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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 471 OF 2015**

Hindustan Coca-cola Marketing
Private Limited

.... Applicant.

V/s

State of Maharashtra and Others

.... Respondents.

Mr. Faisad Sayyed i/b M/s Manilal Kher Ambalal & Co. for the
Applicant.

Mr. Kelengathu O. Devassy for Respondent Nos. 2 and 3.

Mr. A. A. Palkar, APP for the State.

CORAM: NITIN W. SAMBRE, J.

DATE: DECEMBER 6, 2019

P.C.:-

1] In C.C. No. 1180/SS/2007, the Respondent/Accused came to be acquitted by an order dated 21/07/2015 passed by the Metropolitan Magistrate, Mumbai.

2] The case of the complainant is, cheque issued by the Respondent/Accused towards legally enforceable liability for an amount of Rs 40,75,499/- dated 15/09/2006 came to be dishonoured, as payment was stopped by the drawer.

3] While questioning the acquittal, the learned Counsel for the Applicant/Complainant would urge that the acquittal is based on erroneous reasons and the conclusion thereon. He would urge that the acknowledgment of effecting service of notice on Respondent/Accused should have been construed to be received on 10/10/2006 and not on 4/10/2006, as was claimed by the Accused. The learned Counsel for the Applicant/Complainant while explaining the procedure as followed in the postal department, would submit that stamp dated 4/10/2006 on the acknowledgment is of reaching the statutory notice issued under Section 138 of the Negotiable Instruments Act of a particular Post Office and not of alleged intimation received by the Applicant/Complainant of effecting service of notice on the Accused. He would try to establish that notice was served on the Accused and the acknowledgment was received by the complainant on 10/10/2006 and that being so, demand notice dated 30/09/2006 has to be presumed to have been served on 10/10/2006. By drawing support from the the provisions of Section 27 of the General Clauses Act, he would submit that once the notice is posted then it is beyond the control of the Applicant/Complainant to monitor

the effect of service of the same.

4] The next limb of the argument of the learned Counsel for the Applicant/Complainant is, once the Respondent/Accused has acknowledged the liability pursuant to confirmation letter dated 5/10/2005 which is at Exhibit-10, the Court below has committed an error in granting acquittal. Apart from above, the submissions are, the Resolution passed by the Board of Directors in favour of the Complainant's Witness No.2 – Mr. Saket Sarkar, authorizes him to appoint any official of the complainant company by delegating powers to initiate proceedings in question and that being so, Complainant's Witness No.1 was legally authorized to pursue the complaint on behalf of the company.

5] The aforesaid submissions are resisted by the learned Counsel for Respondent Nos. 2 and 3. According to him, order of acquittal is based on legally sustainable reasons. He would urge that the initial onus on the complainant is not discharged and that being so, order of acquittal is not justified.

6] Considered the submissions.

7] Perused the documents and the evidence produced on record by the complainant. The initial onus on the complainant is to demonstrate that the cheque was issued for legally enforceable debt and so as to establish the same, he has drawn support from document at Exhibit-10 i.e. balance confirmation letter dated 5/10/2005. Though Respondent/Accused appears to have issued the said document at Exhibit-10, same speaks of balance against the Accused to the tune of Rs 18,77,945.68 and same is, in any case, less than the amount of cheque i.e. Rs. 40,75,499/-

8] As such, Exhibit-10 cannot be stretched to the extent to mean that the Applicant/Complainant has discharged his burden of proving that the cheque was issued for legally enforceable debt of Rs 40,75,499/-

9] Apart from above, Respondent/Accused has come out with a defence that notice in question has been received by the Accused on 4/10/2006 and support is drawn from the postal stamp of

Bhayandar Post Office. Once the Accused has come out with such defense based on admissible evidence on record, again the onus is shifted on the complainant to prove by examining representative from Postal Department so as to establish that acknowledgment of service of statutory notice was received by him on 10/10/2006 and not on 4/10/2006, which he failed to establish.

10] The last contention raised by the complainant is about an authority given in favour of C.W.2, who, in turn has delegated powers to C.W.1 to depose and pursue the complaint. Even if any technical defect is noticed, it is submitted that Supreme Court in catena of judgments has ruled that such technical defect can be cured.

11] However, the aforesaid submission on the last issue of authority to pursue the complaint will be hardly of any consequence in favour of the complainant, particularly when he has failed in discharging his burden, as to initiation of complaint within limitation prescribed under the Negotiable Instruments Act and also discharging his onus of establishing that the cheque was issued for legally enforceable debt.

12] In the aforesaid background, it could be inferred that the view expressed by the learned Magistrate for acquitting the Respondent/Accused is a possible view.

13] In view of the above, Application for leave to appeal stands rejected.

(NITIN W. SAMBRE, J.)