

(2011) 10 AP CK 0067

Andhra Pradesh High Court

Case No: Criminal A. No. 1019 of 2006

Sri Ratnagiri Cements Pvt. Ltd.,
Visakhapatnam

APPELLANT

Vs

M/s. Rao "N" Sons Modern
Appliances, Visakhapatnam

RESPONDENT

Date of Decision: Oct. 14, 2011

Acts Referred:

- Negotiable Instruments Act, 1881 (NI) - Section 138

Citation: (2012) 2 ALD 912 : (2012) 2 ALD(Cri) 912

Hon'ble Judges: R. Kantha Rao, J

Bench: Single Bench

Advocate: G. Rama Gopal, for the Appellant; Nimmagadda Satyanarayana Counsel for Respondents 1 to 3 and Public Prosecutor Counsel, for the Respondent

Final Decision: Dismissed

Judgement

Honourable Sri Justice R. Kantha Rao

1. This Criminal Appeal is filed against the judgment, dated 21-03-2006, passed by the II Additional Chief Metropolitan Magistrate, Visakhapatnam in C.C. No. 162 of 1999. The said judgment is against the acquittal and the complainant preferred the present appeal.

2. I have heard Sri G.Rama Gopal, learned counsel appearing for the appellant and Sri Satyanarayana Nimmagadda, learned counsel appearing for R-1 to R-3.

3. Brief facts relevant for considering the appeal may be stated as follows:

The appellant-complainant is a company, manufacturing cement in Autonagar, Visakhapatnam. Respondents 2 to 4 are the partners of the 1st respondent firm, which is said to be super stockist. Thereby there were some business transactions between the appellant and the respondent from 11-03-1996 to 31-03-1996.

According to the appellant, the respondents owed a sum of Rs. 22,08,522/- by the end of March, 1998 towards the cost of the cement purchased from the appellant. In discharge of the said debt in part, the respondents issued a cheque, dated 30-03-1998, for Rs. 13,50,000/- in favour of the appellant drawn on Centurion Bank, Visakhapatnam. When presented for collection, the cheque was dishonoured with an endorsement that it exceeded arrangement. Again, at the request of the respondents, the appellant presented cheque for collection in the 1st week of January, 1999. When it was sent for clearance on 16-01-1999, it was again dishonoured endorsing "refer to drawer". Subsequently, the appellant issued notice, dated 21-01-1999, to the respondents calling upon them to pay the amount of Rs. 22,08,522/- within fifteen days after the receipt of the notice. The respondents having received notice did not make that payment. Thereafter, the appellant filed the complaint u/s 138 of the Negotiable Instruments Act (for brevity "the Act") which was taken on file by the learned Magistrate and the respondents were tried for the offence u/s 138 of the Act.

The learned Magistrate acquitted the respondents-accused holding that the statutory notice issued on 21-01-1999 u/s 138 of the Act by the appellant-complainant is defective and is not in accordance with Section 138 proviso (b) of the Act and therefore, the complaint is not maintainable.

4. Now the point for determination in this appeal is whether the order of acquittal is legal and proper, which was passed by the learned Magistrate basing on the point that the statutory notice, Ex.P-4, issued by the appellant/complainant is defective and that the complaint is not maintainable.

5. In order to arrive at a conclusion on the finding recorded by the learned trial Court, it is necessary to look into Section 138 proviso (b) of the Act, which reads as follows:

(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.

From the above provision, it is obvious that the statutory notice shall contain the demand of payment of the cheque amount. Now it is necessary to peruse Ex.P-4, notice, issued by the appellant. In Ex.P-4, notice, the appellant mentioned about the amount of Rs. 22,08,532/- which became due from the respondents to the appellant. Issuance of a cheque by the respondents is for an amount of Rs. 13,50,000/- and it is dishonoured when presented for collection. But the appellant in para-7 of Ex.A-4, notice, stated as follows:

That you are also informed that dishonour of cheque is also a criminal offence u/s 138 of Negotiable Instruments Act and liable for punishment and therefore my client in addition to recovery of the money will also institute criminal proceedings

against you, in case you fail to pay the said sum of Rs. 22,08,552/- with interest @ 24% p.a. within 15 days from the date of receipt of this notice and you are also liable to pay the notice charges of Rs. 500/-

6. The crucial point requires for consideration is that there is no demand of cheque amount of Rs. 13,50,000/- by the appellant to the respondents. The appellant did not specifically state in Ex.P-4, notice, that since the cheque amount is not paid, the complaint will be filed against the respondents u/s 138 of the Act. The appellant, however, demanded the respondents to repay the entire debt of Rs. 22,08,522/- and stated that in case they failed to pay the said sum of Rs. 22,08,522/- with interest @ 24% per annum within 15 days from the date of receipt of notice, it is a criminal offence u/s 138 of the Act and the respondents are liable for punishment.

7. The learned trial Court, advertent to Ex.P-4, notice, held that the said notice is not in accordance with proviso "(b)" of Section 138 the Act. Since there is no clear demand for payment of cheque amount of Rs. 13,50,000/- , but the demand is in respect of entire debt together with interest, therefore, according to the learned trial Court, the notice is defective.

