

Ghuge

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

WRIT PETITION NO.558 OF 2019

Arshad Abdul Wahid Qureshi ... Petitioner
V/s.
 Asif Abdul Wahid Qureshi and Anr ... Respondents

Mr. Irfan Shaikh for the petitioner.

Mr. Pankaj Kandhari i/b Mr. Taribun Khan for
 respondent No.1.

Mr. M.G. Patil, for respondent No.2/APP for the State.

CORAM : AMIT BORKAR, J.

DATED : APRIL 20, 2023

P.C.:

1. **Rule.** Rule made returnable forthwith.
2. Challenge in this petition is to the order dated 24th July, 2017 issuing process against the petitioner/(accused) in a proceeding under Section 138 of the Negotiable Instruments Act, 1881.
3. The facts giving rise to the petition is as under :-

Out of partnership his dispute between the brothers, Nine cheques were issued by the Petitioner. Out of Nine cheques, Five cheques as specified in paragraph 16 of the complaint were dishonoured. The chart provides details of the cheques dishonoured as under :-

Cheque no.	Drawn on	Amount	Cheque date	Check ret.
447464	Oriental bank of commerce	25,00,000/-	15/07/2016	30/9/2016

447465	Oriental bank of commerce	50,00,000/-	31/7/2016	30/9/2016
447466	Oriental bank of commerce	50,00,000/-	31/07/2016	30/9/2016
447467	Oriental bank of commerce	50,00,000/-	31/07/2016	30/9/2016
447468	Oriental bank of commerce	13,99,000/-	31/07/2016	30/9/2016

4. The total amount of cheque as averred in the complaint is Rs.1,88,99,000/- .

5. The statutory notice issued by the complainant makes demand is as under:-

“Under the above circumstances and fact as explained above, We are instructed by our client to demand from you through this Demand Notice that you immediately within the next 15 days from the date of receipt of this Demand Notice discharge your **“Legally Enforceable Liability”** by paying to our client **Rs.2,58,04,000/-** (Rupees Two Crores Fifty Eight Lakhs Four Thousand Only), the amount for which, cheques issued by you will not be honoured by your banker, alongwith the interest accrued on the total amount due @ 21% as agreed between you and out client and you are also liable to pay a sum of Rs.10,000/- towards the charges for the present notice”.

6. The petitioner has, therefore, challenged issuance of process interalia on the ground that the statutory demand notice makes demand in excess of the amount of the cheque and, therefore, it is invalid. In support of his submission he relied on the judgment in the case of **M/s. Rahul Builders Vs. M/s Arihand Fertilizer & Chemicals and Anr**, reported in 2008(1) SCC (Cri) 703 and **K.R. Indira Vs. Dr. G Adinarayana**, reported in 2003 (4) Mh.LJ 1081, **Suman Sethi Vs. Ajay K. Churiwal**, reported in 2000 (2) Mh.LJ 301.

7. Per contra, learned advocate for the complainant submitted that the stand of accused is dishonest. He precluded from raising such plea as does not lie in his mouth to raise such plea particularly when there is no dispute about amount of Rs.2,58,04,000/-. According to him, based on fiduciary relationship between the brothers the transaction was made and the accused is now raising technical plea which impermissible. According to him, the statutory notice is valid. The demand was based on Nine cheques which were issued by the accused. However, he presented only Five cheques and, therefore, the complaint was filed in relation to the dishonored cheques. To support his contentions he relied on the judgment in the case of **Ramnarayan Vs. Proprietor, Daulat Enterprises and Ors**, reported in MANU/MH/0893/2005.

8. I have considered the submissions made on behalf of both the sides. From the averments in the complaint and the material produced along with complaint following undisputed facts emerge.

(i) The accused issued Nine cheques. Out of Nine, Five cheques were dishonored.

(ii) Total amount of Five dishonoured cheques is Rs.1,88,99,000/-.

(iii) The statutory notice demands amount of Rs.2,58,04,000/- along with 21% interest and 10,000/- towards charges for notice.

9. Based on aforesaid undisputed fact, the question of law which arises for consideration is whether statutory notice under

Section 138 of the Negotiable Instruments Act, 1881 demanding excess amount than cheque amount is valid. The said question is no longer res integra in view of Judgment in the case of **Suman Sethi** (supra) and **M/s. Rahul Builders** (supra).

