

K. Hymavathi vs The State Of Andhra Pradesh on 6 September, 2023

Author: A.S. Bopanna

Bench: Prashant Kumar Mishra, A.S. Bopanna

2023INSC811

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. OF 2023
(Arising out of SLP (Crl) No. 7455 of 2019)

K. Hymavathi

... Petitioner

Versus

The State of Andhra Pradesh & Anr.

... Respondent

With

Crl. Appeal No.....of 2023 @ SLP (Crl) No. 7459 of 2019
Crl. Appeal No.....of 2023 @ SLP (Crl) No. 7457 of 2019
Crl. Appeal No.....of 2023 @ SLP (Crl) No. 7458 of 2019

JUDGMENT

A.S. Bopanna, J.

1. Leave granted.

2. The appellant is assailing the judgment dated 12.02.2019 passed by the High Court of Andhra Pradesh at Amravati in Criminal Petition No. 12675 of 2018 and Nisha Khulbey Date: 2023.09.06 16:41:30 IST Reason:

analogous petitions. Through the judgment, the High Court Page 1 while allowing the petitions before it, quashed the criminal proceedings against Respondent No. 2, being C.C. No.681 of 2017 and analogous complaints on the file of II Additional Chief Metropolitan Magistrate at Visakhapatnam. The appellant is the complainant in CC

No. 681 of 2017 and the other complaints, filed against the accused – respondent no.2 under Section 138 and 142 of the Negotiable Instruments Act ('NI Act' for short). The appellant is therefore before this Court claiming to be aggrieved by the said judgment.

3. The brief facts of the case as narrated in the first of the above appeal are that the appellant and respondent no.2 are known to each other. Due to their acquaintance respondent no.2 approached the appellant to borrow a sum of Rs 20,00,000/- stating that he required the amount to finance his son's higher education to study medicine and for domestic expenses. In order to assure the re-payment, respondent no.2 executed a promissory note on 25.07.2012 wherein it was agreed that the amount was to be repaid in full and along with interest at 2% per month. There was a Page 2 condition in the promissory note that the full and final payment will be made by December, 2016. The respondent No.2 failed to comply with the condition in the promissory note but on 28.04.2017 issued a cheque bearing No.548045 drawn on the Vijaya Bank, J.P. Marg, Visakhapatnam for a sum of Rs. 10,00,000/- towards partial discharge of the debt. The cheque when presented for collection was returned by the Bank on 15.05.2017 due to insufficient funds to honour the cheque. The appellant got issued a legal notice dated 24.05.2017 to respondent No.2, which was replied to by respondent No.2 on 01.06.2017. The appellant sent a rejoinder to the said reply on 03.06.2017.

Respondent No.2 sent a reply to the said rejoinder on 07.06.2017. The appellant thereafter filed complaints under Section 138 of the NI Act on 11.07.2017 before the Special Magistrate, Vishakhapatnam vide CC No. 681 of 2017 and analogous complaints. The learned Special Magistrate in accordance with law, took cognizance of the complaint under Section 138 of NI Act against the respondent No.2 -

Page 3 accused vide order dated 14.09.2018 and ordered the issue of summons.

4. The fact situation in the analogous appeals is also similar except for the date of the promissory note and the date of the cheque. However, in all the promissory notes the period for repayment indicated is the same and all other facts arising for consideration are similar. Hence for the purpose of narration and consideration of the law, the facts relating to the appeal arising out of SLP(Crl.) No.7455 of 2019 is referred herein.

5. The respondent No.2 herein however filed the petition in CRL.P No.12675 of 2018 and analogous petitions under Section 482 of the Criminal Procedure Code, 1973 (for short 'CrPC') before the High Court praying to quash proceedings under CC No. 681 of 2017 and analogous complaints. The High Court allowed the petitions filed under Section 482 CrPC by respondent no.2 herein, noting various judgments by this Court and the various High Courts, and observing that the limitation for enforcing the promissory notes had Page 4 expired much prior to the issuance of the cheques in question. As such, it was held this was a fit case for quashing since the complaint filed seeking prosecution was not in respect of a legally recoverable debt.

