M/S. RAHUL BUILDERS

v.

M/S. ARIHANT FERTILIZERS AND CHEMICAL AND ANR.

NOVEMBER 02, 2007

[S.B. SINHA AND HARJIT SINGH BEDI, JJ.]

Negotiable Instruments Act, 1881:

s.138, proviso (b)—Dishonour of cheque—Complaint petition—Maintainability of, when no specific demand made in notice for payment of amount covered by cheque—Held: Not maintainable since service of notice not in conformity with proviso (b) to s.138—Also the section does not speak of 15 days' notice—In absence of such stipulation, it cannot be held to be so contemplated—Notice—Interpretation of statutes.

Interpretation of statutes:

Proviso—Applicability of—Held: When proviso applies, main section would not.

Appellant and Respondent No.1 entered into a contract. Appellant submitted bills for execution of contractual work for Rs. 26.46 lacs. Respondent No.1 paid Rs. 17.74 lacs. Balance of Rs. 8.72 lacs was outstanding. Respondent No.1 issued a cheque for Rs. 1 lac in favour of appellant which on presentation was dishonoured on the ground that Respondent No.1 had closed its account with the Bank.

Appellant sent letter dated 31.10.2000 to Respondent No.1 requesting to make payment of pending bills within 10 days. Respondent No.1 did not make payment. Appellant filed complaint petition on 11.12.2000. The High Court quashed the proceedings holding that 15 days' notice having not been served upon Respondent No. 1, the same was not valid in law and that the notice was vague and did not serve the statutory requirements of Provisos

A (b) and (c) of s.138 of the Negotiable Instruments Act, 1881. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1. S.138 of Negotiable Instruments Act, 1881 does not
B speak of 15 days notice. It contemplates service of notice and payment of amount of cheque within 15 days from the date of receipt. When the statute prescribes for service of notice specifying a particular period, it should be expressly stated. In absence of any such stipulation, it is difficult to hold that 15 days' notice was thereby
C contemplated. The High Court, therefore, was not correct in arriving at the aforementioned finding. [Para 8] [956-C, D]

2. In the notice dated 31.10.2000 issued by the appellant to Respondent No. 1, information was only given that the cheque when
D presented was returned "unpassed" by the bank authorities on the plea that the account had been closed. By the operative portion of the said notice, the respondent was called upon to remit the payment of his pending bills, otherwise suitable action shall be taken.

[Para 9] [956-E, F]

E *Suman Sethi* v. *Ajay K. Churiwal and Anr.*, [2000] 2 SCC 380 and *K.R. Indira* v. *Dr. G. Adinarayana,* [2003] 8 SCC 300, referred to.

3.1. Service of a notice is imperative in character for
F 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 Section 138 of the Act, the complaint petition would not be maintainable. The Parliament while enacting
G 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
H unpaid. [Para 10] [956-G; 957-A, B]

3.2. 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 paid 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. 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 of bills, i.e., Rs. 8.72 lacs. The noticee was to respond to the said demand. No demand was made upon it to pay the sum of Rs. 1 lac which was tendered to the complainant by cheque. Therefore, entire sum was demanded and not a part of it. As no demand was made for payment of the cheque amount, the impugned judgment cannot be faulted. [Paras 10 and 13] [957-B, C, D; 959-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 525 of 2005.

From the final Judgment and Order dated 22.11.2004 of the High Court of Madhya Pradesh, Bench at Indore, in Misc. Criminal Case No. 2924 of 2004.

Sushil Kumar Jain, Puneet Jain, Pratibha Jain and H.D. Thanvi for the Appellant.

Sanjeev Sachdeva and Chetan Chopra (for C.D. Singh) for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J . 1. Failure on the part of the appellant to serve a proper notice strictly in terms of proviso appended to Section 138 of the Negotiable Instruments Act (for short "the Act") whether would lead to quashing of a criminal proceedings initiated by II Additional Sessions Judge, Neemuch on a complaint made by the appellant herein is the question involved in this appeal which arises out of a judgment and order

A dated 22.11.2004 passed by the High Court of Madhya Pradesh in Misc. Criminal Case No. 2924 of 2004.

2. Appellant is a partnership firm. Respondent No. 1 entered into a contract with it for construction of a building and factory premises. Appellant executed the said contract. It submitted bills for execution of B contractual work for a sum of Rs. 26,46,647/-. Respondent No. 1 had made payments of Rs. 17,74,238/- and a balance of Rs. 8,72,409/- was said to be outstanding. A cheque for a sum of Rs. 1,00,000/- drawn on Federal Bank Limited, Indore was issued by Respondent No. 1 in favour of the appellant. Upon presentation of the said cheque, it was not C honoured on the ground that Respondent No. 1 had closed its account with the bank. A notice dated 31.10.2000 was sent by it to Respondent No. 1 stating:

> "...Your cheque No. 693336 dated 30/4/2000 for Rs. 1,00,000/ D - has also been returned unpassed by the bank authorities with the plea that A/C No. 1461 has already been closed. Hence the undersigned is now free to take up any legal step against you to get the amount of my pending bills.
>
> In view of the above, you are requested to remit the payment E of my pending bills within 10 days from the date of receipt of this letter otherwise suitable action as deemed fit will be taken against you."

