

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 714 OF 2003

Dhanraj Balkrishna Khond

...Appellant

vs.

Jagannath Sudam Sonawane
and Anr.

...Respondents

Adv. Aditya Kharkar i/by Dr. Uday P. Warunjikar - Advocate for the
Appellant

Ms. Bhakti A. Gadamagaonkar – Advocate for the Respondent No. 1

Mr. H. J. Dedhia - APP for the Respondent No. 2-State

CORAM : S. M. MODAK, J.

RESERVED ON : 24th MARCH, 2023

PRONOUNCED ON : 17th APRIL, 2023

JUDGMENT :-

1. Though the small but technical issue has arisen in this appeal and it has become more interesting in view of the detail and thorough arguments advanced by learned Advocate Dr. Warunjikar for the Appellant-Complainant and learned Advocate Ms. Bhakti A. Gadamagaonkar for the Respondent No. 1-accused.

2. Learned Advocate Dr. Warunjikar with all his experience and articulation tried to convince me that statutory notice prior to lodging of prosecution under Section 138 of the Negotiable

Instruments Act was given in time. Even on some occasion his colleagues Mr. Aditya Kharkar, Mr. Siddhesh Pilankar also tried their level best to convince me. However to the misfortune of the Appellant, their arguments though attractive have not convinced my conscious. Hence I have no alternative but to dismiss the appeal.

3. The Court of the JMFC Court No. 9, Pune as per judgment dated 27/01/1999 was pleased to acquit the accused for the offence punishable under Section 138 of the Negotiable Instruments Act. The trial court framed only one composite point whereby he included all the ingredients of offence under Section 138 of the Negotiable Instruments Act. As everyone knows the issue about existence of legally recoverable debt or liability, reason for dishonour, issuing statutory notice in time and filing the complaint in time are the necessary ingredients.

4. With the assistance of both the sides, when I have read the judgment, learned Magistrate has acquitted the Respondent No. 1 mainly for the reason that the mandatory notice was not issued in time and that is why there is a non-compliance. So if those findings are set aside, then the question will crop up whether other ingredients are proved or not. As I have said in the beginning there is

no merit in the appeal, I have not gone into correctness of the findings on the other issue.

5. So the issue involved in this appeal is “whether trial magistrate was correct in observing that statutory notice was not given in time from the date of information as to dishonour?”

6. There are few dates which are relevant. That is to say date of deposit of cheque and date of returning the cheque/date of cheque return memo. During oral and documentary evidence following dates are relevant :-

Date of deposit

- 1) 06/11/94 – as told by Complainant.
- 2) 11/11/94 – as told by bank witness

Date of return/memo

- 1) 06/11/94 – as told by Complainant
- 2) 14/11/94 – as told by bank witness
- 3) 24/01/95 – as reflected in account extract of Complainant Exh. 38.
- 4) Date of memo – 24/01/95 (Exh. 37)

7. So the issue is whether the documentary evidence can be considered to presume those dates mentioned therein (without there being foundation in the avernments in the complaint/evidence of the

Complainant) According to learned Advocate Dr. Warunjikar the period of 15 days prescribed as per proviso (b) to Section 138 of the Negotiable Instruments Act will start from receipt of the written information from the bank by the payee entry in account extract. For ascertaining the correctness of the findings, certain facts need to be stated. They are as follows :-

Evidence of Complainant

- a) The complainant is a tenant in respect of the shop which is owned by the father of the accused.
- b) The complainant advanced Rs. 39,500/- by way of hand loan to the accused.
- c) It is for the purpose of marriage of brother of accused and for incurring medical expenses of the mother of the accused. (Though this is not stated in the complaint and it is admitted by the Complainant during cross-examination and also observed by the trial court)
- d) The accused issued a cheque for Rs. 39500/- in favour of the Complainant. It was drawn on Cosmos Co-operative Bank, Aundh Branch dated 06/11/1994 (Exh. 24).
- e) It was bearer cheque (this assumes significance).
- f) The complainant was also having account in the

same branch. He deposited the cheque on 06/11/1994 (Though bank witness Shri Deshmukh stated that it was deposited on 11/11/1994).

- g) The Complainant got knowledge of dishonour on the same date within an hour.
- h) The statutory notice is issued on 03/02/1995 (Exh. 25) after long gap.
- I) The accused gave a reply dated 15/02/1995 (Exh. 26).

8. Thereafter complaint is filed. As everyone knows at various stages different periods are mentioned for the compliance. We are concerned only with adhering to the time limit for issuing a notice from the date of information about dishonour. Apart from the Complainant, he has also examined witness no. 2-Dilip Deshmukh. From his evidence, certain additional information was brought on record. It is as follows:-

Bank Witness

- (i) Cheque at Exh. 24 bears signature of the accused.
- (ii) Cheque is deposited in their bank on 11/11/1994.
- (iii) Cheque return memo is of 24/01/1995 Exh. 37.
- (iv) Reason for dishonour is refer to drawer. It is

meant as insufficient balance as explained by the witness.

- v) He has produced extracts of the account in the name of the accused at Exh. 38.

9. Learned Advocate Dr. Warunjikar emphasized on certain answers given by him during cross-examination. The relevant are as follows:-

- a) Practice of taking entries in the register as soon as cheque is deposited.
- b) Service charges are to be recovered from the customers, if the cheque is returned.
- c) Extract of the account shows that cheque was returned on 14/11/1994.
- d) Cheque does not bear the date of its deposit.
- e) Once the cheque is returned, entry is taken in the register but he has not produced the said register (so as to know the date of the deposit of the cheque and date of return of the cheque)
- f) He does not know the name/author of the account extract as Exh. 38 that is who from his bank has issued it.