6. Mr. Sanchit Garga, learned counsel appearing on behalf of the appellant while assailing the judgment passed by the High Court, would contend that the High Court did not appreciate that the promissory note executed by respondent No.2 has the binding effect of a contract and hence the complaint under Section 138 of NI Act is maintainable when a cheque is drawn to pay wholly or in part, a debt which is enforceable and there is no bar of limitation. The cheque amounts to a promise governed by Section 25 (3) of the Indian Contract Act, 1872. Such promise which is an agreement is an exception to the general rule that an agreement without consideration is void. Though on the date of making such promise by issuing a cheque, the debt which is promised to be paid, even if is time-barred is a legally recoverable one. In view of Section 25 (3) of the Indian Contract Act, the promise/ agreement is valid and Page 5 therefore the same is enforceable. The learned counsel for the appellant has argued on the principle that the limitation act only bars the remedy and not the right of a party. He has relied upon the decision of this Court in *S. Natarajan v. Sama Dharman*, (2021) 6 SCC 413 and *A.V. Murthy v. B.S. Nagabasavanna*, (2002) 2 SCC 642.

7. Mr. Sidharth Luthra, learned senior counsel appearing as Amicus Curiae on behalf of respondent No. 2 – accused who has failed to appear despite service of notice, would however seek to sustain the judgment passed by the High Court. The learned Amicus Curiae has fairly put on record a compilation showcasing the different view taken by various High Courts, as well as the position of law stated by this Court. It is contended that the earlier view while considering that the presumption under Section 139 NI Act will apply, did not consider the scope in a criminal trial and the bearing that Section 322 of CrPC would have in the light of the decision in *Expedition Trial of Cases Under Section 138 of NI Act 1881*, (2021) SCC OnLine SC 325 and thus did not consider the jurisdictional fact for invoking Page 6 Section 138 NI Act. It is further contended that the debt being time-barred was not a legally enforceable debt and where a debt is barred by law such debt or liability based on a void contract is against public policy and NI Act cannot apply in such cases. In order to attract Section 25(3) of the Indian Contract Act, an express promise made in writing and signed by the person is required is his contention.

8. At the threshold it would be apposite to take note of the decisions referred to by the learned counsel for the petitioner so as to place in perspective the scope of consideration in a petition filed under Section 482 of CrPC seeking quashment of a complaint filed under Section 138 of NI Act, more so keeping in view the presumption as incorporated under Section 139 of the NI Act. As noted, the learned counsel has relied on the decision in the case of *S. Natarajan vs. Sama Dharman & Anr.* (2021) 6 SCC 413 wherein it is held as hereunder:

“6. The High Court referred to Section 25(3) of the Contract Act, 1872 on which reliance was placed by the complainant and observed that with regard to payment of time-barred debt, Page 7 there must be a distinct promise to pay either whole or in part the debt; that the promise must be in writing either signed by the person concerned or by his duly appointed agent. The High Court then observed that unless a specific direction in the form of novation is created with regard to payment of the time- barred debt, Section 25(3) of the Contract Act cannot be invoked. The High Court then went into the question whether issuance of cheque itself is a promise to pay time-barred debt and referred to Sections 4 and 6 of the NI Act. After referring to

certain judgments on the question of legally enforceable debt, the High Court stated that for the purpose of invoking Section 138 read with Section 142 of the NI Act, the cheque in question must be issued in respect of legally enforceable debt or other liability. The High Court then observed that since at the time of issuance of cheque i.e. on 1-2-2011, the alleged debt of the accused had become time-barred, the proceedings deserve to be quashed.

7. In our opinion, the High Court erred in quashing the complaint on the ground that the debt or liability was barred by limitation and, therefore, there was no legally enforceable debt or liability against the accused. The case before the High Court was not of such a nature which could have persuaded the High Court to draw such a definite conclusion at this stage.

Whether the debt was time-barred or not can be decided only after the evidence is adduced, it being a mixed question of law and fact.”

9. The Learned counsel has further referred to the decision in the case of A.V. Murthy vs. B.S. Page 8 Nagabasavanna (2002) 2 SCC 642 wherein it is held as hereunder:

“5. As the complaint has been rejected at the threshold, we do not propose to express any opinion on this question as the matter is yet to be agitated by the parties. But, we are of the view that the learned Sessions Judge and the learned Single Judge of the High Court were clearly in error in quashing the complaint proceedings. Under Section 118 of the Act, there is a presumption that until the contrary is proved, every negotiable instrument was drawn for consideration. Even under Section 139 of the Act, it is specifically stated that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for discharge, in whole or in part, of any debt or other liability. It is also pertinent to note that under sub-section (3) of Section 25 of the Indian Contract Act, 1872, a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, 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, is a valid contract.

