

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

CRIMINAL APPLICATION NO. 633 OF 2022

Ganesh s/o. Ajabrao Patil .. Applicant

Versus

Late Mrs. Shalini w/o. Sudhakar Rana (died) .. Respondent
Through LRs. Sangita d/o. Sudhakar Rana

Mr. Arun S. Shejwal, Advocate for the applicant.
Mr. A.S. Muthiyan, Advocate for sole respondent.

CORAM	:	KISHORE C. SANT, J.
RESERVED ON	:	30.03.2023
PRONOUNCED ON	:	12.05.2023

PC :-

01. Heard finally by the consent of the parties.
02. The questions raised in this application are as below :-
 - i) Whether notice issued by the complainant though not received by the accused, gives cause of action for filing of a complaint?
 - ii) Whether legal heir can be said to be holder in due course after death of the holder in due course without obtaining heirship or succession certificate?

- iii) Whether the Magistrate has committed error while issuing process without following procedure under section 202 of the Criminal Procedure Code, when the applicant is resident of a place beyond jurisdiction of the Magistrate?

03. The above questions are arising out of the facts stated in short as under :-

04. The complainant/respondent is a daughter one late Shalini Sudhakar Rana, to whom the alleged cheque was given for an amount of Rs.1,28,50,000/-. There was an agreement to sale property of the deceased along with co-owners in Survey No.16 and 18 situated at Mauje, Tq. & Dist. Dhule. All the owners had executed a general power of attorney in favour of the applicant/accused. The power of attorney was given to sell the plots and thereafter to transfer those plots in the name of respective purchasers. The accused thereafter requested the owners to execute registered sale-deed in favour of the accused as he was facing difficulties. The owners, therefore, executed sale-deed in favour of the accused for total consideration of Rs.5,97,87,000/-. The accused assured that he would pay the amount of Rs.2,75,00,000/- at the time of registry. However, the accused paid only initial/part payment to the original complainant and issued post dated cheque

for an amount of Rs.1,28,50,000/- in the name of deceased alone and assured that said cheque will be honoured and requested to present the cheque after the complainant executed registered sale-deed. Cheque dated 27.01.2099 in favour of late Shalini Sudhakar Rana/original complainant was presented in the bank. However, same was returned with endorsement "payment stopped by drawer" on 07.02.2019. The deceased also issued a demand notice but, however, before she could take further action she died.

05. It is stated in the complaint that present respondent/complainant thereafter requested to clear the amount towards cheque which was earlier dishonoured. On that the accused told the complainant to deposit cheque on 25.04.2019. However, again said cheque came to be dishonoured with same endorsement on 26.04.2019. The complainant therefore again issued notice on 06.05.2019 of dishonour of the said cheque. It is stated that said notice came back with endorsement as "wrong address". It is contended that the said notice is deemed to be served on the accused. On this, the complaint is filed on 15.06.2019.

06. The learned JMFC, Aurangabad on a complaint issued process by

order dated 10.10.2019. In the order it is stated that the Court has gone through the original documents on record and on perusal of the complaint, prima facie case is made out against the accused and issued the process. The applicant/original accused is therefore before this Court.

07. So far as questions quoted above are concerned, the address of the applicant given in the present application is “Flat No.7, B Wing, Building No.2, Rugved Society, Gajanan Nagar, Ambad, Tq. & Dist. Nashik”; whereas in the complaint the address given is “Flat No.7, Rugved Co-op society, Behind Shubham Park, Ambad, Nashik 42010”. He submits that the notice is not sent on correct address. Since the notice is not duly served upon the applicant, it cannot be said to be a good service. When the notice itself is not served on the accused, there is no cause of action to file the complaint. He submits that as per the allegations in the complaint, the applicant had given cheque to deceased Shalini, who happens to be mother of the complainant. The complainant cannot be said to be a holder in due course. There is nothing on record to show that the deceased had given authority to the respondent to present the cheque on her behalf or to show that now she has become holder in due course as legal heirs of the deceased. The only averment in complaint

is that after demise of the original complainant, present complainant requested to clear the said cheque amount. As regards third question, the accused is resident of Nashik, whereas the complaint is presented in the Court at Aurangabad and the process is issued by the learned JMFC, Court No.3, Aurangabad. It is submitted that, therefore, it was necessary to hold an inquiry under section 202 of the Cr.P.C.

08. The applicant further submits that in this case the complainant being daughter of the deceased has misused the cheque. The respondent is not a party to the alleged agreement to sale. Said document is also not even notarized. His further contention is that the cheque was only up to Rs.10 lakhs at non-home branch, whereas in this case the cheque is of Rs.1,28,50,000/- i.e. beyond the amount of Rs.10 lakhs and therefore it cannot be said to be a valid cheque.

09. The learned Advocate for the respondent submits that the notice was issued on the correct address of the applicant. In view of section 138 of the Negotiable Instruments Act, the complainant's duty is to send notice on the correct address and in view of section 27 of the General Clauses Act, when

the notice is sent on correct address, same is deemed to have been served upon the consignee. By comparing the addresses given in this application and the complaint, he submits that the address is same and is sufficient and same cannot be said to be incomplete. He states that all the ingredients thus are complete and the complaint is perfectly maintainable. About second question, he submits that there is no dispute about relationship of the deceased and the complainant. The deceased was her mother and she received cheque from the deceased. When the deceased herself had given cheque to the complainant, she has naturally become holder in due course. On the third aspect he submits that the learned JMFC has perused the complaint along with affidavit of evidence and has also perused the original documents filed on record. The Court has satisfied itself about existence of prima facie case and it is only thereafter the order is issued. Therefore, he submits that no fault can be found with the order.

