

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

CRIMINAL APPLICATION NO. 3355 OF 2005

1. Venkatrao S/o Govindrao Shahpurwad,
Age. Major, Occ. Cook, R/o. Anand Nagar
Road, Anandnagar, Nanded.

..APPLICANT..

(Orig Accused)

VERSUS

1. Hardeepsing S/o Zailhasingh Padda,
Age. 48 years, Occ. Business,
R/o. Village Kautha,
Tq. & Dist. Nanded. Orig. complainant
2. State of Maharashtra,
Through Additional Government Pleader
Mumbai High Court, Bench at Aurangabad.

..RESPONDENTS..

WITH

CRIMINAL APPLICATION NO. 3356 OF 2005

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Advocate for Applicant: Mr Shailendra S. Gangakhedkar
Respondent No.1 – absent.
APP for Respondent No.2: S.W. Munde

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CORAM : V.K. JADHAV, J.
Dated: December 06, 2016

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ORAL JUDGMENT :-

1. Being aggrieved by the order passed by the Judicial Magistrate First Class, Court No.3, Nanded dated 2.11.2004 below Exh.1 in SCC No.2493/2004 and the order dated 2.11.2004 passed by the Judicial Magistrate First Class, Court No.3, Nanded in SCC No.2494/2004, thereby issuing process against the present applicant in both the cases under section 138 of the Negotiable Instruments, 1881 (for short hereinafter referred to as 'N.I.Act') and the common order dated 11.8.2005 passed by the 5th Judicial Magistrate First Class, Nanded below Exh.19 in SCC No.2493/2004 and below Exh.18 in SCC No.2494/2004 thereby rejecting the aforesaid applications filed for recalling the order of issuance of process and further the learned Adhoc Additional Sessions Judge, Nanded has refused to

interfere in the order of rejection of the application for recalling the order of issue process in terms of the ratio laid down by the Supreme Court in the case of Adalat Prasad Vs. Rooplal Jindal”, the original accused approached to this Court by filing present criminal applications.

2. The learned counsel for the applicant submits that, in both the cases, respondent no.1-original complainant alleged that the applicant-accused had issued a cheque of certain amount dated 15.7.2004 and 16.7.2004 respectively, however, on presentation of the said cheques in the bank, the said cheque came to be returned with the remark of “funds insufficient”. Consequently, the respondent-complainant had issued a legal notice to the applicant-accused on 13.8.2004. Said notice came to be returned on 19.8.2004 with the remark that the person has left the house. Said legal notice in respect of the dishonour of the cheque has been issued on the correct address and therefore, there would be a deemed service of the notice on applicant-accused on 19.8.2004. The learned counsel submits

that, after expiry of 15 days as contemplated under section 138 clause (c) of the N.I.Act, in view of the provisions of Section 142 (b) the respondent-complainant had to file the complaint on or before 2.10.2004. However, the respondent-complainant had filed two separate complaints bearing S.C.C. No.2493/2004 and 2494/2004 before the learned Magistrate First Class on 7.10.2004. No application was filed for condonation of delay. The learned Magistrate has not considered the same and mechanically issued the order of process against the applicant-accused.

3. None present for the respondent no.1-original complainant in both the cases.

4. I have also heard the learned APP for the respondent State.

5. It appears that the complaint is not filed within a period of one month of the date on which the cause of action arose under clause c to the proviso to Section 138 of the N.I.Act. Section 138 (c) which is relevant for the

present discussion 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 provision of this Act, be punished with imprisonment for a term which may 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).....

(b).....

(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.

Explanation.- For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.”

6. In terms of provisions of Section 142 of the N.I. Act, the Court is not empowered to take cognizance of the offence if there is non-compliance of clause 'b' of Section 142 of N.I. Act. Said clause (b) of Section 142 sub section (1) which is relevant for the present discussion is reproduced herein below :-

“142. Cognizance of offences.-

(1) 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).....

(2).....

(a).....

(b).....

Explanation.-. For the purposes of clause (a), where a cheque is delivered for collection

at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.

7. In view of the above provisions, the respondent complainant ought to have filed the complaint on 2.10.2004 i.e. within a period of one month of the date on which cause of action arises under clause (c) of Section 138 of N.I. Act, as aforesaid.

8. In the instant case, cause of action arose on 3.9.2004 and as such, the complaint ought to have been filed on or before 2.10.2004. However, the Court is not precluded from taking cognizance of the complaint in terms of the provisions of clause 'b' to sub section (1) of Section 142 of the N.I. Act if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

9. In the instant case, respondent-complainant has not bothered to file any application alongwith the complaint explaining about the delay to the satisfaction

of the Magistrate.

10. In view of this, cognizance taken by the Magistrate of the complaint filed by the respondent-complainant and issuing process thereafter against the applicant-accused is liable to be quashed and set aside. Hence, following order.

O R D E R

- I. Both the Criminal Application Nos. 3355/2005 and 3356/2005 are hereby allowed in terms of prayer clause 'C'.
- II. Rule is made absolute in above terms.
- III. Criminal Applications accordingly disposed of.

(V.K. JADHAV, J.)

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aaa/-