

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.801 OF 2003

M/s Radhesham Laxminarayan and Co.,
New Mondha, Jalna, a registered
partnership firm, through its partner
Laxminarayan s/o Bansilal Agrawal
Age 61 years, Occ. Business,
R/o Nath Baba Galli, Jalna

... APPELLANT
(Original Complainant)

VERSUS

1. Kashmirilal s/o Harising Gupta,
Age 50 years, Occ. Business,
R/o Sadar Bazar, Jalna,
District Jalna
At present R/o at Bharat Nagar,
Baraf Girni, Near Shivaji Statue,
New Jalna, District Jalna.

2. State of Maharashtra
(Copy to be served on the
Public Prosecutor, High Court of
Bombay, Bench at Aurangabad)

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

.....

Shri P.F. Patni, Advocate for appellant
Ms Chinmayee Deshpande, Advocate for respondent No.1
Shri S.M. Ganachari, A.P.P. for State

.....

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

DATED: 29th April, 2016.

Date of reserving judgment : 4th April 2016
Date of pronouncing judgment : 29th April 2016.

J U D G M E N T :

1. This is appeal against acquittal of respondent No.2
under Section 138 of the Negotiable Instruments Act, 1881 (Act

in brief), filed by appellant - original complainant.

2. Complainant M/s Radhesham Laxminarayan & Company is partnership firm and filed S.T.C. No.329/1994 in the Court of Chief Judicial Magistrate, Jalna against respondent No.2 - accused (hereinafter referred as accused) as two cheques issued by the respondent relating to purchase of grains had bounced, and in spite of notice, the amounts of Rs.1 Lakh each of the two cheques (total Rs.2 Lakhs) had not been paid.

3. The accused was convicted by the Chief Judicial Magistrate, vide judgment dated 22.2.1995. The accused filed Criminal Appeal No.8/1995, which came up before 2nd Additional Sessions Judge, Jalna. The first appellate Court, vide judgment dated 31.7.2003, acquitted the accused of the offence. Thus this appeal.

4. Relevant facts are as follows :

(a) Respondent Kashmirilal s/o Harising Gupta is proprietor of business known as "Kashmirilal Pramodkumar Agrawal".

(b) Complainant M/s Radhesham Laxminarayan & Co. is partnership having partners Laxminarayan Bansilal Agrawal and

his son Radhesham. It has business of commission agent at Jalna Agricultural Produce Market Committee. Respondent - accused is also in similar business. Green nuts i.e. Moong and Udid grains were supplied to the respondent - accused on 13.9.1993 and 22.9.1993 for the price of Rs.2,82,680=44. Accused issued four post dated cheques on 7.10.1993. First cheque was dated 20.10.1993, second was dated 25.12.1993. Those cheques of the total value of Rs.42,680/- got encashed. However, the third cheque No.0703658, dated 2.2.1994 (Exh.15) for Rs.1 Lakh and the fourth cheque No.0703659 (Exh.16) dated 4.2.1994 of Rs.1 Lakh, when presented, were returned by the Bank with memo mentioning, "exceeds arrangement" and "referred to drawer". Complainant claimed that, on the advice of accused, the cheques were again re-tendered, but were again returned with similar remarks vide Bank memos (Exh.38 and 39) on 10.2.1994. Complainant sent two telegrams and on the same day of 10.2.1994, accused sent reply telegrams to the complainant contending that the cheques had been issued as advance cheques for goods yet to be supplied. Complainant sent registered post A.D. notice through Advocate on 11.2.1994, which was served on 15.2.1994.

5. The accused raised defence that the cheques were not issued towards goods supplied, but were advance cheques for

goods which were yet to be supplied and claimed that, as the goods were not supplied, he was not liable for the payment of the amounts.