Moreover, in the instant case, the appellant has submitted before us that the respondent, in his balance sheet prepared for every year subsequent to the loan advanced by the appellant, had shown the amount as deposits from friends. A copy of the balance sheet as on 31-3-1997 is also produced before us. If the amount borrowed by the respondent is shown in the balance sheet, it may amount to acknowledgment and the creditor might have a Page 9 fresh period of limitation from the date on which the acknowledgment was made.

However, we do not express any final opinion on all these aspects, as these are matters to be agitated before the Magistrate by way of defence of the respondent.

6. This is not a case where the cheque was drawn in respect of a debt or liability, which was completely barred from being enforced under law. If for example, the cheque was drawn in respect of a debt or liability payable under a wagering contract, it could have been said that that debt or liability is not legally enforceable as it is a claim, which is prohibited under law. This case is not a case of that type. But we are certain that at this stage of the proceedings, to say that the cheque drawn by the respondent was in respect of a debt or liability, which was not legally enforceable, was clearly illegal and erroneous.”

10. From a perusal of the legal position enunciated, it is crystal clear that this Court keeping in perspective the nature of the proceedings arising under the NI Act and also keeping in view that the cheque itself is a promise to pay even if the debt is barred by time has in that circumstance kept in view the provision contained in Section 25(3) of the Contract Act and has indicated that if the question as to whether the debt or liability being barred by limitation was an issue to be considered in such proceedings, the same is Page 10 to be decided based on the evidence to be adduced by the parties since the question of limitation is a mixed question of law and fact. It is only in cases wherein an amount which is out and out non-recoverable, towards which a cheque is issued, dishonoured and for recovery of which a criminal action is initiated, the question of threshold jurisdiction will arise. In such cases, the Court exercising jurisdiction under Section 482 CrPC will be justified in interfering but not otherwise. In that light, this Court was of the view that entertaining a petition under Section 482 CrPC to quash the proceedings at the stage earlier to the evidence would not be justified.

11. Notwithstanding the above, the learned Amicus Curiae would submit that the decisions referred to hereinabove would have to be viewed differently keeping in view the subsequent decision of a Constitution Bench of this Court in the case of the Expeditious trial of Cases under Section 138 of NI Act, 2021 SCC Online SC 325 to contend that in the said decision the power of the Magistrate under Section 322 of CrPC being an aspect to be Page 11 taken into consideration was considered. In a case where the Trial Court is informed that it lacks jurisdiction to issue process for complaints under Section 138 of the Act the proceedings will have to be stayed in such cases. Hence, it is contended that the power of the Trial Court to decide with regard to its jurisdiction is not taken away and in that circumstance exercise of power under Section 482 CrPC by the High Court would be justified. It is further contended by the learned Amicus Curiae that even the position under Section 25(3) of the Contract Act being applicable to criminal proceedings for dishonour of cheque will have to be examined in the background of the provision contained in the Explanation to Section 138 of NI Act which specifies that the debt or other liability enforceable would be only a legally enforceable debt or other liability. In such circumstances if the cheque is issued in respect of the debt which is not enforceable or a liability which cannot be recovered, in such event, the presumption under Section 139 of NI Act would not be available.

Page 12

12. Having referred to the judgments cited, prima facie we are of the opinion that the decision in S. Natarajan and A.V. Murthy (supra) has taken into consideration all aspects. No other elaboration is required even if the observations contained in the case of Expeditious Trial of Cases under Section

138 of NI Act (supra) is taken note, since, whether the debt in question is a legally enforceable debt or other liability would arise on the facts and circumstance of each case and in that light the question as to whether the power under Section 482 CrPC is to be exercised or not will also arise in the facts of such case. Even otherwise we do not see the need to tread that path to undertake an academic exercise on that aspect of the matter, since from the very facts involved in the case on hand ex facie it indicates that the claim which was made in the complaint before the Trial Court based on the cheque which was dishonoured cannot be construed as time-barred and as such it cannot be classified as a debt which was not legally recoverable, the details of which we would advert to here below. In that view, we have chosen not to refer to the Page 13 cases provided as a compilation as it would be unnecessary to refer to the same.

