

“18. From the above discussion following aspects emerge: i) Offence under [Section 138](#) of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is “preponderance of probabilities”. The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C., 1973 will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

ii) The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

iii) Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.

iv) Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C., 1973 to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C., 1973 With this approach, prison sentence of more than one year may be required in all cases.

v) Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank’s slip being prima facie evidence of the dishonor of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C., 1973 The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances.

19. In view of the above, we hold that where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings in exercise of its powers under Section 143 of the Act read with Section 258 Cr.P.C., 1973 As already observed, normal rule for trial of cases under Chapter XVII of the Act is to follow the summary procedure and summons trial procedure can be followed where sentence exceeding one year may be necessary taking into account the fact that compensation under Section 357(3) Cr.P.C., 1973 with sentence of less than one year will

be adequate, having regard to the amount of cheque, conduct of the accused and other circumstances.

20. In every complaint under Section 138 of the Act, it may be desirable that the complainant gives his bank account number and if possible email ID of the accused. If email ID is available with the Bank where the accused has an account, such Bank, on being required, should furnish such email ID to the payee of the cheque. In every summons, issued to the accused, it may be indicated that if the accused deposits the specified amount, which should be assessed by the Court having regard to the cheque amount and interest/cost, by a specified date, the accused need appear unless required and proceedings may be closed subject to any valid objection of the complainant. If the accused complies with such summons and informs the Court and the complainant by email, the Court can ascertain the objection, if any, of the complainant and close the proceedings unless it becomes necessary to proceed with the case. In such a situation, the accused's presence can be required, unless the presence is otherwise exempted subject to such conditions as may be considered appropriate. The accused, who wants to contest the case, must be required to disclose specific defence for such contest. It is open to the Court to ask specific questions to the accused at that stage. In case the trial is to proceed, it will be open to the Court to explore the possibility of settlement. It will also be open to the Court to consider the provisions of plea bargaining. Subject to this, the trial can be on day to day basis and endeavour must be to conclude it within six months. The guilty must be punished at the earliest as per law and the one who obeys the law need be held up in proceedings for long unnecessarily."

15. In the said decision, the Apex Court mandates to adopt very pragmatic approach to ensure the speedy disposal of all the matters under section 138 of the Negotiable Instruments Act and also expects the trial Court to issue the summons at the outset-on due examination of material, to enable the accused to pay the amount specified therein without further loss of time. Pro forma summons is being given herein below, which can be used by the Court by making necessary changes while issuing summon to the respondent-accused by also specifying therein that if he is desirous of paying the amount straightway in the bank account of the applicant he may so do it, on intimation to the Court online of such payment on the official email Id, to provided in the summons itself, and straightway thereafter, he can be given a discharge by closing the case qua him. However, if the compounding at the initial stage is feasible, even at a later stage, the attempt should be made to ensure that the parties amicably arrive at a conclusion and subject to the appropriate compensation, as found acceptable to the parties, the matter can be put an end to. For the sake of convenience in the present matter and so as to have uniformity in other cases, before any change is made by way of amendment in the code, a DRAFT SUMMONS is provided as under for the Court to make use of the same:

**Saxchinsingh Rakeshsingh Chauhan v. Tribhuvanbhai Bhailal Vasava *Criminal Appeal (Against Acquittal) No. 30 of 2018 Decided On, 19 January 2018***

- Saxchinsingh Rakeshsingh Chauhan Vs. Tribhuvanbhai Bhailal Vasava On 19 January, 2018

## High Court of Gujarat

Before: Justice Sonia Gokani

### **SAXCHINSINGH RAKESH SINGH CHAUHAN versus TRIBHUVANBHAI BHAILAL VASAVA**

Criminal Appeal (Against Acquittal) No. 30 Of 2018

19.01.2018

#### Judgment

1. Being aggrieved by the judgment and order passed by the learned 12th Additional Chief Judicial Magistrate, Vadodara in Criminal Case No.10028 of 2015 delivered on 30.06.2017 and thereby acquitting the respondent for the offence punishable under section 138 of the Negotiable Instruments Act, 1881 (the N.I. Act herein after), that the present appeal is preferred by the appellant-original complainant.