6. The complainant examined eight witnesses and the accused examined himself in defence. The trial Court found that the complainant proved that on 2.2.1994 and 4.2.1994 accused issued the above two cheques in favour of the complainant from his Account of Jalna Peoples Cooperative Bank Ltd., Jalna. The trial Court also found that when the cheques were presented within validity period, the cheques were returned unpaid by the Bank on the basis that the cheques exceeded the amounts arranged or that there was insufficient amount in the Account. Trial Court held that the complainant had made demand for payment of the amount by giving notice in writing within 15 days and that in spite of receipt of the notice, accused had failed to make the payment.

7. The trial Court held the accused guilty and imposed sentence of payment of fine of Rs.50,000/-, and in default, to suffer simple imprisonment for three months.

8. When the accused carried the appeal to the first appellate Court, the Sessions Court also found that the accused

had issued the two cheques to the complainant against legally recoverable debt. However, the Sessions Court held that the service of the notice required to be issued under Section 138 was not proved, and for such reasons, the Sessions Court proceeded to acquit the accused.

9. When this appeal came up for hearing before me, learned counsel for the appellant - complainant, referred to the above facts and developments and submitted that now the dispute has narrowed down only to the question - Whether or not the notice had been served on the accused as per the requirement of Section 138. The learned counsel for the respondent also submitted that the only question now required to be dealt with and decided was whether the notice and the telegrams concerned had been duly served. The learned counsel for the respondent contended that, although reply telegrams of the accused were brought on record, the telegrams which were sent by the appellant - complainant had not been brought on record and proved. According to her, the notice was not duly proved and the Sessions Court rightly acquitted the accused.

10. In view of the submissions which have been made before me, I proceed to deal with the matter relating to the limited dispute. The counsel for both sides agree that other

aspects required to be complied by Section 138 of the Act had been complied and there is no dispute regarding then. When for legally enforceable debt or other liability the cheque is returned unpaid by the Bank, the requirement is to give a notice. Regarding this, clause (b) of proviso of Section 138 reads as under :

(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

Keeping above provision in view, it would be now appropriate to deal with the concerned evidence.

11. For the complainant, P.W.1 Laxminarayan deposed (in para 6 of his evidence) that the above two cheques of the accused were not encashed and, therefore, he issued notice to the accused through his counsel. The notice is dated 11.2.1994 and the office copy bears signature of the Advocate. The document is at Exh.17. P.W.1 deposed that the acknowledgement receipt did not reach him and so, enquiries were made with the postal authorities and the postal authorities

issued intimation regarding service of the notice. P.W.1 also proved two telegrams dated 10.2.1994 (Exh.18 and 19), which were by way of reply from the accused to the telegrams issued by the complainant.

12. There is evidence of P.W.3 Panditrao Padol, who was working as Public Relations Inspector, Head Post Office, Jalna since April 1994. From the official records maintained in ordinary course, he brought delivery slip from his office, dated 15.2.1994. He proved the document at Exh.31, showing at Sr.No.13 entry regarding registered letter No.2184, addressed to "Kashmirilal Pramodkumar". According to this witness, the document bears signature of the addressee. According to the witness, the document bears official seal of the post office and it is maintained in official capacity and the contents were claimed by this witness to be true and correct. He also proved acknowledgement slip issued by the post office at Exh.32, which according to him bears signature of the Assistant Post Master R.K. Mungi Paithankar. He claimed that, he identifies the signature of the Assistant Post Master as he is their staff member.

13. Then there is evidence of Advocate Navalchand Alijar (P.W.8), who deposed that he had issued the notice Exh.17 to the accused Kashmirilal Pramodkumar Agrawal by registered post

A.D. He proved the postal money receipt Exh.45, which showed that the addressee was "Kashmirilal Pramodkumar Agrawal". This witness claimed that, when he did not receive the acknowledgement from the addressee, he moved the post office and Exh.31 was issued, which shows that the notice was delivered to the addressee on 15.2.1994.

