

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

+ CRL.M.C. No. 3426/2011 & Crl.M.A. No. 12164/2011(Stay)

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Reserved on: 6th March, 2012

Decided on: 20th March, 2012

DHEERAJ JAIN

..... Appellant

Through: Mr. Anant Bhushan, Advocate

versus

STATE & ANR.

..... Respondent

Through: Mr. Mukesh Gupta, APP for the State.
Mr. Sanjay Kumar, Adv. for R-2.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present petition, the Petitioner seeks quashing of the order dated 26th October, 2010 summoning the Petitioner for offence punishable under Section 138 of the Negotiable Instruments Act, 1881(in short the NI Act) and the consequential proceedings in Complaint Case No. 612/1A/11 titled as “Tarachand vs. Dheeraj Jain” pending in the Court of Metropolitan Magistrate, Saket.

2. Learned counsel for the Petitioner inter alia urges that the order of summoning and the consequential proceedings against the Petitioner are required to be quashed on the ground that legal notice was given beyond 30 days of the knowledge of dishonor of the cheque. Secondly, the complaint has been filed against the Petitioner individually though the cheque has been issued on behalf of the company and thus in the absence of the company being impleaded, the Petitioner could not have been vicariously held liable

and thirdly the Court at Delhi has no territorial jurisdiction to try the complaint.

3. During the course of arguments, the scope of the present petition was confined only to the first ground that the legal notice for demand was not issued by the Complainant within 30 days of the knowledge of dishonor of the cheque.

4. Learned counsel for the Petitioner contends that as per the complaint and the affidavit of the Complainant/Respondent No.2, it has been alleged that the Complainant was shocked to know when his bankers returned three cheques unpaid on 10th July, 2010 as bounced with the remarks “insufficient funds” in the bank account of the Petitioner and two cheques bounced due to exceed arrangement. According to the Petitioner, it is the admitted case of Respondent No. 2/Complainant that the legal notice was sent through the counsel on 10th August, 2010 and the Petitioner has failed to make the outstanding payment to Respondent No. 2 even after being served with the legal notice. Reference is made to the complaint, legal notice dated 7th August, 2010 and the affidavit of Respondent No.2 annexed to the complaint where these averments have been mentioned along with the dispatch of the courier receipts and the Registered A/Ds. Reliance in this regard is placed on *Shivakumar vs. Natarajan*, *Crl. Appeal No. 1077 of 2009 decided by the Hon’ble Supreme Court on 15th May, 2009*, *B.K. Sinha vs. State of Gujarat & Anr.*, 2008 *Crl. L.J. 1230 SC* and *Dhananjay Johri vs. Naveen Sehgal*, *Crl.M.C. No. 2172/2010 decided by this Court on 24th November, 2012*.

5. On a notice being issued, Respondent No. 2 has entered appearance and reply has been filed. In the reply, averments made in the complaint and

the affidavit have been reiterated. Further, learned counsel for the Respondent No. 2 orally states that even if it is stated in the complaint and the affidavit filed that he came to know about dishonor of the cheque on 10th July, 2010 and issued the notice on 10th August, 2010, the Respondent would be at liberty to prove before the Court by stating that though the return memo was issued on the 10th July, 2010 but the Respondent No.2 received the same only on 12th July, 2010. It may be noted that there is no such averment in the reply. Reliance is placed on *Srikant Somani and others v. Sharad Gupta, 2005 (2) JCC 138*, *Sunaina R. Mathani vs. NCT of Delhi, 2002(1) JCC 23*, *Anurag Modi vs. MSTC Ltd. 2002(1) JCC 206*, *Sunil Srivastava vs. Ashok Kalra, 2002(3) JCC 1909*.

6. Heard learned counsels for the parties. Reply of Respondent No.2 reiterates the facts stated in the complaint and the affidavit filed before the learned Metropolitan Magistrate in support of the complaint. Thus in view of the admitted position that Respondent No.2 received the intimation of dishonor of cheque on 10th July, 2010 and issued the legal notice through his counsel on 10th August, 2010 it is to be examined whether the order of summoning is legally justified or not and whether the proceedings pursuant thereto are liable to be quashed.

7. Section 138 of the N.I. Act provides:-

“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 provisions of this Act, be punished with imprisonment for ["a term which may extend to two 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) The cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) The payee or the holder induce 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 thirty days"] of the receipt of information by him from the bank regarding the return of the cheques 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.

Explanation.— For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.”

8. A perusal of the Clause (b) to proviso to the Section clearly states that nothing contained in the section shall apply unless the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the amount of cheque by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of the information by him from the bank regarding return of the cheque as unpaid. It may be noted that in the present case admittedly, as per the complaint, affidavit and legal notice, Respondent No. 2 came to know about the dishonor of the cheque on the 10th

July, 2010. The demand made by Respondent No. 2 was beyond the period of 30 days and now Respondent No. 2 cannot agitate that he be permitted to lead evidence to show that he received the knowledge of dishonor of the cheque on 12th July, 2012, which was not the case even before the learned Trial Court.

9. In *Srikant Somani (supra)* relied on by learned counsel for Respondent No.2, this Court was dealing with the period of limitation prescribed for filing the complaint under Section 142(b) of the NI Act and not the period of issue of notice of demand as provided under Clause (b) to the proviso to Section 138 NI Act. In *Sunaina R. Mathani (supra)* this Court on facts held that notice of demand was issued within fifteen days, in view of the provision then existed. Even in *Anurag Modi (supra)* this Court was dealing with the error in cheque number mentioned in the demand notice. In *Sunil Srivastava (supra)* in view of the fact that the Petitioner therein was neither admitting the date of notice nor giving the date on which it was received held that the sender of the notice had the right to lead evidence and prove the date on which notice was received by the Petitioner. Thus, the decisions relied upon by the learned counsel for Respondent No.2 have no application to the facts of the case.

