SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Ramakrishnan Vs. Parthasaradhy

Ramakrishnan Vs. Parthasaradhy

SooperKanoon Citation : sooperkanoon.com/724815

Court : Kerala

Decided On : Mar-05-2003

Reported in : III(2003)BC241; 2003(2)KLT613

Judge : Jawahar Lal Gupta, C.J. and; Kurain Joseph, J.

Acts : Negotiable Instruments Act, 1881 - Sections 25(3) and 138

Appeal No. : Crl. R.P. No. 238 of 1996

Appellant : Ramakrishnan

Respondent : Parthasaradhy

Advocate for Def. : Mathew John, Adv.

Advocate for Pet/Ap. : Benny Gervacis and; Thambi Jacob, Advs.

Disposition : Revision petition dismissed

Judgement :

Jawahar Lal Gupta, C.J.

1. Is the plea of limitation available to the accused in a case under Section 138 of the Negotiable Instruments Act, 1881? This is the short question that arises for consideration in this Revision Petition, which has been referred to a Division Bench. A few facts may be noticed.

2. On May 31, 1991, the petitioner-accused had given a cheque for an amount of Rs. 75,000/- to the 1st respondent-complainant. It was presented to the Bank. It was returned with the remarks - 'funds insufficient'. The position was conveyed to the 1st respondent by a letter dated June 6, 1991. On June 17, 1991, the 1st respondent issued a notice to the petitioner. It was accepted by him. However, the amount was not paid. Thus, the 1st respondent filed the complaint against the petitioner in the court of Chief Judicial Magistrate, Kottayam.

3. After trial, the court vide its judgment dated April 26, 1995, held that the petitioner-accused was guilty of the offence under Section 138 of the Negotiable Instruments Act He was awarded a punishment of fine of Rs. 1,50,000/-. In default of payment, he was sentenced to undergo imprisonment for three months. Out of the fine, Rs. 75,000/- was ordered to be paid to the 1st respondent-complainant.

4. The accused felt aggrieved. He filed an appeal. It was dismissed by the Sessions Judge vide judgment dated January 23, 1996. Undaunted, he filed a Criminal Revision Petition in this Court.

5. The matter was posted before a learned single Judge. It was contended that on the date of issue of the cheque, the accused was not under a 'legally enforceable debt or liability.' Even if there was any claim for recovery of money it was barred by limitation. Thus, he could not have been found guilty of an offence punishable under Section 138 of the Act. In support of this contention, reliance was placed on a single Bench decision of this Court in Joseph v. Devassia (2000 (3) KLT 533).

6. The learned single Judge considered the matter. He expressed reservation about the view taken by the learned Judge in Joseph's case. Hence, this reference to the Division Bench.

7. Mr. Benny Gervacis, learned counsel for the petitioner has contended that the provisions of Section 138 of the Negotiable Instruments Act can be invoked only when there is a legally enforceable liability against the accused. In a case where the claim is completely barred by limitation, it cannot be said that there was a legal liability so as to attract the provisions of Section 138. The claim as made by Mr. Benny Gervacis has been controverted by Mr. Mathew John, learned counsel for

the 1st respondent. He has submitted that there is a presumption in favour of the complainant under Section 139. A liberal meaning to the explanation may defeat the very object with which Section 138 was enacted. He has also pointed out that when a cheque is handed over to a party, there is a concluded contract and the liability becomes legally enforceable. Thus, the accused should not be entitled to raise the defence of limitation. The counsel for both sides have referred to various decisions.

8. A cheque is a bill of exchange. It is drawn on a specified banker. It is a negotiable instrument under Section 6 of the Act Section 118 raises a presumption of consideration unless the contrary is proved. Section 138 provides a penalty when a cheque is dishonoured for insufficiency of funds in the account. The explanation provides that the cheque should have been issued for 'a legally enforceable debt or other liability.'

9. The primary question that arises for consideration is - Does the delivery of a cheque in favour of a drawee not create a legally enforceable liability?

