

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

CRIMINAL APPLICATION NO. 1164 OF 2017

Jaychand Abhayji Singi

..APPLICANT

VERSUS

Rajesh Chandulal Batiya and Another ..RESPONDENTS

Mr. D.A. Naik, Advocate for applicant.

Mr. R.R. Imale, Advocate for respondent no.1.

Mr. A.P. Basarkar, A.P.P. for respondent no.2 – State.

CORAM : SANGITRAO S. PATIL, J.

DATE : DECEMBER 19, 2017

PER COURT :-

The applicant has sought leave to file appeal against the judgment of acquittal dated 07th January, 2017 passed in S.C.C. No. 1984 of 2013 by the learned Judicial Magistrate, First Class, Jalna, whereby Respondent no.1 came to be acquitted of the offence under Section 138 of the Negotiable Instruments Act.

2. Heard the learned Counsel for the applicant and that of Respondent no.1 and the learned A.P.P. for Respondent no.2 – State.

3. The learned Counsel for the applicant submits that the accused has been acquitted solely on the ground that the complaint was not filed within time. According to him, cheque dated 21st August, 2013 was deposited in the bank for encashment, which was returned with the endorsement as "Funds Insufficient" on 24th August, 2013. The applicant issued demand notice on 07th September, 2013 calling upon Respondent no.1 to pay the cheque amount. The applicant did not receive the postal acknowledgement receipt indicating service or non-service of demand notice on Respondent no.1. Therefore, the applicant sent a letter on 21st October, 2013 to the concerned post office asking for information as to whether the demand notice was served on Respondent no.1 or not. He then filed the present complaint on 12th November, 2013.

4. The learned Counsel for the applicant submits that since the post office had not informed about service or non-service of the demand notice on Respondent no.1, the applicant could not file complaint giving information about the service of the demand notice on Respondent no.1.

According to him, the delay, in the circumstances, cannot come in the way of the applicant in proving the offence alleged against Respondent no.1. He submits that the impugned order may be set aside and the case may be remanded for fresh trial.

5. On the other hand, the learned Counsel for Respondent no.1 submits that there is no proof of service of demand notice on Respondent no.1. Moreover, after issuing demand notice, the applicant should have filed the complaint within a period of one month after getting it verified from the post office, whether the demand notice was actually served on Respondent no.1 or not. Without getting it confirmed, complaint came to be filed, that too after a period of one month from the date on which demand notice was reasonably expected to be served on Respondent no.1. He submits that the applicant did not apply for condonation of delay for filing the complaint. The learned Magistrate rightly acquitted the respondent.

6. The demand notice is dated 07th September, 2013. However, as seen from the evidence of the applicant and

the postal registration receipt – Exhibits 27 and 28, it was actually posted on 21st September, 2013. In the normal course, the applicant would have received the postal acknowledgement of the receipt within a period of a week. It was necessary for him to enquire with the post office about service or non-service of the demand notice on Respondent no.1 at least within 15 days from 21st September, 2013. However, the applicant did not take any steps to get it verified from the post office about the service or non-service of the demand notice on Respondent no.1 and it is only on 21st October, 2013, that he submitted application – Exhibit 29 to the post office seeking information as to whether the demand notice was served or otherwise. He, then filed the complaint on 12th November, 2013 without waiting for reply from the post office. In paragraph no.5(b) of the complaint, he mentioned that he sent the demand notice to Respondent no.1 on 21st September, 2013 and in clause (c), he mentioned that Respondent no.1 failed to make payment to the cheque within fifteen days from the receipt of demand notice. He did not at all mention the date of service of

demand notice on Respondent no.1. The learned trial Judge relied on the judgment in the case of **Surendra Sanganeria Vs. Ramesh Rijhumal and Anr. 2010 ALL SCR 1121**, wherein it is observed that in the absence of mention of date of receipt of demand notice by the accused in the complaint under Section 138 of the Negotiable Instruments Act, the period of limitation prescribed under Section 142 of the said Act cannot be determined and under such circumstances, the order issuing process against the accused is liable to be set aside. In the present case, there is no mention of the date of service of demand notice on Respondent no.1 in the complaint filed by the applicant, nor there is evidence of the employee from the post office to show that the demand notice was served on Respondent no.1 on any particular date. Consequently, the process itself was not liable to be issued against Respondent no.1 for the offence under Section 138 of the said Act.

7. As stated above, the demand notice was actually sent by the applicant to Respondent no.1 through

Registered Post A.D. on 21st September, 2013. The applicant could have taken benefit of the provisions of the General Clauses Act, showing that the demand notice was sent on the correct address of Respondent no.1 and in the ordinary course, it would have been served on Respondent no.1 within a week from 21st September, 2013. He could have mentioned a particular date as a deemed date of service of demand notice on Respondent no.1. However, he has not done so. Even if it is accepted that in the ordinary course the demand notice would have been served on Respondent no.1 by 28th September, 2013, it was necessary for the applicant to file the complaint within a period of one month from the deemed date of service of demand notice on Respondent no.1. The complaint filed on 12th November, 2013, certainly, would be much beyond the prescribed period of limitation from the deemed date of service of demand notice on Respondent no.1. The learned trial Judge, therefore, was right in holding that the complaint was liable to be dismissed on the ground that it was beyond the period of limitation prescribed under Section 142 of the Negotiable Instruments Act.

8. In the above mentioned facts and circumstances of the case, I do not find any reason to interfere with the impugned judgment and order passed by the learned trial Court acquitting Respondent no.1 of the offence under Section 138 of the Negotiable Instruments Act. In the result, I pass the following order :-

ORDER

- (1) Leave to file appeal against the judgment and order dated 07th January, 2017 passed in S.C.C. No. 1984 of 2013 by the learned Judicial Magistrate, First Class, Jalna is refused.
- (2) Criminal Application No. 1164 of 2017 is disposed of accordingly.

[SANGITRAO S. PATIL]
JUDGE

SSD