# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
# CRIMINAL APPELLATE JURISDICTION

## CRIMINAL APPEAL NO.722 of 2005

Shri Ramsing Baguji Kolhe
(since deceased through)
Smt. Ranjana Ramsingh Kolhe ... Appellant

v/s.

Shri Ganibai Dawood Patel & anr. … Respondents

Mr.S.V.Sawant a/w. Ruchita Kadam for the appellant.
Mr. Kaustubh Dube i/b. U.B. Nighot for respondent no.1.

**CORAM : DAMA SESHADRI NAIDU, J.**

**2nd August 2019.**

**P.C.**

The appellant claims to have sold grapes to the respondent, who in turn issued a cheque for Rs.1,00,000/-. It was to discharge a part of the debt. When presented, the cheque was bounced. After issuing the statutory notice, the appellant filed a complaint under Section 138 of the NI Act. Junior Magistrate, First Class, Junnar, tried the respondent in CC No.313 of 2000 but eventually acquitted him. Aggrieved, the appellant has filed this appeal against acquittal.

**Submissions:**

**The Appellant:**

2. Shri Sanjeev Sawant, the learned counsel for the appellant, has submitted that the debt has been admitted, but the trial Court has dismissed the complaint on a technicality: the statutory notice is vague. In that context, he has submitted that though the notice contained other amounts, the demand was confined to the cheque amount. In elaboration, he has submitted that the respondent had purchased loads of grape from the appellant, and to discharge a part of the debt, he issued the cheque. So, in the notice, the appellant only contextualized the transaction and narrated the sequence of events in the notice. Then in the end, he demanded the cheque amount. According to him, the notice is in the least vague.

3. To support his contentions, Shri Sawant has relied on *Pandurang Ramchandra Ghorpade v. Shri Vijay Gopala Lohar*[1] rendered by the learned Single Judge of this Court, and *Suman Sethi v. Ajay K. Churiwal*[2].

**Respondent:**

4. In response, Shri Kaustubh Dubey Patil, the learned counsel for the respondent, has submitted that the statutory mandate under Section 138 is unmistakable. Unless the notice expressly demands the

1 2015 ALL MR (Cri) 4806
2 (2000) 2 Supreme Court Cases 380

amount covered by cheque, the law does not obligate the drawer of the cheque to respond to that notice. To support his contention, he has relied on *Rahul Builders v. Arihant Fertilizers & Chemicals*[3].

5. Heard Shri Sawant for the appellant and Shri Kaustubh Dube for Respondent No.1.

**Discussion:**

6. As both the counsel agree, the issue falls in a narrow compass. And, in fact, the debt stands admitted—as rightly pointed out by the appellant's counsel. But the issue turns on a technicality. Then the question is whether the statutory notice suffers from any vagueness. Harsh as it may sound, the notice does suffer from vagueness, and I wish it were otherwise.

7. To contextualize the dispute, I may note that the respondent purchased from the appellant grapes worth Rs.2,15,000/-. The notice contains no date about the purchase, but that lacuna holds no importance. The respondent issued a cheque for Rs.1,00,000/-, after paying Rs.60,000/- in cash. Still there remained Rs.55000/- balance.

8. The appellant presented for encashment the cheque, dated 15th April 2000, drawn on the Muslim Co-operative Limited, Pune Branch. He presented that cheque through Rajgurunagar Sahakari Bank Ltd. Branch Narayangaon, Taluka Junnar, District Pune, in which he had the account. But on 14th June 2000, the cheque was returned unpaid

[3] 2008(4) Mh.L.J. 365

for insufficient balance.

9. So the appellant issued the statutory notice under Section 138 on 19th June 2000. The respondent has not paid the amount, nor has he replied to the notice. Under those circumstances, the appellant filed CC No. 313/2000 before Judicial Magistrate of First Class, Pune District.

10. Incidentally, the notice was issued in the Marathi language. The appellant's counsel himself has provided to the Court the English version of the notice. That version has not been disputed by the respondent counsel. As much turns on the contents of the notice, I rely on the translation provided by the appellant's counsel.