3. As despite receipt of the said notice, Respondent No. 1 did not F make any payment, a complaint petition was filed on 11.12.2000. An application was filed by Respondent No. 1 for rejection of the said complaint *inter alia* on the ground that the notice issued by the appellant was not a valid one. The said application was rejected. A revision application filed thereagainst before the District and Sessions Judge, G Neemuch was also dismissed.

4. The High Court, however, by reason of its impugned order, in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure (Code), has quashed the criminal proceedings pending against it holding: H

(i) 15 days' notice having not been served upon Respondent No. 1, the same was not valid in law. A

(ii) The complainant by reason of the said notice having demanded a sum of Rs. 8,72,409/- as against the cheque which was for a sum of Rs. 1,00,000/- only, the notice was vague and did not serve the statutory requirements of Provisos (b) and (c) of Section 138 of the Act. B

5. Mr. Sushil Kumar Jain, learned counsel appearing on behalf of the appellant submitted that the High Court committed a serious error in passing the impugned judgment so far as it failed to consider: C

(i) Section 138 of the Act does not postulate a 15 days' notice;

(ii) Non-payment of the amount of cheque being Rs. 1,00,000/- being a part of the demand sum of Rs. 8,72,409/-, no exception thereto could be taken. D

6. Mr. Sanjeev Sachdeva, learned counsel appearing on behalf of Respondent No. 1, on the other hand, supported the judgment contending that the notice in question does not sub-serve the requirements of Section 138 of the Act.

E

7. Relevant portion of Section 138 of the Act reads as under:

"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 money to another person from out of that account for the discharge, F 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 G 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 extend to one year, or with fine which may extend to twice the amount of the cheque, or with both: Provided that

H

A nothing contained in this section shall apply unless

(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
B of money by giving a notice in writing, to the drawer of the cheque, within fifteen 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
C 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."

8. Section 138 does not speak of a 15 days' notice. It contemplates service of notice and payment of the amount of cheque within 15 days
D from the date of receipt thereof. When the statute prescribes for service of notice specifying a particular period, it should be expressly stated. In absence of any such stipulation, it is difficult to hold that 15 days' notice was thereby contemplated. The High Court, therefore, was not correct in arriving at the aforementioned finding.

E

9. We have noticed hereinbefore the notice dated 31.10.2000 issued by the appellant to Respondent No. 1. An information thereby was only given that the cheque when presented was returned "unpassed" by the bank authorities on the plea that the account had been closed. It was
F averred that in such a situation the complainant was free to take any legal steps against the accused to get the amount of his pending bills. By the operative portion of the said notice, the respondent was called upon to remit the payment of his pending bills, otherwise suitable action shall be taken.

G 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

H

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 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. 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 of bills, i.e., Rs. 8,72,409/-. The noticee was to respond to the 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.

11. Mr. Jain relied upon a decision of this Court in *Suman Sethi* v. *Ajay K. Churiwal and Anr.*, [2000] 2 SCC 380 wherein it was stated:

> "8. It is a 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. the cheque amount. If no such demand is made the notice no doubt would fall short of its legal requirement. Where in addition to the "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 the break-up of the claim the cheque amount, interest, damages etc. are separately specified, other such claims for interest, 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*

A *demand is made without specifying what was due under the dishonoured cheque, the notice might well fail to meet the legal requirement and may be regarded as bad.*

9. This Court had occasion to deal with Section 138 of the Act in Central *Bank of India* v. *Saxons Farms* 3 and held that the object B of the notice is to give a chance to the drawer of the cheque to rectify his omission. Though in the notice demand for compensation, interest, cost etc. is also made the drawer will be absolved from his liability under Section 138 if he makes the payment of the amount covered by the cheque of which he was aware within 15 C days from the date of receipt of the notice or before the complaint is filed."

[Underlining is ours for emphasis]

D As therein, some other sums were indicated in addition to the amount of cheque, it was, therefore, not held to be a case where the dispute might be existing in respect of the entire outstanding amount.

12. On this aspect of the matter, we may consider *K.R. Indira* v. *Dr. G. Adinarayana* [2003] 8 SCC 300 wherein this Court upon noticing E *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 F 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 G 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 H 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 proceeded against under Section 138 of the Act..." A

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. B

14. For the reasons aforementioned, there is no merit in this appeal which is dismissed accordingly. C

D.G. Appeal dismissed.