14. Regarding all this evidence brought on record by the complainant to prove that notice in writing was issued to the accused, in defence, the accused deposed that with regard to the cheques Exh.15 and 16, he disclosed to the complainant that payments against those cheques will be arranged on receipt of delivery of goods. He deposed that, he did not receive the goods and, therefore, he had no responsibility to arrange for the payment in respect of cheques Exh.15 and 16. He deposed that, he had received two telegrams from the complainant whereas he gave reply to telegrams vide Exh.18 and 19. He further deposed that, he did not receive any registered post A.D. notice from the Advocate for complainant. Thus, regarding the registered post notice, there is mere denial and regarding telegram, the accused admitted to have sent replies Exh.18 and 19.

15. The trial Court accepted that the notice and telegrams were duly served and that there was compliance of the

above proviso of Section 138 regarding service of notice. The above evidence, however, has been questioned by the Sessions Court. The Sessions Court, in para 10 of its judgment, observed that, there was no evidence on record to show as to on which address the notice Exh.17 had been sent. It also observed that, in Exh.31, the name of the accused has been shown as "Kashmirilal Pramodkumar" although the name of the accused is "Kashmirilal Harising". He referred to the evidence of the accused, who had denied that he had signed the delivery list Exh.31. The Sessions Court, in para 13 of its judgment repeated its concern that the evidence on record revealed that the notice was addressed to "Kashmirilal Pramodkumar Agrawal" when the name of accused is "Kashmirilal Harising Gupta". It also repeated that, the record did not show as to what was the address to which the notice was sent. Thus, it concluded that the notice was not duly sent to the correct name and address.

16. I will first take up the matter relating to telegrams which were sent. The record contains Bank intimations Exh.18 and 19, which are dated 10.2.1994 informing the complainant that the cheques could not be honoured. Thus, the cheques had bounced. There is no dispute regarding the fact that the complainant sent telegrams. The accused deposed that he sent replies to the telegram. The reply telegrams are at Exh.18 and

19, both bearing postal stamps dated 10.2.1994. These reply telegrams are addressed to the complainant. I will reproduce the contents of Exh.18. The contents are read as under :

"RECD TELEGRAM NO QUESTION OF
PAYMENT CHEQUE NO 0703658 JALNA
COOPERATIVE PEOPLES BANK RS ONE LAC
BECAUSE YOU GIVE ADVANCE CHEQUE TEN
DAYS BEFORE FOR SUPPLY MOONG 100
BAGS BUT YOU FAIL TO SUPPLY MOONG YET
PLEASE SUPPLY MOONG 100 BAGS AFTER
PAYMENT CHEQUE ONE LAC

KASHMIRILAL PRAMODKUMAR"

17. The other telegram Exh.19 has similar contents except for the cheque number. In Exh.19, the cheque number referred is 0703659. Thus, although the trial Court has made much of what witnesses stated while referring to the accused, the accused himself, while sending the reply telegrams, put the sender's name as "Kashmirilal Pramodkumar". It is true that the copies of telegrams sent by him have not been obtained by the complainant from the post office and on record there are only its replies Exh.18 and 19. Although the learned counsel for the respondent - accused argued that the telegrams are in dispute, still the accused himself has deposed that he did send such reply telegrams Exh.18 and 19. As regards submission of the learned

counsel for the accused that the complainant did not bring on record the copies of telegrams sent by the complainant, I do not think it makes much difference when all the necessary particulars can be seen from the reply telegrams. Sub-clause (b) of the proviso of Section 18 only requires sending of "notice in writing". It does not say that it should necessarily be by registered post A.D. In the present matter, when it is an admitted fact that the complainant, after the cheques bounced, did send telegrams, looking to the replies Exh.18 and 19, I find that there is sufficient compliance of the requirement of law that the complainant should give notice in writing to the accused regarding bouncing of the cheques. The cheques bounced on 10.2.1994. The telegrams were given by the complainant immediately and on the same day of 10.2.1994 accused sent replies Exh.18 and 19. The accused failed to honour the cheques within 15 days of receipt of the notice and the complaint came to be filed on 24.3.1994. Although the accused is claiming that the complainant should have filed copies of the telegrams he sent when it is an admitted fact that the accused sent reply telegrams, the original telegrams are in possession of the accused himself and the evidence which is in the complete control of the accused has not been produced. Had it been produced, it would be unfavourable to the accused must be presumed. Illustrations (g), (h) and (i) of Section 114 of the Indian Evidence Act, when kept in view, show that a

