

10.

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.M.C. 1667/2009

KUSP ELECTRONICS P.LTD. & ORS. Petitioner
Through : Ms. Purnima Maheshwari, Adv.

versus

SIPLA ELECTROMEK Respondent
Through : Mr. Sanjiv Bakshi, Adv.

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI

1. Whether reporters of local papers may be allowed to see the Judgment ? **YES**
2. To be referred to the Reporter or not? **YES**
3. Whether the Judgment should be reported in the Digest? **YES**

ORDER
28.08.2009

%

1. Present petition has been filed under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as, "Cr.P.C.") read with Article 227 of the Constitution of India and is directed against the summoning order dated 22-01-2005 issued, pursuant to a complaint [Comp. Case No.699-C/09 (Old No.266/1/2005)] filed by the respondent under Section 138 of the Negotiable Instruments Act.

2. The brief facts as per the petition, are as under:

Petitioner no. 1 (Kusp Electronics P.Ltd., hereinafter referred to as "petitioner company") had placed an order to the respondent for supply of computer hardware accessories and parts, which were duly supplied by the respondent. The petitioner company thereafter issued a cheque bearing no.219280 dated 19.11.2004 for Rs. 88285/- to the respondent. However, the said cheque was dishonoured upon presentation and about which the respondent duly informed the petitioner company. In lieu of the cheque amount, the petitioner company returned certain

computer hardware and accessories and stated that they were worth Rs.88285/- i.e. equivalent to the cheque amount, as the full and final settlement of all dues. Respondent however, addressed a letter to the petitioner company stating therein that the said goods/articles sent by the petitioner company were worth only Rs.60,000/- to 65,000/- and that the petitioner company should settle the accounts. Thereafter the respondent issued a legal notice dated 24.12.2004 under Section 138 of the Negotiable Instruments Act and claimed the balance amount of Rs.25,000/-. Since as per the respondent, the petitioner had failed to make the requisite payment within the stipulated time period of fifteen days, the respondent filed a complaint against the petitioner under section 138 of the Negotiable Instruments Act. Finding *prima facie* merit in the contention of the respondent, and on the basis of which, learned trial court vide order dated 22.01.2005, issued summons to the petitioner.

3. Learned counsel for the petitioner submits that the petitioners were shocked to receive the Court summons, as per which the respondent had filed a complaint case no.699-C-09 under Section 138 of the Negotiable Instruments Act. Learned counsel submits that there is no legal liability of the petitioner towards the respondent. Learned counsel submits that both in the legal notice as well as in the complaint, the respondent has admitted receipt of certain goods in lieu of the dishonoured cheque, and the respondent kept the trial court in darkness and did not disclose the true and correct facts about the full and final settlement having been arrived at between the parties on 06.12.2004.
4. It is further submitted by counsel for the petitioner that it is the respondent who has cheated the petitioner inasmuch as, the respondent has failed to return the dishonoured cheque, which the respondent had assured to return to the petitioners. The

respondent with ulterior motives and malafide intention has filed a false case against the petitioner in order to extort money.

5. Learned counsel for the petitioner submits that even otherwise also, notice dated 24.12.2004 addressed to the petitioner company, does not fulfill with the requirements of section 138 of the Negotiable Instruments Act, as per which demand should be made for the cheque amount, and if no such demand is made, then notice would fall short of the legal requirement. Counsel submits that the legal notice, which has been issued, is not within the provisions of Section 138(b) of the Negotiable Instruments Act inasmuch that the respondent has only called upon the petitioners to pay a sum of Rs.25,000/- with interest accrued thereon within a period of fifteen days, and not sought for the cheque amount.
6. *Per Contra*, learned counsel for the respondent submits that the present petition is not maintainable as the petitioner has suppressed and withheld material facts and documents. He submits that the petitioner company had vide its purchase order dated 09.11.2004 placed an order for immediate supply of 13 UPS pieces for which the payment was to be made through a post-dated cheque of ten days. Through invoice dated 09.11.2004 bearing no.1131, the respondent supplied the abovesaid 13 UPS to the petitioner for a total sum of Rs.87,050/-. Thereafter the petitioner company through its Director handed over a cheque bearing no.219280 dated 19.11.2004 drawn on Citi Bank for an amount of Rs.88,285/, to the respondent. However, when the said cheque was presented for encashment

by the respondent, the same was returned unpaid by the Bank vide return memo dated 20.11.2004 with the endorsement 'insufficient funds'. The respondent approached the petitioner company, who assured that the said cheque shall be positively encashed, if presented in the first week of December, 2004. The respondent accordingly presented the said cheque for encashment but it was again returned unpaid vide return memo dated 03.12.2004. Subsequent to all these developments, the petitioner company in furtherance of their intention to cheat the respondent, vide letter dated 06.12.2004 and delivery challan bearing no.9989 dated 06.12.2004 requested the respondent to accept certain computer hardware which according to the petitioner company were equivalent to the cheque amount. However, on an enquiry from the market, the respondent found out that the said material was only worth Rs.60,000/- to 65,000/-. Learned counsel for the respondent has drawn the attention of this Court to a communication dated 08.12.2004, which was addressed to the petitioner, whereby the petitioner company was duly informed that the material was valued for Rs.60,000/- to 65,000/-. And 7 days time was given to settle the accounts, otherwise necessary legal action would be initiated.

