

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

CRIMINAL APPEAL NO. 1045 OF 2006

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Praveen Otarmal Parmar

Age – 40 years,

Occ - Business.

R/o – Himply Chanchal Apartment,

Opposite Niyoshi Park,

Sanghavi Nagar,

Aundh, Pune -7.

...Appellant

vs.

1. M/s. Abhiroop Associates

Registered Partnership Firm

Having its Office at-254/1/2 Jeevandeep Society,

Baner, Pune -21.

Throught its Partner-

Shri. Uday Raghunath Manerikar.

2. Mr. Uday Raghunath Manerikar

Age – Adult,

Occ - Business.

R/o – 254/1/2 Jeevandeep Society,

Baner, Pune – 21.

...Respondents

Mr. Mandar Limaye, Advocate for the Appellant.

Mr. Suryakant B. Chaudhari i/b. Mr. Sachin Gholap, Advocate for
the Respondent Nos. 1 and 2.

Mr. H. J. Dedhia – APP for the Respondent No.3 – State.

CORAM : S. M. MODAK, J.

RESERVED ON : 9TH JUNE 2023

PRONOUNCED ON : 7TH AUGUST 2023

Judgment :

1. The Court of 11th Jt. Judicial Magistrate First Class, Pune acquitted the respondent for the offence punishable under Section 138 of Negotiable Instruments Act *vide* judgment dated 23rd March, 2006 in Case No.298 of 2003. The complaint was not filed in time and hence respondent was acquitted. It is the complainant who has preferred this Appeal. The parties will be referred in their original status.

2. The complainant sent first notice on 31st March, 2006 to two accused. Accused No.1 is a firm and accused No.2 is partner. It was sent by R.P.A.D. Acknowledgment was not received. Hence complainant posted the notice dated 31st March, 2006 again to accused No.1 and accused No.2 on 16th April, 2006 and on 21st April, 2006 respectively. As there was failure to pay by both the accused, the complaint was filed on 5th June, 2003. The complaint was filed by considering cause of action arisen on the basis of notice posted on second occasion. Trial Court observed that there was delay of four days in filing the complaint (page 7). Trial Court calculated the period from the notice posted on 31st March, 2003 by R.P.A.D. On this background, I have heard Mr. Mandar Limaye,

learned Advocate for Appellant, Mr. Suryakant B. Chaudhari,
 learned Advocate for the Respondent Nos. 1 and 2 and Mr. H. J.
 Dedhia, learned APP for the State – Respondent No.3.

3. So questions which crop up is as follows :-

- a) When the complainant filed the complaint on the basis of notice posted on second occasion, whether it was proper for the trial court to dismiss the complaint as time barred?
- b) Whether trial Court ought to have given an opportunity to the complainant to explain delay occurred?
- c) What order?

4. According to Mr. Limaye :-

- a) When the process was issued and when case has proceeded it was not proper for the trial Court to dismiss the complaint.
- b) It was obligatory on the trial Court either to condone delay on its own or ought to have given an opportunity to offer an explanation.
- c) To buttress his submission he relied upon the observation in the judgment of ***T. S. Muralidhar vs. H. Narayana Singh***¹ and ***K. Bhaskaran Vs. Sankaran Vaidhyan Balan and another***².

¹ 2010 CRLJ 3315

² (1999) 7 SCC 510

5. Whereas Mr. Gholap for accused supported the order and submitted that there is no duty cast upon the trial Court to condone the delay particularly when the complainant has not prayed for condonation of delay. He explained to me the relevant dates from the complaint, evidence and as observed by the trial Court. He also filed on record summary of those dates.

6. The complainant examined himself and representative each from the bank of accused and the complainant. It is important to note that when complaint was filed, complainant pleaded:-

“both the accused did not claim the notices and both the Registered A.D.’s were returned to my advocate with a remark as not claimed. Hence he reissued the notice to accused No.1 and 2 on 16th April, 2003 and 21st April, 2003 through under posted certificate.”

When he gave evidence, he deposed as :

“..... both the accused did not claim the notice and both the RPAD were returned to my advocate with remark as not claimed”.

7. On this evidence trial Court observed:-

“The envelope which was sent to accused No.1 is at Exh-38 and it is returned unserved with remark “intimation delivered”. On perusal of the said

envelope, it reflects that, intimation was delivered to the accused on 14th April, 2003 and from 14th April, 2003 the accused could not have claimed the notice within 7 days. It means the said notice is not claimed on 21st April, 2003.”

In respect of service on accused No.2 it is observed:-

“The second envelope which was sent to accused no.2 is at Exh-39, it is returned unserved with remark “intimation delivered on 7th April, 2003 and 8th April, 2003. It means the accused could have claimed the said envelop of the notice till 15th April, 2003. As the envelop has been returned unserved, it means, the accused has not claimed it on 15th April, 2003”.

8. It is clear that Exh-38 and Exh-39 are the envelopes which are not claimed by the accused. They were sent by R.P.A.D. and U.P.C. envelope are different. Complaint is filed on the basis of the notice sent subsequently way of U.P.C. So when the trial Court decided the matter, there was evidence available on the basis of both the notices. For better understanding, the relevant dates are reproduced below:-

Notice dated 31/03/2003 posted on first occasion by R.P.A.D.

