

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

FRIDAY, THE 30TH DAY OF OCTOBER 2015/8TH KARTHIKA, 1937

Crl.Rev.Pet.No. 3764 of 2006 ()

AGAINST THE JUDGMENT IN CRL.APPEAL 109/2003 of ADDITIONAL SESSIONS
JUDGE FAST TRACK COURT-1, PALAKKAD DATED 11-07-2006

AGAINST THE JUDGMENT IN ST 274/1999 of CHIEF JUDICIAL MAGAISTRATE
COURT, PALAKKAD DATED 30-01-2003

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

SRI.SHIHAHBUDDIN AHAMMED,
PROPRIETOR BABU LODGE, MARKET ROAD,
PALAKKAD-678 014.

BY ADVS.SRI.P.VIJAYA BHANU
SRI.M.REVIKRISHNAN

RESPONDENT(S)/RESPONDENTS/COMPLAINANT AND STATE:

1. SRI.A.K.KRISHNARAJ,
S/O.KUTTAPPAN, DIARA STREET, KOPPAM
PALAKKAD.

2. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

R2, BY PUBLIC PROSECUTOR SRI. N. SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 30-10-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

acd

'C.R.'

P.D. RAJAN, J.

Crl.R.P.No.3764 of 2006

Dated this the 30th day of October, 2015

ORDER

The question is whether non mentioning of the cheque number in the notice issued by the "payee or the holder of the cheque" amounts to non-compliance of S.138(b) of the Negotiable Instruments Act? This revision petition was preferred against the judgment in Criminal Appeal No.109/2003 of the Additional Sessions Judge, Fast Track-I, Palakkad. The revision petitioner was the accused in S.T.No.274/1999 before the Chief Judicial Magistrate, Palakkad for having committed an offence punishable u/s.138 of the Negotiable Instruments Act (hereinafter referred to as the N. I. Act). The complainant's case in the trial Court

was that the accused borrowed a sum of ₹1 lakh from him and in discharge of that debt, he issued Ext.P1 cheque. When it was presented for encashment, it was dishonoured for the reason of funds insufficient. The complainant, who is the holder of the cheque demanded the amount by issuing a notice in writing to the drawer of the cheque. Even after notice, there was no repayment, hence the complaint.

2. During trial, complainant was examined as PW1 and his documents were marked as Exts.P1 to P6. The accused did not adduce any defence evidence. The learned Chief Judicial Magistrate, Palakkad convicted the accused u/s.138 of the N.I. Act and sentenced to simple imprisonment for three months and ₹1,00,000/- as compensation u/s.357(3) Cr.P.C. Against that, he preferred criminal appeal 109/2003 before Additional

Sessions Judge, Fast Track-I, Palakkad which was dismissed by the appellate Court. Being aggrieved by that, he preferred this revision petition.

3. Sri. Vijaya Bhanu, the learned counsel appearing for the revision petitioner contended that the cheque number mentioned in the complaint as well as in Ext.P4 notice is different and if it is not mentioned correctly in the notice, there is no cause of action as claimed u/s.138 (b) of the N.I. Act. When there is no proper notice, the conviction and sentence passed by the trial Court is to be set aside. He relied the decisions reported in Bank of Baroda v. Philip Thomas [2006(3) KLT 729] and John K. Abraham v. Simon C. Abraham [2014 (1) KLT 90 (SC)].

4. I have heard the learned Public Prosecutor.

5. For maintaining a complaint service of notice is mandatory. This legal liability on the part of payee or the

"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 year, or with fine which may extend to twice the amount of the cheque, or with both:

(a) xxx xxx xxx

(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 falls 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."

It is seen from the Section extracted above that there is no express form of notice u/s.138 of the N.I. Act and the form in which the notice has to be issued is immaterial. It is pertinent to note that the notice, however, has to be issued in writing and an oral demand does not satisfy the requirement.

6. Apex Court in Rahul Builders v. Arihat Fertilizers & Chemicals [(2008) 2 SCC 321] explained the requirement and form of notice as follows:

10. Service of a notice, it is trite, is imperative in character for maintaining a complaint. It creates a legal fiction. Operation of Section 138 of the Act is limited by the proviso. When the proviso applies, the main Section would not. Unless a notice is served in conformity with Proviso (b) appended to Section 138 of the Act, the complaint petition would not be maintainable. The Parliament while enacting the said provision consciously imposed certain conditions. One of the conditions was service of a notice making demand of the payment of the amount of cheque as is evident from the use of the phraseology "payment of the said amount of money". Such a notice has to be issued within a period of 30 days from

the date of receipt of information from the bank in regard to the return of the cheque as unpaid. The statute envisages application of the penal provisions. A penal provision should be construed strictly; the condition precedent wherefor is service of notice. It is one thing to say that the demand may not only represent the unpaid amount under cheque but also other incidental expenses like costs and interests, but the same would not mean that the notice would be vague and capable of two interpretations. An omnibus notice without specifying as to what was the amount due under the dishonoured cheque would not subserve the requirement of law.

