

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

CRIMINAL WRIT PETITION NO.488 OF 2017

Godawari w/o.Bhagwan Pimpale
Age: 42 years, Occu.: Agri/Household,
R/o.Pimpalgaon (Barav),
Post.Nalani (Bk.),
Tq.Bhokardan, Dist.Jalna. ..Petitioner

Versus

Gangamai Sahakari Karkhana
Through,
Suresh s/o. Murlidhar Hivarde
Age: 33 yrs., Occu.: Service,
R/o.Harinagar, Ghatnandra, Tq.Sillod,
Dist.Aurangabad. ..Respondent

...

Advocate for the petitioner: Mr.Chandrakant R.Thorat
Advocate for the respondent: Mr.S.B.Kakde

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**CORAM : PRAKASH D.NAIK, J.
DATED : 03.11.2017**

ORAL JUDGMENT:-

1) The petitioner has approached this Court by challenging the proceedings initiated against her for an offence under Section 138 of the Negotiable Instruments Act. The complaint was numbered as SCC No.449 of 2009.

2) The brief facts which are necessary to consider the reliefs sought in this petition are as follows:-

The respondent has filed a complaint before the Court of Judicial Magistrate First Class at Sillod for offence under Section 138 of the Negotiable Instruments Act. The accused/petitioner had entered into agreement with complainant for transporting sugarcane for crushing season 2007-08 and for that, the accused obtained amount in advance from the complainant. The accused did not transport sugarcane for the said period. The amount of Rs.5,36,143/- was remaining balance with accused. The complainant's case is that, the accused had issued a cheque dated 29.10.2009 for Rs.5,36,143/- in favour of complainant. When deposited, the cheque was returned with remarks "insufficient funds". In pursuant to that the complainant issued a demand notice to the accused on 22.3.2010 by register post calling upon the accused to pay the cheque amount. The notice was served on 25.3.2010. Thereafter, a complaint was filed before the Court for the offence under Section 138 of the Negotiable

Instruments Act. After recording verification statement, the learned Judicial Magistrate First Class issued process against the petitioner for the said offence on 28.6.2010.

3) The petitioner preferred Criminal Revision Application No.10 of 2013 before District Judge challenging the order of process. The said application was rejected on 28.2.2017.

4) The petitioner is aggrieved by the said order of issuance of process against her and therefore, she has preferred this petition challenging the said order and the proceedings. The learned counsel for the petitioner submitted that the complaint is not maintainable in law since the demand notice was not served upon the petitioner. It is submitted that the mandatory notice of demand has not been served upon the petitioner. The address mentioned in the notice dated 22.3.2010 i.e. Pimpalgaon Bavne, Post.Nalni, Bhokardan, Dist.Jalna,

which is also reflected in the title of the complaint. The applicant did not reside at Pimpalgaon Bavne but she is resident of Pimpalgaon Barav, Post.Nalni, Taluka Bhokardan, District Jalna. The notice was sent on incorrect address and hence the same is not received by her. There is no village named Pimpalgaon Bavne, which is ascertained by applicant through Right to Information Act. The Court issued summons to applicant. The address on summons mentioned as Pimpalgaon Bavne, Post.Nalni, Bhokardan, District Jalna, but there is scoring in the summons. It is submitted that without serving the demand notice upon the petitioner, the respondent has filed a complaint for an offence under Section 138 of the Negotiable Instruments Act. On account of non-service of the demand notice, the proceeding for such offence is not maintainable in law and the same deserves to be quashed and set aside. It is submitted that the issuance of demand notice and service upon the petitioner is prerequisite for initiating proceedings under Section 138 the Negotiable Instruments Act. It is submitted that

the Sessions Court did not consider the aforesaid aspect while deciding Criminal Revision Application.

