IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 702 OF 2019

Amit Digvijay Singh	**]**	
Aged About 38 years, Occ : Business,	**]**	
Addressed at 10, Nilkanth Woods,	**]**	
Manpada, Thane (E)	**]**	**...APPLICANT/**
	]	**Orig. Accused**

Versus

1.	**Gokuldas Jagannath Bhutada**	**]**	
	Age : 66 years, Occ : Agriculture,	**]**	
	Residing at Kasbe Wani, Tq. Dindori,	**]**	
	Dist. Nashik	**]**	
2.	**The State of Maharashtra**	**]**	**...RESPONDENTS**

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Mr. S.V. Marwadi i/by. Mr. N.M. Nadar for the Applicant.
Mrs. S.R. Agarkar, APP for Respondent – State.
Mr. Mayank Bagla i/by. Mr. Jainish Jain for Respondent No. 1.

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CORAM	**:**	**S.S. SHINDE, J.**
RESERVED ON	**:**	**10th JULY 2019**
PRONOUNCED ON	**:**	**19th JULY 2019**

JUDGMENT

1. This application takes an exception to the order passed by the 6th Judicial Magistrate First Class, Nashik (for short “said Court”) on 09th May 2019 thereby issuing process against applicant for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short “the said Act”).

2. The present applicant is an accused in the Summary Case No. 2373/2018 and first Respondent is original complainant before the said Court. It was stated in the complaint that, complainant is an agriculturist and resident of Kasabe Vani, Taluka Dindori, District Nashik. The accused and the complainant were known to each other and has had good acquaintances and were friends since long. It is alleged that, the Accused met with the complainant and represented that he was in need of money for his business. Accordingly, the accused requested the complainant to give him the hand loan of Rs. 30,00,000/- (in words Rs. Thirty Lakhs only) for the purpose of his various businesses. The accused assured the complainant that the said amount will be refunded when money will be available with him. Having a cordial relationship with the Accused, the complainant relying upon the said assurance of the Accused paid him an amount of Rs. 30,00,000/- in cash. Since the hand loan was given looking to the cordial relationship between the parties the said loan was interest free hand loan.

3. It was alleged that, in pursuance of the acccused's liability and / or legal dues payable to complainant, accused had issued and

delivered to the complainant a cheque bearing No. 137572 dated 15.12.2017 drawn on Business Bank, Ltd., Mahatma Nagar, Nashik for a sum of Rs. 30,00,000/- with an assurance to honour the said cheque immediately upon the presentation thereof.

4. It was alleged that, the aforesaid cheque was deposited by the complainant for encashment in his bank namely Shree Mahesh Co-operative Bank Ltd., M.G. Road, Nashik Branch on 08.01.2018 which was returned dishonoured. The fact of the said dishonour of cheque was intimated to the complainant under a memo dated 09.01.2018 issued by the said Bank. The said memo was delivered to the complainant on 09.01.2018. Therefore, the complainant left with no option but to issue a notice by Registered post, calling upon the accused to pay the aforesaid amount. The complainant in the said notice had warned the accused that in the event if the cheque amount is not paid to him, the complainant would be constrained to file a summary criminal case under Section 138 of the said Act.

5. It was alleged that, the said notice was sent to the accused on his residential address and a copy thereof was sent on his business place. The complainant avoided to receive the said notices on both the

addresses. Hence the concerned postman intimated the accused to collect the said notices which were sent in the covers. Inspite of receipt of intimation about both these notices the accused failed to collect and receive the said notices from the concerned offices. In the circumstances both these notices were returned to the complainant. The accused avoided to collect and to receive the said notices, as he was aware of the contents of the said notices. It is pertinent to note that the said notices sent by the complainant under his own signature. The complainant had also written his name on the said covers as the sender. The cover of notices sent on the residential address of the accused was returned and delivered to the complainant on 15.02.2018. The cover of notices sent on the business address of the accused was returned and delivered to the complainant on 06.02.2018.

Despite having knowledge of the said notices, the Accused either failed to reply the said notices or / and neglected to make payment of the said cheque to the complainant. In the circumstances mentioned herein above the accused has not disputed his liability to make the payment of the said cheque as he has not replied the said notice.

6. It was alleged that, the accused has committed the offence under the provisions of Chapter XVII of the said act, which provides for punishment with an imprisonment for a term whch may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both.

7. For the sake of convenience and meeting requirements of the said act the complainant has set out date wise incidences as follows:

<u>SYNOPSIS</u>

Sr No.	Particulars	Cheque No. 137572
1.	Date of issue of cheque	15.12.2017
2.	Date of presentation	08.01.2018
3.	Date of dishonour	09.01.2018
4.	Date of communication	09.01.2018
5.	Date of issue of Notice u/s. 138 of the NI Act.	19.01.2018
6.	Date of return of the said notice sent at business address	06.02.2018
7.	Date of return of the said notice sent at residential address	15.02.2018

In view of the aforesaid it is contended by the complainant that the cheque is very well presented within limitation by the complainant into the bank for the purpose of encashment, as well as Notice under Section 138 of the said Act was also issued within time to the accused.