7. According to learned counsel for the respondent, since there was no reply from the petitioner and the material which was supplied was only worth Rs.60,000/- to Rs.65,000/-, the respondent had therefore issued a legal notice dated 24.12.2004, calling upon the petitioner company to pay the outstanding amount of Rs.25,000/-, within fifteen days of the receipt of the legal notice.

Learned counsel submits that it is amply clear that there is no merit in the present petition and the same deserves to be dismissed.

8. I have heard learned counsel for the parties and carefully gone through the record of the case. It would be useful to refer to the case of ***Suman Sethi Vs. Ajay K. Churiwal*** reported at **(2000) 2 SCC 380**, wherein the Supreme Court has held:

“138. *Dishonour of cheque for insufficiency, etc., of funds in the account.*—Where any cheque drawn by a person on an account maintained by him with a banker for *payment of any amount of money* to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, *without prejudice to any other provision of this Act*, be punished with imprisonment for a term which may extend to one  383 year, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) * * *

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the *said amount of money* by giving a notice in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the *said amount of money* to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

* * *

139. *Presumption in favour of holder.*—It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the

discharge, in whole or in part, of any debt or other liability.”(emphasis supplied)

6. We have to ascertain the meaning of the words the “said amount of money” occurring in clauses (b) and (c) to the proviso to Section 138. Reading the section as a whole we have no hesitation to hold that the above expression refers to the words “payment of any amount of money” occurring in the main Section 138 i.e. the cheque amount. So in a notice, under clause (b) to the proviso, demand has to be made for the cheque amount. Dr Dhavan, learned Senior Counsel has urged that Section 138 being a penal provision has to be construed strictly. We may refer the decision of this Court in *M. Narayanan Nambiar v. State of Kerala*¹. This Court considered the rule of construction of a penal provision and quoted with approval the following passage of the decision of the Judicial Committee in *Dyke v. Elliott*². The passage runs as follows:

“No doubt all penal statutes are to be construed strictly, that is to say, the court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip, that there has been a casus omissus, that the thing is so clearly within the mischief that it must have been intended to be included if thought of. On the other hand, the person charged has a right to say that the thing charged although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair commonsense meaning of the language used, and the court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.”

7. There is no ambiguity or doubt in the language of Section 138. Reading the entire section as a whole and applying common sense, from the words, as stated above, it is clear that the legislature intended that in a notice under clause (b) to the proviso, the demand has to be made for the cheque amount. According to Dr Dhavan, the notice of demand should not contain anything more or less than what is due under the cheque.

¹ AIR 1963 SC 1116 : 1963 Supp (2) SCR 724.

² (1872) 4 PC 184 : 26 LT 45.

8. It is a well-settled principle of law that the notice has to be read as a whole. In the notice, demand has to be made for the "said amount" i.e. the cheque amount. If no such demand is made the notice no doubt would fall short of its legal requirement. Where in addition to the "said amount" there is also a claim by way of interest, cost etc. whether the notice is bad would depend on the language of the notice. If in a notice while giving the break-up of the claim the cheque amount, interest, damages etc. are separately specified, other such claims for interest, cost etc. would be superfluous and these additional claims would be severable and will not invalidate the notice. If, however, in the notice an omnibus demand is made without specifying what was due under the dishonoured cheque, the notice might well fail to meet the legal requirement and may be regarded as bad.

9. This Court had occasion to deal with Section 138 of the Act in *Central Bank of India v. Saxons Farms*³ and held that the object of the notice is to give a chance to the drawer of the cheque to rectify his omission. Though in the notice demand for compensation, interest, cost etc. is also made the drawer will be absolved from his liability under Section 138 if he makes the payment of the amount covered by the cheque of which he was aware within 15 days from the date of receipt of the notice or before the complaint is filed.

10. In Section 138 the legislature clearly stated that for the dishonoured cheque the drawer shall be liable for conviction if the demand is not met within 15 days of the receipt of notice but this is without prejudice to any other provision of the Act. If the cheque amount is paid within the above period or before the complaint is filed the legal liability under Section 138 will cease and for recovery of other demands as compensation, costs, interest etc., a civil proceeding will lie. Therefore, if in a notice any other sum is indicated in addition to the "said amount" the notice cannot be faulted, as stated above."