11. The record reveals that during the trial, the appellant got himself examined as PW1, besides examining the PW2, who is an employee of payee bank. The accused responded to question No.6, under Section 313 of Cr PC., by saying that the amount in the notice was not proper, so he has not paid the amount.

12. In that context, the trial Court has observed that the notice mentioned Rs.1,00,000/-, besides mentioning Rs.55,000/- as the debt due. According to the trial Court, there is no specific demand for the repayment of Rs.1,00,000/- in the notice.

13. Indeed, the appellant's counsel has insisted that for the balance Rs.55,000/-, there was a separate agreement. Because of what was felt to be an ambiguity in the statutory notice, the trial Court

acquitted the respondent-accused.

14. As I have already noted the entire case hinges on the statutory notice. Plainly put, the question is whether that punitive vagueness absolves the respondent from his liability, as mandated under Section 138 of the Negotiable Instruments Act.

15. The notice first informs the respondents that he had purchased grapes worth Rs.2,15,000/- from the appellant. That remains undisputed. The appellant then admits in the notice that the respondent paid Rs.60,000/- towards partial discharge of the debt. To have the remaining 1,55,000/- the appellant had repeatedly asked the respondent. Eventually, the respondent issued a cheque for Rs.1,00,000/- "for the balance amount of Rs.55,000/- [the respondent has] given in writing".

16. The notice then speaks of the presentation of the cheque and its dishonor for insufficient balance. Now comes the crux of the notice, and it reads:

> "Hence the present notice is issued to you and you are informed and further called upon under this notice *to pay the entire amount to my client within 15 days from the date of receipt of this notice and take acknowledgement for the same.* You have issued cheque in favour of my client in spite of knowing that there is no sufficient funds/amount in your account and your this act was with mala fide intention only with a view to cheat my client. My client states that said cheque issued by you is dishonoured and, therefore, you are liable to face action by filing criminal complaint under the provisions of Indian Penal Code.

> You are called upon to comply with the contents of this notice, failing which my client will be compelled to adopt and file both civil and criminal proceedings against you on you entire risk as to cost and consequences. The cost of the present notice of Rs.500/- is kept upon you.
>
> You should not adopt false defence that notice is not received by you within time, therefore, as a matter of abandoned precaution this notice is also sent to you under ordinary post simultaneously, which you may note."
>
> (italics supplied)

17. Had this notice been issued in civil proceedings, I reckon the Court would have held that it requires a different standard of interpretation. Here, first, Section 138 does not provide for a mechanism to recover any money, be it a debt. Recovery, if any, in the name of compensation or fine is only incidental. What is essential is a conviction under Section 138 of the NI Act. And the payment of fine or compensation does not absolve the debtor from his civil liability of re-paying the debt. At best, the civil Court could take judicial note of the criminal prosecution, including the amounts the debtor may have paid as fine or compensation.

18. The adjudication under Section 138 of NI Act may result in incarceration. So the standard of proof on a transaction which is otherwise contractual is higher. The Complainant needs to prove the guilt of the accused beyond a reasonable doubt. If on the same

transaction—that is, based on the very cheque, which is a negotiable instrument—if the creditor were to initiate civil proceedings, the standard of proof would be plain preponderance of probability.

19. In this case, as the counsel on either side inform the Court, the appellant did file a civil suit for the balance Rs.55,000/- and secured a decree. But neither counsel is sure whether those decretal fruits were realised.

20. I reckon the notice suffers from vagueness. It first mentions the total debt. Then it acknowledges the part payment. Then it speaks about the amount covered by cheque and also the balance amount still to be paid. Indeed, the appellant's counsel contends that there is a separate agreement for that balance amount. And on that count, the notice reads: "For the balance amount of Rs.55,000/- you have given in writing". If we read between the lines, we may understand what has been given in writing is perhaps the respondent's undertaking to pay the balance Rs.55,000/-. I am prepared to accept the appellant's contention to that extent.

