

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.615 OF 2003

Sudam s/o. Sampatrao Auti
Age-43 years, Occu:Business,
R/o- N-12, D-51/5, Hudco,
T.V. Center, Aurangabad.

...APPELLANT
(Orig. Complainant)

VERSUS

1) Rupchand s/o. Budhusingh Dhage,
Age-40 years, Occu. Business,
R/o- At post Railgaon, Tq-Sillod,
Dist-Aurangabad

2) The State of Maharashtra

...RESPONDENTS
(Resp. No. 1 - Orig. Accused)

...
Shri. N.K. Kakade, Advocate for Appellant.
Shri. Hemant F. Pawar, Advocate for
Respondent No.1.
Shri. K.D. Mundhe, A.P.P. for Respondent No.2.

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CORAM: A.I.S. CHEEMA, J.

DATE OF RESERVING JUDGMENT : 8TH JUNE,2016.

DATE OF PRONOUNCING JUDGMENT: 16TH JUNE, 2016.

JUDGMENT :

1. Appellant - Original Complainant has filed this Appeal against dismissal of his Complainant filed under Section 138 of Negotiable Instruments Act, 1881 ("N.I. Act" in brief) and the acquittal of Respondent No. 1 - Accused.

2. The case of the Complainant as can be seen from the Complainant filed in the trial Court is as under : -

(A) Between Complainant and the Accused there was a transaction regarding sale of Tempo MH-20-A-5761. There was an agreement whereby the Accused agreed to purchase the vehicle for Rs. 1,65,000/- (Rupees One Lakh Sixty Five Thousand) from Complainant. On the same day on 15th January, 1999 Accused paid cash of Rs. 35,000/- (Rupees Thirty Five Thousand) and for the balance amount issued following cheques:

Sr. No.	Date	Amount	Cheque No.
1	25-01-1999	Rs. 30,000/-	634676
2	02-02-1999	Rs. 65,000/-	634677
3	03-02-1999	Rs. 35,000/-	634678

(B) Complainant claimed that on 20th January, 1999 Accused came and gave cash of Rs.30,000/- (Rupees Thirty Thousand) to the Complainant and Complainant returned the cheque dated 25th January, 1999. Before Complainant put the cheques of February 1999 in the bank, Complainant requested the Accused that his mother has expired and cheques may be deposited in the month of March. Accordingly, Complainant deposited the remaining two cheques in his bank, Aurangabad District Central Co-operative Bank, branch at T.V. Center, Aurangabad, (hereafter referred as - Bank of Complainant at Aurangabad) on 7th March 1999. As the cheques issued by the Accused were from his bank - Aurangabad-Jalna Gramin Bank, branch

Ambhai, Tq. Sillod, (hereafter referred as - Bank of Accused) the cheques came to be sent to that branch. The branch at Ambhai dishonoured the cheques and issued memo dated 31st March 1999. The cheques along-with memo dated 31st March 1999 came to the bank of the Complainant at Aurangabad on 22nd April 1999 and were received by the Complainant. As the cheques were dishonoured, on 22nd April 1999 itself Complainant sent notice by Registered Post. Notice was also sent Under Certificate of Posting. The acknowledgement of receipt of the Registered Post Notice came back to the Complainant on 8th May 1999 which showed that the Accused has received the notice. The Accused did not pay within fifteen days of the receipt of the notice, thus the Complaint was filed.

3. In the trial Court Complainant filed his affidavit of evidence and was cross-examined. The concerned documents were exhibited. The trial Court considered the evidence which was brought on

record and acquitted the Accused, mainly on the ground that notice was not issued within fifteen days of the dishonour of the cheques and thus the notice was not legal and proper.

