

(2016) 10 GUJ CK 0015
In the Gujarat High Court

Case No : Criminal Revision Application (Against Acquittal - Negotiable Instrument Act) No. 503 of 2016

Sunil Kanubharthi Goswami

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 03-10-2016

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, Section 142

Citation : (2017) 173 AIC 314 : (2017) 1 GLR 370

Hon'ble Judges : Mr. S.G. Shah, J.

Bench : Single Bench

Advocate : Mr. Hemant K. Makwana, Advocate, for the Applicant No. 1; Mr. Manan Mehta, A.P.P, for the Respondent No. 1; Mr. Chintan S. Popat, Advocate, for the Respondent No. 2

Final Decision : Dismissed

Judgement

Mr. S.G. Shah, J.—Rule. Learned advocate Mr. Chintan S. Popat waives service of notice of rule for respondent No.2 and learned APP Mr. Manan Mehta waives service of notice of rule for respondent No.1 - State.

2. Heard learned Advocate Mr. Hemant K. Makwana for the applicant and learned APP Mr. Manan Mehta and learned Advocate Mr. Chintan S.Prajapati for Respondent No.2.

3. Petitioner herein is the original complainant whereas Respondent No. 2 is Original Accused in Criminal Case No. 766/2015 preferred by complainant under Section 138 of the Negotiable Instruments Act before the Chief Judicial Magistrate, Ahmedabad, (Rural). Therefore, parties are referred in their same capacity before the Trial Court.

4. The complainant has preferred a complaint contending that the cheque issued by the respondent has returned unpaid for want of sufficient funds in his account with the bank. However, it is an undisputed fact that the cheque in question is

dated 27th March, 2015 for Rs. 1,36,000/- which was returned unpaid i.e. dishonored by the banker with their endorsement dated 15th June, 2015 for the reason of "insufficient funds" in their account. It is also undisputed fact that statutory notice under Section 138(b) of the Negotiable Instruments Act, 1881, was addressed by the complainant on 23rd June, 2015 and it was served upon the accused on 27th June, 2015. Therefore, the cause of action for filing the complaint is arising from 13th July, 2015 i.e. 15 days after the date of service of notice for which the accused has failed to make payment. Therefore, if complaint is to be filed within 30 days from the cause of action, then it is to be filed on or before 12th August, 2015. This is the statutory provision and therefore there is no discretion either with the complainant or with the Court to change such schedule which is confirmed in Section 138 of the Negotiable Instruments Act. The relevant provisions for the calculation of limitation to file such complaint is found in the form of proviso to Section 138 and Section 142 of the Negotiable Instruments Act, which reads as under:

"138. Dishonour of Cheque for insufficiency etc., of the funds in account

xxx xxx xxx

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 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

(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."

142. Cognizance of offences:-

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 © 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].

(c) no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138."

5. A bare perusal of the above Sections make it clear that complaint under Section 138 of the Negotiable Instruments Act is to be made within one month from the date on which the cause-of-action arises as provided under clause(c) of the proviso to Section 138 and that such proviso makes it clear that the drawer of the cheque is permitted to make the payment of the amount of money to be paid for such cheque to the payee within 15 days of the receipt of the statutory notice as provided under clause(b) of the proviso to Section 138 of the Negotiable Instruments Act, 1881.

6. Therefore, if we recollect the factual details which are described herein above, now it becomes clear that the cause-of-action to file the complaint arose to the present complainant on 13th July, 2015 i.e. after 15th day from the date of service of statutory notice upon the accused which is 27th June, 2015 and therefore, complaint is to be filed within 30 days from 13th July, 2015 i.e. on or before 12th August, 2015. It is undisputed fact that the complaint is filed after 12th August, 2015 i.e. on 19th August, 2015 and therefore there is delay of 7 days in filing such complaint. Though proviso to Section 142 empowers the Court to condone such delay, it is clear that the cognizance of the complaint may be taken by the Court after the prescribed period as aforesaid only if the complainant satisfies the Court that he had sufficient cause for not filing the complaint within such period. Therefore, it is mandatory for the complainant to plead and prove that there was sufficient cause for not filing the complaint within prescribed period.