10. The learned Advocate for the applicant has relied upon judgment in the case of **In Re: Expedited Trial of Cases under Section 138 of N.I. Act** reported in **2022 LiveLaw (SC) 508**, wherein the Hon'ble Apex Court has held that it is necessary to conduct inquiry under section 202 of the Cr.P.C. and

evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit and in suitable cases the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses.

11. The learned Advocate for the respondent has relied upon judgment in the case of C.C. Alavi Haji Vs. Palapetty Muhammed & Ors., reported in (2007) 6 SCC 555. The Hon'ble Apex Court in that case considered the effect of dispatch of notice by registered post on the correct address of the consignee. It is stated in para 9 as under :-

“9. It is, thus, trite to say that where the payee dispatches the notice by registered post with correct address of the drawer of the cheque, the principle incorporated in Section 27 of the G.C. Act would be attracted; the requirement of Clause (b) of proviso to Section 138 of the Act stands complied with and cause of action to file a complaint arises on the expiry of the period prescribed in Clause (c) of the said proviso for payment by the drawer of the cheque. Nevertheless, it would be without prejudice to the right of the drawer to show that he had no knowledge that the notice was brought to his address.”

. The Apex Court also considered the provisions of section 114 of the Indian Evidence Act and held that notice will have to be treated as served. Ultimately it is held that when notice is sent by registered post on the correct address of the drawer, same complies clause (b) of proviso to section 138 of the NI Act.

12. The next judgment relied upon by the respondent is the judgment of the Hon'ble Apex Court in the case of Shankar Lal Vs. Sanyogita Devi (dead) through LRs., reported in MANU/SC/2184/2009, wherein the Hon'ble Apex Court has held that wife and legal heirs of the deceased presented the cheque to the concerned bank and the same were dishonoured. On that the respondent had given statutory notice to the accused for payment of the amount. There the accused raised question that the complainant was neither payee nor holder of the cheque in due course and therefore no cognizance could have been taken. The Trial Court rejected the contention. The said order was carried to the High Court. The High Court dismissed the petition holding that the complainant was not holder in due course. The Hon'ble Court considered the plain reading of the provision. By considering section 9 of the Act, which defines express "holder in due course", which reads as under.

"7. A plain reading of the provision makes it abundantly clear that the Court shall not take cognizance of any offence punishable under Section 138 of the Act except upon a complaint, in writing, made by the payee or, as the case may be, the holder in the due course of the cheque. The expression 'payee' is defined under Section 7 of the Act which says "the person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the 'payee'". Section 9 defines the expression 'holder in due course' which reads as under:

"Holder in due course' means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if

payable to bearer, or the payee or endorsee thereof, if payable to bearer, or the payee or endorsee thereof, if payable to order, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title."

. The Hon'ble Apex Court held that the payee is holder in due course of the cheque. The Hon'ble Apex Court also considered the judgment in the case of Muthuveeran Chetty Vs. Govindan Chetty reported in (1961) 2 MLJ 470, wherein it was held that the person to whom property in the negotiable instrument stands transferred by operation of law is entitled to sue as such. It was held that the promissory note can devolve upon the legal heirs of the deceased payee on the operation of law. It was held that the law applicable in the case of promissory note would be equally applicable to the cheque as both are within meaning of negotiable instrument under the Act. It was held that legal heirs can file complaint as liability to pay amount of cheque exists even after death of the holder in due course of the cheque.

13. The third judgment relied upon by the respondent is of Punjab and Haryana High Court in the case of Meena H. Madhani Vs. Dixon Knitwears, MANU/PH/2267/2012 to submit that no specific mode of inquiry under section 202 of the Cr.P.C. is prescribed, which is now being settled.

14. The last judgment the learned Advocate for the respondent relied upon is of this High Court in the case of **Blackburn Metals Vs. M/s. Zep Engineering Works & Ors. (Criminal Application (APL) No.1768/2019)**. It is held that where Magistrate holds inquiry itself, it is not necessary to examine witness and in suitable case the Magistrate can examine documents for satisfaction as to the sufficiency of grounds for proceedings under section 202 of the Cr.P.C.

15. Considering the submissions and the judgments, this Court finds that it was necessary for the Magistrate in to conduct inquiry under section 202 of the Cr.P.C. in view of judgment in Suo Moto Writ Petition of the Hon'ble Apex Court. So far as other questions are concerned, this Court finds that since inquiry under section 202 of the Cr.P.C. is not yet held, it would be proper to remit the matter to the Magistrate for applying his mind afresh and to pass suitable order after conducting inquiry under section 202 of the Cr.P.C. Since this matter is being remanded, in order to avoid prejudice, this Court finds that other questions need not be discussed and answered. Hence, the following order :-

ORDER

- i) The application is partly allowed.
- ii) The complaint is remanded to the learned Magistrate to conduct inquiry under section 202 of the Cr.P.C. and thereafter to pass necessary orders.
- iii) The criminal application is accordingly disposed off.

[KISHORE C. SANT, J.]