M/S. Sil Import, Usa vs M/S. Exim Aides Silk Exporters, ... on 3 May, 1999

Equivalent citations: AIR 1999 SUPREME COURT 1609, 1999 AIR SCW 1218, 1999 ALLMR(CRI) 1 740, (1999) 2 EFR 395, (1999) 5 BOM CR 493, (1999) 2 PUN LR 604, 1999 (5) KANTLD 255, (1999) 3 SCALE 90, 1999 (2) ALL CJ 1497, 1999 ALLMR(CRI) 1 826, (1999) 2 ALLMR 558 (SC), 1999 ALL CJ 2 1497, 1999 CRILR(SC MAH GUJ) 317, 1999 CALCRILR 277, 1999 (3) LRI 261, (1999) 3 JT 325 (SC), 1999 (122) PUN LR 604, 1999 (5) SRJ 436, 1999 (2) UJ (SC) 876, 1999 UJ(SC) 2 876, 1999 (3) JT 325, 1999 (4) ADSC 473, 1999 (4) SCC 567, 1999 SCC(CRI) 600, 2000 (6) COM LJ 471 SC, (2009) 1 NIJ 84, (1999) ILR (KANT) 2497, (1999) 2 CHANDCRIC 4, (1999) 36 ALL LR 300, (1999) BANKJ 852, (1999) 97 COMCAS 575, (1999) 2 EASTCRIC 128, (1999) 2 CIVILCOURTC 295, (1999) 2 KER LT 275, (1999) 2 MAH LJ 787, (1999) 2 MPLJ 168, (1999) 2 ORISSA LR 354, (1999) 16 OCR 647, (1999) 2 RECCRIR 658, (1999) 3 CURCRIR 15, (1999) 33 CORLA 379, (2000) 1 BANKCAS 668, (1999) 4 SUPREME 400, (1999) 25 ALLCRIR 1301, (1999) 2 ALLCRILR 432, (1999) CRILT 37, (1999) 3 CRIMES 21, (1999) 79 DLT 414, (1999) 2 MAHLR 340, (1999) 38 ALLCRIC 858, (1999) 3 BANKLJ 1, (1999) 3 CIVLJ 678, (1999) SC CR R 410, (1999) 2 CAL HN 39, 1999 CRILR(SC&MP) 317, (1999) 2 BANKCLR 322, 1999 (2) ANDHLT(CRI) 302 SC, (1999) 2 ANDHLT(CRI) 302, (1999) 5 BOM CR 416

Bench: M.B.Shah, K.T.Thomas

PETITIONER:
M/S. SIL IMPORT, USA

Vs.

RESPONDENT:
M/S. EXIM AIDES SILK EXPORTERS, BANGALORE

DATE OF JUDGMENT: 03/05/1999

BENCH:
M.B.Shah, K.T.Thomas

JUDGMENT:

THOMAS, J.

Leave granted.

A fax message sent by the respondent for his own safeguard has now boomeranged. Neither can he disown sending the fax message nor can he own its full implication. Thus he is forked in a catch-22-situation. Such a situation arose in a criminal proceeding which respondent launched against appellant for the offence under Section 138 of the Negotiable Instruments Act (for short the Act).

How the above situation is reached can be summarised thus:

> Respondent is a proprietary concern doing business in finished silk products by exporting them to foreign countries. Appellant is a company having its Headquarters in California (USA). Appellant has been placing orders with the respondent for exporting such silk materials. According to the respondent, appellant owed a sum of 72075 U.S. dollars (equivalent to more than 26 lakhs of rupees) towards the sale consideration of several consignments of materials despatched to the appellant on the orders placed. After much correspondence and negotiations appellant company issued some post dated cheques on State Bank of India (California ARTESIA Branch). Three of such cheques were presented on 3-5-1996 after those cheques attained maturity, for encashment through Bank of Madurai, Bangalore Branch. Two cheques were returned dishonoured with the reason no sufficient funds.
>
> On receipt of such intimation respondent sent a notice to the appellant company by fax on 11-6-1996. On the next day the respondent sent the same notice by registered post also which was served on the appellant on 25-6-1996. On 8-8-1996 respondent filed a complaint before the Additional Chief Metropolitan Magistrate, Bangalore in respect of cheque No.188 dated 20-11-1995 (for 5998.40 US dollars) and another cheque No.187 (with which the present appeal is not concerned). The Metropolitan Magistrate, after receiving the complaint on file took cognizance of the offence and issued process to the appellant. It was sought to be quashed for which the appellant filed a petition before the magistrate on various grounds. Learned magistrate upheld some of the grounds urged by the appellant and dismissed the complaint discharging the accused by his order dated 20- 11-1996.
>
> Respondent thereupon moved the High Court of Karnataka in revision against the aforesaid order of discharge. A single judge of the High Court allowed the revision petition and set aside the order of the Metropolitan Magistrate and restored the complaint on file with a direction to proceed with the prosecution in respect of cheque No.188. It is the said order of the High Court which is now being challenged. The only point convassed by the appellant, in this appeal, was that the magistrate has no jurisdiction to take cognizance of the offence after the expiry of 30 days from the date of cause of action and in this case when respondent filed a complaint on

