

**(1999) 04 CAL CK 0007****Calcutta High Court****Case No:** C.R.R. No. 1848 of 1997

United Credit Ltd.

APPELLANT

Vs

M/s Agro Sales India

RESPONDENT

**Date of Decision:** April 9, 1999**Acts Referred:**

- Negotiable Instruments Act, 1881 (NI) - Section 138, 138(b), 141, 94
- Penal Code, 1860 (IPC) - Section 420

**Citation:** (1999) 2 CivCC 592 : (1999) 3 RCR(Criminal) 74**Hon'ble Judges:** D.P. Sirear-I, J**Bench:** Single Bench**Advocate:** Debasish Roy and Mr. Pritosh Sinha, for the Appellant;**Final Decision:** Dismissed

### **Judgement**

D.P. Sirear-I, J.

The Opposite Party Nos.2 to 4 are the partners of the O.P.No.1 with which company, the petitioner, a financing company had some business transactions. It has been alleged in this case that the accused O.P.No.2 at the time of execution of the agreement with the petitioner company in discharge of liability of the O.P.No. 1 company issued three post-dated cheques bearing No.438640 dated 3.11.96. No.438641 dated 3.12.96 and No.438642 dated 3.1.97 for a total sum of Rs.97,440/-only, each cheque being for an amount of Rs.32,480/-. The other O.P. It is alleged, were present and consented to the act of the issuance of the cheques by the O.P.No.2. The cheques were duly presented by the agent of the petitioner to the banker of the complainant-petitioner-company, that is, Allahabad Bank within the validity period. But the cheques were returned being dishonoured with the remarks "refer to drawer" as the memo of the bank dated 7.1.97. The petitioner company got the intimation about dishonour of the cheques on 8.1.97. Thereafter the petitioner-complainant tried to establish contact with the accused persons-O.Ps. but failed to contact them as the accused persons continued to avoid any contact

with the complainant-petitioner.

2. Under this circumstances as alleged by the petitioner, the petitioner served legal notice upon the accused persons u/s 138(b) of the N.I. Act demand payment of the aforesaid amount of Rs.97,440/- . Along with that amount for which cheques were issued. M/s Sinha & Co. through whom the notice was served upon the O.Ps. accused, demanded a further sum of Rs.510/- as the cost of the aforesaid notice and called upon the O.Ps.-accused to make payment of the amount within 15 days of the receipt of the notice. But in spite of that the accused-O.Ps. did not pay the amount and for that the petitioner-complainant lodged complaint u/s 138 read with section 141 of the N.I. Act before the Ld.Chief Metropolitan Magistrate, Calcutta. The Ld. C M.M.Calcutta took cognizance and transferred the case to the Ld.Metropolitan Magistrate, 16th Court. Calcutta, who examined the complainant as a witness on solemn affirmation, but instead of proceeding with the case he refused to issue process against the present accused persons, opposite parties. The petitioner then filed an application before the Ld.Magistrate submitting that in spite of the claim of cost of the notice as made in the demand notice issued in terms of Section 138(b) of the N.I. Act the case was quite lawful and liable to be proceeded with. But by the order dated 29.5.97 the trial Court dismissed the complaint filed by the petitioner. The petitioner prays for setting aside the order dated 29.5.97, passed by the Ld.C.M.M.. 16th Court, Calcutta, in C-497/97 and for directing the Magistrate to proceed according to law. The petitioner has given a xerox copy of all the relevant documents. It appears from the xerox copy of the notice issued u/s 138(b) of N.I. Act annexed at page 23 of this revisional application that the petitioner through the Advocate Firm claimed payment not only of the cheque amount of Rs.97,440/- but also a further amount of Rs.510/- as the cost of that notice, calling upon the accused-opposite parties to make payment of the amount within 15 days of the receipt of notice at the risk of institution of the criminal proceeding u/s 138 read with section 141 of the N.I. Act. It appears from page 27 of the revisional application that Ld.C.M.M. 16th. Court Calcutta by his order dated 29.5.97. a xerox copy of which has been filed with this revisional application, held that: "He considered, pursued the copy of documents filed. It reveals from the copy of notice of demand dt. 14.1.97 that the complainant has demanded the accused person to pay the cheque amount of Rs. 97,440/-along with Rs.510/- towards cost of notice.