presumption can be raised against the accused that if he produces the telegrams which he admittedly received, they would not be in his favour. The argument of the counsel for accused that the complainant should have got certified copies from the post office has no substance. Ultimately they would still be copy of the original.

18. In this matter, before the Sessions Court, the accused has demonstrated that, "Kashmirilal Pramodkumar Agrawal" is a proprietorship, of which he is proprietor and his name is "Kashmirilal Harising Gupta". On this basis, the accused appears to have convinced the trial Court that, reference made to "Kashmirilal Pramodkumar" may not be read as reference to him. In the arguments before me also similar contentions have been raised.

19. The words "proprietor" and "proprietorship" have been defined in Black's Law Dictionary, 6th Edition as under :

"Proprietor : Owner of proprietorship. One who has the legal right or exclusive title to property, business, etc. In many instances it is synonymous with owner.

Proprietorship: A business which is owned by a person who has either the legal right and exclusive title, or dominion, or the ownership of that business. *Shermco Industries, Inc. v. Secretary of U.S. Air Force, D.C. Tax.*, 452 F. Supp. 306, 314. A business, usually incorporated, owned and controlled exclusively by one person. Such a business is commonly designated a "sole proprietorship."

20. If the above meaning of proprietor is considered, it shows that, proprietor is owner of proprietorship. In instances it is synonymous with the owner. In present matter, the owner of the proprietorship concerned is "Kashmirilal Harising Gupta". He has set up the proprietorship calling it "Kashmirilal Pramodkumar Agrawal". At times he has referred to it by suffixing "M/s". His own cheques, which are not in dispute, Exh.15 and 16, have rubber stamps reading "For Kashmirilal Pramodkumar Agrawal" with place for signature and rubber stamp further mentioning "Proprietor". Thus, this accused has projected himself in the market as owner of proprietorship called "Kashmirilal Pramodkumar Agrawal". As the meaning of the word "proprietor" itself shows the proprietorship in many instances is synonymous with owner. With his first name Kashmirilal being common as an individual and as proprietor, some confusion of the people dealing with him may happen. The accused knows when he is being addressed as an individual and when proprietorship is being referred.

21. If Exh.17 is perused, the notice mentions the addressee as under :

"To,
Kashmirilal Pramodkumar Agrawal
Prop.: Kashmirilal Harising Agrawal,
New Mondha, Jalna."

22. With the evidence of the complainant P.W.1 and Advocate P.W.8 claiming that Exh.17 was sent to the accused and there being further evidence of P.W.3 Panditrao Padol, bringing documents from post office regarding service of the notice, it is surprising to find the Sessions Court recording that there is no evidence on record to show as to on which address the notice was sent. In para 10 of its judgment and the observations in para 13, the first appellate Court further confused itself by observing that the notice was addressed to "Kashmirilal Pramodkumar Agrawal" when the name of the accused is Kashmirilal Harising Gupta. If the address on the notice Exh.17 is seen, it was addressed to Kashmirilal Pramodkumar Agrawal. This is the name of the proprietorship. The business deal was with the proprietorship, of which the proprietor is accused Kashmirilal Harising Gupta. No doubt in the notice, in the name of the proprietor, instead of "Gupta", "Agrawal" was typed. However, merely by this confusion, the notice cannot be said to be bad, because basically it was addressed to the proprietorship, which the accused himself had projected to the market for his business. The notice was correctly addressed to the proprietorship which had issued the cheques and only because there was error in the surname of proprietor, it cannot be said that notice was not there. Exh.45 is the money receipt which is issued by the post office at the time of booking by the registered

