

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

CRIMINAL APPLICATION NO. 3384 OF 2005

YOGESH MADHUKAR SONWANE

age 37 yrs, Occ. Business,
R/o Atithi Dining Hall,
Main Road, Shrirampur,
Dist. Ahmednagar.

..Applicant..

VERSUS

MS ALKA HARIBHAU DHUMAL

aged 42 yrs, Occ. Lecturer,
R/o 27, Shreyanagar, Aurangabad.

..Respondent..

...

Advocate for Applicant : Mr Ajinkya Kale h/f S B Talekar

...

CORAM : V.K. JADHAV, J.

Dated: September 23, 2016

...

ORAL JUDGMENT :-

1. Being aggrieved by the order dated 3.12.2005 passed below Exh.35 in SCC No.9038/2004, the original accused has filed present criminal application.

2. Brief facts, giving rise to the present application are as follows :-

Respondent has filed a complaint bearing SCC No.9038/2004 before the Judicial Magistrate First

Class, Aurangabad against the applicant-original accused for having committed an offence punishable under section 138 of the Negotiable Instruments Act. In due course, the said SCC No. 9038/2004 was taken up for hearing. Respondent-original complainant has submitted her examination-in-chief in the form of affidavit before the Magistrate and she was also subjected to cross examination by the applicant-accused. Thereafter, respondent-complainant has filed an application Exh.35 stating therein that the demand notice has not been exhibited.

The applicant accused has strongly resisted the said application by filing his say wherein it has contended that the respondent-complainant has filed said application Exh.35 to fill up the lacuna and to prolong the matter. Said application Exh.35 also resisted on the ground that respondent-complainant did not prove the contents of the notice as per the provisions of the Indian Evidence Act. The learned Judicial Magistrate First Class Court no.3 Aurangabad by its impugned order passed below Exh.35 dated

3.12.2005 allowed said application and accordingly exhibited the said notice as exh.36. Hence, this application.

3. The learned counsel for the applicant-accused submits that, although a passing reference has been made in paragraph no.4 of the affidavit of examination-in-chief that, notice was issued to the accused on 13.10.2004 by courier which was served on the accused, copy of the notice alleged to have been sent on 13.10.2004 was not filed or annexed alongwith an affidavit. It has not mentioned as to on what date notice has been sent by courier and served on accused. Learned counsel submits that, Order 13 Rule 4 deals with a endorsement on documents admitted in evidence and when the witness proves any document, correct exhibit number should be noted immediately on the document itself by giving reference in the body of the deposition against description of the said document. Learned counsel submits that, copy of the notice alleged to have been issued through courier on 13.10.2004 was

not exhibited nor any exhibit number was written on document. Learned counsel submits that, respondent-complainant has failed to prove said notice and therefore, at a later stage in order to fill up lacuna application exh.35 came to be filed. Learned Magistrate has erroneously allowed said application.

4. Even though, notices were duly served on respondent-original complainant on court motion, none appears for her.

5. On careful perusal of the impugned order, it appears that, in the affidavit of evidence Exh.32 in paragraph no.4 it is mentioned to the effect that “ultimately the notice was issued to the accused on 13.10.2004 through courier by name Avenues Courier, Aurangabad which was served on the accused.” The slip of the service is annexed herewith. It be exhibited as address of the accused is correct. On the backdrop of this, the learned counsel for the applicant submits that, contents of the demand notice of dishonour of cheque of

the amount and signature of the counsel who has issued said notice are not duly proved. According to the learned counsel it cannot be said that, contents of the office copy of the notice have been duly proved.

6. On perusal of the cross examination of the respondent-complainant, the applicant-accused has himself invited the respondent-complainant to explain about the contents of the legal notice and accordingly in paragraph no.4 of the cross-examination the respondent-complainant has stated which is reproduced herein below :-

“I had issued notice of this dishonour of these cheques on 13.10.2004. Accused received that notice dated 14.10.2004.”

7. Furthermore, it has only suggested to respondent-complainant in the cross examination that, he has not issued notice to the applicant-accused within legal time. It has nowhere suggested to the respondent-complainant that no legal notice has been issued and served on accused. Same is also evident from the

further cross examination where it is suggested to the respondent-complainant that, complaint is not filed within prescribed period of limitation. Said suggestion is in continuation of the suggestion that respondent-complainant has not issued notice to the accused within legal time.

8. In the light of the above discussion, it appears that, the learned Magistrate has therefore rightly exhibited the said legal notice. I am in agreement with the Magistrate that in the light of the cross examination as referred above, there is no likelihood of any prejudice to be caused to the applicant/original accused.

9. In view of the above discussion, I do not find any substance in the application. Because of the interim relief granted in the year 2006 further proceedings in SCC No.9038/2004 pending before the Magistrate are stayed. Thus, certain directions for expeditious disposal of the case requires to be given to the Magistrate. Hence, I proceed to pass the following order.

ORDER

- I. Criminal application is hereby dismissed.
- II. The applicant-accused shall appear before the Judicial Magistrate First Class, Aurangabad on **21.10.2016**. The learned Judicial Magistrate First Class, Aurangabad shall issue notice to respondent-complainant about the date of hearing and dispose off said S.C.C. No.9038/2004 within SIX MONTHS thereof.
- III. Criminal application accordingly disposed off. Rule discharged.

sd/-

(V.K. JADHAV, J.)

....

aaa/-