In my opinion in view of the decision of the Hon"ble High Court. Calcutta, the demand of more amount than the cheque amount or the less amount than the cheque amount is illegal. It is no demand in the eye of law. As such the notice being bad and illegal, there cannot be any cause of action to initiate this proceeding. Consequently, the cognizance taken is also bad in my opinion.

As such the instant petition of complainant need be dismissed.

Hence ordered.

That the petition of complainant stands dismissed."

3. The only point for consideration is whether in a case u/s 138 of the N.I. Act the complainant is entitled to claim any amount more than the stark cheque amount, even by way of cost of the notice.

4. It appears from the order that the Ld.Magistrate dismissed the case without issuing process for the complainant's demand of Rs.510/- towards cost of notice, in excess of the actual amount covered by the cheque involved in the case and for that he found guidance from a decision of this Court. But he did not quote the decision on which he relied upon. It was quite improper on the part of the Magistrate to found his case on a ruling of the High Court without specifically referring to the same and just keeping in his mind what weighed with him. We cannot decipher what ruling was in the mind of the Ld.Magistrate. The Ld.advocate for the petitioner, however, supplied the lacuna by claiming that the Ld.Magistrate in this finding relied on the ruling reported in (1995) 2 Cal HN 37 per Bhattacharyya, J., in which it was held by this Court that:

"The wording in clause (b) to the proviso of section 138 "a demand for payment of the said amount of money by giving a notice in writing to the drawer of the cheque", refers to the cheque amount and not any other amount either smaller or higher than the amount mentioned in the cheque. So the notice need to be given demanding the cheque amount. If any bigger amount or smaller amount than the cheque amount is mentioned, that will create difficulty to the drawee to know how much amount he has to pay or she has to pay as the case may be, and that makes the notice insufficient and vague and the notice will become illegal."

5. He however, distinguishes this ruling on the question of fact claiming that in the case covered by that ruling in question, claim of any amount by way of cost of notice was not made but, although the cheque and the notice both were issued for an amount of Rs.5,79,000/- the demand was made for an amount of Rs.6,50,000/- and in that case, the notice being for an amount of Rs.5,79,000/- and demand. Rs.6,50,000/- the notice as vague and insufficient and not sustainable in law. Mr.Roy argues that the situation should be distinguished from this case for patent reason. On the contrary, he relies on ruling of Tiwari, J. reported in 1998 C.Cr. LR(Cal) 106. In that case a cheque issued for Rs. 20,00,000/- bounced and a notice under the said provision of the Act was issued by the petitioner, demanding payment of the amount of bounced cheque and also incidental charges of Rs. 1,500/- plus notice charges and for non-payment thereof, a complaint u/s 138 of the N.I. Act was lodged. In that case also the opposite parties contended that the notice was bad as it included, not only the cheque amount but also incidental charges. It was held by Tiwari, J. in that decision that as the notice clearly spelt out the amount covered by the cheque and as the petitioner knew what was his responsibility, if any extra

amount was claimed in the notice that would not vitiate the notice.

6. I have given anxious consideration to the arguments of the Ld. advocate Mr.Roy, in absence of anybody on behalf of the opposite parties. Hearing of this case goes ex parte.

7. The two rulings appear to be contradictory to each other. While in the ruling of this Court reported in (1992) 2 Cal HN 37 per Bhattacharyya, J. It was found that although cheque was issued for an amount of Rs.5,79,000/- drawn on the U.B.I. Lansdown Branch and a notice was issued demanding the payment of that much amount that is, Rs.5,79,000/- only within 15 days (as is revealed from para 5 of 1995 ruling) the complaint was lodged for a sum of Rs.6,50,000/- (as is revealed from para 32 of the ruling) although the para 13 gives the case otherwise. However, there was identical argument on the point that there was discrepancy between, either the cheque amount and notice amount or the amount described in the notice and as described in the complaint. There is nothing to show that this difference between the amounts covered by the cheque (which actually was included in the notice as is revealed from para 5 of the ruling) and the amount for which the complaint was filed (as is revealed from para 22 of the ruling) was due to any amount claimed by way of cost of notice or any incidental charges. But I find from para 6 of the ruling of this Court per Tiwari, J., reported in 1998 C CR LR (Cal) 106 that in that case decided by Bhattacharyya, J. the notice did not specifically spell out what was the amount covered by the cheque which the accused was required to remit and for that the notice as held bad (which in my humble opinion is not a correct reading), but in the case covered by the ruling per Tiwari, J., the notice clearly spelt out the actual amount covered by the cheque and as such the case was found valid on the ground that the petitioner knew what was the principal amount and which he was required to remit. In paragraph 4 of his ruling Tiwari, J. held that:

