

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

CRIMINAL APPEAL NO.239 OF 2018

Yogesh Traders,
Through its Proprietor,
Yogesh s/o Papalal Jaiswal,
Age : 29 years, Occu : Business,
R/o Nathbaba Lane, Sadar Bazar Jalna,
Tal. And Dist. Jalna ... Appellant

VERSUS

Sandip S/o Devidas Ambhure,
R/o Bhavani Nagar, Aurangabad Road,
DsitRICT Jalna ... Respondent

Mr. R.A. Jaiswal, Advocate for the appellant
Mr. P.G. Rodge, Advocate for the respondent

CORAM : S.M.GAVHANE, J.

DATED : 02.04.2019

ORAL JUDGMENT :-

1. Heard.
2. Admit, taken up for final hearing with the consent of both the parties.
3. By this appeal the appellant/original complainant in STC No.1820 of 2014 agaisnt the respondent/accused has challenged order dated 15/09/2017 passed by the Judicial Magistrate, First Class, Jalna

dismissing the said case and acquitting the respondent/accused of the offence punishable under Section 138 of the Negotiable Instruments Act.

4. Facts in short, are that, the appellant filed aforesaid complaint case against the respondent for the offence punishable under Section 138 of the Negotiable Instruments Act alleging that cheque of Rs.98,900/- issued by the respondent in favour of the appellant was dishonored. Thereafter, as the appellant did not take steps to serve the respondent with the notice of the case on 15/09/2017, the case was dismissed. Said order passed by the learned Magistrate below Exh.1 runs as under:

"This is a complaint case instituted under section 138 of the Negotiable Instruments Act. Since 26/07/2016, the complainant has not taken any steps against the accused. Therefore, on 21/06/2017, the matter was kept for passing D.I.D. order. But, even then today, the complainant and his counsel are absent. It appears from the conduct of the complainant that he is not interested to proceed with the matter further. Hence, I pass following order-

ORDER

1. The complainant is dismissed in default.
2. The accused is acquitted of the offence punishable under Section 138 of the Negotiable Instruments Act vide Section 256 of the Code of Criminal Procedure."

5. It is the above said order which is under challenge in this appeal by the appellant/complainant.

6. Mr.Jaiswal, learned counsel for the appellant fairly submitted that after filing of the complaint on 26/07/2016, 21/06/2017 and on 15/09/2017 the appellant and his advocate could not take steps to serve notice of the case on the respondent and therefore complaint was dismissed. According to the learned counsel the amount of cheque involved in the case is more than Rs.98,000/-. It is submitted that the appellant be given an opportunity to proceed with the case by setting aside the impugned order by allowing the appeal.

7. Mr.Rodge, learned counsel for the respondent submitted that case was dismissed due to failure of the appellant to take steps. Further it is submitted that the appellant did not serve notice on the respondent prior to filing of the complaint as per the statutory provision and therefore, the appellant has no case. Thus, the learned counsel has supported the order under challenge and claimed to dismiss the appeal. The learned counsel for the respondent submitted that the case was

dismissed due to fault on the part of the appellant and therefore due to appeal respondent has to unnecessarily incur the expenses and hence some costs be saddled on the appellant, to which the learned counsel for the appellant has not seriously objected.

8. I have carefully considered the submissions made by the learned counsel appearing for both the parties. There is no serious dispute that the appellant and his advocate were absent on 26/07/2016, 21/06/2017 and 15/09/2017 and therefore, lastly on 15/09/2017 impugned order was passed. However, considering the submissions made by the learned counsel for the appellant, the fact that there is dishonour of cheque of more than Rs.98,000/- issued by the respondent in favour of the complainant, it is just to set aside the impugned order of dismissal of the case, to have decision in the case on merits and to give opportunity to appellant to prove it's case, by allowing the appeal. Therefore, following order is passed.

ORDER

(i) Appeal is allowed.

(ii) Impugned order dated 15/09/2017 passed by Judicial

Magistrate, First Class, Jalna in STC No.1820/2014 is quashed and set aside. Appellant to pay Rs.2000/- (Rs. Two thousand) towards costs to the respondent and costs to be deposited in the trial Court.

(iii) The STC No.1820/2014 is restored to it's original position and the learned Magistrate is directed to proceed with the case in accordance with law. Since the respondent/accused has caused appearance in this appeal, no separate notice in the case would be necessary to respondent/accused.

(iv) The respondent/accused as well as the complainant are directed to appear before the JMFC, Jalna on 29/04/2019 and then the learned Magistrate to dispose of the case within six months from the date of receipt of this order.

[S.M.GAVHANE, J.]