

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

CRIMINAL APPLICATION NO. 2114 of 2017

Dainik Sarvamat of Shrirang Prakashan
Through its Personal Manager Prakash Shankar Arkhade,
age 41 years occupation service
R/o Ward No. 7, Sarvamat Press,
Shrirampur Dist. Ahmednagar

...APPLICANT

VERSUS

Goraksh Dashrath Nehe (Press Reporter)
R/o at post Dhonewadi Rajapur road,
Sangamner Taluka Sangamner Dist. Ahmednagar
AND
R/o Maratha Seva Nag. Sah. Patsanstha Ltd.,
Shewale Complex, New Akole road, Sangamner
Taluka Sangamner Dist. Ahmednagar.

...RESPONDENT

*Mr Pushpak U. Gujarathi, Adv., holding for Mr Ajay G. Talhar,
Advocate for applicant.
Mr K.N. Shermale, Advocate for respondent.*

CORAM : PRASANNA B. VARALE, J.

DATE : 30th January 2018

ORAL ORDER :

Heard learned Counsel Mr Pushpak Gujarathi, holding for
Mr Talhar, learned Counsel appearing for the applicant.

2. By the present application, the applicant prays for leave to appeal, challenging the judgment and order passed by the learned Judicial Magistrate F.C., Shrirampur, dated 22nd February 2017. Learned Counsel Mr Gujarathi vehemently submitted that the order of acquittal recorded by the learned Magistrate is on erroneous grounds. The learned Counsel then submits that though the learned Magistrate found favour with the applicant and accordingly recorded findings in affirmative on two points framed for consideration, on erroneous appreciation, the third point for consideration was replied in negative.

3. Learned Counsel Mr Shermale, appearing for the respondent vehemently supports the order passed by the learned magistrate. He submits that the learned Magistrate committed no error and by considering the material on record and provisions of law in proper perspective recorded the judgment and order of acquittal.

4. It may not be necessary to refer to the details. Suffice it to say that the applicant approached the Court of Magistrate. The applicant is a representative of newspaper publication, namely "Dainik Sarvamat" at Shrirampur. It was alleged that respondent Goraksh Dashrath Nehe dishonoured certain cheques i.e. instruments. It was

case of the applicant that the accused was free-lancer reporter and was maintaining account for publishing advertisements. Certain amount was due and payable against accused. For the said amount, cheques were issued in favour of the complainant. When the complainant relying on assurances given by the accused and in view of the cheques drawn in favour of the complainant deposited the cheques, the cheques were dishonoured, with a memo issued by the bank that the accused was not carrying sufficient funds in his account to honour the cheques. Then it is alleged that necessary formalities were taken up, such as, issuance of notice, and in spite of compliance of the formalities and giving an opportunity to the accused, the accused failed to repay the amount and the complainant left with no choice but to approach the Court of the Magistrate.

5. The accused vehemently denied the allegations. It was the submission before the Magistrate that the notice was not served on the accused and it is a non-compliance of the provision of the Act which is a mandatory provision. The learned Magistrate in view of the material brought before him and in view of the rival submissions, framed the points for consideration, namely:

“(1) Whether the complainant has proved that the

accused issued cheques bearing No. 058255 dated 20/03/2010 for Rs. 25,000/-, cheque No. 058256 dated 25/03/2010 for Rs. 30,000/- and cheque No. 058257 dated 31/03/2010 for Rs. 25,000/- drawn on Sangamner Merchants Co-op. Bank Ltd., Sangamner Branch towards a legal debt or liability ?

(2) Whether the complainant has proved that the cheque returned dishonoured for the reason “funds insufficient” ?

On the first two points, the learned Magistrate recorded his findings in the affirmative. Now, the whole controversy revolves around the finding recorded by the learned Magistrate on the third point for consideration. The third point for consideration framed by the learned Magistrate is:

(3) Whether the complainant has proved that in-spite of issuance and receipt of notice dated 22/04/2010 the accused failed to pay the cheque amount within 15 days ?”