7. Unfortunately, in the present case, if we peruse the complaint which is produced at Annexure-"B", there is neither disclosure that there is some delay in filing such complaint and therefore there is no explanation or reason to consider that there is sufficient cause for not filing the complaint within the prescribed period so as to enable the Court to take cognizance. Therefore, in absence of pleading and proof regarding sufficient cause, the Court cannot be convinced that there was sufficient cause.

8. In view of the above facts, the Chief Judicial Magistrate has by his order dated 14th October, 2015 rejected the complaint of the complainant considering that when there is no application to condone delay and when there is no disclosure by the complainant that the complaint is filed belated, there is no reason to condone the delay. It is clear that the complaint is filed after the prescribed time and hence it is rejected.

9. Therefore, complainant has challenged such order of dismissal dated 14th October, 2015 by filing Criminal Appeal No. 52 of 2015 before the Sessions Court of Ahmedabad, (Rural). The Sessions Court has also by the impugned order and judgment dated 30th March, 2016 confirmed the decision of the Chief Judicial Magistrate by dismissing the appeal. Though order of the Chief Judicial

Magistrate was passed upon facts only, now the Sessions Court has dealt with the issue in detail while dismissing the appeal and thereby refused to condone the delay in filing the complaint.

10. A perusal of impugned judgment shows that the Sessions Court has taken care of the rival submissions and applicable law and therefore, there is no irregularity or illegality in any manner whatsoever in the impugned judgment. The Appellate Court has framed proper issues, discussed all the facts and considered all the law points and citations referred by the complainant, but ultimately concluded to dismiss the appeal, ss complainant has never sought for condonation of delay by showing any cause as a sufficient cause for such delay. Therefore, I do not find any substance in the Revision petition so as to interfere with the concurrent findings of the two Courts below which is mainly based upon the factual details which categorically confirm that there is clear delay of 7 days in filing the complaint by the complainant and neither there is an application to condone the delay nor even a whisper in the complaint to satisfy the Court that there was sufficient cause for not filing the complaint in time. Therefore, minute details of the dispute between the parties are not much material to be discussed herein whereas issues to be dealt with in this revision is described in the impugned order and therefore I do not wish to reproduce the same.

11. At this juncture reference to the decision in the case of Umiya Pipe Private Limited v. State of Gujarat reported in 2008 (3) G.L.H. 628 is material wherein Co-ordinate Bench of this High Court has held that powers to condone delay in filing a complaint cannot be exercised in absence of any pleading and/or request to condone delay and thereby complaint was quashed being time barred. Almost similar situation is there in the present case and therefore there is no reason to deviate from such decision.

12. As against that, petitioner/complainant is relying upon following two judgments. However, both these judgments do not help the petitioner for the reasons discussed herein after:

(I) Surekha Sandip Hajare v. Instacomp, reported in 2004 CriLJ 1687, wherein the Single Judge of Bombay High Court held that if complaint is filed after expiry of limitation, Court should be liberal in condoning such delay if the complainant is not blamable for his own act, because law does not help the indolent and the delay has to be condoned in the interest of justice and in context with the grounds which were beyond the control of such complainant. However it cannot be ignored, even for condoning the delay by taking liberal view there must be sufficient cause to the satisfaction of the concerned Court that there is reason to condone the delay. Whereas, the same judgment also confirms that every complainant is obliged to submit an application for condonation of delay as indicated by the provisions of Section 473 of the Code if prima facie the complaint is indicating that it is filed beyond the period of statutory limitation provided by the concerned Act.

(II) In the case between Nikumb Dairy Products Ltd. v. State of Maharashtra reported in 2007 (1) BCR (CRI) 515, wherein also the Single Judge of the Bombay High Court is referring the case of Surekha Sandip Hajare (Supra). Though the Court has remanded back the application for condonation of delay to the Trial Court, it is nowhere concluded that the delay can be condoned irrespective of absence of sufficient cause and irrespective of specific application for condonation of delay. Therefore, none of the above judgments would help the petitioners to succeed in this petition.

13. In view of above facts and circumstances, when there is no application to condone the delay and when there is no cause shown at all to be considered as a sufficient cause to condone the delay there is nothing in the revision petition which can help the petitioner to succeed in this petition, more particularly in absence of any irregularity or illegality and when there are two concurrent findings of the Courts below. Even the legal position does not aid or support the petitioner.

14. For the foregoing reasons, Criminal Revision Application is