

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 30 OF 2013**

The Azmane Urban Co-operative
Credit Society Limited,
with its Head Office at
Mandur, Neura, Ilhas Goa.
Represented herein by its Manager,
Shri Devendra Dongrikar
61 years of age,
having its office at Mandur,
Neura, Old Goa,
Ilhas Goa. ... Appellant

V e r s u s

1. Shri Kissan Gokuldas Naik,
son of late Gokuldas Naik,
major of age,
r/o H.No.344, Wada Bhat,
P.O. Neura, Ilhas Goa.
2. State
through Public Prosecutor,
High Court of Bombay
at Panaji Goa. ... Respondents

Mr. A. D. Bhobe, Advocate for the appellant.

Mr. S. Shet, Advocate for respondent no.1.

Ms. M. Pinto, Additional Public Prosecutor for respondent no.2.

CORAM : K. L. WADANE, J

JUDGMENT RESERVED ON : 15.01.2015

JUDGMENT PRONOUNCED ON : 22.01.2015

J U D G M E N T :-

Present appeal is preferred by the appellant against

the order passed below Exhibit 21/D in Criminal Case No. OA/159/2011/B by the learned Judicial Magistrate First Class, Panaji, on 01.10.2012.

2. The parties are referred to their original status.

3. Brief facts lead to the present appeal may be summarised as below :

The complainant has filed a complaint against the accused for the offence punishable under Section 138 of the Negotiable Instrument Act, 1881.

4. The complainant is a society registered under the Maharashtra Co-operative Societies Act, as made applicable to the State of Goa having its office at Mandur Goa and the accused is its member. The accused stood surety to the loan amount of Rs.3,00,000/- availed from the complainant by one Mr. Devidas N. Narvekar, resident of Altinho, Panaji Goa. Mr. Narvekar, is the principal borrower and the accused and one more person namely Mr. Raju G. Naik, are the sureties executed in favour of the complainant. The accused and the sureties agreed and undertake to repay the loan amount.

5. The accused issued a cheque for an amount of Rs.1,86,100/- dated 10.05.2011 drawn on his account with the South Indian Bank Ltd., Panaji, towards the repayment of overdue amount payable for the loan account. The complainant deposited the cheque for its collection and it was returned to the complainant on 12.05.2011 with an endorsement that the "Funds Insufficient".

6. Then, the complainant issued a demand notice dated 26.05.2011 as required under Section 138 of the Negotiable Instrument Act, and the same was received by the accused on 01.06.2011. In spite of the service of notice, the accused failed to pay the amount of cheque within next 15 days. Thus, he has committed an offence punishable under Section 138 of the Negotiable Instrument Act.

7. On presentation of the complaint, the process was issued against the accused on 23.09.2011 and during the course of the proceedings, the substance of accusation was explained to the accused to which he denied and claimed to be tried.

8. On 31.08.2012 the accused filed an application for discharge under Section 258 of the Criminal Procedure Code and 320 read with Section 147 of the Negotiable Instrument Act,

contending inter-alia that he paid the entire amount to the complainant and the loan account has been closed. The application was opposed by the present appellant/complainant stating that the accused had presented the application at Exhibit 21/D in order to delay the proceedings. Further, it is contended that the accused owes a large sum of money to the complainant by way of direct as well as indirect liability as a guarantor of loans obtained in the name of his mother and the brother which are highly irregular. Hence, there is no question of compounding the offence. It is further contended that the accused failed to comply with the demand notice to pay the amount of cheque within the stipulated time. Therefore, he has committed the offence and any subsequent development cannot nullify the offence completed. Considering the averments in the application at Exhibit 21/D, the learned Magistrate has allowed the application and the accused has been acquitted. Being aggrieved and dissatisfied with this order, the present appeal.

9. I have heard the arguments of Mr. A. D. Bhobe, learned counsel appearing for the appellant/complainant and Mr. S. Shet, learned counsel appearing for the respondent no.1/accused at length. I have also gone through the entire material on record through the learned counsel. Considering the facts and

circumstances of the case and the material on record, the following point arises for determination :

POINTS	FINDINGS
1 Whether the order passed below Exhibit 21/D under the appeal is legal, proper and correct ?	In the Negative
2 What order ?	The appeal is allowed

REASONS

10. **Point No.1** : Mr. Bhobe, learned counsel appearing for the appellant/complainant has argued that the learned Magistrate has taken into account the subsequent development of the matter and influenced by the fact that the amount of cheque has been paid by the accused to the complainant and the loan account has been closed. On that impression, the learned Trial Court has acquitted the accused and compounding of the offence is allowed. As against this, Mr. S. Shet, learned counsel appearing for the respondent no.1/accused has argued that the accused is the surety and the principal borrower is a different person, still he has paid the amount as per the cheque and the loan account is closed. In view of the discharge of liability, no offence is said to have been committed by the accused. Therefore, the learned Trial Court has rightly acquitted the accused by compounding the offence.

11. In the light of the rival contentions of both the parties and the arguments advanced on their behalf, it is material to note that the subsequent demand due under the cheque has no bearing in the amount or relation with the offence which had already committed by the accused. At the most, it can be one of the grounds for having sympathetic view after the conclusion of the trial. Once the plea of the accused is recorded, then the Trial Court has to proceed with the trial unless the matter is compounded by the parties in accordance with law.