"In the case on which reliance was placed, the demand notice was held to be bad because a lump sum amount was demanded after including interest and other expenses by the complainant and this Court held that since the amount covered by the cheque and the one demanded by a notice u/s 138. N.I. Act and was at variance, a complaint cannot be based on the basis of such invalid notice."

8. I respectfully differ from that observation of Hon"ble Tiwari, J. on those facts cited above, I feel embarrassed to state that I do not find anything in the ruling per Bhattacharyya, J. as quoted above from the ruling per Tiwari, J. that the demand notice as held to be bad because by the notice the holder claimed any amount exceeding the cheque amount including interest and other expenses. There is nothing to show in that ruling per Bhattacharyya, J. that the extra amount claimed at the time of demand was by way of the cost of notice and incidental charge or any interest. The finding of Bhattacharyya, J. as contained in para 21 of his ruling does not also support the interpretation of fact made in the ruling per Tiwari, J. However, I do not find anything in the ruling per Bhattacharyya, J. that notice was issued

claiming any amount other than the cheque amount. It appears to me from the reading of the ruling that the case as found not maintainable as the amount for which the complaint was filed was much higher than the cheque amount and the notice amount as stated in paras 4 and 5 of the ruling of Bhattacharyya, J.

9. Be as it may in the case covered by the ruling of Tiwari, J. apart from the cheque amount of Rs.20,00,000/- a further sum of Rs. 1,500/- plus notice charge was claimed. I think that in none of the cases covered by these rulings it can be believed that the petitioner did not know what was the principal amount which he was required to remit. Consequently the two rulings as above appear to be incompatible with each other. To decide the question before us we must examine the provision of section 138 of the N.I. Act.

10. It is a settled principle of law that N.I. Act is a Special Act and the Chapter XVII was enacted for providing penalties in case of dishonour of certain cheques for insufficiency of funds in the account which was treated to be offence. The said section lays down:

"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 in whole or in part, or any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that amount is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank, such person shall be deemed to have committed an offence and shall, without prejudice to any of the 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 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 notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of the 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.

11. This chapter and particularly this section was enacted with a view to enhance the acceptability of the cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of the cheques on the grounds stated in the said provision with a view to provide adequate safeguards to prevent harassment of the

honest payee and honest drawer. It is a special provision of law, in addition to the conventional provision of law for recovery of the money, enacted absolutely for the purpose of making the cheques viable and to provide adequate safeguards for preventing harassment of the honest payee as well as honest drawer. The section provides special criminal liability under some special circumstances and it is in addition to the criminal liability as provided in any other Act or Code and also to civil liability of the person issuing cheques. This provision is attracted only when the drawer has no sufficient fund to cover the cheque amount or the cheque amount exceeding the amount arranged with the bank and also on certain other grounds as interpreted by various rulings from time to time. The purpose of this section is, therefore, hyper-technical and in addition to other parallel provisions, and cheques bouncing only for the grounds enjoined in the clauses of section 138 attracts the mischief at the point of penalty as specifically provided in that section. This section itself, as interpreted by a good number of judicial pronouncements, appears to be complete provision of law, and a special provision of law, and the benefit provided in it must be in addition of other relief provided in any other criminal legislation, as for example, u/s 420, I.P.C. and also civil laws.

12. Therefore, in interpretation of this provision of law we also must be hyper-technical. A benefit u/s 138 can be attracted only on the circumstances specifically spelt out in that provision of law, subject to the riders as added thereto in the proviso enumerated as (a), (b), (c).