8. It was alleged that, the cause of action for the complaint arose on the dates mentioned hereinabove. Thus the complainant has issued notice under Section 138 within the prescribed period of limitation and after the said notice was returned to the complainant, the complaint is filed within time. Hence the complaint is filed within the prescribed time limit after the return of the notice sent on 15.02.2018 on the residential address of the accused.

9. It was prayed in the said complaint that, process against the accused be issued and accused be summoned, tried and be punished as per the provisions of Section 138 of the said Act.

10. Being aggrieved by the said order of the issuance of process the applicant has filed the present application invoking the inherent Jurisdiction of this Court under Section 482 of the Code of Criminal Procedure.

11. Learned counsel appearing for the applicant submits that, the complaint is filed by the first Respondent before the said Court on

14th March 2018 is not maintainable as the same is not filed within the period of limitation, since as per the first respondent himself. The notice dated 19.01.2018 was sent at the residential address of the applicant and was returned to the first respondent on 15th February 2018 and the applicant herein was intimated the said notice on 27.01.2018.

12. It is submitted that, the averments made in the complaint are false, in as much as it is stated in the complaint that, the applicant has not replied to the statutory notice issued by the first respondent. The first Respondent has not produced as single document to show as to when and where alleged transaction took place and which documents were executed with regard to the said transaction. The first Respondent has failed to disclose his source of income and financial capacity to give an alleged loan of Rs. 30,00,000/- by cash to the applicants. It is submitted that the statement of bank Account of the applicant will show that, the said cheque was part of the cheque book issued on 09.12.2011. The bank statement will also show that since there was a change in the format of the cheque hence the bank had issued new cheque book. Hence the present cheque being issued as alleged is not possible. The copy of the new cheque is also annexed to

the petition to show that, the old cheque in question could not have been issued. It is further submitted that, the statutory notice given by the first Respondent to the applicant is also vague and even on that ground the said Complaint is liable to be quashed. The first respondent has misused an old cheque given by the Applicant many years ago and has cheated the applicant.

13. It is further submitted that, the trial Court has mechanically passed the order of issuance of process without application of mind, and without considering the facts of the case. There is no legal enforceable liability, hence the complaint of the first Respondent is not maintainable. The offence under Section 138 of the said Act is not made out hence the order of issuance of process against the applicant cannot legally sustain. Learned counsel appearing for the applicant in support of aforesaid contention relied upon the unreported judgments of the Hon'ble Apex Court in the case of ***Himanshu Vs. B. Shivamurthy and Anr[1].*** also in the case of ***A.C. Narayanan Vs. The State of Maharashtra and Ors.***[2]

14. On the other hand, learned counsel appearing for the first Respondent invites attention of this Court to the affidavit in reply filed

1 Criminal Appeal No. 1465 of 2009
2 CDJ 2017 BHC 1470

on behalf of the first Respondent. Learned counsel appearing for the first Respondent, at the outset, denied all the allegations made in the application. It is submitted that, the applicant has circumvent the remedy of Revision available to him before approaching the High Court. The applicant can file the Revision challenging the impugned order however, applicant has directly invoked an inherent jurisdiction of this Court under Section 482 of the Code of Criminal Procedure. The applicant is intentionally avoiding to avail the same remedy. It is submitted that, the first Respondent addressed two letters on 19.01.2019 to the applicant, one of his residential address and other at his business address. Both the letters were served upon the applicant. However, the applicant with malafide intention wanted to avoid his liability and therefore, refused to accept the said letters. It was therefore submitted that, one of applicants friend suggested applicant that he should attempt to serve letters upon the applicant through E-mail, it was at such time that the Respondent No. 1 informed his friend that he is not aware as to how concept of E-mail works. It is also aruged that first Respondent did not possesses any E-mail ID and is not comfortable and / or conversant to usage of E-mail ID. However, the friend of first Respondent sought permission of first Respondent to create an E-mail I'd and once again served the applicant a copy of the notice dated 19.01.2018 upon the applicant.

15. It is submitted that, the friend of the first Respondent created a E-mail ID on behalf of the Respondent No. 1 and addressed a copy of the notice under Section 138 of the said Act to the applicant. It is submitted that, since Respondent No. 1 was not convergent with the technology, he could not access the E-mail ID created by his friend at his instance. It is submitted that the Respondent No. 1 did not possess any smartphone. It is submitted that since first Respondent is not convergent with technological advancement and how to operate the E-mail, he sent notices to the applicant vide post on residential as well as business address of the applicant. The alleged reply of the applicant on 08.02.2018 if considered, there exist nothing detrimental to the case of first Respondent made out before the said Court in the alleged reply of the applicant sent to the first Respondent. It is submitted that alleged reply is in effect admitting that the cheque issued by the applicant, only defined that is drawn up is that applicant alleges a case of cheating and in fact states that the applicant will file complaint in the police department as the applicant alleges that the first Respondent has cheated the applicant. It is submitted that the

