

Gopalakrishnan Vs. Noorjahan and Others

Gopalakrishnan Vs. Noorjahan and Others

SooperKanoon Citation : sooperkanoon.com/946786

Court : Kerala

Decided On : Jun-23-2011

Judge : The Honourable Mrs. Justice M.C. Hari Rani

Appeal No. : Crl.A.No.1241 of 2004

Appellant : Gopalakrishnan

Respondent : Noorjahan and Others

Judgement :

The complainant in C.C.No.480/2001 on the file of the Judicial First Class Magistrate Court, Varkala is the appellant. The complaint was filed against the first respondent herein complaining of commission of the offence punishable under Section 138 of the Negotiable Instruments Act by the respondent/accused. The learned Magistrate found that the period of limitation would start from the date of receipt of notice by the accused i.e. 05/09/2000 but the complaint was lodged on 27/11/2000 i.e. after the prescribed time limit as contemplated under Section 138 of N.I. Act. The learned Magistrate hence held that the complainant has failed to prove all the ingredients of S.138 of N.I. Act. On that finding, the learned Magistrate found the accused not guilty of the offence u/s. 138 of N.I. Act. She was acquitted of the said offence u/s.255(1) Cr.P.C. Hence, this appeal is preferred by the aggrieved complainant against acquittal of the accused.

2. The case of the complainant in brief is as follows:-

The accused borrowed an amount of Rs.96,000/- (Rupees Ninety six thousand only) from the complainant on 25/10/1997 at the house of the complainant on condition that it shall be returned within one year. When he demanded back the amount on 01/08/1998 the accused issued a cheque dated 29/08/2000 for Rs.1,50,000/- being the principal amount with its interest drawn on IOB, Varkala branch dated 29/08/2000. When the cheque was presented for collection at the bank, it was returned dishonoured on the reason "account closed". When notice of demand was issued through lawyer to the accused, it was accepted by the accused. She failed to reply to the notice and to repay the amount. Hence, it was complained by the complainant/appellant that the accused has committed the offence under Section 138 of the Negotiable Instruments Act.

3. It is contended in this appeal that the lower court did not consider the evidence adduced by the appellant/complainant and acquitted the accused on the finding that the complaint has not been filed within the time limit as contemplated under Section 138 of the Negotiable Instruments Act. The learned counsel further argued that the word used in Section 138 (c) is receipt of the notice. According to the learned counsel, only in cases where a complainant is having specific knowledge about the date on which the notice was served, the period of one month for filing the complaint can be reckoned from the day immediately following the day on which the period of 15 days from the date of receipt of the notice by the drawer expires. In a case where the acknowledgment card had not received back and there is no material to show the service of notice to the drawer on a particular date, the date of knowledge of the complainant regarding receipt of notice by the drawer is to be taken as the date on which the payment period of 15 days as contemplated under proviso (c) of S.138 of the N.I. Act starts. Then only the cause of action arises and the complaint made within one month from that date is within time. According to the learned counsel only on 27/10/2000, the date on which complainant came to know through the postal authorities regarding receipt of statutory notice by the accused can be reckoned as the relevant date. The complaint was filed on 27/11/2000 i.e. within 45 days - Period of 15 days for payment and one month, thereafter. Hence the finding of the court below is illegal and the judgment of the lower court may be set aside, submitted the learned counsel for the appellant.

4. The contention of the appellant has been stoutly opposed by the learned counsel for the first respondent/accused. The learned counsel submitted that the cause of action arose on 05/09/2000, the date on which lawyer notice was actually served on the accused and therefore, there is no ground for any interference with the impugned judgment of acquittal passed by the learned Magistrate.

5. In the light of the contentions raised by the parties in this case, the point for consideration is when had the cause of action for filing the complaint arisen in the facts and circumstances of this case.