4. Aggrieved by the dismissal of the Complaint and acquittal of the Accused, present Appeal is filed.

5. It is claimed and it has been argued by the learned counsel for the Appellant-Complainant that the Complaint was filed within limitation and the trial Court has wrongly interpreted the law. The slips regarding dishonour of cheques were received by the bank of the Complainant at Aurangabad on 22nd April 1999 and the Complainant came to know about the dishonour only on 22nd April 1999 and evidence was led regarding this but the trial Court wrongly interpreted the documents and evidence, and wrongly acquitted the Accused. The learned counsel for the Appellant submitted

that the trial Court wrongly attributed knowledge to the Appellant as of 31st March 1999 which was the date on which the bank of Accused at Ambhai dishonoured the cheques. The bank of Accused issued the dishonour slip Exhibit 46 on 31st March 1999 which came to the bank at Aurangabad through Branch of Aurangabad District Central Co-operative Bank, branch Ambhai, which is clear from the memo Exhibit 45. The documents naturally took time to reach Aurangabad branch of the bank of the Complainant and his evidence that he got the information on 22nd April 1999 could not have been ignored. The Complainant had sent notice Exhibit 49 on the same day and it was mentioned in the Complaint that the memo regarding dishonour of cheques has been received at Aurangabad on 22nd April 1999. Trial Court wrongly observed that the notice was silent in this regard. According to the learned counsel the approach of the trial Court was wrong and the evidence brought by the Complainant could not have been ignored.

Ultimately the counsel submitted that if necessary, the matter should be remanded so that the Complainant can call the witness from the branch of the bank of Complainant at Aurangabad to bring on record the concerned documents.

6. Against this, the learned counsel for the Accused submitted that the record itself shows that the cheques were dishonoured on 31st March 1999. At the concerned time the provisions of Section 138 of the N.I. Act required that the notice should be sent within fifteen days of the dishonour of the cheque. The counsel referred to the cross-examination of the Complainant to state that the Complainant in Cross-examination was unable to tell the date on which the bank returned the cheques to him. Thus, according to the counsel, the trial Court has rightly found that the notice was not valid and rightly dismissed the Complaint. According to him, the record shows that the vehicle had been transferred to the Accused by

executing necessary documents required to be filed before R.T.O. It is argued that the Accused had taken defence that he had paid cash of Rs.1,00,000/- (Rupees One Lakh) regarding the amounts of the two cheques concerned but the Complainant did not returned back those cheques and has misused the same. It is claimed that as the notice mentioned that the cheques were dishonoured on 31st March 1999, the notice not being within fifteen days of 31st March 1999, was not valid.

7. In reply, the learned counsel for the Complainant claimed that if the Accused took back the first cheque dated 25th January 1999 when he paid cash, it would not be likely that he would pay the balance amount without taking back the cheques and thus the defence had no substance. In the cross-examination of Complainant he admitted that R.T.O. forms were signed on 10th February 1999. Complaint was filed on 28th May 1999.

Accused never claimed till then that he paid cash Rupees One Lakh but cheques had not been returned it is argued.

8. Section 138 of the N.I. Act provides that, where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money for discharge of debt or other liability is returned by the bank unpaid, for insufficiency of amount or if it exceeds the amount arranged, the said person shall be deemed to have committed an offence. In order to constitute the offence, the Proviso requires that the payee should make a demand for the payment of the amount by giving a notice in writing to the drawer of the cheque. At the relevant time the said sub-clause (b) of Proviso required the notice to be given within fifteen days "of the receipt of information by the payee from the bank regarding return of the cheque as unpaid". It is clear that fifteen days are

required to be seen from the date of information from the bank to the payee. Keeping this in view, when the present matter is considered, what appears is that the trial Court got carried away from the fact that memo Exhibit 46 was dated 31st March 1999 and the notice Exhibit 49 was not issued within fifteen days from the said date. According to the trial Court, there was no document that the Complainant received information on 22nd April 1999 and that the notice sent by the Complainant was silent about receiving back the cheques by the Complainant and when he got the knowledge about dishonour of the cheques.

9. I have gone through the notice Exhibit 49. The notice mentions that the Complainant had deposited the cheques for collection in his bank at the branch at Aurangabad and the same were sent by the Registered Post for collection to the branch of the bank of the Accused at Ambhai. Notice mentions that the cheques were, however,

dishonoured on 16th March 1999. It was mentioned in the notice that Gramin Jalna Bank, branch Ambhai sent the memos by Registered Post to the Bank of Complainant and the memos were received on 22nd April 1999 and on same day the expenses of collection had been debited from the account of the Complainant.