present applicant has at no point of time elaborated as to what steps applicant took in pursuance of the alleged case of cheating, which admittedly the applicant was put to notice way back in January 2018 when the cheque was dishonoured. It would not be out of context to state that, the mere fact that the applicant alleges cheating but has not taken any steps even after a lapse of a period of more than a year and half from the date from which the applicant alleges cheating, explains as to the fallaciousness alleged by the applicant only to shy away from making such payments. The conduct of the applicant speaks volume as to the falsity and infirmity in the submissions made by the applicant. In support of the aforesaid contentions learned counsel placed reliance on the judgments in the case of ***Purushottam s/o Maniklal Gandhi Vs. Manohar K. Deshmukh and anr***[3], ***Darshan Singh Vs. State***[4] & ***Prabhu Chawla Vs. State of Rajasthan and Anr***[5].

16. Heard the counsels appearing for the parties at length and with their able assistance perused the pleadings in the petition, grounds taken therein and annexures thereto. The first point raised by the applicant that, the complaint filed by the first Respondent on 14th March 2018 is not maintainable since not filed within limitation is

3 2007 (1) Mh.L.J. 210
4 2001 STPL (DC) 190 CAL
5 Criminal Appeal No. 842 of 2016 (SLP (Crl.) No. 3314 of 2009)

concern, it would be relevant to mention the few relevant dates. First respondent in his reply has stated that, the cheque was issued on 15.12.2017 same was presented in the bank on 08th January 2018. The said cheque was dishonored on the ground of *insufficient funds* . The applicant communicated to the first Respondent on 09th January 2018 that the cheuqe is dishonored due to insufficient funds in the account of applicant. The notice was issued by the first Respondent to the applicant on 19th January 2018 to his business as well residential address. As mentioned by the first respondent in reply that the notice issued on business address was received on 06.02.2018 and notice sent at residential address was received on 15.02.2018. Thereafter, complaint was filed on 14th March 2018. Upon plain reading of aforesaid dates *prima facie* it appears that the date of return of the notice sent at residential address is 15th February 2018 and complaint is filed on 14th March 2018. Therefore, according to complainant complaint is filed within time. It is the contention of the applicant that said notice was replied through email on 27th January 2018 and therefore, the complaint filed by the first Respondent is not within time. The another submissions is that when the notice was returned from business address on 06.02.2018, the complaint should have been filed within 1 month. It appears that to find out whether the complaint filed by the first Respondent was within limitation or otherwise, appreciation of documents is necessary. First respondent has stated that he has no knowledge, how to access the email and also he does not possess the smartphone. Be that as it may, it appears from the material on record that the trial Court will have to find out after appreciation of documents on record, whether the complaint filed by the first Respondent was within time or otherwise. Prima facie it appears that notice sent on residential address of the applicant was received by the complainant i.e. by first Respondent on 15th February 2018 and complaint was filed on 14th March 2018. Therefore, at the threshold it cannot be concluded that complaint was not filed within limitation. Therefore, trial Court will have to find out upon appreciation of documents placed on record, whether the applicant had knowledge of accessing email, and as a matter of fact, whether he received the email sent by the applicant on 27th January 2018.

17. Another contention of the counsel for the applicant that, the first Respondent has not replied or produced on record single documents to show when and where the alleged transaction between the applicant and first respondent had taken place and which

documents were executed with regard to said transaction, and what is the source of income of the first Respondent to pay such huge loan amount to the applicant. In this respect it is only during trial the Trial Court will be able to appreciate the aforesaid contentions.

18. An another contention of the applicant that the statement of bank account of the applicant will show that the said cheque was part of the cheque book issued on 09th December 2011 to the applicant, and there was change in the format of the cheque and now the applicant has been issued new cheque book by the Bank and, therefore the Respondent has misused old cheque given by the applicant many years ago and has cheated the applicant is concerned, it is for the trial Court to consider the above contention after appreciating the material placed on record. The learned Single Judge (***R.C. Chavan, J.***) of the Bombay High Court in the case of ***Purushottam s/o Maniklal Gandhi Vs. Manohar K. Deshmukh and another (Supra)*** has taken a view that: *"It is open to a person to sign and deliver a blank or incomplete cheque and is equally open for the holder to fill up blanks and specify the amount therein"*.

19. *Prima facie* it appears that signature on the subject

cheque is not denied by the present applicant. In the light of the discussion in forgoing paragraphs this Court is of the opinion that no interference is called for in the order of issuance of process. Hence, application stands rejected.

20. The observations made herein above are prima facie in nature and confined to the adjudication of the present Criminal Application. The trial Court shall not get influenced by the aforesaid observations during the course of trial. All contentions are kept open for being agitated before the trial Court.

(S.S. SHINDE, J.)