. In other words, there was nothing like right to claim back the amount from the respondent was time barred. Consequently, it is held that the JMFC Court had definitely fallen in an error in coming to the conclusion that there was no legally enforceable debt or other liability and thereby erred in dismissing the complaint no.200/OA/NI/08/E, on this ground alone.

9. For the reasons mentioned above and considering the total effect of the evidence led before the trial Court there is a legal necessity to interfere with the impugned judgment and order and to set it aside. Consequently, it is held that the present appellant has established the case as against the respondent/accused for offence punishable under Section 138 of Negotiable Instruments Act. In the result, the present appeal succeeds and the same is disposed of with following order:

ORDER

(i) Criminal Appeal No.36/2011 is allowed

(ii) The impugned judgment and order dated 2/11/2010 passed by the Judicial Magistrate First Class, Margao is hereby quashed and set aside.

(iii) The respondent no.1 is hereby convicted for the offence punishable under Section 138 of Negotiable Instruments Act and is sentenced to suffer simple imprisonment for the period of 6 months and to pay fine of Rs.12.00 lakhs, failing which the respondent no.1 shall undergo imprisonment for the period of 6 months. If the fine amount is paid, it shall be paid to the present appellant/original complainant as and by way of compensation. Time is given to the respondent to surrender before the trial Court within one week.

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