2. An application for condonation of delay was preferred for condoning delay of 53 days in preferring an application for Special Leave to Appeal. Before allowing the same, notice was issued to the respondents and the same was duly served to the respondents through the concerned police station however, he has chosen not to appear.

3. This Court after granting Special Leave to Appeal under section 378 (4) of the Code of Criminal Procedure, 1973 on January 09, 2018 had issued the notice for final disposal, pending admission of appeal, making it returnable on January 19, 2018, appellant chose to serve directly, which was permitted, however, what could be noticed that the affidavit of direct service is filed by the representation of the appellant Mr. Ravidutt Atmaram Sharma, resident of 18, Aadarsh Nagar Society, Chhani Jakat Naka, Vadodara. According to him, he went to the respondent on the address, given in the cause title but, he has refused to accept the notice.

3.1 Considering the affidavit filed by Mr. Sharma, there appears to be a due service to the respondent-original accused, who has chosen not to respond and on the contrary, has refused due service of notice. He had already been served at the time of deciding application for condonation of delay and he chose not to contest although in his statement while accepting service, he showed his desire to be represented by the private lawyer and hence, is aware of pendency of this proceeding.

3.2 Treating the said service as deemed service of notice, this Court has proceeded with

the hearing of this appeal.

4. Learned advocate, Mr.Dhruv Dave appearing for the appellant has urged that only twice the appellant could remain present in the month of May, 2017 and in the month of June, 2017 before the trial Court. On rest of the adjourned dates, he continued to be present either personally or through his advocate. However, the Court disregarding consistent presence of the appellant, has dismissed the complaint under section 256 of the Code of Criminal Procedure, 1973 and thereby, has given an acquittal to the respondent-accused which he has urged is the object of the provision of section 256 of the Code of Criminal Procedure, 1973. It is the matter where any delay has been caused on account of the complainant, on the contrary, the service could be effected to the respondent No.2-accused in the month of December, 2015 and the matter was placed for recording plea of the accused. There is a reference of the matter pending for the hearing of application given below Exhibit-5, which was heard later and all the marks 4/1 to 4/6 had been exhibited. He, therefore, urged to quash and set aside the judgment and order of the trial Court.

4.1 Per Contra, learned Additional Public Prosecutor, Mr.Poojari has supported the judgment and order to urge that those litigants who do attend the court proceeding do deserve any sympathetic approach. He took this Court through the Rojnama to dismiss this appeal.

5. Having thus heard both the sides and also on careful examination of the judgment impugned and the noting on record so also Rojnama of Criminal Case No.10028 of 2015, for the reasons to follow hereinafter, this appeal deserves to be allowed.

6. It appears from the record that on two days i.e. on 19.05.2017 and 30.06.2017, neither the complainant nor the learned advocate for the complainant remained present. On the second adjourned date i.e. on 30.06.2017, the trial Court for want of prosecution had passed an order under section 256 of the Code of Criminal Procedure, 1973. It emerges that the criminal complaint filed by the appellant is of the year February, 2015 and the respondent could be served only in the month of December, 2015. Matter after recording plea as well as on hearing of Exhibit-5 application, had been posted for cross examination of the appellant by the learned advocate appearing for the respondent-accused on both the days. It is in dispute and as also reflected in the proceeding (rojkaam) that neither the complainant nor his learned advocate remained present on those two adjourned days. However, an opportunity ought to be availed to the complainant, who had waited for almost two years for the matter to be proceeded with.

7. It would be profitable to reproduce the provision of section 256 of the Code of Criminal Procedure, 1973 at this stage:

*“(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does appear, the Magistrate shall, notwithstanding anything herein before contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day: Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the*

*Magistrate is of opinion that the personal attendance of the complainant is necessary, the Magistrate may dispense with his attendance and proceed with the case.*

*(2) The provisions of subsection (1) shall, so far as may be, apply also to cases where the nonappearance of the complainant is due to his death."*

7.1 Section 256 of the Code of Criminal Procedure, 1973 empowers the Court to dismiss the complaint for want of prosecution and also acquit the accused of the offence if the complainant does remain present on day on which the Court schedules the matter, either for cross examination or for any other purposes. Proviso to the said provision also makes a way for the learned advocate for the complainant to remain present instead of insisting on the personal presence of the complainant.