8-8-1996, the aforesaid period of 30 days stood expired much earlier. The said plea was based on the fact situation that respondent sent the notice by fax on 11-6-1996 receipt of which has been owned by the appellant in full measure. If the notice sent by fax is to be treated as the notice in writing contemplated in the Section, the cause of action should have arisen on the expiry of 15 days therefrom (i.e. 26-6-1996) and the period of limitation for filing the complaint expired on 26-7-1996, according to the appellant. As the complaint was filed long after that date the magistrate has no jurisdiction to take cognizance of the offence, contended learned counsel.

Section 142 of the Act reads thus: 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 (c) of the proviso to section 138;

(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.

The language used in the above Section admits of no doubt that the magistrate is forbidden from taking cognizance of the offence if the complaint was not filed within one month of the date on which the cause of action arose. Completion of the offence is the immediate forerunner of rising of cause of action. In other words cause of action would arise soon after completion of the offence, and the period of limitation for filing the complaint would simultaneously start running.

To circumvent the above hurdle, respondent submitted that 15 days can be counted only from 25-6-1996 the date when appellant received the notice sent by registered post, and the cause of action would have arisen only on 11-7-1996. The complaint which was filed on 8-8-1996 is therefore within time, according to the learned counsel for the respondent.

The above controversy could have been averted if respondent had filed the complaint on any day between 11th and 26th of July, 1996, because any date during that interregnum would have been good either when the fax message is treated as the notice or when the registered notice is treated as the required intimation. Hence, on the facts of the case, the real point in controversy is, when did the cause of action arise? A decision on the said point is vitally crucial for further continuance of the criminal proceeding, as law has imposed an interdict on the court against taking cognizance of the offence after the expiry of 30 days counted from the date of arising of cause of action.

Learned single judge has adopted the following reasoning for concluding that the cause of action had arisen on the expiry of 15 days from 25-6-1996:

This is a situation whereby the petitioner/complainant had placed himself within the two horns of a bull and it was not possible for him to avoid strike to one or the other. To put it otherwise, if the complainant had lodged the complaint under the assumption that the fax message was received by him, the accused would have contended that he had not received the fax message and therefore, the complaint filed on the basis of it is premature, as there is nothing for the complainant to establish that the same was served on him. To be on a safer side, he has waited for the acknowledgement of the notice sent to him and filed it within 45 days from the date of receipt of the acknowledgement.

The sum and substance of the said reasoning appears to be that cause of action would arise only on the expiry of 15 days from the date which the complainant knows to be the date of service of notice.

The requirement for sending a notice after the cheque is returned by the Bank unpaid is set out in clauses (b) and

(c) of the proviso to Section 138 of the Act. They read thus:

> Provided that nothing contained in this section shall apply unless:-
>
> (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.

The duty cast on the payee on receipt of information regarding the return of the cheque unpaid is mentioned in clause (b) of Section 138. Within 15 days he has to make a demand for payment. The mode of making such demand is also prescribed in the clause, that it should be by giving notice in writing to the drawer of the cheque. Nowhere it is said that such notice must be sent by registered post or that it should be despatched through a messenger.

Chapter XVII of the Act, containing Sections 138 to 142, was inserted in the Act as per Banking Public Financial Institution and Negotiable Instruments Laws (Amendment) Act, 1988. When the legislature contemplated that notice in writing should be given to the drawer of the cheque, the legislature must be presumed to have been aware of the modern devices and equipment already in vogue and also in store for future. If the court were to interpret the words giving notice in writing in the section as restricted to the customary mode of sending notice through postal service or even by personal delivery, the interpretative process would fail to cope up with the change of time.

Facsimile (or Fax) is a way of sending hand-written or printed or typed materials as well as pictures by wire or radio. In the West such mode of transmission came to wide use even way back in the late 1930s. By 1954 International News Service began to use Facsimile quite extensively. Technological

advancement like Facsimile, Internet, E-mail etc. were on swift progress even before the Bill for the Amendment Act was discussed by the Parliament. So when Parliament contemplated notice in writing to be given we cannot overlook the fact that Parliament was aware of modern devices and equipment already in vogue.

