

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1098 OF 2018

Jalindar S/o Mahadev Shendge
Age : 46 years, Occ: Business,
R/o Bhimalaya "Buddha Nagar",
Jawahar Colony, Aurangabad. ... **Petitioner**

Vs.

Mogal S/o Shankar Pathare,
Age: 62 years, Occ: Labour,
R/o Flat No. X-9, Laxmi Complex,
Pandharpur, Aurangabad. ... **Respondent**

Mr. Prashant S. Shinde, Advocate for Petitioner.
Mr. Rahul O. Awasarmol, Advocate for Respondent.

CORAM : MANGESH S. PATIL, J.

DATE OF RESERVING THE JUDGMENT : 03.01.2019
DATE OF PRONOUNCING THE JUDGMENT : 09.01.2019

JUDGMENT :

Heard.

2. Rule. Rule is made returnable forthwith. The learned advocate for the respondent waives service. With the consent of both the sides the matter is heard finally at the stage of admission.

3. The respondent is the original complainant who had filed a complaint under Section 138 of the Negotiable Instruments Act against the petitioner for bouncing of the cheque issued by the latter. The

cheque was dated 30.09.2013, it was deposited for encashment on the same day. Intimation about its dishonour was received on 30.10.2013. The respondent issued a legal notice to the petitioner on 04.11.2013. It was duly served on the same day. The period of one month after service of the notice expired on 04.12.2013 and the complaint was filed on 07.02.2014. Since according to the respondent there was delay of 32 days in filing the complaint. He preferred an application for condoning the delay, with a view to satisfy the Magistrate that there was sufficient cause for not making the complaint within the statutory period. The respondent also contended that he was not well from 25.11.2012 to 06.02.2014 as he was suffering from Typhoid and Malaria and that was the cause for the delay.

4. After conducting necessary hearing, by the order dated 12.09.2017 the learned Magistrate found that in fact there was a delay of 50 days and not 32 days which was not properly explained. Even the Magistrate found that the Medical Certificates produced by the respondent were doubtful in as much as there was some discrepancy as to the period during which he had undergone treatment as an in-door patient and as an out-door patient. Even the Medical Certificates did not bear any date or the serial number which further created doubt about their genuineness and thus held that the respondent had failed to satisfy him regarding existence of sufficient cause for not making the complaint within the statutory period and rejected the application.

5. The respondent being aggrieved by the refusal of the Magistrate to condone the delay preferred Criminal Revision No.245 of 2017 in the Court of Sessions at Aurangabad. The learned Sessions Judge by the impugned judgment and order dated 17.05.2018 allowed the revision, quashed and set aside the order passed by the Magistrate on 12.09.2017 and condoned the delay subject to a direction for payment of cost of Rs. 2,000/- to the petitioner.

6. Being aggrieved by the order passed by the learned Additional Sessions Judge the petitioner is before this Court.

7. The learned advocate for the petitioner vehemently submitted that there was in fact an apparent mistake committed by the respondent in calculating the delay. The delay was of 50 days whereas the respondent had calculated it to be 32 days and obviously has committed an error which goes to the root of his request for condonation of delay. The learned advocate further submitted that the Medical Certificates produced by the respondent were also not reliable and for elaborate reasons the Magistrate had refused to rely upon them. As a result, the respondent having failed to satisfy the Magistrate about existence of sufficient cause there was no apparent error or illegality committed by the Magistrate in refusing to take cognizance by condoning the delay.

8. The learned advocate for the petitioner further submitted that there was no apparent illegality committed by the learned Magistrate. He had assigned plausible reasons for not exercising the discretion in favour of the respondent. Still, without meeting the reasons assigned by the Magistrate the learned Additional Sessions Judge has invoked the revisional powers under Section 397 of the Cr.P.C. and has substituted his own discretion in place of that of the Magistrate without sufficient reasons. The scope of the revision did not permit him to scrutinize the matter independently and to arrive at an independent conclusion by ignoring the reasons assigned by the Magistrate. The learned Additional Sessions Judge has committed gross error in invoking the powers under Section 397 in unsettling the order passed by the Magistrate and that may be quashed and set aside restoring the order passed by the Magistrate.

9. The learned advocate for the respondent supported the reasoning assigned by the learned Additional Sessions Judge. He submitted that it is a matter of bouncing of cheque. The respondent was not to gain anything by allowing his remedy to be barred by limitation. He had assigned sufficient cause for not filing the complaint within the statutory period. The delay was sufficiently explained. If the Medical Certificates produced by the respondent were not to be relied upon by the Magistrate an opportunity ought to have been extended to him to examine the Doctor. The whole approach of the Magistrate was perverse

and arbitrary and was sufficient for the Sessions Court to have invoked the revisional powers under Section 397 of the Cr.PC.