7. Apex Court in Suman Sethi v. Ajay K. Churiwal

[2000 SCC (Cri) 414] held as follows:

"This Court had occasion to deal with Section 138 of the Act in Central Bank of India v. M/s. Saxons Farms, (1999) 8 JT (SC) 58 : (1999 AIR SCW 3621 : AIR 1999 SC 3607 : 1999 Cri LJ 4571) and held that the object of the notice is to give chance to the drawer of the cheque to rectify his omission. Though in the notice demand for compensation, interest, etc. is also made drawer will be absolved from his liability u/S. 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 complaint is filed.

8. A close reading of Section 138 of the N.I. Act, shows that only the payee or holder of the cheque in due

course is entitled to make a demand for payment of such amount by giving a notice in writing to the drawer of the cheque. After receipt of notice by the drawer of the cheque, if there is non payment of the due amount, the payee can file a complaint. In this case, PW1 presented Ext.P1 cheque for encashment and it was dishonoured for the reason of funds insufficient. Ext.P2 is the dishonour memo. Ext.P3 is another memo. He demanded money by giving a notice in writing. Even after receipt of notice, there was no repayment. Ext.P4 series are postal receipt and copy of lawyer notice. Ext.P5 is the returned notice to the sender. Ext.P6 is the extract of the ledger. Analysing the evidence of Exts.P1 to P6, it is clear that the cheque was dishonoured for the reason of funds insufficient. In the trial Court, revision petitioner took another contention that the notice u/s.138(b) was not received by him and no

complaint is maintainable under Section 138 of N.I. Act.

The trial court observed that the notice was returned 'unclaimed' and relied the decision of the Apex Court in Bhaskaran v. Balan[1999 (3) KLT 440], in which it was held that the notice refused by the addressee can be presumed to have been served on him. But in this revision he has not raised that contention, but he insisted to mention the cheque number in the notice.

9. Before preferring a complaint, the payee or the holder of the cheque has to make a demand by giving a notice in writing u/s.138(b) of the N.I. Act. Ext.P4 series is the lawyer notice and postal receipt. It is true that in the issued notice, there is a difference in the number of the cheque. It is clear from Section 138 (b) of the N.I. Act, no express or specific form of notice has been prescribed under the N.I. Act. Therefore, the accused

cannot take a contention that the notice has to be issued in a specific form and any error crept in mentioning the number invalidates a negotiable instrument. The learned Magistrate relied the decision of this Court in Viswanathan v. Ramachandran Nair [1996(2) KLT 449], in which it was held that there is no requirement u/s.138 of the N.I. Act stating the number of the cheque in the notice. When there is a mistake in stating the number of the cheque, the notice was held to be not bad, since the drawer of the cheque could not be misled. Delhi High Court in Santosh Arora v. Jai Narain Aggarwal & State [2010 CrLJ (NOC) 449 (Del)] held that if the details given in the notice are sufficient to bring to the knowledge of the drawer that cheque issued by him has not been dishonoured, mere non- mentioning of the number of the cheque or giving incorrect number would not be fatal.

10. Service of a notice is trite and obligatory for maintaining a complaint. S.138 does not speak of cheque number in a notice. It contemplates giving of a notice in writing. When statute does not prescribe service of notice by specifying the number, it is difficult to hold that the notice was defective. Further, the notice in writing is sufficient by informing the accused about the dishonour of the cheque issued by him to clear the payment of the cheque. When cheque is dishonoured for the reasons stated u/s.138 of the N.I. Act, a presumption u/s.139 of the N.I. Act can be drawn in favour of the holder of the cheque. Therefore, when the cheque number is not mentioned or there is a mistake in the number mentioned in the cheque, the accused cannot claim that the notice is bad or not in proper form to invalidate the cause of action. However, that contention advanced by the learned counsel

for the revision petitioner is to be discarded. What is necessary under S.138(b) of the N.I. Act is that a demand for the amount covered by the dishonoured cheque, which is apparently clear in the notice. Appreciating this legal aspect, the learned Magistrate convicted the revision petitioner, which was upheld by the appellate Court. I do not find any illegality in the conviction of the Courts below. Considering the facts and circumstances of the case, the sentence is modified as follows:

The revision petitioner is sentenced to undergo imprisonment till rising of the Court u/s.138 of the N.I. Act and to pay compensation of ₹1 lakh u/s.357(3) Cr.P.C. in default simple imprisonment for three months. The revision petitioner is directed to surrender in the Chief Judicial Magistrate, Palakkad forthwith to undergo the modified sentence, failing which the learned Magistrate

shall issue non bailable warrant against the revision petitioner.

Crl.R.P. is disposed of as above.

P.D. RAJAN, JUDGE.

acd