

M.Cr.C.No.1470/2013

23/6/2014

Mr. N.J.Dave, counsel for applicant.

Mr. D.K.Goyal, counsel for the non-applicant.

This is an application u/s 378(4) Cr.P.C. for leave to appeal against the judgment dated 19/12/2012 passed by XIII ASJ, Indore in Cr.Appeal No.139/2012 whereby learned ASJ has acquitted the non-applicant from the charges under section 138 of the Negotiable Instruments Act (hereinafter referred as 'the Act' for brevity) and set aside the conviction and sentence passed by the learned JMFC, Indore in cr.case No.1352/06 on 23/1/2012.

2. Facts in brief are that applicant has filed a complaint under section 138-A of Negotiable Instruments Act alleging that on 27/4/2006, non-applicant gave a cheque of Rs.50,000/- to applicant which was subsequently bounced by the bank for want of sufficient funds. Thereafter on 5/5/2006, applicant sent a notice to the non-applicant but the applicant did not receive any acknowledgement to the notice. Subsequently Customer Care Center of Postal Department vide letter dated 10/7/2006 informed the complainant that the registered notice has been delivered on 6/5/2006 to non-

applicant. Meanwhile on 29/6/2006 a complaint u/s 138 of the Act was filed against the non-applicant before the Court of JMFC, Indore. Learned JMFC took cognizance on the basis of complaint and the non-applicant was put to trial. At the stage of defence evidence, the applicant moved an application u/s 5 of the Limitation Act praying for condoning the delay of 8 days in filing the complaint. Learned JMFC allowed the application and condoned the delay, thereafter non-applicant preferred a Criminal Revision bearing No.392/11 before the ASJ challenging the order of condonation of delay. Learned ASJ vide order dated 26/8/2011 allowed the revision and gave a finding that since proviso to the Section 142(b) of the Act provides for condoning delay and hence application u/s 5 of Limitation Act is not maintainable. Moreover, at the stage of defence such application was not maintainable.

3. Thereafter the JMFC proceeded in the matter with a view that once he took the cognizance in the matter he cannot retreat from it and further he recorded a conviction and passed sentence of six months imprisonment and awarded compensation of Rs.70,000/- (Rs.Seventy Thousand) u/s 357(3) Cr.P.C.. Being aggrieved the non-applicant preferred criminal appeal No.139/12

against such conviction before the XIII ASJ, Indore.

4. Learned ASJ vide order dated 19/12/2012 allowed the appeal and set aside the conviction passed by learned JMFC on the ground that the complaint was time barred and no application was filed as per proviso of section 142(b) of the Act. Against the order of acquittal the complainant/applicant has filed the instant application seeking leave to appeal.

5. Learned counsel for the applicant submitted that provision of section 142 of the Act should not be strictly construed and after taking the cognizance, the objection with regard to limitation cannot be agitated particularly when the applicant has satisfactorily explained the delay by filing the application u/s 5 of the Limitation Act. Therefore, order of acquittal passed by the learned ASJ solely on the ground that the application for condonation of delay at the defence stage was not maintainable, is illegal. There is no stage provided in the statute for filing an application for condonation of delay, therefore leave to Appeal be granted.

6. Learned counsel for the non-applicant vehemently opposed the application and submitted that admittedly, the complaint was time barred by 6 days and no application was filed for condonation

of delay as per the proviso of Section 142(b) of the Act and therefore the Magistrate was not competent to take cognizance on a time barred complaint. Provisions of Sec.5 of Limitation Act are not applicable to the complaint u/s 138 of the Act. Thus there is no illegality in the order of acquittal passed by the learned ASJ.

7. I have considered the rival contentions of both the parties and perused the record.

8. It is admitted fact that the notice was sent on 5/5/2006 which was received by the non-applicant on 6/5/2006. The non-applicant was required to make payment in terms of the said notice within fifteen days i.e. on or before 21/5/2006 but he failed to comply the notice therefore as per Sec.138(c) cause of action arose on 22/5/2006. As per the provision of Sec.142(b) the complaint must be filed within one month i.e. on or before 21/6/2006 whereas the complaint was filed on 29/6/2006. Thus the complaint is barred by 6 days.

9. In the complaint it is not mentioned that complaint is time barred by 6 days and no application is filed as per the proviso to the Section 142(b) of the Act. The application u/s 5 of the Limitation Act was filed when the case was fixed for defence

evidence.

10. Firstly, it has to be seen whether the provisions of Sec.5 of the Limitation Act are applicable to the complaint under section 138 of the Act. applications and Appeals and not to the complaint.