10. Mr. Mathew John, learned counsel for the first respondent refers to the provisions contained in Section 25(3) of the Indian Contract Act, 1872. By this provision, an agreement made without consideration is void unless 'it is a promise, made in writing and signed by the person to be charged therewith, or by his agent..... to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.' Thus, even in a case where a claim for recovery through a civil suit has become barred by limitation a promise made in writing and signed by the executant to pay becomes an agreement supported by consideration. Such an agreement is enforceable under law. Still further, by virtue of the provisions of Section 46 of the Negotiable Instruments Act, the delivery of a cheque completes the transaction. By the factum of delivery, the written promise matures into an enforceable contract. This is so despite the fact that the limitation for recovery of the amount may have expired before the making of the written promise.

11. Learned counsel for the petitioner submits that Section 25(3) of the Contract Act cannot be invoked to interpret the provisions of Section 138 of the Negotiable

Instruments Act.

12. The contention cannot be accepted. Section 138 provides for a penalty in a case where a cheque is dishonoured on account of insufficiency of funds. The cheque has to be by way of payment of a 'legally enforceable debt or a liability.' The liability may arise out of a contract or otherwise. Thus, to determine as to whether or not a liability is legally enforceable, the provisions of the Contract Act cannot be said to be irrelevant. These can provide a cause for a legal liability. Resultantly, when a person writes a cheque and delivers it to a person, the drawee not only gets the civil right to present the cheque and recover the amount, but in the event of the cheque being dishonoured the person who has issued the cheque becomes liable for prosecution under Section 138. In order words, the issuance of a cheque becomes a promise to pay under Section 25(3) of the Contract Act. The delivery of the cheque to the drawee creates a right to recover the money. On the cheque being dishonoured the person concerned becomes liable for prosecution. The execution of the cheque is an acknowledgement of a legally enforceable liability and when it is dishonoured the consequences of prosecution and punishment follow.

13. Mr. Benny Gervacis was at pains to point out that a cheque is drawn only when it is written and signed. If the claim is barred by limitation even before the cheque is actually drawn, it cannot amount to an acknowledgement of a debt or liability. This contention cannot be accepted. It is, undoubtedly, true that 'to draw' means to write and sign. However, even if the claim is barred by limitation on the date of the drawing of the cheque, on delivery to the other person, it becomes a valid consideration for another agreement. The drawal of the cheque evidences such an agreement. This acknowledgement is enforceable. The drawing and delivery of a cheque create a legally enforceable liability. Thus, we are of the opinion that when a person writes, signs and delivers a cheque to another it is an acknowledgment of a legally enforceable liability. Thereafter, if the cheque is dishonoured on account of insufficiency of funds such a person shall not be entitled to plead that at the time of his writing the cheque the claim had become barred by limitation and, thus, he is not liable to be punished under Section 138.

14. Mr. Benny Gervacis contended that under Section 18 of the Limitation Act the acknowledgement has to be made before the expiry of the period of limitation. In the present case, the cheque was executed after the limitation had already expired. Thus, it cannot amount to an extension of limitation.

15. For the purpose of the present case, it does not appear to be necessary to go into this matter in detail. It may, however, be mentioned that under Section 25(3), a promise can be made even in a case where the limitation for recovery of the amount has already expired. Such a promise has to be in writing. It can be in the form of a cheque. When a cheque is delivered to the payee, the person is entitled to present the cheque to the bank and seek payment. In such an event, if the cheque is dishonoured, the liability under Section 138 would arise. It would not be permissible for the accused to contend that the liability was not legally enforceable.

16. There is another aspect of the matter. It can happen that a cheque may be executed under coercion and yet the person who had drawn the cheque may face prosecution.

17. It is undoubtedly correct that Section 139 raises a presumption in favour of the holder of a cheque. But it creates only a rebuttable presumption. It is still open to the person who has delivered the cheque to prove the necessary facts and show that the cheque had been issued without any consideration or that it was not in pursuance to any legally enforceable debt or other liability.

18. Learned counsel for the petitioner pointed out that the courts have consistently taken the view that the plea of limitation is available as a valid defence to the accused. Learned counsel referred to the decisions in Girdhari Lal Rathi v. P.T.V Ramanujachari and Anr. (1997 (2) Crimes 658), Smt. Ashwini Satish Bhat v. Shri. Jeevan Divakar, (1999 DCR 470) and Joseph v. Devassia (2000 (3) KLT 533).

19. We have examined these decisions. Regretfully, though respectfully, we are unable to concur with the view taken by the Andhra Pradesh and the Bombay High Courts. The decision of the learned single Judge of this Court basically rests upon the view of the Andhra Pradesh High Court. We find that the relevant provisions

like Section 25(3) of the Contract Act and Section 46 of the Negotiable Instruments Act, were not brought to the notice of the learned single Judge.

