

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

MONDAY, THE 20TH DAY OF MAY 2019 / 30TH VAISAKHA, 1941

Cr1.MC.No. 3289 of 2015

PETITIONER:

B.SURENDRA DAS
S/O.LATE BHANU PANICKER, PROPRIETOR, HOTEL
GEETHU INTERNATIONAL, POOVAR,
THIRUVANANTHAPURAM.

BY ADV. SRI.K.B.PRADEEP

RESPONDENTS:

- 1 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH
COURT OF KERALA, ERNAKULAM - 682 031.
- 2 BIJU M.S.
S/O.MRITHYUNJAYAN, SANTHA SADANAM, THOTTAM,
MULLOOR P.O., VIZHINJAM, THIRUVANANTHAPURAM
DISTRICT - 695 001.

BY ADVS.
SRI.K.K.DHEERENDRAKRISHNAN FOR R2
SRI.S.RAJEEV
SRI.V.VINAY

PUBLIC PROSECUTOR SMT.K.K.SHEEBA

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON
04.04.2019, THE COURT ON 20.05.2019 PASSED THE FOLLOWING:

"CR"

R.NARAYANA PISHARADI, J

Crl.M.C.No.3289 of 2015

Dated this the 20th day of May, 2019

ORDER

The petitioner is the accused in the case C.C.No.254 of 2015 on the file of the Court of the Judicial First Class Magistrate-X11, Thiruvananthapuram. The case is one instituted upon a complaint (Annexure-IV) filed under Section 142 of the Negotiable Instruments Act, 1881 (for short 'the Act') pertaining to an offence punishable under Section 138 of the Act. The complaint is filed against the petitioner by the second respondent. The petitioner seeks to quash the complaint by invoking the power of this Court under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code').

2. The material averments in the complaint are the following: The complainant and the accused are close relatives.

The accused borrowed an amount of Rs.35,00,000/- from the complainant and he signed and gave a cheque dated 15.11.2014 to the complainant. The complainant presented the cheque in the bank. It was dishonoured due to insufficient funds. The complainant received intimation from the bank regarding the dishonour of the cheque on 13.12.2014. He sent a lawyer notice to the accused on 15.12.2014 informing him of the dishonour of the cheque. The accused received the notice on 17.12.2014. He did not pay the amount of Rs.35,00,000/- due to the complainant as per the cheque. The accused sent a reply notice containing false averments.

3. Heard learned counsel for the petitioner and the learned Public Prosecutor and also the learned counsel for the second respondent.

4. Learned counsel for the petitioner contended that no demand for payment of the amount of the cheque was made by the complainant as per the notice (Annexure-I) sent by him under clause (b) of the proviso to Section 138 of the Act and therefore, the notice is defective and the proceedings initiated against the petitioner pursuant to such notice cannot be

sustained. *Per contra*, learned counsel for the second respondent/complainant contended that demand for payment of the cheque amount is made as per Annexure-I notice and that the requirement under clause (b) of the proviso to Section 138 of the Act had been complied with.

5. Annexure-I notice contains a recital as follows: " It is to be noted that my client is legally entitled to realize the said amount from you and you are legally bound to pay the above said amount of Rs.35,00,000/- (Rupees Thirty five lakhs only) to my client within 15 days from the date of this notice.....".

6. The main provision of Section 138 of the Act states what would constitute an offence. The offence is complete upon dishonour of the cheque. An offence under Section 138 of the Act is committed no sooner a cheque drawn by the accused on an account being maintained by him in a bank for discharge of debt/liability is returned unpaid for insufficiency of funds or for the reason that the amount exceeds the arrangement made with the bank. The proviso appended to Section 138 imposes certain further conditions which must be fulfilled for taking cognizance of the offence. One of such conditions, as envisaged under Clause

(b) of the proviso to Section 138 of the Act, is that the payee or the holder in due course of the cheque, as the case may be, shall make a demand for the payment of the amount of the cheque 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.

7. A plain reading of clause (b) of the proviso to Section 138 of the Act would indicate that the payee or the holder in due course of the cheque should make a demand for the payment of the amount covered by the cheque 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. What is required is a demand in writing by giving a notice to the drawer of the cheque of the amount covered by the cheque. The statutory provision indicates in unmistakable terms as to what should be clearly indicated in the notice and what manner of demand it should make. Service of notice of demand is a condition precedent for filing a complaint for an offence under Section 138 of the Act. A demand for payment of the amount of the cheque by sending a notice in

writing is sine qua non for filing such a complaint. In the notice, demand has to be made for the cheque amount. If no such demand is made, no doubt, the notice would fall short of its legal requirement (See **Indira v. Adinarayana: AIR 2003 SC 4689** and **M/s Rahul Builders v. M/s Arihant Fertilizers : (2008) 2 SCC 321**).

8. However, it is to be noted that the object of sending a notice demanding payment of the amount of the cheque is to give a chance to the drawer of the cheque to rectify his omission and also to protect an honest drawer. No form of notice is prescribed under Clause (b) of the proviso to Section 138 of the Act (See **Central Bank of India v. M/s Saxon Farms : AIR 1999 SC 3607**). The requirement of giving notice to the drawer of the cheque is to enable him to avoid the prosecution under Section 138 of the Act. It is well settled principle of law that the notice has to be read as a whole. A notice must be construed not with a desire to find fault in it which would render it defective. It must not be read in a hyper-technical manner. It must be construed strictly but in a sensible manner.