8. Considering the over all facts and circumstances, this Court is of the opinion that it is a case of a complainant desirous to proceed with the matter nor has he consistently remained absent despite the best of the opportunities having been availed by the Court. Apologizing for their absence on both the occasions, the appellant-complainant has urged this Court that the best of the endeavors shall be made once allowed in this appeal to expeditiously proceed with the matter.

9. Bearing in mind the factual matrix and the law on the subject, the Court is convinced that this is surely a matter which warrants interference and the judgment and order dated 30.06.2017 passed in Criminal Case No.10028 of 2015 by the learned 12th Additional Chief Judicial Magistrate, Vadodara deserves to be quashed and set aside.

10. While so doing it, the complainant-appellant is also directed to seek any adjournment and proceed with the Criminal Case on merit on expeditious basis. Likewise, the Court concerned also shall ensure that the matter is proceeded with on urgent basis.

11. Noticing the fact that, the respondent No.2-original accused has chosen to accept the notice of appeal pending admission issued by this Court and the affidavit to that effect is also brought on the record as discussed herein above, this Court notices that even before the trial Court, in the instant case, the delay had been caused in causing to serve the respondent-accused. It is often noticed in many matters that all possible tactics are adopted by the opponent-accused to delay the matter by avoiding the services. Exercise of power under section 65 of the Code of Criminal Procedure, 1973 which necessitates the direction from the Court to affix the notice/summons on the address of the respondent-accused deserves in such cases, would be a must.

12. Additionally, the requirement would be to take recourse to the advancement of technology by ensuring if there are other surest modes of service through the email or the text messages on the official mobile numbers.

13. Another vital aspect deserves a specific detailing at this stage. Noticing the resistance and also inhibition on the part of the respondent-accused and the time and resources taken in responding to the summons of the Court, the Apex Court in case of Meters and

Instruments Private Limited and Another v. Kanchan Mehta reported in AIR 2017 SC 4594 has directed all the Courts concerned to issue the summons by detailing the process for issuance of the summons online where the accused can pay the specified amount online and his personal presence can be dispensed with.

14. Bearing in mind the magnitude of challenge posed by cases filed under section 138 of the Negotiable Instruments Act, which according to the Apex Court constitute about 20% of the total number of cases filed in the Courts as per 213th report of the Law Commission. The Court has treated this categories of cases which can be partly or entirely concluded “online” without physical presence of the parties by simplifying procedures where seriously disputed questions are required to be adjudicated. Hoping that at least certain numbers of cases under Section 138 can be decided online by taking recourse to the mandate. The Apex Court held and observed that if the complaint with affidavit and documents can be filed online, the process also is issued online and the accused may pay the amount specified online, and that may obviate the need for personal appearance of the complainant or the accused. It is only in the event of the accused contesting, need for appearance of parties may arise which may be through counsel and wherever viable, video conferencing can be used.

Some of the vital directions issued in this regard deserves reproduction profitably at this stage:

“18. From the above discussion following aspects emerge:

i) Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is “preponderance of probabilities”. The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C., 1973 will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

ii) The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

iii) Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.

iv) Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of

imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C., 1973 to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C., 1973 With this approach, prison sentence of more than one year may be required in all cases.

v) Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the banks slip being prima facie evidence of the dishonor of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C., 1973 The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances.

19. In view of the above, we hold that where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings in exercise of its powers under Section 143 of the Act read with Section 258 Cr.P.C., 1973 As already observed, normal rule for trial of cases under Chapter XVII of the Act is to follow the summary procedure and summons trial procedure can be followed where sentence exceeding one year may be necessary taking into account the fact that compensation under Section 357(3) Cr.P.C., 1973 with sentence of less than one year will be adequate, having regard to the amount of cheque, conduct of the accused and other circumstances.