5) The learned counsel for the petitioner has placed reliance on the decision of the Apex Court in the case of *M/s.Sarav Investment and Financial Consultants Pvt.Ltd. And Anr. Vs. Llyods Register of Shipping Indian Office Staff Provident Fund and Anr.*, reported in **AIR 2007 SC (Supp.), 1688**. It is submitted that in the said decision, the Apex Court has categorically observed that the communication of demand notice is imperative. In case notice is not served upon the accused, the proceeding under Section 138 of the Negotiable Instruments Act, cannot be initiated against the accused as the complaint does not fulfill the requirements of law.

6) The learned counsel representing the respondent-complainant submitted that the the contentions raised by the petitioner are disputed questions of facts. It is submitted that the notice was served upon the petitioner, which is evident from the evidence on record. It is further submitted that in the complaint, the complainant has specifically stated that demand notice was issued to the accused and the same was served upon the her. It is therefore, submitted that the complainant must be given an opportunity to adduce the evidence and prove the fact of service of demand notice upon the accused. This is not a stage to adjudicate upon the issue of service of demand notice, more particularly, taking into consideration the fact that averments in the complaint indicated that the notice was served upon the petitioner. The learned counsel also placed reliance upon the communication issued by the postal authorities wherein it is stated that "the article has been delivered on 25.6.2010 to the addressee". However, the learned counsel for the petitioner submits that the complainant

cannot place reliance upon such a document in this petition. The said document is not part of the complaint. The learned counsel for the respondent, however, submitted that document was produced during the course of hearing of the revision application before the Sessions Court and that the complainant would rely upon such document during the course of the trial. The complainant may be given an opportunity to adduce evidence to establish the fact that the notice was served on accused.

7) I have considered the submissions advanced by both the parties. I have also perused the complaint as well as the orders passed by the Courts below. The learned Judicial Magistrate First Class has issued process against the accused after recording verification statement and going through the contents of the complaint. The Court found that there is prima-facie material to issue process on the basis of the averments in the complaint and the documents, which were annexed to

the said complaint. The complaint mentions the fact that notice is served on accused. The defence of accused based on the documents relied upon by accused cannot be considered at this stage.

8) The petitioner had preferred the revision application before the Sessions Court, which has been rejected vide order dated 28.2.2017. The learned Additional Sessions Judge, while passing the order has observed that upon considering the grievance of the accused, it is revealed that prima-facie the complainant has produced necessary documents on record. Hence, opportunity to prove the factum of service of notice on accused is required to be given to the complainant. For that Trial Court is required to proceed on its own merits. The grievance of the accused that mandatory notice is not served on the accused, may be a probable defence. It is settled proposition of law that probable defence is not required to be considered for quashing the proceedings.

9) I do not find any reason to interfere in the order of the process as well as order passed by the Sessions Court. The complainant ought to be given an opportunity to lead the evidence in the trial to establish the fact of service of notice. Prima-facie, at this stage, the averments in the complaint and the documents on record indicates that notice was issued and the same was served. It would be open to the accused during the trial to rebut the said fact and to establish by her defence that the notice was not served upon her. It is true that Apex Court in its decision, which is relied upon by the petitioner has observed that service of demand notice is mandatory and imperative and in the absence of such notice, the proceedings are not tenable in law. However, in the present case, the case of the complainant is that the notice was served upon the accused. The contention of the petitioner-accused is primarily based upon disputed question of facts, which cannot be gone into at this stage and it can be raised at the time of the trial as

her probable defence.

10) In the aforesaid circumstances, I am not inclined to grant the reliefs as prayed by the petitioner in this petition. There is no reason to interfere in the order of process passed by the learned Judicial Magistrate First Class as well as order passed by the Additional Sessions Judge rejecting the revision application preferred by the petitioner. Hence, I pass the following order:-

ORDER

(I) Criminal Writ Petition No.488 of 2017 is dismissed.

(II) It is clarified that the observations made in this Order are for considering the prayers sought in this petition and the Trial Court shall not be influenced by these observations during trial.

[PRAKASH D.NAIK, J.]