

HIGH COURT OF GUJARAT

**UMIYA PIPE PRIVATE LIMITED A COMPANY INCORPORATED UNDER AND ORS
Versus
STATE OF GUJARAT AND ANR**

Date of Decision: 24 September 2008

Citation: 2008 LawSuit(Guj) 2550

Hon'ble Judges: [M R Shah](#)

Eq. Citations: 2009 1 GLR 312, **2008 3 GLH 628**, 2009 5 RCR(Civ) 405, 2009 77 AllIndCas 339, 2009 20 GHJ 114

Case Type: Criminal Miscellaneous Application

Case No: 15251 of 2007

Subject: Banking, Civil, Criminal

Acts Referred:

[Code Of Criminal Procedure, 1973 Sec 482](#)

[Negotiable Instruments Act, 1881 Sec 142\(b\), Sec 138\(b\), Sec 138\(c\), Sec 138, Sec 142](#)

Final Decision: Application allowed

Advocates: [Falguni Patel](#), [R C Jani](#), [R S Sanjanwala](#)

Cases Cited in (+): 1

M. R. Shah, J.

[1] RULE. Ms. Falguni Patel, learned Additional Public Prosecutor, waives service of rule on behalf of respondent No. 1-State and Shri R.C. Jani, learned advocate waives service of rule on behalf of respondent No. 2.

[2] With the consent of the learned advocates appearing on behalf of the respective parties, the application is taken up for final hearing today.

[3] The short but an interesting question of law posed for consideration of this Court is which date would be the relevant date for starting the limitation for filing the complaint under Section 138 of the Negotiable Instruments Act, 1881.

[4] By way of this application under Section 482 of the Code of Criminal Procedure, the applicants-original accused have prayed for an appropriate order to quash and set aside Criminal Case No. 749/2007 pending in the Court of learned Metropolitan Magistrate, Court No. 5, Ahmedabad filed by respondent No. 2-original complainant for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 as well as the order dated 09/02/2007 passed by the learned trial Court in the aforesaid Criminal Case issuing summons upon the applicants for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

[5] A criminal case has been filed by respondent No. 2-original complainant against the applicants and others for the offence punishable under Section 138 of the Negotiable Instruments Act in the Court of learned Metropolitan Magistrate, Court No. 5, Ahmedabad alleging inter alia that the cheque for an amount of Rs. 3 Crore was issued by the applicants-original accused and when the said cheque was presented, the same came to be dishonoured/returned with an endorsement "insufficient balance". It was the case on behalf of respondent No. 2-original complainant that thereafter the applicants were served with the legal notice under Section 138 of the Negotiable Instruments Act, 1881, and, thereafter, the applicants gave vague reply to the notice but did not make payment, and, therefore, the aforesaid criminal case came to be instituted against the applicants-original accused for the offence under Section 138 of the Negotiable Instruments Act, 1881. The learned trial Court issued summons upon the applicants and others by impugned order dated 09/02/2007 for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881. Hence, the applicants-original accused have preferred the present Criminal Miscellaneous Application under Section 482 of the Code of Criminal Procedure for quashing and setting aside the complaint.

[6] Shri R.S. Sanjanwala, learned advocate appearing on behalf of the applicants-original accused has vehemently submitted that the impugned complaint/criminal case is beyond the period of limitation as described under Section 138 read with Section 142 of the Negotiable Instruments Act, 1881. It is submitted that the cheque in question was deposited on 09/12/2006 and the said cheque came to be dishonoured on 11/12/2006 and the bank returned the said cheque with an endorsement "insufficient balance" on 12/12/2006. Notice under Section 138 of the Negotiable Instruments Act, 1881 was issued by respondent No. 2-original complainant upon the applicants on 20/12/2006 and the said notice was received by the respective applicant on 22/12/2006 and the same was replied by the applicants on 05/01/2007 and was sent on 10/01/2007 and received by respondent No. 2-original complainant on 11/01/2007 and, thereafter, the impugned complaint under Section 138 of the Negotiable Instruments Act, 1881 has been filed before the learned trial Court on 09/02/2007. It

