

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO. 455 OF 2004

Raghunath Kondiba Devkar ..Applicant

v/s.

Suresh Shrichand Nanwani & Ors. ..Respondents

Mr. Pradip Patole i/b. S.S.Patwardhan for the Applicant

Mr.D.P.Adsule, APP for the Respondent-State.

Mr. Nagesh Chavan i/b. Ashok Chougule for the Respondent.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : FEBRUARY 17, 2016.**

P.C.

1. By this application under Section 482 of Cr.P.C. the applicant who is an accused in SCC/654/2000 has challenged the impugned orders dated 1st October, 2003 and 6th November 2003, whereby the learned Magistrate and the Revisional Court rejected his request to recall of process under Section 138 of the N.I. Act.

2. The brief facts necessary to decide this application are as under :

. The respondent no.1 had filed a complaint under Section 138 of the Negotiable Instruments Act alleging that the applicant herein had issued four cheques of Rs.50,000/- each towards refund of security deposit. One of the cheques dated 10th October, 1999 was dishonoured. The statutory notice issued by the respondent no.1 complainant had returned with a postal endorsement "Not Claimed despite intimation". Since the cheque amount was not paid, the respondent no.1 complainant filed a complaint under Section 138 of the Negotiable Instruments Act.

3. The applicant herein, apparently in view of the judgment of the Apex Court in *K.M. Mathew Vs. State of Kerala (1992) 1 SCC 217*, had filed an application for recall of process. The said application was dismissed by order dated 22.9.2003. The applicant challenged the said order in Revision Application No. 131 of 2003. The said revision application also came to be dismissed. Being aggrieved by the said order, the applicant has invoked the inherent jurisdiction of this Court under Section 482 of Cr.PC.

4. Learned Counsel Shri Patole has submitted that the provisions of Section 138 are not fulfilled. The statutory notice as required under Section 138 of the N.I.Act is not served. And hence the process be recalled.

5. The records reveal that the applicant was served with summons on 30th July, 2000. The substances of accusation was explained on 21st April, 2001 whereas the application for recall of process was filed on 10th September, 2003 i.e. more than three years since the date of service of the summons. The order of the learned Magistrate clearly indicates that the applicant had failed to remain present after the service of summons and several warrants were issued to secure his presence. The learned Magistrate has observed that the applicant has been trying to prolong the trial. The fact that the applicant has filed the application three years after issuance of the summons and there being no justification for the delay, only justifies the observations of the learned Magistrate that filing of the application for recall of process, after recording the plea, is nothing but an attempt to delay the proceedings.

6. Be that as it may, the only submission advanced by the learned Counsel for the applicant is that the complainant herein had not given statutory notice as required under the provisions of Section 138 of the Negotiable Instruments Act. He has relied upon the decision of the Apex Court in *Shakti Travel & Tour vs. State of Bihar [(2002) 9 SCC 415]* and the decision of this Court in *Lalmani Tiwari vs. Bhimrao Govind Pawar [(2001) 2 Mh.L.J. 342]*.

7. A perusal of the complaint lodged by the respondent no.1 complainant indicates that the applicant herein had permitted the complainant to run the hotel from 8.8.996 till 31.3.1999. The complainant had stated that he had given to the applicant an amount of Rs.2 lakhs by cheque towards security deposit. The applicant was required to return the said deposit on expiry of the said agreement. The complainant had stated that after the expiry of the said contract the complainant called upon the applicant accused to return the said deposit of Rs.2 lakhs. The applicant thereafter issued four cheques for Rs.50,000/- each, out of which two cheques were encashed. The

respondent no.1 complainant had stated that the cheque dated 10.10.1999 for Rs.50,000/- was deposited in Bank of Maharashtra, Sangli Branch, and the said cheque was returned unpaid. The complainant therefore issued a statutory notice to the applicant which was returned unserved with endorsement “not claimed despite intimation.”. The respondent no.1 complainant had stated that the applicant had not paid the cheque amount.

8. The averments made in the complaint prima facie indicate that the applicant had issued the subject cheque towards refund of the security deposit. The said cheque was deposited in the bank and was returned unpaid. The respondent complainant had issued the statutory notice and that the said notice was returned unclaimed.

9. It may be mentioned here that the judgments relied upon by the applicants are not applicable to the facts of the case, particularly in view of the decision of the Apex Court in the case of *K. Bhaskaran Vs. Sankaran Viadhyan Balan & Anr. [(199) 7 SCC 510]* wherein

the Apex Court has held as under:

“ 21. In Maxwell's Interpretation of Statutes, the learned author has emphasized that “provisions relating to giving of notice often receive liberal interpretation”. The context envisaged in Section 138 of the Act invites a liberal interpretation for the person who has the statutory obligation to give notice because he is presumed to be the loser in the transaction and it is for his interest the very provision is made by the legislature. The words in clause (b) of the proviso to Section 138 of the Act show that the payee has the statutory obligation to “make a demand” by giving notice. The thrust in the clause is on the need to “make a demand”. It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once it is despatched his part is over and the next depends on what the sendee does.”

10. The Apex Court after making reference to Section 27 of General Clauses Act, has held that :

No doubt Section 138 of the Act does not require that the notice should be given only by “post”. Nonetheless the principle incorporated in Section 27 (quoted above) can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice.

11. In the instant case, the averments made in the complaint indicate that the notice was sent by registered post and the same was not claimed despite intimation. In the light of provisions under Section 27 of General Clauses Act and the principles laid down by the Apex Court in *K. Bhaskaran (Supra)* the notice is deemed to have been served. The learned Magistrate as well as the Sessions Judge were right in holding that there was due compliance of requirement of provision (b) to Section 138 of N.I. Act. The application has no merits and was filed only with an intention of delaying the proceedings.

12. Hence the application is dismissed with costs of Rs.10,000/- to be paid to the respondent No.1 – complainant within one month from the date of the receipt of the order.

(ANUJA PRABHUDESSAI, J.)