6. To decide the point in controversy in this case, it is relevant to refer the facts of the case.

7. The case of the complainant is that accused approached him and borrowed an amount of Rs.96,000/- on 25/10/1997 at his house and on condition that it shall be returned with interest within one year. When it was demanded back on 01/08/1998, she issued cheque dated 29/08/2000 for Rs.1,50,000/- being the principal amount with interest. Power of attorney holder of the complainant was examined as PW1. He testified in accordance with the allegations in the complaint. According to PW1, the amount was borrowed on 25/10/1997 on condition that it shall be returned within two months and when it was demanded back on 01/08/1998, the accused issued Ext.P1 cheque for Rs.1,50,000/- being the principal amount with interest drawn on IOB, Varkala branch on the account maintained by the accused. When the cheque was presented for collection by the bank of complainant namely Bank of Madurai, Varkala branch, it was returned dishonoured on the reason 'account closed'. The account was closed on 05/08/1998 and the cheque was issued on 01/08/1998 and there was no sufficient funds in her account on that day or thereafter to honour Ext.P1 cheque. The evidence of PW1 is corroborated by Exts.P2 and P3 dishonour memos dated 29/08/2000 and the intimation memo dated 30/08/2000. That evidence further gets support from the evidence of PW2, the Manager of I.O.B, Varkala and the certified copy of statement of account produced by PW2 and marked as Ext.P9. Then the complainant caused to issue lawyer's notice on 02/09/2000 and the copy was marked as Ext.P4. The postal receipt of the notice was marked as Ext.P5. The

acknowledgment card was not returned to the complainant. Complaint was preferred on 05/10/2000 by the Advocate who issued notice on behalf of the complainant before the Post Master of Vadasserikkonam regarding non-receipt of acknowledgement for the registered article. Ext.P5 is the complaint, for which the Manager, Customer Care center, Thiruvananthapuram sent a reply, Ext.P6 on 17/10/2000 wherein it was informed that “the enquiries made revealed that the registered article was delivered to the addressee at VADASSERIKONAM 695145 on 05/09/2000.” Ext.P7 is the certificate of delivery issued by Sub Postmaster, Vadasserikonam wherein it is certified that “the RL No.597 booked at Varkala P.O on 04/09/2000 was received here on 05/09/2000 and delivered to Smt. Noorjahan, Thenguvila Veedu, Vadasserikonam on 05/09/2000 itself.” The complainant got Exts.P6 and P7 on 27/10/2000 as revealed from Ext.P8, the postal cover addressed to the lawyer who issued the notice. The accused failed to repay the amount even after receipt of notice. Hence the complaint was lodged on 27/11/2000 by the complainant alleging offence under Section 138 of the N.I. Act against the accused.

8. It was contended by the learned defence counsel that the complaint was filed after the prescribed time limit and offence under Section 138 of N.I. Act would not lie against the accused as the complaint was time-barred. Learned counsel for the complainant contended that the complainant got the knowledge regarding the receipt of lawyer’s notice by the accused on 27/10/2000 only. Hence the limitation period for filing the complaint would start from the date of knowledge of the complainant regarding the service of notice and the statutory period prescribed to file the complaint for the offence under Section 138 of the N.I. Act would start from such date of receipt of knowledge i.e. from 27/10/2000 only. According to the learned counsel, the complaint may not fail for default on the part of the postal department and without any fault on the part of the complainant.

9. In this case, the dishonoured cheque was returned to the appellant on 29/08/2000 with the note “Account closed” and intimation received on 30/08/2000. The appellant caused to send a lawyer’s notice on 02/09/2000 demanding payment within 15 days. The notice was received by the respondent on 05/09/2000. The respondent accused neither sent reply notice nor made payment

within the stipulated period of 15 days. The appellant did not receive acknowledgment card evidencing receipt of notice by the accused as envisaged under Section 138(b) of the N.I. Act. Hence he complained of the same before postal authorities and he was informed that the postal article/lawyer notice already delivered to the accused. The accused had received the same on 05/09/2000 which fact was intimated to the appellant on 27/10/2000 as revealed from Exts.P6 and P7. Thereafter the complaint was filed on 27/11/2000 against the accused alleging offence under Section 138 of the Negotiable Instruments Act.

10. After considering the evidence adduced in this case, the trial court that Ext.P1 cheque was drawn on an account maintained by the accused at I.O.B, Varkala branch and there was no sufficient funds to honour the cheque in the account of the accused on 01/08/1998 or thereafter. The court found that the cheque was issued by the accused in discharge of a legally enforceable debt to the complainant. After entering into such a finding, the learned Magistrate found that the complaint was lodged after the prescribed time limit and the offence under Section 138 of the Negotiable Instruments Act would not hence lie against the accused. Accordingly, the accused was found not guilty of the alleged offence and acquitted the accused under Section 255(1) Cr.P.C.

11. The only point for consideration in this appeal is whether the complaint is time barred?

12. It will be advantageous to straight away extract the relevant Provisos (b) and (c) appended to Section 138 and Section 142(b) of the N.I.Act.

138. Dishonour of cheque for insufficiency, etc., of funds in the account:-

Xxx xxxx xxx

Provided that nothing contained in this section shall apply unless -

(a) xxx xxx xxxx

(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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(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.”