is submitted that as per Section 138 of the Negotiable Instruments Act, 1881, complaint under Section 138 of the Negotiable Instruments Act, 1881 is maintainable where a cheque has been presented within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier and 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 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. It is further submitted that as per Section 142 of the Negotiable Instruments Act, 1881, 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; and such a 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. It is further submitted that respondent No. 2-original complainant has to make the complaint after fifteen days of the receipt of the notice by the applicants-original accused. It is submitted that in the present case, notice was received by the applicants on 22/12/2006 and, therefore, if fifteen days time, as contemplated under Clause (c) of the Negotiable Instruments Act, 1881, is given, within a period of one month the respondent-original complainant was required to make the complaint, i.e., on or before 06/02/2007. However, in the present case, complaint has been made on 09/02/2007. It is submitted that there is no application submitted by respondent No. 2-original complainant to condone the delay in making the complaint beyond the period of limitation as contemplated under the proviso in Sub-clause (b) of Section 142 of the Negotiable Instruments Act, 1881 and, therefore, it is submitted that the impugned complaint is barred by limitation as provided under Section 142 of the Negotiable Instruments Act, 1881 and, therefore, the same deserves to be quashed and set aside.

[7] Shri R.C. Jani, learned advocate appearing on behalf of respondent No. 2-original complainant has submitted that the limitation to make the complaint for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 would start from the date of receipt of the reply to the notice by the respondent-original complainant under Section 138 of the Negotiable Instruments Act, 1881, by the applicants-original accused. It is submitted that in the present case, reply sent by the applicants to the notice under Section 138 of the Negotiable Instruments Act, 1881 to the respondent-original complainant came to be received by the respondent-original complainant on 11/01/2007 and, thereafter, within a period of one month, complaint can be made and, therefore, it is submitted that the relevant date for considering the period of limitation to make the complaint would be the date on which the reply to the

notice under Section 138 of the Negotiable Instruments Act, 1881 is received by the respondent-original complainant and not after fifteen days of receipt of the notice under Section 138 of the Negotiable Instruments Act, 1881 by the applicants-original accused. Therefore, it is submitted that considering the relevant date as 11/01/2007 and within one month thereafter, the impugned complaint has been made on 09/02/2007 i.e. within the period of limitation and, therefore, it is requested to dismiss the present application.

[8] Heard the learned advocates appearing on behalf of the respective parties. A complaint has been filed by respondent No. 2 herein against the applicants-original accused for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881. The cheque in question was deposited by respondent No. 2-original complainant on 09/12/2006 and the same was dishonoured by the bank on 11/12/2006 with an endorsement "insufficient balance". The said cheque was returned by the bank on 12/12/2006. Respondent No. 2-original complainant issued notice upon the applicants-original accused as contemplated under Section 138 of the Negotiable Instruments Act, 1881 by UPC and RPAD on 20/12/2006. The said notice was received by the applicants-original accused on 22/12/2006. The applicants-original accused replied to the said notice under Section 138 of the Negotiable Instruments Act, 1881 on 10/01/2007 and the same was received by respondent No. 2-original complainant on 11/01/2007. Thereafter, respondent No. 2-original complainant had made a complaint before the learned Metropolitan Magistrate, Court No. 5, Ahmedabad for the offence under Section 138 of the Negotiable Instruments Act, 1881 on 09/02/2007.

[9] The question, which is posed for consideration of this Court, is whether the impugned complaint made by respondent No. 2-original complainant against the applicants-original accused is within the stipulated time/period of limitation as contemplated under Section 142 read with Section 138 of the Negotiable Instruments Act, 1881.

[10] It is the contention on behalf of the applicants-original accused that the complaint for the offence under Section 138 of the Negotiable Instruments Act, 1881 is required to be made by respondent No. 2-original complainant within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138, i.e., immediately, after fifteenth day of receipt of the notice by applicants-original accused under Section 138 of the Negotiable Instruments Act, 1881 and, thereafter within one month. Thus, it is the case on behalf of the applicants-original accused that in the present case, notice issued, by respondent No. 2-original complainant under Section 138 of the Negotiable Instruments Act, 1881, was received by the applicants-original accused on 22/12/2006 and giving fifteen days time as contemplated under Sub-clause (c) of the proviso to Section 138, the complaint was required to be made

within a period of thirty days from 06/01/2007, i.e., on or before 06/02/2007 and in the present case, complaint has been made on 09/02/2007.

[11] On the other hand, it is the contention on behalf of respondent No. 2-original complainant that the limitation to make the complaint would start from the date of receipt of the reply to the notice by the applicants-original accused i.e. in the present case on 11/01/2007.