10. In the case of **Suman Sethi** (supra), the Apex Court in paragraph 5, 6 and 7 as held as under :-

5. We have to ascertain the meaning the words “said amount of money” occurring in clauses (b) and (c) to proviso to Section 138. Reading the Section as a whole we have no hesitation to hold that the above expression refers to the words “payment of any amount of money” occurring in main Section 138 i.e. the cheque amount. So in notice under clause (b) to the proviso, demand has to be made for the cheque amount. Dr. Dhawan, learned senior counsel has urged that the Section 138 being a penal provision has to be construed strictly. We may refer the decision of this Court in ***M. Narayan Nambiar v. State of Kerala, AIR 1963 Supreme Court 1116 : 1963(2) (Supp.) SCR 724.*** This Court considered the rule of construction of penal provision and quoted with approval the following passage of the decision of the Judicial committee in ***Dyke v. Elliot, 1872 LR 4 AC 184.*** The passage runs as follows :

“ No doubt all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included if thought of. On the other hand, the person charged has a right to say that the thing charged although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument according to the fair commonsense meaning of the language used,

and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument. ”

6. There is no ambiguity or doubt in the language of Section 138. Reading the entire Section as a whole and applying commonsense, from the words, as stated above, it is clear that the legislature intended that in notice under clause (b) to the proviso, the demand has to be made for the cheque amount. According to Dr. Dhawan, the notice of demand should not contain anything more or less than what is due under the cheque.

7. It is well settled principle of law that the notice has to be read as a whole. In the notice, demand has to be made for the “said amount” i.e. cheque amount. If no such demand is made the notice no doubt would fall short of its legal requirement. Where in addition to “said amount” there is also a claim by way of interest, cost etc. whether the notice is bad would depend on the language of the notice. If in a notice while giving up break up of the claim the cheque amount, interest, damages etc. are separately specified, other such claims for interests, cost etc. would be superfluous and these additional claims would be severable and will not invalidate the notice. If, however, in the notice an omnibus demand is made without specifying what was due under the dishonoured cheque, notice might well fail to meet the legal requirement and may be regarded as bad.

11. In the case of **M/s. Rahul Builders** (supra) the Apex Court in paragraph 10, 12 and 13 as held as under :-

“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 demand may not only represent the unpaid amount under the 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 dishonored cheque would not subserve the requirement of law. Respondent No.1 was not called upon to pay the amount which was payable under the cheque issued by it. The amount which it was called upon to pay was the outstanding amounts bills, i.e. Rs.8,72,409/-. The notice was to respond to said demand. Pursuant thereto, it was to offer the entire sum of Rs.8,72,409/-. No demand was made upon it to pay the said sum of Rs.1,00,000/- which was tendered to the complainant by cheque dated 30.04.2000. What was, therefore, demanded was the entire sum and not a part of it.

12. On this aspect of the matter, we may consider *K.R. Indira v. Dr. G. Adinarayan, 2003(4) RCR (Criminal) 966 : 2004(1) Apex Criminal 696 : [(2003)8 SCC 300]* wherein this Court upon noticing Suman Sethi (supra) stated the law, thus :

“..... However, according to the respondent, the notice in question is not separable in that way and that there was no specific demand made for payment of the amount covered by the cheque. We have perused the contents of the notice. Significantly, not only the cheque amounts were different from the alleged loan amounts but the demand was made not of the cheque amounts but only the loan amount as though it is a demand for the loan amount and not the demand for payment of the cheque amount, nor could it be said that it was a demand for payment of the cheque amount and in addition thereto made further demands

as well. What is necessary is making of a demand for the amount covered by the bounced cheque which is conspicuously absent in the notice issued in this case. The notice in question is imperfect in this case not because it had any further or additional claims as well but it did not specifically contain any demand for the payment of the cheque amount, the non-compliance with such a demand only being the incriminating circumstance which exposes the drawer for being demand only being the incriminating circumstance which exposes the drawer for being proceeded against under Section 138 of the Act....”

13. As in the instant case, no demand was made for payment of the cheque amount, we are of the opinion that the impugned judgment cannot be faulted”.

12. Conspectus of both the decision lays down the proposition of law that the demand notice cannot exceed the cheque amount. The expression “said amount money” agreeing in clause (b) and (c) to the proviso of Section 138 needs to be interpreted as the cheque amount only.

13. It is true that the notice needs to be construed liberally. However, in case the omnibus demand was made however the cheque amount and other amount are severable then notice can be termed as valid. However, in the facts of the case, undisputedly cheque amount of five dishonored cheques is of Rs. 1,88,99,000/- and the demand was made for payment of Rs. 2,58,04,000/- which exceeds the cheque amount of dishonored cheques.

14. Therefore, the essential ingredients of Section 138 of the Negotiable Instruments Act, 1881 of issuance of valid demand notice has not been fulfilled therefore, complaint cannot proceed against the accused.

15. Learned advocate for the petitioner also submitted that since the cheque has been issued on behalf of partnership, the partners need to be made party to the complaint. Since this Court is setting aside the order of issuance of process on the ground of validity of notice, the other contentions raised by the petitioner need not to be gone into. Hence, following order.

16. Rule is made absolute in terms of prayer clause (a). No costs.

17. It is made clear that the observations made in this order are only for the purposes of considering the validity of order of issuance of process in relation to proceeding under Section 138 of the Negotiable Instruments Act, 1881 and shall not influence any other proceedings between the parties in relation to subject matter of complaint.

(AMIT BORKAR, J.)