

(2013) 07 AHC CK 0247

Allahabad High Court

Case No: U/S 482/378/407 No. 4881 of 2012

Kapil Dev Tiwari

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision: July 2, 2013

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 482
- Negotiable Instruments Act, 1881 (NI) - Section 138

Citation: (2013) 1 BC 587

Hon'ble Judges: Vishnu Chandra Gupta, J

Bench: Single Bench

Advocate: Mayank Pandey, for the Appellant; Rakesh Nayak, Govt. Advocate, for the Respondent

Judgement

Vishnu Chandra Gupta, J.

Heard learned Counsel for the applicant, learned special Counsel appearing on behalf of the complainant and learned AGA.

By means of this petition u/s 482, Cr.P.C. the petitioner has prayed for quashing the impugned summoning order dated 6.1.2011 and also prayed for quashing the proceeding of Complaint Case No. 5888 of 2010, u/s 138, Negotiable Instruments Act, 1881, P.S. Kotwali Akbarpur, District Ambedkar Nagar.

The fact in brief for deciding this petition are that a cheque of Rs. 50,000/- issued to opposite party No. 2, Ankur Verma by petitioner Kapil Dev Tiwari on 13.9.2010. When this cheque was presented in Axis Bank Ltd. the same was dishonoured on account of insufficient fund vide memo dated 22.9.2010. The memo was received by the petitioner on the same day as admitted by Counsel for the opposite party No. 2. A notice of demand has been issued on 4.11.2010 for payment of Rs. 5,00,000/- thereafter a complaint has been filed u/s 138, Negotiable Instruments Act (hereinafter referred to as "Act") on 9.12.2010. The proceeding has been challenged

on two grounds; (i) statutory demand notice has not been issued within 30 days from the date of intimation of dishonouring the cheque. (ii) Notice of demand contemplated u/s 138 of the Act has not been given.

2. So far as point No. 1 is concerned, it is not in dispute, rather it is admitted by the Counsel for the opposite party No. 2, that cheque dated 13.9.2010 was presented in the bank and intimation of dishonouring of cheque was received on 22.9.2013. Admittedly, the notice of demand issued on 4.11.2010. As such this notice has been issued after lapsed of 30 days from the date of intimation received by opposite party No. 2 of dishonouring of the cheque. Proviso added to Section 138 of the Act makes it mandatory that "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 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid." This requirement is mandatory to constitute offence u/s 138 of the Act which in present case has not been complied with.

3. So far as point No. 2 is concerned, the aforesaid Proviso (b) makes it clear that payee or the holder in due course of the cheque shall make a demand of payment of the said amount of money by giving a notice in writing.

4. In this case, a cheque of Rs. 50,000/- has been issued which was returned unpaid but notice which has been issued on 4.11.2010 (Annexure 3 to this petition) shows that the opposite party No. 2 in this notice demanded within 30 days a sum of Rs. 5,00,000/- (five lakh) towards damages for social economic and mental harassment and not of the amount of the cheque. In view of the aforesaid notice, it cannot be said that this notice of demand is in conformity to the requirement of Proviso (b) of 138 of the Act. In view of above, the petition succeeds. The proceedings u/s 138 of the Act initiated on the basis of complaint pending in the Court of Chief Judicial Magistrate, Ambedkar Nagar having Criminal Complaint No. 5888 of 2010 (Ankur v. Kapil Dev Tiwari) is quashed.