13. In that regard the perusal of the impugned judgment would disclose that the very narration as contained in para 4 of the impugned order would indicate that the consideration therein was predicated only on two facts as noted by the High Court, (i) that the promissory notes are of the year 2012, (ii) that the cheques are issued in the year 2017. It is in that light the High Court has indicated that the date of issuance of the cheque is beyond three years from the date of issuance of the promissory note so as to classify it as a time-barred debt. In this regard, on perusal of the records we note that the High Court has in fact misdirected itself, has proceeded at a tangent and has therefore erred in its conclusion.

14. As already noted, the facts are almost similar in all four cases and as such for the purpose of narration a perusal of the promissory note dated 25.07.2012 (Annexure P/1) would inter alia record as follows:

Page 14 “.....hereby admit to have availed a loan amount shown above for the purpose of meeting my own family expenses and for higher education of my children by collecting the cash amount of Rs.20,00,000/- (In words:

Rupees Twenty Lakhs only) for which I do hereby further agree to pay a monthly interest of Rs.2/- (In words: Rupees Two only) per month and fully understand hereby that I am bound by virtue of the promissory to repay the capital or principal loan amount as well as the agreed payable monthly interest amount within the date of December 2016 by ensuring the total payment to you or any of your assignees as directed by you by taking the payable amount to your home and pay it there...”
(emphasis supplied)

15. A perusal of the above-extracted and emphasised portion would indicate that the promise is to repay the principal amount with the interest accrued within December, 2016. Hence, when the respondent had agreed to repay the amount within December, 2016, the cause of action to initiate proceedings to recover the said amount if not paid within December 2016 would arise only in the month of December, 2016. In that light, the limitation would be as provided under Article 34 to the Schedule in Page 15 the Limitation Act, 1963. For the purpose of easy reference, the same is extracted here below:

THE SCHEDULE PERIODS OF LIMITATION Description Period of Time from of
suit limitation which period begins to run PART II – SUITS RELATING TO
CONTRACTS

34. On a bill Three years When the of exchange fixed time or expires.

promissory note payable at a fixed time, after sight or after Page 16 demand.

(emphasis supplied)

16. The provision would indicate that in respect of a promissory note payable at a fixed time, the period of limitation being three years would begin to run when the fixed time expires. Therefore, in the instant case, the time would begin to run from the month of December, 2016 and the period of limitation would expire at the end of three years thereto i.e. during December, 2019. In that light, the cheque issued for Rs.10,00,000/- which is the subject matter herein is dated 28.04.2017 which is well within the period of limitation. The complaint in CC No.681 of 2017 was filed in the Court of the Chief Metropolitan Magistrate on 11.07.2017. So is the case in the analogous complaints. Therefore, in the instant case not only the amount was a legally recoverable debt which is evident on the face of it, the complaint was also filed within time. Hence there was no occasion whatsoever in the instant case to exercise the power under Section 482 to quash the complaint. In that view, the order impugned dated 12.02.2019 passed by the Page 17 High Court in Criminal Petition Nos.12652, 12670, 12675, and 12676 of 2018 is not sustainable.

17. The order impugned is accordingly set aside.

18. The complaints bearing CC No.681 of 2018, CC No.644 of 2018, CC No.250 of 2018, and CC No.254 of 2018 are restored to the file of the Chief Metropolitan Magistrate, Visakhapatnam. Keeping in view that the matter has been pending from the year 2017, the Trial Court shall now proceed with the matters as expeditiously as possible but in any event shall dispose of the matter within six months from the date on which a copy of this judgment is furnished.

19. Before parting with the matter, we would like to place on record and command the usual, able assistance rendered by Mr. Sidharth Luthra, learned senior counsel as Amicus Curiae in the absence of respondent, in guiding this Court to arrive at its conclusion.

Page 18

20. The appeals are accordingly allowed with no order as to costs.

21. Pending application, if any, shall stand disposed of.

.....J. (A.S. BOPANNA)J. (PRASHANT
KUMAR MISHRA) New Delhi, September 06, 2023 Page 19