IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 905 OF 2014

Smt. Halima Khojam Dawoodi ..Petitioner

v/s.

The State of Maharashtra & Anr. ..Respondents

Mr. Mohd. Saeed Asgar Moghul for the Petitioner.
Mrs.R.V.Newton, APP for the State.
Ms. Aruna Singh for the Respondent No.2.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED : SEPTEMBER 08, 2015.

P.C.

1. Heard. Rule. Rule made returnable forthwith. By consent of parties taken up for hearing.

2. The petitioner is the accused in C.C.No.4300676/SS/2012 filed by the respondent no.2-complainant under Section 138of Negotiable Instruments Act before the Court of the Metropolitan Magistrate's 43rd Court, Borivali, Mumbai. She has challenged the order dated 24.12.2012, whereby the

learned Metropolitan Magistrate, 43rd Court, Borivali, has issued process against her for offence punishable under Section 138 of the N.I.Act. The petitioner has filed this petition for quashing and setting aside the order dated 24.12.2012.

3. The learned Counsel for the petitioner has submitted that the subject cheque was in the name of Murgan Swaminathan Nadar, whereas the name of the complainant is Murgesh Swaminathan Naidu. He therefore claims that the complainant was not the holder in due course and hence was not competent to file the complaint.

4. The learned Counsel for the petitioner has further submitted that the statutory notice was sent on 3.4.2012, whereas the averments in the complaint reveal that the cheque was returned/dishonoured for “insufficient funds” as per the cheque return memo dated 1.3.2012. Learned Counsel for the petitioner therefore claims that the notice was sent after the expiry of period of 30 days and hence the complaint under Section 138 of the Negotiable Instruments Act is not maintainable.

5. The Learned Counsel for the petitioner has further stated that the cause title of the complaint reveals that the petitioner as well as the respondent/complainant are the residents of “Chincholi Phatak 669, Squatter Colony, Goregaon (East), Mumbai 400 064”. He claims that the statutory notice was issued at the address of the complainant and hence there was no proper service of the notice.

6. Per contra the learned Counsel for the respondent no.2 has submitted that the cheque return memo was received sometime on 5th March 2012 and this fact was not stated in the complaint due to inadvertance. He has further stated that the complainant is a resident of Room no.667 and that due to inadvertance the room number is mentioned as 669. He has submitted that the averments made in the complaint prima facie disclose the ingredients of offence under Section 138 of the Negotiable Instruments Act, hence the learned Magistrate was justified in issuing the process under Section 138 of the Negotiable Instruments Act.

7. I have perused the record and considered the submission made by the respective parties.

8. Section 138 of Negotiable Instruments Act, 1881 reads as follows:

> " [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 [19] [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, [20] [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.]

9. Section 142 of Negotiable Instruments Act reads as follows-

[142 Cognizance of offences. —Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138......

10. A plaint reading of Section 138 and 142 of the Negotiable Instruments Act makes it clear that in order to attract Section 138 Negotiable Instruments Act the following requirements are essential:

a) The cheque for an amount is issued by the drawer to the payee/complainant on a bank account maintained by him.

b) The said cheque is issued for the discharge, in whole or in part of any debt or orther liability.

c) The cheque is returned by the bank unpaid on account of insufficient amount to honour the cheque or it exceeds the amount arranged to be paid from that account by an agreement made with the bank.

d) The cheque is presented to the bank within 6 months from the date on which it is drawn or within the period of its validity.

e) 30 days demand notice is issued by the payee or the holder in due course on receipt of information by him from the bank regarding the dishonour of the cheque.

f) The drawer of said cheque fails to make the payment of the said amount of the money to the payee or the holder in due course within 15 days of the said notice.

g) The debt or liability against which the cheque was issued is legally enforceable.

h) A written complaint is made by the payee or as the case may be, the holder in due course of the cheque.

i) Such complaint is made within one month from the date of cause of action arises under Section 138(c) of the proviso, unless delay in filing complaint is condoned for sufficient grounds.