Date of Intimation	14/04/2003	07/04/2003 & 08/04/2003
Last date on which accused ought to have collected the envelope from the post as observed by the trial Court.	21/04/2003	15/04/2003
Expiry on 15 days to make payment	Roughly	Roughly

	06/05/2003	30/04/2003
Complainant ought to be filed	No observation	From 01/05/2003 upto 01/06/2003 as per trial Court
Complainant filed on	05/06/2003	05/06/2003

9. According to Mr. Limaye, if the dates for accused No.1 firm are considered, cause of action arose on 06/05/2003 and from that date the complaint is filed in time. If we see the record, we may find that the complaint was filed on the basis of posting of notice on second occasion. The evidence of service of notice posted first by way of R.P.A.D. was not available. But at the time of evidence, these envelopes were very much available and they were tendered in evidence. On this background the complainant ought to have taken some stand i.e. to say complaint is filed on the basis of first notice and on the basis of notice posted subsequently:

10. There is also absence of clarity in the mind of trial Court. That is to say, trial Court calculated the period on the basis of notice sent firstly on 31/03/2003 by R.P.A.D. On one hand trial Court has given findings as to limitation on the basis of first notice but not given findings about limitation on the basis of notice posted by U.P.C.

11. The Hon'ble Supreme Court in case of **Birendra Prasad Sah Vs.**

State of Bihar and Another³ dealt with similar situation. When the notice is sent on first occasion and when no service proof is available and when notice is posted on second occasion, what should be the approach of the trial Court is discussed. The facts relevant for our consideration are as follows:-

1.	Date of receipt of Memo	04/12/2015
2.	Date of notice	31/12/2015
3.	14/02/2016 - 23/02/2016	Complainant inquired with post- but could not get any proof of service.
4.	Second Notice	26/02/2016
5.	Reply	02/03/2016
6.	Complaint filed	11/05/2016

Complaint was filed on the basis of second notice. There was delay. It was condoned and process was issued. It was unsuccessfully challenged before session Court and then before High Court. It was quashed and then complainant approached the Hon'ble Supreme Court. The quashing order was set aside and complaint was restored. The relevant observation on the point of condonation of delay are:-

“Both in Paras 7 and 8 of the complaint, the appellant indicated adequate and sufficient reasons for not being able to institute the complaint within

³ 2019 (7) SCC 273

the stipulated period. These have been adverted to above. The CJM condoned the delay on the cause which was shown by the appellant for the period commencing from 6-4-2018. However, if Paras 7 and 8 of the complaint are read together, it is evident that the appellant had indicated sufficient cause for seeking condonation of the delay in the institution of the complaint.”

In that case there was delay in filing complaint. It was calculated from second notice. Condonation was not asked from the first notice. About the order of High Court, it was observed:-

“The High Court has merely adverted to the presumption that the first notice would be deemed to have been served if it was dispatched in the ordinary course. Even if that presumption applies, we are of the view that sufficient cause was shown by the appellant for condoning the delay in instituting the complaint taking the basis of the complaint as the issuance of the first legal notice dated 31-12-2015.”

12. So period was impliedly condoned on the basis of presumed service. The provisions of section 27 of General Clauses Act are relevant. The Hon’ble Supreme Court in case of **K. Bhaskaran Vs. Sankaran Vaidhyan Balan and another**⁴ referred the presumption as notice is sent on correct address. In this case, the address is correct.

13. The observation in case **Birendra Prasad Sah** as referred above

⁴ (1999) & Supreme Court Cases 510

will be applicable except with one modification. There was no prayer for condonation of delay in present complaint. But foundation is there. Complainant has pleaded why notice was sent by U.P.C. During evidence, he has also produced the envelopes which were unclaimed. This Court feels that the litigant should not suffer for want of necessary prayers for condonation of delay.

14. If on 31st March, 2003 on first occasion, if the notice is sent by R.P.A.D. correct address, the presumption will come in to play. In case of **Bhaskarn V. Sankarn Vaidhyanbalan** (supra) has observed :-

“Thus, when a notice is returned by the sendee as unclaimed such date would be the commencing date in reckoning the period of 15 days contemplated in clause (c) to the provision of Section 138 of the Act. Of course such reckoning would be without prejudice to the right of the drawer of the cheque to show that he had no knowledge that the notice was brought to his address. In the present case the accused did not even attempt to discharge the burden to rebut the aforesaid presumption.”

In this case also the R.P.A.D. envelopes returned back with remark ‘unclaimed’. The facts are similar. Through the observations on the point of territoriality were set aside subsequently, above observations still holds good.

15. The prosecution under Negotiable Instruments Act is *quasi*

civil. The appellant needs to be given an opportunity to pray for condonation of delay. This Court has not given any findings on other issues. At the same point, the complainant needs to be saddled with cost of Rs.5,000/- If the delay is condoned there is no need to adduce fresh evidence. Hence, I intend to allow the appeal I proceed to pass the following order:-

ORDER

- a) Appeal is allowed.
- b) The order dated 25th August, 2006 passed by the Court of 11th Jt. J.M.F.C. Pune is set aside.
- c) The complainant is granted liberty to pray for condonation of delay caused in preferring the complaint from the date of cause of action accrued on the basis of first notice.
- d) The parties are directed to appear before the Court of 11th Jt. J.M.F.C., Pune on 17th August, 2023.
- e) The complainant is at liberty to file an application within 15 days from today.
- f) The trial Court is directed to decide the application within 30 days from 17th August, 2023.
- g) If the delay is condoned, the trial Court is directed to proceed further on the basis of evidence already recorded.
- h) The trial Court to dispose of the case in six months

from the date of decision in condonation of delay application.

- i) The Appellant is directed to pay the cost of Rs.5,000/-(Rupees Five Thousand Only) to the Respondent-Accused / his counsel within the period of three weeks from today.
- j) Appeal is disposed of in above terms.
- k) The trial Court is at liberty to regulate the conduct of the defaulting parties by imposing minimum cost of Rs. 5,000/- (Rupees Five Thousand Only).

[S. M. MODAK, J.]