

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

CRIMINAL APPLICATION NO.4256 OF 2019

Ambadas s/o. Sarjerao Garje	..Applicant
Vs.	
Vaijnath Sahakari Sakhar Karkhana Ltd.	..Respondent

**AND
CRIMINAL APPLICATION NO.4257 OF 2019**

Ajinath s/o. Natha Garje	..Applicant
Vs.	
Vaijnath Sahakari Sakhar Karkhana Ltd.	..Respondent

**AND
CRIMINAL APPLICATION NO.4258 OF 2019**

Namdev s/o. Karbhari Garje	..Applicant
Vs.	
Vaijnath Sahakari Sakhar Karkhana Ltd.	..Respondent

Mr.N.B.Garje, Advocate for applicant
Mr.Surekha Devmane, Advocate for respondent

**CORAM : R.G. AVACHAT, J.
DATE : APRIL 08, 2022**

ORDER :-

All these applications under Section 482 of the Code of Criminal Procedure are being decided by this common order since common questions of fact and law arise therein.

2. The applicants are accused in the respective cases instituted by the respondent – sugar factory under Section 138 of the

Negotiable Instruments Act ("the Act", for short). The challenge to the institution of the complaint under Section 138 of Negotiable Instruments Act against the applicants herein, is on the ground of it being abuse of process of the Court.

3. Learned counsel for the applicants would submit that blank cheques were obtained way back in 2007. The claims therein have been barred by limitation. The main bone of contention of the applicants herein is that the statutory demand notice/s have never been served upon them and as such, no offence punishable under Section 138 of the Act did take place. Learned counsel, therefore, urged for allowing the applications.

4. Learned counsel for the respondent would, on the other hand, submit that the issues raised in these applications are on facts, which need to be addressed by the trial Court on recording of evidence. According to learned counsel, in view of Section 27 of the General Clauses Act, a notice sent on the last known address of the applicants herein would be deemed to have been duly served, unless contrary is shown. She, therefore, urged for rejection of the applications.

5. Considered the submissions advanced. Perused the averments in the respective complaints along with the documents relied on.

6. Section 138 of the Act reads thus :-

“Section 138. Dishonour of cheque for insufficiency, etc., of funds in the account.-

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless--

(a)

(b)

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.”

7. The aforesaid provisions would indicate that for constituting the offence under Section 138 of the Act, the statutory requirements are: issuance of statutory notice of demand of money covered by the cheque; and failure of the accused to pay the same within 15 days of the receipt of the said notice.

8. Let us see whether the statutory requirements have been complied with in respect of the cases in hand. As regards Criminal Application No.4256 of 2019 (arising out of S.C.C. No.705 of 2016), it has been mentioned therein that the respondent-complainant had sent the demand notice on 18.08.2016 by R.P.A.D. The postal cover containing demand notice returned with remarks that the addressee has left the place and his whereabouts are not known. So far as Criminal Application No.4257 of 2019 (arising out of S.C.C. No.751 of 2016) is concerned, it has been mentioned that the demand notice was sent to the applicant on 18.08.2016 by R.P.A.D. The postal cover containing demand notice returned with endorsement that the addressee was out of station. Notice, therefore, could not be served. The cover containing notice was returned to the sender.

In both these cases i.e. in Criminal Application Nos.4256 of 2019 and 4257 of 2019, the statutory demand notices have not

been served on the applicants. As such, one of the ingredient of the offence under Section 138 of the Act is lacking.

9. In the case of **Shakti Travel and Tours Vs. State of Bihar and anr. (2002)9 SCC 415**, the Apex Court observed thus:-

“ The only ground on which the learned counsel for the appellant prays for quashing of the complaint is that on the assertions made in paragraph 8 of the complaint, it must be held that notice has not been served and, therefore, an application under Section 138 could not have been maintained. Undoubtedly, the accused has a right to pay the money within 15 days from the date of the service of notice and only when it fails to pay, it is open for the complainant to file a case under Section 138 of the Negotiable Instruments Act. That being the position and in the complaint itself having not been mentioned that the notice has been served, on the assertions made in paragraph 8, the complaint itself is not maintainable. We accordingly quash the complaint.”

10. Since there was no service of the statutory demand notice on the applicants in Criminal Application Nos.4256 of 2019 and 4257 of 2019, there is no compliance of the ingredients of the offence under Section 138 of the Act. Continuation of the proceedings in both these complaint cases would, therefore, be an abuse of process of the Court. The order of issuance of process in both these cases is, therefore, liable to be set aside.

11. So far as Criminal Application No.4258 of 2019 is concerned, it has been specifically averred therein that the demand notice was received by the applicant on 29.08.2016 and the acknowledgment receipt bearing thumb impression of the so called receiver has been placed on record. The applicant herein disputes the thumb impression. The serving Officer or the postal employee appears to have not obtained attestation to the thumb impression of the noticee. As such, it would be a question of fact, whether the thumb impression appearing on the acknowledgment receipt is that of the applicant herein. The same can only be ascertained during the trial of the case. No fault, therefore, could, *prima facie*, be found with the order of issuance of process in S.C.C No.708 of 2016. Criminal Application No.4258 of 2019, therefore, fails.

12. In the result, the following order:-

- (i) Criminal Application Nos.4256 of 2019 and 4257 of 2019 are allowed. The impugned orders of issuance of process in these application are set aside.
- (ii) Criminal Application No.4258 of 2019 is rejected.

[R.G. AVACHAT, J.]