post A.D. letter. That document also contains the name of the addressee as Kashmirilal Pramodkumar Agrawal. The evidence of P.W.5 Bank Manager also shows that the accused had opened his account with the Bank in the name of what is referred as "firm" mentioning the same to be Kashmirilal Pramodkumar Agrawal. Accused projected the name of his business as Kashmirilal Pramodkumar Agrawal. He opened Bank Account in such name; issued cheques in such name and conducted business using such name. In such situation, where the witnesses referred to accused as Kashmirilal Pramodkumar Agrawal, the evidence has to be properly read so as to mean that the witnesses were referring to the proprietorship projected by the accused.

23. As per Exh.31 proved by P.W.3 Panditrao from Post Office, the registered post A.D. notice was served on 15.2.1994, which can be said to be in ordinary course of business. In Exh. 31, the addressee is referred as Kashmirilal Pramodkumar. Although the accused denied that he has signed this document, still this document is given from the records of the Post Office maintained in ordinary course. The first appellate Court wrongly ignored the evidence of P.W.3 claiming that he was posted at the Post Office after 15.2.1994. Under illustration (e) of Section 114 of the Indian Evidence Act, official acts must be presumed to

have been regularly performed. Looking to the document coming from the record of the Post Office, official acts can be presumed to have been regularly performed. It is not the case of the accused that on 15.2.1994 he was not available at Jalna itself, or that there is someone else of same name etc.

24. I find that, the trial Court rightly held that the notice Exh.17 had been served on 15.2.1994. The observations of the Sessions Court are not correct and the Sessions Court has wrongly appreciated the evidence regarding notice Exh.17 and its service. Calculated from the date of 15.2.1994 also, the complaint filed must be said to be in time.

25. In the matter of **C.C. Alavi Haji Vs. Palapetty Muhammed and another**, reported in **(2007) 6 SCC 555**, the Hon'ble Supreme Court has held that, where accused claims not to have received notice sent by post, but receives copy of complaint with summons, he can, within 15 days of the receipt of summons, make payment of the cheque amount and on that basis request Court to reject complaint. Without doing this, he cannot contend that there was no proper service. Looking to the observations of the Hon'ble Supreme Court, even if the above evidence of the telegrams as well as the registered post A.D. notice Exh.17 is to be ignored the accused did not pay the

amount within 15 days of receipt of summons of the trial Court. Thus, the accused cannot avoid liability. He has to be held guilty.

26. I find that, the complainant had given sufficient notice to the accused not merely by sending registered post A.D. notice but also by telegrams and the accused had knowledge about bouncing of the cheque and still failed to pay. This being so, the judgment of the trial Court was correct and the first appellate Court wrongly interfered with the conviction.

27. In this matter, the trial Court has imposed only fine of Rs.50,000/- although it found that the accused was liable to pay the amount of cheques. In para 20 of its judgment, it held that, "Complainant is legally entitle to recover the amount in question i.e. Rs.2,00,000/-"

28. This matter was finally argued on 6.4.2016. At that time, the learned counsel for the appellant had taken permission to make further submissions in case he can find some rulings on question of enhancement of sentence. Subsequently, on 12.4.2016, learned counsel for both sides were present and were further heard as recorded in order dated 12.4.2016, with regard to question of enhancement of sentence.