10. Learned Advocate Dr. Warunjikar on the basis of the

available materials made a submission that cheque must have been deposited on two occasions:-

- (a) One is on 06/11/1994 and;
- (b) Second is when the cheque is returned on 14/11/1994 as stated by the witness and as evidenced in account extract.

Consideration

11. It is true that the Complainant has not filed any document to show on which date he has deposited the cheque in Cosmos Bank. Generally, it is accompanied by pay-in-slip and its counter file remained with the payee.

12. From the entire evidence the following facts can be inferred:-

- (a) As per oral version cheque is deposited on 06/11/1994.
- (b) As stated by Shri Deshmukh the cheque was deposited on 11/11/1994.

Presentment on 06/11/1994

13. From this date, admittedly notice at Exh. 25 is beyond

prescribed period.

Presentment on 11/11/1994

14. So let us assume that the date of 11/11/1994 is second time presentment. Now let us see the evidence on the point when did the cheque was dishonoured. The following is the evidence:-

- (i) Though an entry is taken in the Register while returning the cheque on behalf of the bank, the register is not produced.
- (ii) Statement of the accounts at Exh. 38 shows that cheque is returned on 14/11/1994 (Rs. 20/- is debited in his account).

15. It is important to note that the Complainant has not stated anything about second time presentment and he has not said anything about getting knowledge of said dishonour after 14/11/1994. His evidence is silent on that aspect. So on the basis of debit entry of Rs. 20/- dated 14/11/1994 can we infer that cheque was presented? It cannot be accepted because simply on the basis of the certain entries in the documents when there being no foundation in the evidence of Complainant, the Court cannot draw an inference. Furthermore, even if we presume that his debit entry dated

14/11/1994 pertains to deposit of the cheque in question, whether notice was given within the period of 15 days. Answer is no.

Cause of action on 24/01/1995

16. Learned Advocate Dr. Warunjikar and his colleagues emphasized that mere knowledge of the dishonour is not sufficient but there has to be written cheque memo. It is required because a payee may come to know the reason of the dishonour. Even Dr. Warunjikar gave an example of the present day practice of getting SMS from the bank about dishonour of the cheque and according to him if we accept of such intimation of the dishonour, then the payee will be jeopardized. Because for want of memo, he is handicapped in knowing the reason for dishonour.

17. Though initially, he stressed on the provisions of Section 146 of the Negotiable Instruments Act, later on he did not stick to the said submission. If bank slip or memo having official mark is produced, presumption arises about dishonour of the cheque. It is rebuttable presumption. This provision was not there when the case was tried. It is by way of amendment.

18. If we consider the 24/01/1995 as the relevant date, the

notice given at Exh. 25 on 03/02/1995 is within the period of 15 days from the 24/01/1995. That date is reflected in account statement. It is deposed by the bank witness. The bank witness was also cross-examined on behalf of the Complainant. He admits that the customers need to be informed about dishonour of the cheque immediately. If there is debit entry on 14/11/1994, certainly it can be said that there is enormous delay in informing the complainant on 24/01/1995. The accused tried to bring on record about relationship of the Complainant and the bank witness. There is nothing wrong if they are knowing each other because Complainant is their customer. It has furthermore testified during cross-examination that the both are resident of the same village.

19. Learned Advocate for the Respondent relied upon the judgment in the case of ***Kamlesh Kumar Vs. State of Bihar and Anr.***¹. Learned Advocate Shri Kharkar for the Appellant tried to differentiate facts of that case and the present facts. In that case cheque was presented on two occasions and notice was issued from the date of knowledge of the dishonour and it was issued in pursuance of the second presentment. On 10/11/2008, when cheque

1 AIR 2014 Supreme Court 660

was presented, the Complainant got knowledge of dishonour on account of un-availability of the sufficient balance. Whereas notice was issued on 17/12/2008 that is after the period of 30 days. (at that time the period is about 30 days) and hence it was held beyond the prescribed period. Complainant also filed an affidavit thereby stating that bank has issued memo and it was received on 17/11/2008. He wants to plead that from 17/11/2008, the notice was given in time. (para no. 13). However it was not accepted by the Hon'ble Supreme Court and the knowledge received on 10/11/2008 was considered as starting point for the calculating the prescribed period.

20. According to the learned Advocate Shri Kharkar merely knowledge of the dishonour is not sufficient but payee must know the reason of the dishonour. The payee has to plead in the Court as to why cheque was returned and the reason falls within a purview of the reasons for dishonouring permissible under Section 138 of the Negotiable Instruments Act.

21. But in this case, I do not think it necessary to go into the said issue. I am not inclined to accept the cheque return memo dated 24/01/1995 as information about dishonour. For the reason that

there is no foundation made by the Complainant in the evidence.

22. If the Complainant wants the Court to believe the date of 24/01/1995 as knowledge of the dishnour, he was bound to lay a foundation in the evidence, so as to connect this cheque return memo to the actual date of presentment. This has not been done. Even though, bank witness has said about cheque return memo dated 24/01/1995, it does not relieve the complainant about proving necessary facts about deposit and receipt of memo. One does not know whether complainant has received that memo. Court cannot accept the arguments just on the basis of certain piece of the evidence, unless Complainant in his evidence has deposed accordingly.

23. For the above discussion, I do not find that findings given by the trial court can be faulted. Those findings are given on correct appreciation of the evidence. Hence there is no merit in the appeal. Hence appeal is dismissed.

[S. M. MODAK, J.]