Xx xxx xxx

Xx xxx xxx

142. Cognizance of offences. -

Xx xxx xxx

Xx xxx xxx

(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.

13. To constitute of an offence under Section 138 of the Negotiable Instruments Act, the notice of demand in writing on the part of the payee and the failure on the part of the drawer to pay the amount within a period of fifteen days of the receipt of the said notice have to be proved. The notice has to be received by the accused.

14. From the evidence adduced by the complainant before the lower court, it is evident that after receipt of the dishonour memo from the drawee bank, the complainant sent notice by Registered Post with A/D to the accused through his Advocate by letter dated 02/09/2000 demanding payment of said amount of money. The accused had admittedly received the aforesaid notice on 05/09/2000. The period of 15 days ordinarily expired on 20/09/2000. So cause of action for filing complaint would arise normally from 21/09/2000. The complaint was to be filed within one month - i.e. on or before 21/10/2000. But complaint was filed on 27/11/2000. Is it barred by limitation as found by the lower court?

15. On the question of notice, the Apex Court in the decision in K. Bhaskaran v. Sankaran Vaidhyan Balan (1999 (7) Supreme Court Cases 510) it was held as follows:

“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.”

16. In the present case, the accused received the statutory notice; but did not choose to send a reply. In case of refusal of the postal article or unserved in spite of intimation, change of address etc. it would be returned to the sender after making such endorsements on the postal article by the postal authorities. But in the case on hand, neither the intimation nor the acknowledgment card was received by the complainant till 05/10/2000. Thereafter his Advocate sent a letter to the Postal Authority on 05/10/2000 complaining about the non-receipt of acknowledgment of the registered article addressed to the accused. On 27/10/2000 the complainant had received the letters, Exts.P6 and P7 from the postal authorities and came to know that the registered article/notice was delivered to the addressee/accused on 05/09/2000. The relevant complaint to the Postal Authorities had been filed by the complainant's counsel on 05/10/2000 as revealed from Ext.P6 and came to know on 27/10/2000 that the statutory notice was received on 05/09/2000 by the accused. Within one month after excluding that day of 27/10/2000 i.e. on 27/11/2000 the complaint was lodged by the complainant before the lower court. The learned Magistrate, upon examination of the witnesses and perusal of the record, appears to have taken cognizance of the alleged offence and directed issue of summons upon the accused by his order dated 27/06/2001. On receipt of summons, the accused appeared and contested the case. Only after trial the accused was acquitted on the finding that the complaint

was filed after the prescribed time limit.

17. Under the provisions of clause (c) of S.138 of the Act the cause of action for such-like complaint arises on the failure of the drawer "to make 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 15 days of the receipt of the said notice" given under clause (b) thereof; and not before that. No such complaint can, therefore, legally be filed before the aforesaid period. That being so, the material and relevant date for accrual of cause of action for such complaint is the date of receipt of notice by the drawer. The complainant being the sender of the notice cannot clearly know the date of actual service of the same and can only wait for the acknowledgment card. The receipt of the notice under clause (b) of S.138 of the Act must invariably be by the drawer of the cheque to whom it is given. Knowledge of the sender about the date of receipt of notice by the drawer is, therefore, very much material as regards accrual of the cause of action for making the complaint. Where notice is sent by registered post A/D, which is the usual mode of service waiting for the acknowledgment card can, hardly be avoided, if the parties do not belong to the same place or near about places. The knowledge of the sender (complainant) about the fact of and date of receipt of such notice by the addressee/accused would invariably be dependent upon the agencies, namely, the Postal Department, which is obliged to return back the A/D card to the sender of the registered notice. A/D card did not reach back the sender, necessitating correspondence with the Postal Department as to the delivery/service of the registered notice or the date of delivery/service of such notice. In such circumstances, the complainant herein cannot be compelled to draw the presumption regarding due service of notice by the addressee/accused as provided under Section 27 of the General Clauses Act. Such presumption in support of service of notice would depend upon the facts and circumstances of each case and such presumption can be raised by the complainant at the trial stage only. Such presumption of due service can be rebutted by the accused. Accordingly, the appellant opted to take the risk for proving that the accused received the notice and preferred the complaint before the postal authorities and obtained certificates regarding the delivery of notice whereby on 27/10/2000 he knew about the actual receipt of the postal article/statutory notice by the addressee/accused on 05/09/2000.