9. Applying the principles laid down to the facts of this case, I find that the petitioner company had placed an order with the respondent for immediate supply of computer hardware (UPS) and which were duly supplied by the respondent. The payment was made by the petitioner company vide cheque bearing

³ (1999) 8 SCC 221 : 1999 SCC (Cri) 1411 : JT (1999) 8 SC 58.

no.219280 dated 19.11.2004 for an amount of Rs.88,285/. However, the said cheque when presented by the respondent before the concerned bank was returned unpaid by the Bank with the endorsement 'insufficient funds'. Subsequently, the petitioner company, vide letter dated 06.12.2004 requested the respondent to accept certain computer hardware which according to the petitioner company were equivalent to the cheque amount. The material was duly accepted and the following endorsement was made by the respondent "This material is against dishonour of cheque for Rs.88285/-". Since per the respondent, on an enquiry from the market, it was found out that the said material was only worth Rs.60,000/- to 65,000/- and accordingly, the respondent drew the attention of the petitioner to this fact vide communication dated 08.12.2004, the same is reproduced hereunder:

"You have given some material to us against your Disbursement Cheque No.219280 dated 19.11.2004 for Rs.88285.00 of CITI Bank. We have shown that material in Mkt they people value for that material Rs.60 to 65 thousand. Now suggest us that should we sold that material in market on balance of Amount Rs.25000/- Twenty five thousand when it will be paid.

10. I find that in this communication dated 08.12.2004, the respondent had in fact, sought approval from the petitioner for selling the said material at the same price, which had been received by them. However, neither any approval was given nor the petitioner replied to the subsequent communication. Since, per the respondent, the material which was supplied was only worth Rs.60,000/- to Rs.65,000/-, the respondent thereafter

issued legal notice dated 24.12.2004, calling upon the petitioner company to pay the outstanding amount of Rs. 25,000/-, within fifteen days of the receipt of the legal notice. Relevant portion of the said legal notice dated 24.12.2004 is reproduced hereunder:

“I therefore, call upon you to pay to my client the said sum of Rs.25,000/- and pay interest on the said amount at the rate of 24% per annum and Rs.5500/- towards the costs of this legal notice within FIFTEEN DAYS from the receipt of this notice, failing which my client shall be constrained to file legal proceedings against you in the appropriate court of law which will be entirely at your risks, costs and consequences which please note. Copy kept for further action.”

11. It is not disputed by learned counsel for the petitioner that though admittedly a cheque was issued in the sum of Rs.88285/- to the respondent, however, he has contended that in lieu of the cheque amount, the petitioner has handed over one Silver IBM 84821 4x, One HP Desktop, two IBM CD Writers and two CD Roms (IBM) in terms of the communication dated 06.12.2004. It is also submitted that while accepting the material, respondent had made an endorsement, which reads as under:

“This material is against dishonour of cheque for Rs.88285/-“

12. Learned counsel for the petitioner further submits that in view of the acceptance of material in lieu of the cheque, there was no legally recoverable debt as per the provisions of Section 138 of Negotiable Instruments Act.
13. Learned counsel for the respondent has neither denied the communication nor the endorsement made by his client in Court today.

14. Taking into consideration the case of **Suman Sethi** (*supra*) wherein it has been observed by the Apex Court that the demand notice under Section 138(b) of the Negotiable Instruments Act should intimate the drawer about the dishonour of cheque and seek payment of cheque amount only, and whereas in the present case, I find that that the respondent never sought for the payment of the cheque amount of Rs.88285/-, vide notice dated 24.12.2004. Rather the respondent made a demand of Rs.25,000/-, thus the communication dated 24.12.2004 addressed by the respondent to the petitioner, fails to meet the essentials of a valid notice as per the settled position of law.
15. Having regard to the endorsement made by the respondent in the communication dated 06.12.2004 and in view of the fact that the communication dated 24.12.2004, which has been issued is not with regard to dishonor of cheque but is only calling upon the petitioner to pay sum of Rs.25,000/-, the complaint filed by the respondent (complainant before the trial court), does not fall within the provisions of section 138 the Negotiable Instruments Act. Accordingly, present petition is allowed. The summoning order dated 22.01.2005, pursuant to a complaint [Comp. Case No.699-C/09 (Old No.266/1/2005)] filed by the respondent under Section 138 of the Negotiable Instruments Act, stands quashed.
16. Petition stands disposed of.
17. Dasti.

AUGUST 28, 2009
'msr'

G.S.SISTANI,J