10. In *Sivakumar v. Natarajan, (2009) 13 SCC 623*, it was held:-

“8. By reason of the provisions of the Act, a legal presumption in regard to commission of a crime has been raised. The proviso appended thereto, however, states that nothing contained in the main provision would apply unless conditions specified in clauses (a), (b) and (c) thereof are complied with. Clauses (a), (b) and (c) of the proviso, therefore, lay down conditions precedent for applicability of

the main provision. Section 138 of the Act being penal in nature, indisputably, warrants strict construction.

9. In *Harman Electronics (P) Ltd. v. National Panasonic India (P) Ltd.*, [2008 (16) SCALE 317] this Court held:

“8. ... The proviso appended thereto imposes certain conditions before a complaint petition can be entertained.

9. Reliance has been placed by both the learned Additional Sessions Judge as also the High Court on a decision of this Court in *K. Bhaskaran v. Sankaran Vaidhyan Balan*, (1999) 7 SCC 510. This Court opined that the offence under Section 138 of the Act can be completed only with the concatenation of a number of acts, namely, (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice. It was opined that if five different acts were done in five different localities, any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the Act and the complainant would be at liberty to file a complaint petition at any of those places. As regards the requirements of giving a notice as also receipt thereof by the accused, it was stated: (SCC pp. 518-19, para 18)

‘18. On the part of the payee he has to make a demand by “giving a notice” in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such “giving”, the travails of the prosecution would have been very much lessened. But the legislature says that failure

on the part of the drawer to pay the amount should be within 15 days “of the receipt” of the said notice. It is, therefore, clear that “giving notice” in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address.’

* * *

13. It is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of a cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence under Section 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice that the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would.”

Keeping in view the aforementioned legal principle, interpretation of clause (b) of the proviso appended to Section 138 of the Act has to be considered.

10. We may, however, at the outset notice that both clauses (a) and (b) of the proviso appended to Section 138 of the Act employed the term “within a period”. Whereas clause (a) refers to presentation of the cheque to the bank within a period of six months from the date on which it is drawn, clause (b) provides for issuance of notice “to the drawer of the cheque, within thirty days of the receipt of information”. The words “within thirty days of the receipt of information” are significant. Indisputably, intimation was received by the respondent from the bank on 3-12-2003.

11. Parliament advisedly did not use the words “from the date of receipt of information” in Section 138 of the Act. It is also of some significance to notice that in terms of Section 9 of the General Clauses Act, 1897, whereupon reliance has been placed by the High Court, the statute is required to use the word “from” and for the purpose of including the last in a series of days or any other period of time, to use the word “to”. The departure made from the provisions of Section 9 of the General Clauses Act by Parliament, therefore, deserves serious consideration.

12. Indisputably, the notice was issued on the 31st day and not within a period of thirty days from the date of receipt of intimation from the bank. If Section 9 of the General Clauses Act is not applicable, clause (b) of the proviso appended to Section 138 of the Act was required to be complied with by the respondent for the purpose of maintaining a complaint petition against the appellant.

13. In *Munoth Investments Ltd. v. Puttukola Properties Ltd.*, (2001) 6 SCC 582 construing clause (a) of the proviso appended to Section 138 of the Act, this Court held: (SCC pp. 583-84, para 5)

“5. In our view, the High Court committed material irregularity in not referring to the aforesaid evidence

which was recorded by the Metropolitan Magistrate. Section 138(b) of the Act inter alia provides that the payee has to make demand for the payment of money by giving a notice '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'. So fifteen days are to be counted from the receipt of information regarding the return of the cheque as unpaid. In the present case, it is the say of the complainant that the cheque was presented for encashment on 12th; it was returned to the Bank on 13th and information was given to the complainant only on 17th, as 14th, 15th and 16th were Pongal holidays. The learned counsel fairly pointed out that in the complaint it has been stated that the complainant had received intimation with regard to the return of the said cheque from his banker on 13-1-1994. However, he submitted that this is an apparent mistake and for explaining that mistake the appellant has led the evidence before the trial court. Undisputedly, he pointed out that in the State of Tamil Nadu, 14-1-1994 to 16-1-1994 there were Pongal holidays and, therefore, the appellant came to learn about the dishonour of his cheque on 17-1-1994."

We, with respect, agree with the approach of the learned Judges.

14. Our attention has furthermore been drawn to a decision of the Kerala High Court in *K.V. Muhammed Kunhi v. P. Janardhanan*, 1998 Cri LJ 4330 (Ker), wherein construing clause (a) of the proviso appended to Section 138 of the Act, a learned Single Judge held: (Cri LJ p. 4331, para 3)

"3. ... A comparative study of both the sections in the Act and the General Clauses Act significantly indicate that the period of limitation has to be reckoned from the date on which the cheque or instrument was drawn. The words 'from' and 'to' employed in Section 9 of the General Clauses Act are

evidently clear that in cases where there is an ambiguity or suspicion with reference to the date of commencement of period of limitation in any Act or special enactment, the words 'from' and 'to' employed in Section 9 of the General Clauses Act can be pressed into service." (See also *K.C. Nanu v. N. Vijayan*, (2007) 1 KLJ 326).

We are in agreement with the aforementioned view."

11. In view of the legal position that the notice of demand has to be issued within 30 days period, I am of the opinion that the complaint of Respondent No. 2 against the Petitioner is not maintainable. Thus, the impugned order of summoning and the proceedings pursuant thereto are quashed.

12. Petition and application are disposed of accordingly.

(MUKTA GUPTA)
JUDGE

MARCH 20, 2012
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