18. Under Section 142(b) of the Act a competent court can take cognizance of a written complaint of an offence under Section 138 of the N.I. Act if it is made within one month of the date on which the cause of action arises under clause (c) of the proviso to S.138 as already mentioned. It is significant to note that clause (b) of Section 142 refers to only one fact which will give rise to the cause of action and that is the failure to make payment within 15 days from the date of receipt of the notice. Consequent upon the failure of the drawer to pay the money within the period of 15 days as envisaged under clause (c) of the proviso to S.138, the liability of the drawer for being prosecuted for the offence he has committed arises. The period of one month for filing the complaint under S.142(b) is to be reckoned accordingly. Sections 138 and 142 postulate only one cause of action for dishonour of one cheque. There can be prosecution for one offence only and such offence is committed by the drawer immediately on his failure to make the payment within fifteen days of the receipt of the notice served in accordance with clause (b) of the proviso to S.138. That cause of action under clause (c) of the proviso to Section 138 of the Act is within 15 days of receipt of notice issued under clause (b) of Section 138. In case of failure of the drawer to pay the money within the stipulated time he would be liable for the offence and the cause of action for filing the complaint will arise under Section 142(b) of the Act. The period of one month for filing the complaint will be reckoned from the date immediately following the date on which the period of 15 days from the date of receipt of the notice by the drawer expires.

19. On such construction, cause of action for such complaint, so far as the complainant in this case is concerned, would accrue on the failure of the drawer to make payment within fifteen days from the date of knowledge of the complainant about the receipt of the notice by the drawer/accused. Such construction would not in any way be prejudicial to the accused. It would rather be beneficial to her as she would get longer time to make payment of the amount and thus avoid criminal liability for non-payment.

20. For the fault on the part of the accused in not sending a reply and in not repaying the amount as demanded within the period stipulated in the notice which admittedly was received by her, the complainant cannot be punished/penalized for

the same. The complainant cannot also be put to any sufferance or prejudice for not filing the complaint before he came to know of the actual service of the notice of demand on the accused.

21. It will only be apposite to note that as per settled law, the complainant who has issued a notice of demand on the basis of the dishonour of the cheque, cannot represent the cheque again and claim a further opportunity to initiate a valid prosecution for dishonour of the same cheque. If the Court accepts the stand of the accused, it would mean that a complainant who waited bona fide for receipt of information about due service of the notice of demand on the drawer of the cheque would not get a fair opportunity to prosecute the complaint. That cannot obviously be the law.

22. Considering the facts and circumstances of this case, it has to be held that the cause of action for filing the relevant complaint so far as the present complaint is concerned, arose on the expiry of 15 days from 27/10/2000, the date of knowledge of the complainant about the receipt of notice by the accused, sent under clause (b) of Section 138 of the N.I.Act. The filing of the complaint by the complainant was within one month therefrom. That day (27/10/2000) is to be excluded for counting the period of one month. The complaint was filed by the complainant on 27/11/2000. The result would be that the complaint filed on 27/11/2000 is within the stipulated period and within time. Instead of that, the learned Magistrate took the starting point of cause of action as 05/09/2000 and fell in error by dismissing the complaint on the finding that the same was barred by time. The finding of the learned Magistrate regarding the dismissal of the complaint filed by the appellant is set aside. The impugned judgment to that extent cannot be sustained which is set aside accordingly.

23. The summarise, I hold that the expression “the date of receipt of the said notice” in proviso (c) of Section 138 of the N.I.Act must be realistically understood as ‘the date of knowledge of receipt of the said notice’ while computing the period of “one month of the date on which cause of action arises” in Section 142(b) of the N.I.Act. That alone would be a just, purposive and realistic interpretation of the law. Any contra interpretation would be unjust and would result in frustration of the

purpose of law.

24. I further note that after the amendment to Section 142 of the N.I.Act with effect from 06/02/2003 there is no chance for any such injustice as the Magistrate shall be at liberty to condone the delay if any in filing the complaint. The newly introduced proviso reads as follows:

142. Cognizance of offences

X x x

“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.”

But the court certainly has the burden to reasonably interpret the expression ‘date of receipt of the notice’ in Section 138 (c) in respect of pre-amendment cases to avoid injustice.

25. Accordingly, this appeal is allowed. The finding of the learned Magistrate that the complaint was filed after the prescribed time limit as contemplated under Section 138 of the Negotiable Instruments Act and the acquittal of the accused on that finding are set aside. I found that the complaint was made by the complainant/appellant within the period prescribed under Section 142(b) of the N.I.Act.

26. The case is remanded back to the lower court. The learned Magistrate shall dispose the matter afresh in accordance with the provisions of law within a period of two months from the date of receipt of the records of this case. Parties shall appear before the learned Magistrate on 11/7/2011. Send back the records to the court below immediately.