10. I have carefully gone through the order passed by the Magistrate as well as the impugned order passed by the learned Additional Sessions Judge. There can be no dispute that the statutory period prescribed by Section 142 goes to the root of the jurisdiction of the Magistrate for taking cognizance of a complaint under Section 138 of that Act. It is trite that when a statute lays down a time frame and further provides for a strict compliance and lays down a fetter on the powers of a Magistrate / Court to take cognizance of a complaint, the time limit has to be strictly adhered to. Failure on the part of a complainant to conform to such time line divests the Magistrate from taking cognizance of his complaint.

11. The object of bringing a civil right under the purview of criminal law by incorporating Chapter XVII in the Negotiable Instruments Act, 1881 which came to effect from 01.04.1989 was to provide for a speedy remedy for recovery of money secured by a cheque, by virtue of amendment a proviso was inserted to Clause (b) of Sub-section 1 of Section 142 which enables a Court to take cognizance of a complaint even after the prescribed period for lodging the complaint is over if the complainant satisfies the Court that he had sufficient cause for not making the complaint within the prescribed period. The proviso

is apparently worded on the lines of the Section 5 of the Limitation Act, 1963. It is thus apparent that a complainant has been extended an additional opportunity to satisfy the Court that he had sufficient cause for not preferring the complaint.

12. Obviously, it is the objective satisfaction of the Magistrate to whom a complaint is made to arrive at conclusion and to exercise the discretion judiciously. Looked at from this angle, in my considered view no fault can be found with the order passed by the learned Magistrate in refusing to condone the delay. He has clearly pointed out as to how in fact the delay was of 50 days and not 32 days as was calculated by the respondent. He has clearly pointed out that the statutory notice under proviso (b) of Section 138 was issued on 04.11.2013. It was received on the same day. The period of 15 days which was available with the petitioner to make payment expired on 19.11.2013 and the complaint ought to have been filed within one month from 19.11.2013 i.e. on or before 18.12.2013. But the complaint was filed on 07.02.2014 and thus the delay was of 50 days. The learned Sessions Judge has apparently over looked this aspect and the calculation of delay made by the Magistrate. On the contrary without assigning any reason the learned Additional Sessions Judge has assumed that there was only a delay of 32 days which observation is quite perverse and arbitrary.

13. Similarly, the learned Magistrate has also assigned cogent

reasons for not relying upon the Medical Certificates / Medical Record produced by the respondent regarding his illness. He has demonstrated as to how the certificate produced by the respondent of Dr. Arun Lolage stated that he had taken treatment as an O.P.D. patient from 25.11.2013 to 06.02.2013. He also pointed out as to how it only mentions that the respondent was an indoor patient from 25 November and was discharged on 05.12.2014. He has demonstrated as to how contradictory statements have been made in the certificate. First statement shows that the respondent was treated as an O.P.D. patient from 25.11.2013 to 06.02.2014, whereas it also mentions that he was treated as an indoor patient from 25.11.2013 to 05.12.2013. Whatever may be the case, taking this certificate as its face value, it clearly shows that at least from 05.12.2013 onwards the respondent was not treated as an indoor patient. If that was the case, it was for him to have explained as to why he could not file the complaint within the statutory period from 05.12.2013 onwards till 07.02.2014.

14. Interestingly, even this reasoning assigned by the Magistrate has not been objectively examined by the learned Additional Sessions Judge. Perusal of the impugned order would clearly reveal that the learned Additional Sessions Judge has also not touched this aspect. All in all, the learned Additional Sessions Judge has invoked the revisional powers under Section 397 of the Cr.P.C. which are clearly circumscribed by inherent limitations. He was not excepted to exercise the powers of

an appellate Court. It is trite that the revisionary powers can only be exercised where the lower Court has passed the order which is either perverse, arbitrary or capricious. Oblivious of such settled legal position, the learned Additional Sessions Judge has quashed and set aside the order passed by the Magistrate and has condoned the delay which has clearly resulted in miscarriage of justice and the error is liable to be corrected by this Court under the inherent powers under Section 482 of the Cr.P.C. as well as under Article 227 of the Constitution of India.

15. The result may be harsh in as much as the respondent would stand to lose the remedy. However, that is an inevitable consequence and mere sympathy cannot outweigh the consequences of law providing the rights.

16. In my considered view, on facts, the respondent had failed to demonstrate existence of sufficient cause for condoning the delay as the Magistrate had clearly appreciated the facts and the law in the proper perspective and had assigned plausible reasons for refusing the condoning of delay. The order by no stretch of imagination was perverse, arbitrary or capricious. The learned Additional Sessions Judge could not have invoked the revisionary powers under Section 397 of Cr.P.C. Besides he has erred in exercising these powers judiciously. He has failed to meet the grounds assigned by the learned Magistrate and

has ventured to substitute his discretion in place of the one judiciously exercised by the Magistrate. The impugned order suffers from gross illegality and is liable to be quashed and set aside.

17. The Writ Petition is allowed.

18. The impugned order passed by the learned Additional Sessions Judge in Criminal Revision No.245 of 2017 dated 17.05.2018 is quashed and set aside and that of the Magistrate dated 12.09.2017 is restored.

19. The Rule is made absolute in above terms.

(MANGESH S. PATIL, J.)

KAKADE