20. In every complaint under Section 138 of the Act, it may be desirable that the complainant gives his bank account number and if possible email ID of the accused. If email ID is available with the Bank where the accused has an account, such Bank, on being required, should furnish such email ID to the payee of the cheque. In every summons, issued to the accused, it may be indicated that if the accused deposits the specified amount, which should be assessed by the Court having regard to the cheque amount and interest/cost, by a specified date, the accused need appear unless required and proceedings may be closed subject to any valid objection of the complainant. If the accused complies with such summons and informs the Court and the complainant by email, the Court can ascertain the objection, if any, of the complainant and close the proceedings unless it becomes necessary to proceed with the case. In such a situation, the accuseds presence can be required, unless the presence is otherwise exempted subject to such conditions as may be considered appropriate. The accused, who wants to contest the case, must be required to disclose specific defence for such contest. It is open to the Court to ask specific questions to the accused at that stage. In case the trial is to proceed, it will be open to the Court to explore the possibility of settlement. It will also be open to the Court to consider the provisions of plea bargaining. Subject to this, the trial can be on day to day basis and endeavour must be to conclude it within six months. The guilty must be punished at the earliest as per law and the one who obeys the law need be held up in proceedings for long unnecessarily."

15. In the said decision, the Apex Court mandates to adopt very pragmatic approach to ensure the speedy disposal of all the matters under section 138 of the Negotiable Instruments Act and also expects the trial Court to issue the summons at the outset, on due examination of material, to enable the accused to pay the amount specified therein without further loss of time. Pro forma summons is being given herein below, which can be used by the Court by making necessary changes while issuing summon to the respondent-accused by also specifying therein that if he is desirous of paying the amount straightway in the bank account of the applicant he may so do it, on intimation to the Court online of such payment on the official email Id, to provided in the summons itself, and straightway thereafter, he can be given a discharge by closing the case qua him. However, if the compounding at the initial stage is feasible, even at a later stage, the attempt should be made to ensure that the parties amicably arrive at a conclusion and subject to the appropriate compensation, as found acceptable to the parties, the matter can be put an end to. For the sake of convenience in the present matter and so as to have uniformity in other cases, before any change is made by way of amendment in the code, a DRAFT SUMMONS is provided as under for the Court to make use of the same:

"1. You are hereby summoned for having been arrayed as an accused in a matter under section 138 of the Negotiable Instruments Act in the above referred Criminal Complaint. However, instead of remaining personally present as provided by the Apex Court in the case of M/s.Meters and Instruments Pvt. Ltd. v. Kanchan Mehta (AIR 2017 SC 4594), you may deposit the amount of Rs. \_\_\_\_\_ (i.e. Rs. \_\_\_\_\_/being the Principal Amount of cheque + Rs. \_\_\_\_\_ interest at the rate of 9% + Rs. \_\_\_\_\_ towards costs of the matter) in the account of the complainant (i.e. Savings Bank Account No. \_\_\_\_\_ with State Bank of India, Ahmedabad and bearing IFSC No.SBIN \_\_\_\_\_) on or before \_\_\_\_\_.

2. Your communication of deposit of such amount on Email I.D.of the Court (i.e. ) on or before \_\_\_\_\_, may entitle you for closure of this case.

3. If you choose to deposit, you shall need to disclose your specific defence by remaining present on \_\_\_\_\_ at \_\_\_\_\_.

Note: Relevant paragraphs 19 and 20 of the judgment in the case of M/s.Meters and Instruments Pvt. Ltd(Supra) are attached herewith."

16. Respondent No.2 in this matter if choses to pay the amount as may be specified in the notice directly in the bank account, the trial Court may give quietus to the matter by closing the proceeding qua him.

17. Appeal is allowed accordingly. The judgment and order dated 30.06.2017 is quashed and set aside. Criminal Case No.10028 of 2017 is restored back to the file for the Court to proceed with the same without further loss of time.

18. While issuing the summons afresh to the appellant, the proforma summons as given above shall be issued. If the matter does end at that stage, the matter shall be proceeded with expeditiously where the complainant and the respondent accused both shall

cooperate. No adjournment shall be asked for nor shall be given unless there are unavoidable circumstances.

19. With the above directions, appeal is disposed of accordingly. Notice is discharged.

20. Direct Service is permitted.

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