As the first two points are replied in the affirmative by assigning reasons, it may not be necessary to refer to those reasonings. As stated above, it is only controversy in respect of the third point framed for consideration and thereby non-compliance of the mandatory

provisions. It was the case of the applicant/complainant that the notice was issued to the accused on the addresses given in the complaint. It was an attempt made to submit that the notice was served on the addresses of the accused, namely, at/post Dholewadi, Rajapur road, Sangamner. It was also submission that the accused raised no objection about this address in another proceedings. Now, on the backdrop of the denial of the accused that the accused is resident of "Dholewadi, Rajapur road, Sangamner, but he is resident of Dholewadi Post Gunjalwadi Taluka Sangamner District Ahmednagar, an attempt was made before the Court to submit that the applicant, who was party to that proceedings, was called at Sangamner Police Station and notice was served on him at that police station and in that proceedings address of the accused was shown as resident of Dholewadi, Rajapur road, Sangamner. The learned Magistrate himself took an exercise of assessment of the material on the backdrop of the defence raised by the accused that the notice is not served upon him and the acknowledgment receipt placed on record is not signed by him. The learned Magistrate on perusal of the material observed in paragraphs No. 18 & 19 of the judgment, thus:

"18. One of the notice is sent and allegedly served at the address "At & Post Dhonewadi, Rajapur Road,

Sangamner, Tal. Sangamner.” It appears that the said address is of some area within Sangamner City. Defacto complainant Dilawar however in his cross-examination specifically admits that, the accused reside at “Dholewadi, Sangamner” (ढोलेवाडी, संगमनेर). There is a prominent difference between 'Dhnewadi' and 'Dholewadi'. The accused also on oath states that, his address is at “Dholewadi, Post Gunjalwadi, Tal. Sangamner, Dist. Ahmednagar.” (ढोलेवाडी, पो. गुंजाळवाडी, ता. संगमनेर , जि. अहमदनगर.). No suggestion is given to the accused that, the said address is not true. On the contrary, it is suggested that, this place comes within jurisdiction of Sangamner Taluka Police Station. There appears an independent Post Office at Gunjalwadi, in whose jurisdiction the accused reside. However, the notice to accused is sent at the address – At & Post Dhnewadi (मु.पो. ढोणेवाडी).

19. The accused has also disputed his signature over the acknowledgment receipt at Exh. 33. The difference between the signature of the accused on the cheque and that on the acknowledgment receipt is clearly seen with the naked eyes. The acknowledgment seems to have signed by some person named Shita. In the cross-examination of the accused, a suggestion is also given that, some person by name Sita resides in his house. The accused has squarely denied the same.”

(Emphasis supplied)

6. It was also submitted that the notice was issued on another address allegedly of the accused, namely, Maratha Seva Nagari Sahakari Patsanstha Maryadit, Sangamner. An attempt was made to submit through the evidence of Dilawar, representing complainant, that it is a place where the accused frequently visits. Now, the accused by examining witness, namely, Argade (D.W.2), who is Accountant of the Society, states in his oral testimony before the Court that the accused is nowhere related to the society and no accommodation is provided to the accused by the society. Considering these very aspects, the learned Magistrate relied on the judgment of the Karnataka High Court in the case of **K. Narayan Nayak Vs. N. Shivrama Shetty {2009 ALL MR (Cri.) Journal 54}** and held that the complainant failed to satisfactorily prove that the demand notice is properly given and also failed to prove that there was a proper service of the notice on the accused. The learned Magistrate was, thus, of the opinion that there is non-compliance of the mandatory provision for constitution of an offence against accused under Section 138 of the Negotiable Instruments Act. Resultantly, the judgment and order of acquittal was recorded.

7. Considering all these aspects, in my opinion, the view taken by the learned Magistrate is a probable view. The learned Magistrate accepting one probable view and deciding the matter recording the order of acquittal, cannot be a reason to grant relief to appeal the order. The application, thus, being meritless, the permission for grant of leave is refused. Application, thus, is dismissed.

(PRASANNA B. VARALE)
JUDGE.

Madkar