8. The learned counsel appearing for the appellant relied on a decision reported in [Suman Sethi Vs. Ajay K. Churiwal and Another](#), wherein, the Supreme Court, in para-8, held as follows:

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 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. The learned counsel for the appellant also invited my attention to the decision reported in [Central Bank of India and Another Vs. M/s Saxons Farms and Others](#), which was relied upon by the trial Court. In the said case also, the Supreme Court held that the nature and object of giving notice to the drawer of the cheque is to give a chance to the drawer to rectify his mistake and to protect the interest of the drawer. Thus the notice must make a demand for the amount of cheque. The provisions of Section 138 proviso Clause (b) of the Act prescribes no form of notice. Though no form of notice is prescribed in the above clause (b) the requirement is that notice shall be given in writing within fifteen days of receipt of information from the bank regarding return of the cheque as unpaid and a demand for payment of

the amount of the cheque has to be made in the notice.

10. The learned counsel appearing for the appellant, relying on the above two judgments, argues that since there being no form of notice prescribed by the statute under proviso (b) of Section 138 of the Act, and when the details of the transactions are clearly mentioned and the demand was also made by the appellant to pay the amount due together with interest, the issuance of notice under Ex.P-4 is enough compliance of the statutory requirement u/s 138 of the Act. Therefore, the learned trial Court erroneously dismissed the complaint given by the appellant.

11. On the other hand, the learned counsel appearing for the respondents 1 to 4 would submit that the demand regarding the cheque amount of Rs. 13,50,000/- is absent in Ex.P-4, and as such, as held by the learned trial Court, the statutory notice is invalid and ultimately, the complaint filed by the appellant is not maintainable for defective notice. In support of his contention, the learned counsel appearing for the respondents 1 to 4 relied upon a decision reported in [K.R. Indira Vs. Dr. G. Adinarayana](#), Wherein, the Supreme Court, in para-8, held as follows:

As was observed by this Court in Central Bank of India v. Saxons Farms (1998) 8 SCC 221, the object of the notice is to give a chance to the drawer of the cheque to rectify his omissions. The demand in the notice has to be in relation to "said amount of money" as described in the provision. The expression "payment of any amount of money" as appearing in the main portion of Section 138 of the Act goes to show that it needs to be established that the cheque was drawn for the purpose of discharging in whole or in part of any debt or any liability, even though the notice as contemplated may involve demands for compensation, costs, interest etc. The drawer of the cheque stands absolved from his liability u/s 138 of the Act if he makes the payment of the amount covered by the cheque of which he was the drawer within 15 days from the date of receipt of notice or before the complaint is filed.

12. He also relied upon a decision reported in [Jugesh Sehgal Vs. Shamsheer Singh Gogi](#), 3, wherein the Supreme Court in para-11, held as follows:

It is true that Section 138 of the Act was enacted to punish unscrupulous drawers of cheques who, though purport to discharge their liability by issuing a cheque, have no intention of really doing so, yet to fasten a criminal liability under the said provision, necessary Ingredients of the section are to be satisfied.

13. In fact, in Dr.G.Adinarayana"s case (3 supra), the Supreme Court referred the decisions in Churiwal and Saxons Farms" cases (1 and 2 supra, respectively) and explained the legal requirements for notice u/s 138 proviso (b) of the Act.

14. The crux of the issue is that apart from the other requirements, the complainant has to make a specific mention in the statutory notice issued u/s 138 of the Act about the demand of the cheque amount. The demand as to non-payment of the

cheque amount may also include the mention about the costs of the notice, interest accrued on the cheque amount and damage etc. But the complainant has to specify in the notice that in the event of failure to pay the cheque amount, the respondents-accused are liable for prosecution u/s 138 of the Act. Thus, the respondents accused must be aware of the fact that the failure to pay the cheque amount will be resulting in being liable for prosecution u/s 138 of the Act.

15. The respondents might be under an obligation to pay the entire amount due to the appellant-complainant. But failure to pay the entire amount due does not attract the penal limit as embodied u/s 138 proviso (b) of the Act. In clear terms, it is mentioned in the said provision that a demand shall be made for payment of the said amount of money by giving notice in writing. Therefore, the respondents-accused must be aware of the fact that failure to pay the cheque amount will make them liable for criminal prosecution and ultimately resulting in punishment for the offence u/s 138 of the Act. In the instant case, nowhere, it is mentioned specifically that unless the respondents pay the cheque amount i.e. an amount of Rs. 13,50,000/- , they are liable for prosecution u/s 138 of the Act. The appellant only stated in Ex.P-4, notice, that the respondents 1 to 4 are liable to pay an amount of Rs. 22,08,522/- which is the entire amount due to the appellant-complainant together with interest at 24% per annum.

16. Therefore, as rightly held by the learned trial Court, the impugned notice issued by the appellant/complainant does not satisfy the legal requirements u/s 138 proviso (b) of the Act. Therefore, it is defective. The order of acquittal, passed by the learned trial Court holding that the complaint filed by the appellant is not maintainable, does not warrant any interference. For the reasons aforementioned, the appeal preferred against the order of acquittal fails and the same is dismissed.