

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.96 OF 2017

Annand Madhavrao Sarnaaik & Anr.

.....Petitioners

Versus

The State of Maharashtra & Anr.

.....Respondents

Mr. Rishi Bhuta a/w. Manish Bohra i/by M/s. A.S. Khan & Associates,
Advocate for the Petitioners.

Mr. S.S. Hulke, APP for the Respondent-State.

Ms Bhambwani Asha Mirchumal, Advocate for Respondent No.2.

CORAM : SURENDRA P. TAVADE, J.

DATE : 10th JANUARY, 2020

ORAL JUDGMENT:

1. Heard learned counsel for the respective parties.
2. Respondent No.2 had filed criminal complaint bearing C.C.No.1484/SS/2014 under Section 138 of the Negotiable Instruments Act, 1881 against the petitioners. On the basis of the same, the process was issued against the petitioners. The petitioners have challenged the order of issuance of process on the ground that the notice under Section 138 (b) of the Negotiable Instruments Act, 1881 is without demand of the amount of dishonored cheque. It is contended that the notice issued by the respondents is bad in law because the same does not give rise to cause of action to them to file a complaint. It is also contended that the process was wrongly issued by the trial Court and the same be quashed and set aside.

3. Notice was served upon the respondents/original complainants and they appeared through their counsel. The respondents have filed documents viz. the affidavit of evidence filed in the original complaint and the documents relied upon by the respondents viz. power of attorney, bill of exchange, letter by the accused, dishonoured cheque, bank memo issued by the bank, legal demand notice, receipt of UPC and the returned envelope.

4. Learned counsel for Respondent No.2 contended that the matter is part heard. Respondent No.2 is in witness box. His cross examination is not yet started. It is contended that there is no specific demand of the amount of dishonoured cheque, but the sum and substance of the notice shows that the cheque was dishonoured and legal action would be taken against the petitioners. She further contended that there is a technical flow of the notice, but that can be ignored because the matter is lingering for more than five years in the trial Court. The petitioners have deliberately delayed the trial and took disadvantage of the technical flow of the notice. Hence, she contended that the petition be dismissed.

5. Perused the complaint and the documents. The crucial document is the demand notice because the entire case revolves around the demand notice. For this purpose, it is required to be produced the provisions of Section 138(b) and (c), which read as under:-

138.....

(a).....

(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.*

6. If Section 138(b) is perused, it is crystal clear that after dishonor of cheque, the payee or holder in due course, is required to make demand for payment of the said amount of money by giving a notice in writing to the drawer of the cheque, within thirty days from the date of intimation of dishonored cheque. In the present case, after dishonoured of cheque, Respondent No.2 had issued notice dated 22nd March, 2014. In first paragraph of the notice, details of bill of exchange, amount of cheque, date of presentation of dishonoured cheque, date of dishonoured cheque are mentioned. It is specifically mentioned that cheque was returned unpaid by Saraswat Co-operative Bank on 25.02.2014 with the remarks "funds insufficient". Therefore, it was the ground for Respondent No.2 to issue notice under Section 138(b) of the Negotiable Instruments Act, 1881. In last paragraph of the said notice, it was mentioned that the cheque issued by the petitioner was dishonoured and he has committed an offence under Section 138 of the Negotiable Instruments Act, 1881. It was further mentioned that in view of the same, respondent is proceeding against the petitioners under Section 138 of the Negotiable Instrument Act, 1881 by way of legal action in the matter. Nowhere in the notice, the petitioners were called upon by Respondent No.2 to pay the amount of dishonoured cheque within 15 days of receipt of notice.

7. On this point, the provisions of Section 138(c) is very crucial wherein it is mentioned that if the drawer of cheque fails to make the payment of the

dishonoured cheque within 15 days from the date of receipt of the notice, the cause of action would arise for payee to file complaint under Section 138 of the Negotiable Instruments Act, 1881. In the present case, the respondents did not call upon the petitioners to pay the amount of dishonoured cheque within 15 days from the receipt of notice. Therefore, it appears that the petitioners remained silent to reply the notice. So the petitioners did not pay the amount of dishonoured cheque.

8. On this point, learned counsel for the petitioners relied upon the decision of Kerala High Court in the case of **C.P. Abdul Rasak vs. P. Gangadharan & Anr.**¹ wherein it was held that no demand made in notice, for payment of cheque amount. There was only an intimation to accused with regard to dishonour of cheque as contemplated under Section 138(b) of the Negotiable Instruments Act, 1881. In the said case, Respondent No.2 had issued notice to the petitioners informing him that the cheque issued by him was dishonoured. In the case of **C.P. Abdul Rasak (cited supra)**, the judgment of Apex Court in **Rahul Builders vs. Arihant Fertilizers and Chemicals**² was relied upon, wherein it was held:-

“Service of a notice, it is trite, is imperative in character for maintaining a complaint. It creates a legal fiction. Operation of S.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 S.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

¹ 2016 ALL MR (Cri.) JOURNAL 220

² 2007 (4) KLT 977 (SC)

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.”

9. The Apex Court has observed that the notice has to be issued within 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.

10. In the present case, there was no demand of amount of the dishonoured cheque in the notice. Therefore, the notice is bad in law in the light of the observation of the Apex Court.

11. Learned counsel for Respondent No.2 submitted that the Court should not consider the technical mistakes committed by Respondent No.2 because he had intention to file complaint against the petitioners. Hence, the said intention was disclosed from the notice itself, but I am not inclined to accept the said statement because as it is held by the Apex Court that the provision should be construed strictly. The entire case of the complaint under Section 138 of the Negotiable Instruments Act, 1881 depends on the notice itself. After issuance of demand notice, it was incumbent upon the drawer of a cheque to make payment to the payee, in default the payee gets right to file complaint under Section 138 of the Negotiable Instruments Act,

1881. In the present case, no demand was made, and therefore, the petitioners need not to make any payment. Hence, for want of proper demand notice, the prosecution is bad in law.

ORDER

1. The writ petition is allowed.
2. The order of issuing process dated 17th July, 2014 passed by the learned Metropolitan Magistrate, 58th Court, Bandra, Mumbai in C.C.No.1484/SS/2014 against the petitioners is hereby quashed and set aside.

[SURENDRA P. TAVADE, J.]