2025:BHC-NAG:2275

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION (APL) NO. 1109 OF 2024

Kiran S/o. Ravindra Wadhi
.Vs.
M/s. Ankit Construction, through its partner Kishor Kanhere and others

Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's Orders.	Court's or Judge's orders.

Shri Suraj Ghatol, Adv. a/w Shri J. B. Gandhi, Advocate for applicant.
None for the respondents

CORAM : ANIL S. KILOR, J.
DATED : MARCH 04, 2025.

In a proceeding filed by respondent No.1/ complainant under Section 138 read with Section 142 of the Negotiable Instruments Act, 1881 (for short 'the N. I. Act') process came to be issued vide order dated 25.04.2022 against respondent No.2-company/accused No.1 and its two partners namely the applicant/accused No.2 as well as respondent No.3/accused No.3. The same is impugned in the present application.

2. The learned counsel Shri Suraj Ghatol, holding for Advocate Shri J. B. Gandhi, submits that a notice issued on 03.07.2021, after the cheque in dispute was dishonored, was defective and the same cannot be treated as statutory notice.

3. It is submitted that though the cheque was issued by respondent No.2-company and it was signed by the applicant and respondent No. 3 in a capacity as partners, the notice was addressed to the partners only and it was not issued in the name of the company. It is further submitted that the notice is not a 15 days notice which is mandatory. It is therefore submitted that since the notice itself is defective, the proceeding under Section 138 of the N. I. Act cannot be permitted to continue. For this purpose, the learned counsel for the applicant placed reliance upon the judgments of the Hon'ble Supreme Court of India in the case of *Aneeta Hada .vs. M/s. Godfather Travels and Tours Private Limited*[1] and in the case of *Himanshu .vs. B. Shivamurthy*[2].

4. None appeared on behalf of the respondent though served long back.

5. Considering the submissions made by the learned counsel for the applicant, the only question that fell for consideration is, whether the learned Magistrate was right in issuing process in the present matter. Thus, it would be beneficial to refer to Section 138 of the N. I. Act.

> *"**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*

1 AIR 2012 SC 2795
2 AIR 2019 SC 3052

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 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, [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."

6. From the language of Section 138 it is evident that where any cheque drawn by any 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 the amount of money standing to the credit of that bank 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. Further it is evident that on return of the cheque the payee or the holder of the cheque makes a demand for the payment of said amount of money by giving a notice in writing to the drawer of the cheque, within thirty days of the receipt of the information by him from the bank regarding the return of the cheque as unpaid. Further it is evident that the drawer of such cheque if fails to make the payment of the said amount of money to the payee or as the case may be, to the holder of the cheque within fifteen days of receipt of the said notice, complaint under Section 138 of the N. I. Act can be filed.

7. It is thus clear that fifteen days notice is mandatory. In the present matter, considering the format of the notice dated 03.07.2021 issued to the applicant and the respondent No.3, the same cannot said to be a fifteen days notice as stipulated under Section 138(c) of the N. I. Act.

Further, from the notice, it appears that it was not issued in the name of the company, but in the name of the partners i.e the applicant and respondent No.3.

8. The Hon'ble Supreme Court of India in the case of *Aneeta Hada* (supra) held in para No.42 as follows:

> *"42. We have referred to the aforesaid passages only to highlight that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the company. The learned counsel for the respondents have vehemently urged that the use of the term as well as in the Section is of immense significance and, in its tentacle, it brings in the company as well as the director and/or other officers who are responsible for the acts of the company and, therefore, a prosecution against the directors or other officers is tenable even if the company is not arraigned as an accused. The words as well as have to be understood in the context. In Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others it has been laid down that the entire Statute must be first read as a whole, then section by section, clause by clause, phrase by phrase and word by word. The same principle has been reiterated in Deewan Singh and others v. Rajendra Prasad Ardevi and others and Sarabjit Rick Singh v. Union of Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express*

condition precedent to attract the vicarious liability of others. Thus, the words as well as the company appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted."

9. The Hon'ble Supreme Court of India in the case of *Himanshu* (supra) held in para No. 16 as follows:

"16. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused"

10. Considering the above-referred observations made by the Hon'ble Supreme Court of India, if the impugned order is seen, it is evident that there is a mention by the learned trial Court that the process was issued on perusal of the complaint supported by the documents and verification affidavit of the company. However, it appears that the

learned Magistrate failed to appreciate whether statutory notice was issued by the complainant before filing of the proceeding under Section 138 of the N. I. Act.

11. As far as the notice dated 03.07.2021 as pointed out by the learned counsel for the applicant is concerned, the same is obviously not as per Section 138 of the N.I. Act. However, it is difficult to know whether the complainant is relying solely upon the said notice or there is any other notice issued by the complainant under Section 138 of the N.I. Act. The said fact cannot be verified as nobody appeared on behalf of the complainant though served long bank.

12. In the circumstances, the only option left with this Court is to remand this matter so that the learned Magistrate can verify the documents and examine whether a statutory notice of 15 days was issued in this case. Accordingly, I pass the following order:

ORDER

i. The criminal application is partly allowed.

ii. The order dated 25.04.2022 passed by learned Civil Judge Senior Division and Additional Chief Judicial Magistrate, Nagpur in SCC No. 6466 of 2022 is hereby quashed and set aside.

iii. The matter is remanded back to the learned Magistrate to decide and consider the complaint afresh for the purpose of issuance of process.

iv. The criminal application stands **disposed of**, accordingly.

(ANIL S. KILOR, J.)

Namrata