In clause (b) to the proviso it has been laid down that: "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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid."

13. A notice under the said clause (b) is therefore, a necessary requirement for attracting the benefit u/s 138 of the N.I. Act. It has been laid down in clause (b) to the proviso that the payee or the holder should make a demand for the payment of the said amount of money by giving notice in writing within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, (underscore is mine). The benefit provided u/s 138 is therefore, a special benefit which can be attracted only on strict compliance of those requirements as specifically spelt out in the said provision of law at the point of penalty provided therein. Apart from the benefit provided in this provision of law the honest holder in appropriate case may have recourse to the other provisions of law under Indian Penal Code or Civil Laws, as I have stated above; but in order to attract the benefit of this section he must proceed in the hyper-technical way as provided in this provision of law. Accordingly, it must be held that he must make demand issuing notice in writing for payment only of the "said amount of money" as covered by the cheque, and nothing more, within the time limit as specified in the relevant portion of that

section. The question of any further claim as cost of notice and institutional charges, in my opinion, cannot be covered within the provision of section 138 of the N.I. Act. As a notice under clause (b) of the proviso to the section 138 of the N.I. Act is a necessary requirement for instituting the case attracting the benefit of that section and clause (b) of the said proviso specifically lays down that the notice must state "the said amount", that is. the cheque amount only, in my opinion, nothing more than the cheque amount can be claimed in the notice to refund in the complaint, in whatever form it may be. as for example, institutional cost, damage or cost of notice. As I stated above this provision has been enacted with the definite object to make the cheque viable and with the special purpose to enhance the acceptability of the cheques in settlement of liabilities, which does not contemplate any other claim, viz., any damage for non receipt of the amount in due time fraudulent harassment, institutional charge or the notice cost. I fully agree with the finding of Bhattacharyya. J. as contained in para 21 of his ruling that the notice and the claim as made in the complaint should include the stark cheque amount and nothing more, whatever might be the extent of loss suffered by the complainant for non-receipt of the cheque money. If any demand was made by the notice or by the complaint in excess of the cheque amount the same obviously becomes invalid or not maintainable and the benefit of section 138 N.I. Act is no longer available, although in every case the accused opposite party is very much aware about his liability in respect of the cheque money. By the same reason if complaint is filed for any amount other than the cheque amount the case u/s 138. N.I. Act cannot lie.

14. I respectfully differ from the finding of Tiwari, J. and agree with the finding of Bhattacharyya, J. in the rulings quoted above. The argument of Mr.Roy for the petitioner that notice was valid u/s 94, N.I. Act does not help him as the notice in this case does not qualify for a case u/s 138(b). N.I. Act. The ruling relied upon by Mr.Roy as reported in 1992 Company Case Vol.75 page 372 V.P.Revathi V. Asha Bagree per Justice Singh, J. is respectfully distinguished as having no bearing and the ruling (1994) 2 CCR 858 per Singh, J. as contained in para 6 of the judgment is respectfully disagreed with.

15. Considering the points stated above I think that the Ld.Magistrate was perfectly justified in dismissing the petitioner's claim u/s 138 of the N.I. Act. I find no reason to interfere.

16. It is ordered that his revisional application is dismissed ex parte.

17. I make it quite clear that the finding in this order shall not in any way make the petitioner deprived of any right to claim the principal i.e. the cheque amount, along with any interest, cost, damage or institutional charge from the accused opponent party as he may be entitled to recover for his transaction under any law of the land by bringing any other cause in any form other than that u/s 138. N.I. Act, in either Criminal Court or Civil Court as he may be advised as because his complaint is being dismissed in this case on the very special technical ground as I have described

above.

16. No observation in this order shall bind any Civil or Criminal Court for whatever action the petitioner may take in any of those Courts for recovery of his claim amount, including interest, damage, notice cost or any other amount which he may think realizable from the opposite party-accused persons under any appropriate provision of law other than a complaint u/s 138 N.I. Act and such Court shall come to its finding about the merit of such claim independently and not being bound by this judgment.