11. Hon'ble Apex Court in the case of **Subodh S.Salaskar Vs. Jayprakash M.Shah, (2008) 13 SCC 689** held as under :-

“Ex facie, it was barred by limitation. No application for condonation of delay was filed. No application for condonation of delay was otherwise maintainable. The provisions of the Act being special in nature, in terms thereof the jurisdiction of the court to take cognizance of an offence under section 138 of the Act was limited to the period of thirty days in terms of the proviso appended thereto. Parliament only with a view to obviate the aforementioned difficulties on the part of the complainant inserted proviso to clause(b) of Section 142 of the Act in 2002. It confers a jurisdiction upon the court to condone the delay. It is, therefore, a substantive provision and not a procedural one. The matter might have been different if the Magistrate could have exercised its jurisdiction either under Section 5 of the

Limitation Act, 1963 or sec.473 of the Code of Criminal Procedure, 1976. The provisions of the said Acts are not applicable. In any event, no such application for condonation of delay was filed. If the proviso appended to clause(b) of Section 142 of the Act contained a substantive provisions and not a procedural one, it could not have been given a retrospective effect. A substantive law, as it is well settled, in absence of an express provision, cannot be given a retrospective effect or retroactive operation.'

12. Hon'ble Apex Court in the recent judgment of **Econ Antri Ltd. Vs. Rom Industries Ltd., 2014(1) JLJ 1** while dealing computation of the period of limitation for the purpose of complaint filed under the Act held as under :-

“As the limitation Act is held to be not applicable to N.I. Act drawing parallel from Tarun Prasad Chatterjee(supra) where the Limitation Act was held not applicable, we are of the opinion that with the aid of section 9 of the General Clauses Act, 1897 it can be safely concluded in the present case that while calculating the period of one month which is prescribed under Section 142(b) of the N.I.Act, the period

has to be reckoned by excluding that date on which the cause of action arose. It is not possible to agree with the counsel for the respondents that use of the two different words 'from' and 'of' in section 138 at different places indicates the intention of the legislature to convey different meanings by the said words.

13. It is clear that the provisions of Section 5 of the Limitation Act are procedural provision whereas the proviso to the clause(b) of Section 142 of the Act is a substantive provision. Thus, provisions of Section 5 of the Limitation Act are not applicable to the complaint under Section 138 of the Act.

14. Now it has to be seen what is the proper stage for filing an application as per proviso to Section 142(b) of the Act.

15. Madras High Court in the case of **Sri Vasudharini Enterprises Vs. K.Sundar Ramanujam** in CrI.OP.Nos.31536 to 31538/2006 Cr.M.P.Nos.1,1,1/2006 to 1,1,1/2007 decided on 23/7/2009 held as under :-

The proviso to clause (b) of Section 142 of the Negotiable Instruments Act has been inserted, conferring jurisdiction upon the Court to condone the delay, in case if the complaint

was not filed within the limitation period of 30 day in terms of the proviso appended thereto. As the said provision has been held to be a substantive provision and not a procedure one, the complaint being filed beyond the period of limitation, it cannot be entertained by allowing the respondents to file an application after it has been taken cognizance of by the learned Magistrate. That being so, the cognizance taken by the learned Judicial Magistrate is without any sanction of law and therefore, I am of the considered opinion that it deserves to be quashed and accordingly, it is quashed. '.

16. Madras High Court has taken this view in the light of the judgment of Hon'ble Apex Court in the case of Subodh S.Salaskar(supra), therefore I am of the considered view that an application as per proviso to clause(b) of Section 142 of the Act must be filed along with complaint and such application is not maintainable at subsequent stage I.e. after taking the cognizance and if the Magistrate took cognizance on the basis of time barred complaint then this defect cannot be cured by filing an application for condonation of delay at later stage. Hon'ble Supreme Court in the case of Subodh S.Salaskar(supra) held that when a time

barred complaint is filed under Section 138 of the Act and no application for condonation of delay was filed then a substantive right accrued in favour of accused, therefore the accused can raise the objection about the limitation at later stage.

17. Thus, I am unable to convince with the arguments of learned counsel for the applicant that after taking the cognizance the application for condonation of delay can be filed and accused applicant cannot raise the objection with regard to limitation at later stage.

18. In this case, at a defence evidence stage, it was pointed out by the defence that the complaint is time barred, then an application under section 5 of the Condonation of delay was moved which was erroneously allowed by the Magistrate. The order was challenged in revision and the learned ASJ has set aside the order. Even though, learned Magistrate proceeded further in the trial and recorded the conviction.

19. In these circumstances, Magistrate should have not recorded the conviction as he has erroneously taken the cognizance on a time barred complaint. Learned ASJ in appeal rightly held that the complaint was time barred, therefore,

conviction recorded by the Magistrate was illegal, therefore he acquitted the non-applicant.

20. I found that there is no illegality in the order of acquittal passed by learned ASJ in appeal, therefore there is no merit in the application for grant of leave to appeal. Thus, the application is dismissed.

(J.K.Jain)
Judge

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