21. Now comes the demand, and the demand encompasses, as the appellant puts it in the notice, "the entire amount".

22. The notice nowhere excludes Rs.55,000/-, for which there is said to be something else—an agreement—in writing. I am afraid technical as it may sound, given the penal consequences the Courts have leaned towards a strict interpretation of the notice under Section

138 of NI Act. Nowhere has the notice mentioned that the respondent had to pay the cheque amount. If the appellant's intention is only to recover the cheque amount, the expression "the entire amount" is a superfluity. I would have taken that expression, that is the entire amount, as a reference to the cheque, had there been no other amount due from the respondent and not mentioned in the notice.

23. In *Suman Sethi v. Ajay K. Churiwal,* 2000 Cri LJ 1391, the Supreme Court has observed that the notice has to be read as a whole. In the notice, demand has to be made for the "said amount", that is the cheque amount. If no such demand is made, the notice no doubt would fall short of its legal requirement. Besides that, Suman Sethi has held that if the notice contains an omnibus demand without its specifying what was due under the dishonoured cheque, the notice might well fail to meet the legal requirement and may be regarded as bad.

24. Quoting *Suman Sethi* with approval, *Rahul Builders* holds that it is one thing to say that the demand may represent the unpaid amount not only 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." The respondent was not called upon, it observes, to pay the amount which was payable under the cheque issued by it.

25. On the other hand, let us examine the ratio of the decisions the appellant's counsel has relied on. In *Pandurang Ramchandra Ghorpade*, the appellant received two cheques from the respondents. On presentation, they were dishonoured. He issued two notices and filed two complaints under Section 138 of the NI Act. After holding two trials, the learned Magistrate found the respondent not guilty. The Magistrate, however, concluded that the complainant failed to prove that he had demanded the cheque amount by issuing a notice in writing to the accused. That is, the learned Magistrate has observed that the complainant demanded only the hand loan by issuing the said notices and had not demanded the amount of the cheques.

26. On appeal, this Court, per a learned Single Judge, has held that no particular form of notice is prescribed under Section 138(b) of the NI Act. Though two separate notices had been issued, they were issued on the same date; there was no defect in notices, to hold there had been no compliance of Section 138(b) of Act. *Pandurang Ramchandra Ghorpade* has further held that if the notices are properly read, it becomes clear that "by each notice the amount of the cheque mentioned therein, was being demanded and by both the notices together, the loan amount was being demanded." It can be said that the complainant could have done better, it has gone on to observe, by not referring to the 'loan amount' at all, in the concluding part of any of the two notices, and that the complainant should have mentioned only of

the cheque amount, in each of the two notices. Then, in that context, it has emphasised that this "lack of precision on the part of the complainant cannot result in holding the notices to be invalid in either of the cases, so as to treat that there had been no demand for the payment of the amount of the cheque in either of these cases."

27. Regrettably, one more case perishes on the altar of technicality. The adjudication of disputes under Section 138 of the N.I. Act, contractual the violations may have been, assumed a finer forensic aura. It is because they are quasi-criminal offences and result in the defaulter's detention—incarceration.

28. This case demonstrates that an ounce of care and caution at the preparatory stage—at the stage of notice—saves a ton of trouble during the trial. In every case under NI Act, notice is the fulcrum, around which the whole case revolves. Granted, *Rahul Builders* requires narrow construction of the notice.

29. The icing on the cake comes from the appellant's cross-examination. He has admitted that he has demanded, through the notice, the entire amount, and his admission reads:

> "It is not true to say that the notice issued to accused at Chincholi only for encashment of the cheque".

30. Infelicitous as the language is, the appellant did admit, as the respondent counsel contends, that he had demanded the entire loan. That admission forestalls any judicial effort to read the judgment in a

different light. It is the former who lost an opportunity to recover an admitted amount, though.

I, therefore, dismiss the appeal.

**(DAMA SESHADRI NAIDU, J)**

L.S. Panjwani, P.S.