Francis Bennion in Statutory Interpretation has stressed the need to interpret a statute by giving allowances for any relevant changes that have occurred, since the Acts passing, in law, social conditions, technology, the meaning of words, and other matters.

For the need to update legislations, the Courts have the duty to use interpretative process to the fullest extent permissible by the enactment. The following passage at page 167 of the above book has been quoted with approval by a three Judge-Bench of this Court in State vs. S.J. Chaudhary (1996 2 SCC 428): It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking. This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law."

So if the notice envisaged in clause (b) of the proviso to Section 138 was transmitted by fax it would be compliance with the legal requirement.

The High Courts view is that the sender of the notice must know the date when it was received by the sendee, for otherwise he would not be in a position to count the period in order to ascertain the date when cause of action has arisen. The fallacy of the above reasoning is that it erases the starting date of the period of 15 days envisaged in clause ©. As per the said clause the starting date is the date of the receipt of the said notice. Once it starts, the offence is completed on the failure to pay the amount within 15 days therefrom. Cause of action would arise if the offence is committed.

If a different interpretation is given the absolute interdict incorporated in Section 142 of the Act that, no court shall take cognizance of any offence unless the complaint is made within one month of the date on which the cause of action arises, would become otiose.

In this context the decision of a two Judge-Bench in Sadanandan Bhadran vs. Madhavan Sunil Kumar [1998 (6) SCC 514] can be referred to. A payee did not file the complaint within 45 days of sending the notice after the cheque was bounced back, but he presented the cheque once again thereafter and issued another notice. When a new cause of action arose on the strength of the second presentation of the cheque a complaint was filed by the payee on the strength of that second presentation of the cheque. This Court has stated the law in that case as follows:

> Consequent upon the failure of the drawer to pay the money within the period of 15 days as envisaged under clause © of the proviso to Section 138, the liability of the drawer for being prosecuted for the offence he has committed arises, and the period of one month for filing the complaint under Section 142 is to be reckoned accordingly. The combined reading of the above two sections of the Act leaves no

room for doubt that cause of action within the meaning of Section 142© arises and can arise only once. (emphasis supplied) (para 6) Learned Judges proceeded further to consider whether in a case where notice in writing was sent after the first dishonour of the cheque, the payee can once again present the cheque, get it dishonoured for the purpose of filing the complaint. Following statement of law has been clearly adumbrated by this Court in paragraph 7 thereof.

Besides the language of Section 138 and 142 which clearly postulates only one cause of action, there are other formidable impediments which negate the concept of successive causes of action. One of them is that for dishonour of one cheque, there can be only one offence 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 Section 138. That necessarily means that for similar failure after service of fresh notice on subsequent dishonour, the drawer cannot be liable for any offence nor can the first offence be treated as offence of the first one. At that stage, it will not be a question of waiver of the right of the payee to prosecute the drawer but of absolution of the drawer of an offence, which stands already committed by him and which cannot be committed by him again.

The above view of this Court is in direct conflict with the view expressed by the Full Bench of the Kerala High Court in M/s. SKD Lakshmanan Fireworks Industries vs. K.V. Sivarama Krishnan (1995 Crl. Law Journal 1384). (In the headnote made in a volume of Supreme Court Cases which reported Sadanandan Bhadran [1998 (6) SCC 514] the Editor has noted thus: SKD Lakshmanan Fireworks Insustries vs. K.V. Sivarama Krishnan, 1995 Crl. Law Journal 1384 Ker. FB is approved. This needs correction through a corrigendum because the dictum of the Full Bench in SKD Lakshmanan Fireworks Industries vs. Sivarama Krishnan has been disapproved by this Court in Sadanandan Bhadrans case).

The upshot of the discussion is, on the date when the notice sent by Fax reached the drawer of the cheque the period of 15 days (within which he has to make the payment) has started running and on the expiry of that period the offence is completed unless the amount has been paid in the meanwhile. If no complaint was filed within one month therefrom the payee would stand forbidden from launching a prosecution thereafter, due to the clear interdict contained in Section 142 of the Act.

In this case the complainant has admitted the fact that written notice was sent by fax. Appellant has admitted its receipt on the same date. (It must be remembered that respondent has no case that fax has not reached the appellant on the same date). The last day when the respondent could have filed the complaint was 26-7- 1996. But the complaint was filed only on 8-8-1996 So the court has no jurisdiction to take cognizance of the offence on the said complaint.

In the result, we allow this appeal and set aside the impugned judgment in so far as it relates to cheque No.188. The complaint filed by the respondent on the said cheque will stand dismissed.