20. In this context, it deserves mention that Section 138 was incorporated into the statute book primarily with the object of enhancing 'the acceptability of cheque in settlement of liabilities.' It was with this object in view that the drawer of a cheque was said to be made liable 'for penalties in case of bouncing of cheque due to insufficiency of funds in the accounts.....' If this object of the statute is kept in view the explanation cannot be liberally construed. It would only mean that the liability or debt should not arise out of a transaction which is illegal. It should be not a cheque to meet a liability under a wagering contract which shall not be legally enforceable. Otherwise, the object with which Section 138 was enacted shall be defeated.

21. Mr. Benny Gervacis points out that the decision of this Court in Joseph's case has the imprimatur of the Supreme Court. The Petition for Special Leave to Appeal (Crl.)No. 1785 of 2001was dismissed vide order dated September 10, 2001. He submits that their Lordships had heard the counsel for both sides and disposed of the matter by a speaking order. It reads:

'We have heard learned counsel for the petitioner.

We have perused the judgment of the High Court of Kerala in Criminal Appeal No. 161of 1994 confirming the

JUDGMENT / ORDER

of acquittal passed by the Addl. Sessions Judge, Thalassery in Criminal Appeal No. 212 of 1992 holding inter alia that the cheque in question having been issued by the accused for due which was barred by limitation the penal provision under Section 138 of the Negotiable Instruments Act is not attracted in the case.

On the facts of the case as available on the records and the clear and unambiguous provision in the Explanation to Section 138 of the Negotiable Instruments Act the judgment of the lower appellate court as confirmed by the High Court is unassailed.

Therefore, the Special Leave Petition is dismissed.'

On this basis it is contended that the correctness of the view in Joseph's case cannot be doubted. On the other hand, Mr. Mathew John points out that the subsequent decisions of the Supreme Court militate against the contention raised by the counsel for the petitioner.

22. The matter appears to have been considered by their Lordships of the Supreme Court in A.V. Murthy v. B.S. Nagabasavanna (2002 (2) SCC 642). On a perusal of the judgment, we find that the matter was considered by the Supreme Court in the context of the provisions contained in the Negotiable Instruments Act as well as those of the Contract Act. However, the issue of limitation was left open. But what deserves mention is that even though the learned Sessions Judge had quashed the proceedings as the limitation in recovering the money had expired and the order had been upheld by the Karnataka High Court, yet, their Lordships had reversed the decision. This is indicative of the fact that the accused was not entitled to escape liability to suffer penalty merely on account of the fact that the limitation for recovery of the amount had expired before the date of the issue of the cheque. When examined in this light, the dismissal of the SLP in Joseph's case cannot be said to be the enunciation of law which may be binding under Article 141. In fact, a perusal of the order shows that it was wholly on 'the facts of the case as available on the records' that their Lordships had dismissed the Special Leave Petition.

23. No other point has been raised.

24. Before we part with this case a fact that deserves mention is that the proceedings had been initiated in the year 1991. The trial court had imposed a fine of Rs. 1,50,000/- vide its order passed in the year 1995. The respondent had made an application that the amount should either be paid to him or kept in a fixed deposit. The application was dismissed. The result is that the deposit has been lying in the Treasury. The complainant has not been able to get any advantage from that deposit. In such cases, it would be appropriate to deposit the amount in a fixed deposit so that the party which succeeds gets back the money with a reasonable return on it. Otherwise, it becomes a dead loss for both the sides.

25. In view of the above, the question as posed at the outset is answered in the negative. It is held that:

(1) When a person issues a cheque, he acknowledges his liability to pay. In the event of the cheque being dishonoured on account of insufficiency of funds he will not be entitled to claim that the debt had become barred by limitation and that the liability was not thus legally enforceable. He would be liable for penalty in case the charge is proved against him.

(2) The view taken by this Court in Joseph's case cannot be sustained as laying down the correct principle of law. It is consequently overruled.

In view of the above, the revision petition is dismissed. It is further directed that out of the amount of Rs. 1,50,000/- which had been deposited by the petitioner, Rs.75,000/- shall be paid to the respondent-complainant within one week from the presentation of a copy of this order .

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com