10. In the evidence vide affidavit Exhibit 40, the complainant claimed that when the cheques were sent for collection, they were dishonoured by the bank of the Accused on 31st March 1999 and the memos came to the bank at Aurangabad on 22nd April 1999 and were received by the Complainant on 22nd April 1999 itself and at that time the Complainant came to know the cheques have been dishonoured and on same day expenses regarding collection of the cheques were debited in the account of the Complainant. Thus, in the notice itself the Complainant had, on 22nd April 1999, claimed that the memos dishonouring the cheques were received

by his bank on 22nd April 1999. Complainant gave evidence that he came to know about the dishonour of cheques on 22nd April 1999 itself. The Complainant appears to have sent notice Exhibit 49 which was Registered on 23rd April 1999 vide Exhibit 50 and received back the acknowledgement Exhibit 51 signed by the Accused. The evidence of the Complainant is that the acknowledgement came back to him on 8th May 1999. There is no material to show that the Accused raised any challenge to the notice which was sent by the Complainant. Although the complainant was cross-examined, no defence evidence has been led. In the cross-examination of complainant, he was put to memory test when he was asked to state as to the date on which the bank returned cheques to him. Complainant stated that he does not remember the date. In the further cross-examination, however, the complainant denied that it was not true that he was telling false that the cheques were returned to him on 22nd April 1999. The

complainant relied on the documents he received from the Bank and the notice as well as his affidavit to claim that he had received back the memos dishonouring the cheques on 22nd April 1999. It is matter of documents which are material and which have been relied on by the complainant to claim that the memos came back on 22nd April 1999 and accordingly he issued notice Exhibit 49. The trial Court appears to have fallen in error for not relying on the oral evidence led on oath by the complainant.

11. Section 138 of the N.I. Act requires giving of notice within fifteen days from the receipt of information. Looking to the affidavit of the complainant and the notice issued by him, I find that the trial Court wrongly ignored the oral evidence of the complainant. Complainant had nothing to gain from delaying to send notice. He could have resubmitted the cheques for collection in validity period and gained fresh period. As

such I find no reason to doubt his oral evidence read with documents.

12. The learned counsel for the complainant rightly submitted that the defence has no substance that the accused paid cash of Rs.1,00,000/- (Rupees One Lakh) and the two cheques were not returned and misused by the complainant. There is substance in the argument that if the first cheque was returned by the complainant when cash was paid, he would not have retained the other two cheques. It is unlikely that accused would pay cash and still not take back two cheques if on earlier occasion he had paid cash and taken back the first cheque.

13. I find substance in the submissions made by learned counsel for Complainant. For reasons discussed above, I find that the Judgment as recorded by the trial Court is not maintainable and the evidence of the complainant was required

to be accepted. The offence under Section 138 of the N.I. Act must be said to be proved against the Respondent - accused.

14. At the time of arguments, I have heard learned counsel for both sides regarding punishment, in case the Appeal was to be allowed. The counsel for the Accused - Respondent No.1 submitted that matter is quite old and instead of passing any sentence of imprisonment, the Court may direct the amount of cheques to be paid. Against this, the learned counsel for the complainant - Appellant submitted that the complainant was required to be compensated as per bank rate of interest.

15. Keeping in view the provisions as found in Section 138 of the N.I. Act, it would be appropriate not to pass sentence of imprisonment after such long period and it would be in the interest of justice that fine to the extent of

twice the amount of cheques should be imposed.

16. For the above reasons, I pass the following order:-

O R D E R

(I) The Appeal is allowed with costs quantified at Rs.20,000/- (Rupees Twenty Thousand) to be paid by Accused - Respondent No.1 to Appellant - Complainant.

(II) The impugned Judgment passed by the Chief Judicial Magistrate, Aurangabad on 5th August 2003, dismissing the complaint and acquitting the accused, is quashed and set aside.

(III) Instead, it is directed that the Accused - Respondent No.1 is hereby found guilty of offence punishable under Section

138 of the Negotiable Instruments Act, 1881
and is sentenced to fine of Rs.2,00,000/-
(Rupees Two Lakh).

(IV) In default of fine, the Accused -
Respondent No.1 shall undergo rigorous
imprisonment for six months.

(V) Fine if paid, shall be made over to
the complainant - Appellant as
compensation.

(VI) The Accused - Respondent No.1 shall
surrender to his Bail Bonds.

[A.I.S. CHEEMA, J.]