9. In the instant case, in Annexure-I notice it is specifically

stated that the complainant is legally entitled to realize the amount of the cheque from the petitioner and that the petitioner is legally bound to pay the amount of Rs.35,00,000/- (Rupees Thirty five lakhs only) to the complainant within 15 days from the date of the notice. In my opinion, it amounts to a clear demand as required under Clause (b) of the proviso to Section 138 of the Act.

10. Learned counsel for the petitioner has relied upon the decision of the Hon'ble Supreme Court in **Suman Sethi v. Ajay : AIR 2000 SC 828** to buttress his contention that Annexure-I notice does not meet with the requirement under Clause (b) of the proviso to Section 138 of the Act. It has been held in this decision that the legislature intended that in a notice under clause (b) of the proviso to Section 138 of the Act, demand has to be made for the cheque amount and if any other amount is specified in the notice, it cannot be faulted but when 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. This decision has no application to the facts of the present case. An omnibus notice

without specifying the amount due under the dishonoured cheque would not subserve the requirement of law.

11. Learned counsel for the petitioner has contended that the nature of the debt or liability of the petitioner is not mentioned in Annexure-I notice and for that reason, the notice is defective. This contention cannot be accepted. There is no statutory mandate that the notice shall narrate the nature of the debt or liability. Therefore, the omission or error in the notice to mention the nature of the debt or liability, does not render it invalid. It is also to be noted that the nature of the debt is disclosed in the complaint.

12. It is contended by the petitioner that there is no specific averment in the complaint that the cheque was issued in discharge of the amount allegedly borrowed by him from the complainant. There is no need to make such a specific averment in the complaint. There is no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability (See **M.M.T.C Limited v. Medchil Chemicals and Pharma (P) Limited : AIR 2002 SC 182**).

13. Section 139 of the Act provides that it shall be

presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for discharge, in whole or in part, of any debt or other liability. The complainant is entitled to take advantage of this statutory presumption. It is settled law that at this stage the Court is not justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint. At this stage, the Court could not go into the merits and come to a conclusion that there was no existing debt or liability. At the initial stage of the proceedings, the High Court is not justified in entertaining and accepting a plea that there was no debt or liability (See **M.M.T.C. Ltd. v. Medchil Chemicals and Pharma (P) Limited : AIR 2002 SC 182, Maruti Udyog Limitd v.Narender: (1999) 1 SCC 113** and **A.V.Murthy v. B.S. Nagabasavanna: AIR 2002 SC 985**).

14. The petitioner has got many other pleas. It is contended by him that the cheque was stolen by the complainant from his possession. Learned counsel for the petitioner has also raised contentions with regard to the financial capacity of the complainant to lend the huge amount of Rs.35,00,000/-, source

of such amount etc. It is also contended that the account maintained by the petitioner in the bank had become stale as early as in the year 2005.

15. At this stage, the Court cannot consider the merits of the aforesaid pleas raised by the petitioner. Ordinarily, a defence of an accused although appears to be plausible should not be taken into consideration for exercise of the jurisdiction under Section 482 of the Code. Whether there was outstanding liability or not is a question of fact which could be determined only by the trial court after recording evidence of the parties. The High Court shall not express its view on disputed questions of fact in a petition under Section 482 of the Code to come to a conclusion that the offence is not made out. It is well settled that while dealing with a petition under Section 482 of the Code, the Court has ordinarily to proceed on the basis of the averments in the complaint. The defence of the accused cannot be considered at that stage. The Court considering the prayer for quashing a complaint cannot adjudicate upon disputed questions of fact (See **Suryalakshmi Cotton Mills Limited v. Rajvir Industries Limited : AIR 2008 SC 1683, HMT Watches Ltd. v. M. A.**

Abida: (2015) 11 SCC 776 and Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Limited : AIR 2016 SC 4363).

16. The prosecution for an offence under Section 138 of the Act is initiated on the basis of a written complaint made by the payee of a cheque. Obviously such complaints must contain the factual allegations on the following aspects: (1) that a person drew a cheque on an account maintained by him with the banker; (2) that such a cheque when presented to the bank is returned by the bank unpaid; (3) that such a cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity whichever is earlier; (4) that the payee demanded in writing from the drawer of the cheque the payment of the amount of money due under the cheque to payee; and (5) such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid. The only other ingredient which is required to be proved to establish the commission of an offence under Section 138 is that in spite of the demand notice referred to

above, the drawer of the cheque failed to make the payment within a period of 15 days from the date of the receipt of the demand. (See **Harihara Krishnan v. Thomas : AIR 2017 SC 4125**).

17. In the instant case, the complaint contains averments with regard to all the aspects mentioned above. It has also been found that Annexure-I notice meets the requirement under Clause (b) of the proviso to Section 138 of the Act. In the said circumstances, I find no reason to quash Annexure-IV complaint as prayed for by the petitioner. The petition is liable to be dismissed.

Consequently, the petition is dismissed.

(sd/-)

R.NARAYANA PISHARADI, JUDGE

jsr/09/05/2019

APPENDIX

PETITIONERS' EXHIBITS:

ANNEXURE P1	ANNEXURE I. TRUE COPY OF THE NOTICE DATED 15.12.2014.
ANNEXURE P2	ANNEXURE II. TRUE COPY OF THE REPLY DATED 20.12.2014.
ANNEXURE P3	ANNEXURE III. TRUE COPY OF THE SAID LETTER ISSUED BY THE STATE BANK OF HYDERABAD DATED 18.12.2014.
ANNEXURE P4	ANNEXURE IV. TRUE COPY OF THE COMPLAINT FILED BEFORE THE JFMC - XII, THIRUVANANTHAPURAM IN C.C.NO.254/2015.

RESPONDENT'S EXHIBITS:

NIL

TRUE COPY

PS TO JUDGE