

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO. 138 OF 2020

Utkranti Nagari Sahkari Pat Sanstha
Ltd., Jarud, Registration No. 531, Tq.
Warud, District : Amravati, through its
Recovery Officer, Ganesh Shyamrao
Wankhade

... **APPELLANT**

VERSUS

Bhaskar Waman Gaikwad
aged abou 45 years,
Occupation : Business,
R/o Jarud, Tq. Warud,
District : Amravati

... **RESPONDENT**

Shri P.A. Kadu, dvocate for the Appellant.
Shri D.R. Upadhyay, Advocate (appointed) for respondent-sole.

CORAM : **VINAY JOSHI, J.**
DATED : **17/09/2021**

JUDGMENT :

Heard finally by consent of learned Counsel appearing for the
respective parties at the stage of admission.

2. The appellant has challenged the order of conviction passed in Summary Criminal Case No.846 of 2013 for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the N.I. Act') vide judgment and order dated 25.07.2019.

3. The Complainant is a registered Pat Sanstha doing banking business at rural area. On 21.06.2000, at the request of accused, the complainant has borrowed Rs.15,000/- to the accused. For repayment of outstanding loan amount, the accused issued a cheque of Rs.40,000/- on 02/07/2013 to the complainant drawn on the Urban Co-operative Bank Limited, Warud. The complainant has deposited said cheque to its banker. However, the cheque was returned (dishonored) for the reason 'fund insufficient'. For said purpose, the Bank has issued a cheque return memo dated 05.07.2013. The complainant has issued a statutory demand notice dated 11.07.2013, which was received by the accused on 13.07.2013. Since, the payment was not forthcoming within stipulated period, the complaint has been lodged.

4. Upon considering the complaint and related documents, learned Magistrate took cognizance and issued process. The accused denied the guilt. During trial, the complainant has examined its

Recovery Officer Ganesh Wankhade, who was duly authorized by Resolution dated 21.06.2008. The complainants' witness Ganesh Wankhade has deposed in consonance with the complaint. In support of said contention, he has produced dishonored cheque (Exhibit 21), cheque return memo (Exhibit 22), Statutory notes (Exhibit 26), R.P.A.D. receipt (Exhibit 27) and acknowledgment (Exhibit 29). Moreover, to substantiate the case of legally recoverable dues, the complainant has produced promissory note, loan agreement and account extract (Exhibit 25). During the statement under Section 313 of the Code of Criminal Procedure, the accused has admitted issuance of cheque and its dishonored. During cross-examination, a faint attempt has been made to suggest that the cheque was issued towards security, however, there is no material to probabalize the defence. Moreover, the accused was not able to bring any material to lift the statutory presumption incorporated under Section 139 of the N.I. Act. Learned Magistrate has considered the entire evidence in proper perspective and rightly held that the accused has issued a cheque of Rs.40,000/- towards discharge of legally enforceable liability and the cheque was dishonored on its presentation.

5. In order to constitute an offence punishable under Section

138 of the N.I. Act, certain statutory compliances are required. The cause of action would arise in terms of Section 138 (c) of the N.I. Act on the failure of drawer (accused) to pay the amount within 15 days of the receipt of the demand notice. In consequence, issuance and receipt of demand notice is essential factor to establish the offence.

6. The cheque dishonored memo (Exhibit 22) was received by the complainant on 05.07.2013, on which on 11.07.2013 statutory demand notice (Exhibit 26) was issued. In order to establish receipt of notice, the complainant has produced R.P.A.D. receipt (Exhibit 27) and additional dispatch of notice by way of speed post (Exhibit 28). In order to establish that the notice was duly received by the accused, postal acknowledgment (Exhibit 29) was produced. The said acknowledgment bears a date of its receipt as 13.07.2013.

7. Learned Magistrate though held that the complainant has established that the accused has issued a cheque and it was dishonored, however, acquitted the accused by holding that the notice was not received by the accused. Learned Magistrate got himself confused by perusing another acknowledgment (Exhibit 31) regarding one prior notice issued by the complainant before the dishonor of cheque. In

order to clarify the things, it requires to be noted that when the accused committed default in payment of loan amount, initially, the complainant has issued a notice dated 28.06.2013 of which acknowledgment (Exhibit 32) was produced. During cross-examination, the complainant admits that acknowledgment (Exhibit 32) does not bear a signature of accused. Relying on said admission, learned Magistrate has held that receipt of notice has not been proved which resulted into the acquittal. However, said acknowledgment receipt (Exhibit 32) was relating to prior notice dated 28.06.2013 which was not a statutory demand after dishonored of cheque.

8. Undisputedly, cheque was issued on 02.07.2013 and its dishonored was informed vide cheque return memo (Exhibit 22) dated 05.07.2013. Thereafter, statutory notice (Exhibit 26) was issued of which acknowledgment (Exhibit 29) dated 13.07.2013 was tendered. Therefore, it was necessary to take into account the acknowledgment receipt (Exhibit 29) dated 13.07.2013. The accused has neither denied his signature on acknowledgment (Exhibit 29) nor challenge the same during the cross-examination. In view of that it is abundant clear that the accused has received a demand notice dated 11.07.2013. It is not in dispute that the accused has not complied with demand notice within

stipulated period, therefore, the essentials to establish the offence punishable under Section 138 of the N.I. Act are duly proved. Learned Magistrate erred in holding that the notice was not received rather due to confusion of issuance of prior notice. Therefore, the impugned order is not sustainable in the eyes of the law. In view of that, following order is passed :

- (i) The Criminal Appeal is allowed.
- (ii) The impugned judgment and order dated 25.07.2019 passed by the learned Judicial Magistrate First Class, Court No.3, Warud in Summary Criminal Case No.846/2013 is hereby quashed and set aside.
- (iii) The respondent/accused namely – Bhaskar Waman Gaikwad, is convicted for the offence punishable under Section 138 of the Negotiable Instruments Act and sentenced to pay fine of Rs.40,000/- within a period of two months from the date of this order, in default, he shall undergo simple imprisonment for two months.

9. Fees of learned appointed Counsel for the respondent, be paid as per Rules.

JUDGE

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