11. In the instant case, the respondent no.2 complainant had alleged that sometime in the month of July 2008, the petitioner and her husband Khozem Dawoodi had told him that they could help him in setting up

business at Oberoi Mall and had induced him and his wife to pay Rs.5 lakhs to arrange for a counter at Oberoi Mall. Between the period from 2008 to 2010 the respondent no.2 paid to the petitioner and her husband cash of Rs.6,50,000/-, but the respondent no.2 and her husband did not arrange for any such counter and subsequently expressed their inability to arrange for the counter and agreed to return the money to the respondent no.2. When the petitoner and her husband were told to give some security, they prepared a loan agreement dated 25.8.2011, which stated that the petitioner and her husband had taken friendly loan from the respondent no.2 and his wife. The petitioner claims that the contents of the said loan agreement were not correct and that they were compelled to sign the same.

12. The respondent no.2 has further claimed that the petitioner herein on behalf of her husband issued cheque no.190057 dated 28.8.2011 for Rs.50,000/- towards part payment of the money received. The respondent no.2 presented the said cheque on or about 25.2.2012. The complainant has stated that he was informed that the cheque was returned unpaid/dishonoured for "insufficient funds" as per cheque return memo dated 1.3.2012. The respondent no.2 has further stated that by notice dated

2.4.2012, which was despatched on 3.4.2012, he had called upon the petitioner to pay the sum of Rs.50,000/- within the period of 15 days. The respondent no.2 claims that the petitioner did not pay the amount despite receipt of the said notice. Hence, the proceedings under Section 138 of the Negotiable Instruments Act came to be instituted.

13. It is to be noted that the subject cheque is not in the name of the respondent No.2 Murugesh Swaminathan Naidu, but was issued in favour of Murgan Swaminathan Nadar. Neither the complaint nor the statement under Se tion 200 of Cr.P.C. reveals that the respondent no.2 Murgesh Swaminathan Naidu is also known as Murgan Swaminath Nadar. The complaint was therefore not filed by the payee or the holder in due course of the cheque, and consequently does not meet the requirement under Section 142 of the Negotiable Instruments Act.

14. Furthermore, in terms of proviso to Section 138 of Negotiable Instruments Act, the statutory notice was required to be sent within the period of 30 days from the receipt of information about the dishonour of cheque from the bank. In the complaint as well as in the statement under

Section 200 Cr.P.C. the complainant had stated that he was informed by his bank that the cheque was dishonoured for "insufficient funds" as per the cheque return memo dated 1.3.2012. The statutory notice was sent on 3.4.2012 which is beyond the period of 30 days from the date of receipt of information.

15. Be that as it may, the Respondent-complainant had sent the statutory notice to the petitoner by speed post and courier service. Though the complainant has stated that the notice was duly served on the petitioner accused, the remark on the envelope sent by the speed post shows that the same was returned "unclaimed". Similarly, the notice sent by courier was not delivered and was returned with endorsement "person is not there".

16. It is pertinent to note that both these notices were dispatched at the address "Chincholi Phatak 669, Squatter Colony, Goregaon (E), Mumbai 400 064." It can be seen from the complaint that it is the address of the complainant which is stated in the complaint is the address of the complainant as well as the accused. Whereas in the FIR No.254 of 2012 lodged by the complainant against the accused in respect of the same transaction reveals that the address of the complainant as well as accused is

shown as “Squarters Colony, Room No.667, Near Bridge, Goregaon (East), Mumbai 400 064”. In the light of this discrepancy, the complaint on the face of it does not show that the notice was dispatched at the correct address so as to draw presumption under clause 27 of the General Clauses Act.

17. Under the circumstances, in my considered view, the complaint does not satisfy the mandatory requirments of Section 138 of the Negotiable Instruments Act.

. Hence the writ petition is allowed. The impugned order dated 24.12.2012 in C.C.No.4300676/SS/2012 is quashed and set aside. Rule is made absolute.

(ANUJA PRABHUDESSAI, J.)

CERTIFICATE

Certified to be true and correct as per the original signed judgment/order.