12. It is material to note that the respondent no.1/accused has submitted the application at Exhibit 21/D for the discharge and looking to the order passed by the learned Magistrate, the learned Magistrate has observed that considering the facts and circumstances of the case, the application for compounding of offence has to be allowed and accordingly, it has allowed. On perusal of the order passed by the learned Magistrate, it is surprising to note that the accused made an application for discharge on the ground that the amount under cheque was already paid to the complainant and the learned Trial Court has acquitted the accused by compounding the offence. Compounding of offence necessarily must be within the aggrieved parties and in the present matter, it should be between the complainant and

respondent no.1/accused. Nowhere, it is revealed from the record that the complainant and respondent no.1/ accused moved to the Trial Court for compounding of the offence. No doubt, the offence is compoundable in view of the provisions of Section 147 of the Negotiable Instrument Act. Compounding of offence must be by both the parties herein. In the present case, nowhere it is evident on record nor anybody's case that both the parties to the litigation have moved to the learned Trial Court to compound the offence. Therefore, Mr. Bhobe, learned counsel appearing for the appellant/complainant has rightly relied upon the judgment of this Court reported in **2008(1) Bom. C.R. (Cri.) 278** in the case of **Vishnu Bhat V/s Narayan R. Bandekar & Ors.** It has been observed by this Court at para 15 thus :

“**15.** Admittedly, the Complainant had received as on 13/11/2002 Rs. 45,000/- i.e. more amount than due on the subject cheque and yet the learned JMFC proceeded to frame substance of accusation on 23/07/2003. One would wonder as to why the learned Magistrate proceeded to frame the substance of accusation against the accused in case by

that date the payment due on the subject cheque was made to the Complainant. This aspect seems to have been completely lost sight of by the learned Magistrate who even made some uncharitable remarks against the Complainant that he had filed the complaint only with the intention of grabbing extra amount for which he was not entitled to. As held by this Court in William Rosario Fernandes V/s Cabral & Co. & Ors. (2007 (1) Bom. C.R. (Cri.) 141) the offence under Section 138 of the Act is completed in all respects upon the failure by the accused to comply with the notice of demand. If payment is made within the said period of notice, then no offence is committed but in case of failure, the offence is completed. Even if the payment is made on the 16th day the same is not sufficient to come out of the rigours of Section 138 of the Act. In Criminal law commission of offence

is one thing and prosecution for it is quite another. Referring to *Rajneesh Aggarwal V/s Amit J. Bhalla* (2001 (5) Bom. C.R.(S.C.) 162):2001 DGLS 15: (AIR 2001 SC 518): 2001(1) S.C.C. 631, it was stated that so far as the criminal complaint is concerned, once the offence is committed, any payment made subsequent thereof, will not absolve the accused of the liability of the criminal offence, though in the matter of awarding of sentence, it may have some effect on the Court trying the offence. The Supreme Court in the aforesaid case has stated that the object of issuing notice indicating the factum of dishonour of cheques, is to give an opportunity to the drawer to make payment within 15 days, so that it will not be necessary for the payee to proceed against in any criminal action, even though the Bank dishonoured the cheques. Relying on the said decision

this Court held that once the offence is committed, any payment made subsequent thereto, will not absolve the accused of the liability of criminal offence, though in the matter of awarding of sentence, it may have some effect on the Court trying the offence. It is therefore obvious that the accused could not have been acquitted under Section 138 of the Act only because the payments were made subsequently and therefore the acquittal of the accused has got to be considered as perverse and illegal in the light of the decision of the Apex Court, as followed by this Court in the said case of William Rosario Fernandes (*supra*)."

13. Looking to the observations of the above cited case, it appears that it is perfectly applicable to the facts of the present case because the facts of the present case are identical with the facts of the case cited *supra*. The payment of due amount at subsequent stage of trial will not absolve the accused of the

liability of criminal offence. In such circumstances, unless and until the matter is not compounded by the parties, the accused has to face the trial. Therefore, for the reasons recorded above, I am of the opinion that the order passed by the learned Magistrate below Exhibit 21/D appears to be incorrect. Therefore, it needs to be set aside. It is to be noted that all the above observations are made by this Court to decide the limited aspect as to whether the order passed by the learned Magistrate below Exhibit 21/D is proper or otherwise. This Court has not made any observation relating to the merits of the case concerning the offence punishable under Section 138 of the Negotiable Instrument Act. Therefore, the learned Magistrate shall not influence of the above observations and shall independently decide the matter on its own merits in accordance with law. For the reasons stated above, point no.1 is answered in the negative. Thus, the following order :

O R D E R

- (i) Criminal Appeal is allowed.
- (ii) The order passed below Exhibit 21/D in Criminal Case No. OA/159/2011/B dated 01.10.2012 is hereby set aside.
- (iii) The matter is remanded back to the learned Trial Court for disposal in accordance with law.

(iv) The records and proceedings of the case to be sent to the Trial Court forthwith.

(v) Parties to appear before the learned Trial Court on 12.02.2015 at 10.00 a.m.

K. L. WADANE, J

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