IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRI. WRIT PETITION NO. 734 OF 2015

Shahnawaz Y. Rais ... Petitioner.

V/s.

Adil Khalil Bhure & Ors. ... Respondents.

Mr. K. H. Holambe Patil a/w. S.K. Saxena, Advocate for the Petitioner.
Mr. A.P. Mundargi, Senior Advocate a/w. Mr. Subhash Desai & Mr. Hrishikesh Chavan, Advocate for Respondent No.1.

Mr. D. P.Adsule, APP for the State.

CORAM : A. V. NIRGUDE, J.
DATED : 17th NOVEMBER,2015

P.C. :

1 The facts leading to this petition are quite peculiar and can be stated in brief as under :

2 The petitioner and his wife apparently advanced a loan of Rs. 3,00,00,000/ (Rs.Three crores) to Respondent No.1. To repay the loan, Respondent No.1 issued six cheques in favour of the petitioner and his wife Mrs. Jabeen. I am told across the bar that three cheques were issued in favour of the petitioner and three cheques were issued in favour of his wife Jabeen. The cheques got bounced. Surprisingly the petitioner

alone issued a notice under section 138 of the Negotiable Instruments Act, 1881, demanding the amount of Rs.Three crores from Respondent No.1. Respondent No.1 in reply, took a specific defence and denied his liability.

3 Since the amount demanded through the legal notice was not paid by respondent no.1, the petitioner and his wife Jabeen filed one complaint, pursuant to the notice given by the petitioner alone. The question is whether such a complaint is viable and maintainable. It is obvious that the notice was defective because it was not issued on behalf of Mrs. Jabeen also. It is argued that this notice cannot be said to be defective to the extent of the cause of action that arose in favour of the petitioner. The petitioner did receive some cheques from respondent no.1 and these cheques were bounced. The petitioner gave notice, served it properly and respondent no.1 did not repay the amount. So at least to the extent of the petitioner alone the cause of action had arisen. In other words, the learned counsel for the petitioner tried to suggest that the complaint would survive and it should be allowed to continue to the extent of the cause action that arose in favour of the petitioner in respect of the cheques which he had received. He also urged that the court should be lenient to take this view because the petitioner is the victim of this crime.

4 Indeed the petitioner had an independent cause of action in respect of the cheques he had received and which got bounced. He should have issued a notice only in respect of those cheques. The provisions of section 138 are quite peculiar and in order to discuss the submission at the bar, I must quote the same here :

> "**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 be extended to two years], 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 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 thirty 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.
>
> Explanation : For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]

5 In respect of the few cheques, the Petitioner was the "payee". The provisions of section 138 of the Negotiable Instruments Act, 1881, expects the petitioner to make a demand for payment of the "amount of money mentioned in the cheque" by giving a notice in writing to the "drawer" of the cheque. Unless such step is taken, the payee cannot start penal action against the drawer. In this case, the petitioner did not mention anywhere in the notice as to how many cheques and/or what amount he had to receive and/or to what amount he was then entitled to. Such a specific statement is required to be made in the notice. The notice vaguely states that the petitioner received 8 cheques and all of them bounced etc.. Had the said notice mentioned particulars

of cheques issued in favour of the petitioner separately from particulars of cheques issued in favour of his wife Jabeen, probably I could have accepted the submission of the learned counsel for the petitioner and would have allowed the petitioner to continue with his case. Section 138, which is quoted above, contains a specific proviso, prohibiting the court from initiating action unless the condition precedent for sending notice in a particular form is complied with. In absence of such a notice, no cognizance can be taken. The order passed by the lower court appears to be correct and dose not require any interference by this court.

6 In the result, the writ petition is dismissed.

(A.V.NIRGUDE,J.)

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