[12] Relevant provision of the Negotiable Instruments Act, 1881 reads as under;

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

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for (a term which may be extended to two years), or with fine which may extend to twice the amount of the cheque, or with both:

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 on 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 (c) 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.

[13] On fair and conjoint reading of Section 142 read with Section 138 of the Negotiable Instruments Act, 1881, the starting point of limitation as contemplated under Sub Clause (c) of the proviso to Section 138 of the Negotiable Instruments Act, 1881 would be immediately after completion of fifteen days of receipt of the notice served under Section 138 of the Negotiable Instruments Act, 1881. Considering Section 138 of the Negotiable Instruments Act, 1881 a person is deemed to have committed an offence under Section 138 of the Negotiable Instruments Act, 1881 where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, provided that;

(i) the cheque has been presented to the Bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(ii) 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

(iii) 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.

[14] Thus, if within fifteen days of receipt of notice demanding for payment of the amount of money as contemplated under Sub-clause (b) of the proviso of Section 138, the drawer of the such cheque fails to make the payment of the said amount of money to the payee, within a period of thirty days thereafter, the complaint is required to be made. Therefore, the cause of action under Sub-clause (c) of the proviso to Section 138 would arise within fifteen days of the receipt of the notice and for Sub-clause (b) of the proviso to Section 138 if payment is not made within such fifteen days. In the present case, therefore, the cause of action to make the complaint within one month would arise on completion of 15 days after receipt of the notice by the accused i.e. 22/12/2006. Therefore, after completion of 15 days from 22/12/2006 within a period of one month thereafter the complainant was required to make the complaint i.e. on or before 07/02/2007. However, in the present case, the complaint has been made on 09/02/2007 and, therefore, the same is barred by the period of limitation as provided under Section 142 read with Section 138(c) of the Negotiable Instruments Act.

[15] The contention and the submission on behalf of respondent No. 2-original complainant that the cause of action under Sub-clause (c) of the proviso to Section 138 would arise after fifteen days of the reply to the notice under Section 138 by the accused i.e. in the present case on 11/1/2007 cannot be accepted. If such a contention is accepted, in that case, it would render the Sub-clause (c) of the proviso to Section 138 nugatory and adding something which is not provided under Sub-clause (c) of the proviso to Section 138. If such a contention is accepted, it would further extend the period of limitation. In a given case, the accused and/or the drawer may even reply to the notice under Section 138 on the fourteenth day and/or on fifteenth day in that case, the period of limitation would further be extended for a period of 15 days. On fair reading of Clause (c) of the proviso to Section 138 of the Negotiable Instruments Act within 15 days of the receipt of the notice the drawer has to make the payment, and within those 15 days, if the payment is not made, cause of action to make the complaint would arise and, therefore, fifteen days time is given to the drawer to make the payment, failing which, right in favour of the respondent-complainant to make the complaint would arise.

[16] It is true that considering the proviso to Sub-clause (b) of Section 142 cognizance of the complaint may be taken by the Court after the aforesaid prescribed period, if the complainant satisfies the Court that he has sufficient cause for not making a complaint within such period but in that case the complainant has to plead in the complaint to condone the delay making out a sufficient cause for not making the complaint within such a period and if the complainant satisfies the Court that he has sufficient cause for not making the complaint within such a period, the Court may take cognizance of such a complaint. In absence of any pleading and/or request to condone

the delay without pointing out sufficient cause, benefit of such a proviso can be given. In the present case, in the complaint, there is no prayer to condone the delay and/or making out a sufficient cause for not making the complaint within the prescribed period of limitation and, therefore, such a proviso as provided under Sub-Clause would not be helpful to respondent No. 2-original complainant.

[17] Considering the above, the impugned complaint filed by respondent No. 2 herein against the applicant-original accused for the offence under Section 138 of the Negotiable Instruments Act is beyond the period of limitation as prescribed under Section 142 read with Section 138(c) of the Negotiable Instruments Act, 1881 and, therefore, the learned trial Court could not have taken cognizance of the said complaint. Under the circumstances, the impugned complaint and the order of the learned trial Court issuing summons in the said complaint deserves to be quashed and set aside.

[18] For the reasons stated hereinabove, the application succeeds. The impugned complaint being Criminal Case No. 749/2007 pending in the Court of learned Metropolitan Magistrate, Court No. 5, Ahmedabad and the order dated 09/02/2007 passed by the learned trial court in the said complaint are hereby quashed and set aside. Rule is made absolute.

Levons Technologies Pvt. Ltd.