29. Learned counsel for the appellant relied on the case of **Suganthi Suresh Kumar Vs. Jagdeeshan**, reported in **(2002) 2 SCC 420**. In that matter, the respondent therein had drawn two cheques in favour of the appellant, which were dishonoured. The amount covered by the cheques was Rs.4,50,000/-. The trial Magistrate convicted the respondent under Section 138 of the Negotiable Instruments Act, but sentenced him only to undergo imprisonment till rising of the Court and to pay a fine of Rs.5000/- in both the cases. The appellant in that matter preferred revision to the High Court on the premise that sentence was grossly inadequate and at least Section 357(3) of the Code of Criminal Procedure should have been invoked and compensation awarded. The High Court did not interfere with the sentence although it observed that Magistrate should keep in mind object of providing stringent punishment and guidelines given by the Apex Court in "Pankajbhai Nagjibhai Patel Vs. State of Gujarat", reported in (2001) 2 SCC 595. When the matter came up before the Hon'ble Supreme Court, the Hon'ble Supreme Court found that there was no case for the respondent that the said amount had been paid either during the pendency of the case before the trial Court or the High Court or the Supreme Court. It was observed :

" . . . If the amounts had been paid to the complainant there perhaps would have been justification for imposing a flea-bite sentence as had been chosen by the trial Court. But in a case where the amount covered by the cheque remained unpaid it should be the lookout of the trial Magistrate that the sentence for the offence under section 138 should be of such a nature as to give proper effect to the object of the legislation. No drawer of the cheque can be allowed to take dishonour of the cheque issued by him light-heartedly."

The Supreme Court observed that, even if the properties of the respondent had been attached in a civil suit in that matter, still that was not a ground for lessening the gravity of the offence or to impose minor sentence as was chosen by the trial Court. In that matter, the Hon'ble Supreme Court remitted back the matter to trial Court to hear both sides again in the matter of sentence.

30. In the present matter, considering the facts of this matter, I have heard learned counsel for both sides as regards enhancement of sentence, in case the appeal happens to be allowed. I am also keeping in view the submissions made by the accused before the trial Court when sentence was to be passed. The accused submitted that, he is running business in Agricultural Produce Market Committee and has good reputation

and that he did not have intention to cheat the complainant. He had requested the trial Court to impose sentence of fine only. Keeping these submissions also in view, I am considering the present matter. I find that, if provisions of Section 138 of the Negotiable Instruments Act are considered, it was permissible to pass sentence of imprisonment for a term which could extend to one year at the relevant time or with fine which could extend to twice the amount of cheque or with both. If the trial Court considered it appropriate not to pass sentence of imprisonment, it would have been appropriate to consider the amount of cheques which bounced and keeping in view reasonable interest, further amount could have been calculated and fine could have been accordingly ordered. The amounts of the appellant are outstanding since the time the cheques bounced in February 1994. More than 20 years after that date, even if the amount of Rs.2 Lakhs had been kept in Fixed Deposit, it would have multiplied many folds. I find it appropriate that, sentence of fine as per Section 138 of the Negotiable Instruments Act needs to be passed. In fact, even that is on the lower side looking to the time lapsed.

31. For above reasons, the Criminal Appeal is allowed. with costs quantified at Rs.10,000/- (Rupees ten thousand) to be paid by respondent No.1 to the appellant. The impugned judgment and order passed by IInd Additional Sessions Judge,

Jalna in Criminal Appeal No.8/1995 is quashed and set aside. The judgment of conviction as passed by the Chief Judicial Magistrate, Jalna in S.T.C. No.329/1994 is restored. However, instead of the sentence of fine and compensation as passed by the Chief Judicial Magistrate, following order is substituted :-

The accused is sentenced to pay fine of Rs.4,00,000/- (Rupees Four Lakhs) and in default, to suffer simple imprisonment for three months. The amount of fine on being deposited, the same shall be paid to the complainant as compensation.

Amount already deposited, if any, by respondent - accused, shall be adjusted in this amount of fine.

Respondent No.2 - accused shall surrender to his Bail Bonds before Trial Court on 9th May 2016 and pay the fine as directed. In default, Trial Court shall take steps to ensure execution of sentence.

The criminal appeal is accordingly disposed of.

(A.I.S. CHEEMA, J.)