

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU.**

**Petition No. 39/2009
U/S 561-a Cr. PC**

Om Parkash Vs. Darshan Kumar Mahajan

Coram:

Hon'ble Mr. Justice Sunil Hali, Judge.

Appearing counsel:

For the petitioner(s): Mr.B.S. Slathia, Advocate

For the Respondent(s): Mr. W.S. Nargal, Adv.

i) Whether to be reported in

Press/Journal/Media : Yes/ No

ii) Whether to be reported in

Digest/ Journal. : Yes/ No

In order to discharge his liability, the petitioner issued two cheques valued at Rs. 15,50,00 and Rs. 16.00 lacs in favour of the respondent on 12-5-2008 and 21-5-2008 respectively in the name of Citizens Cooperative Bank Limited, Vijaypur. The said two cheques could not be en-cashed on their presentation and the same were returned with the remarks

“**exceeds arrangement**” issued by the concerned bank. Statutory notice was issued by the respondent requesting the petitioner to pay this amount within a period mentioned in the statute. On his failure to make payment, the complaint was filed before the Trial Court under section 138 of the Negotiable Instruments Act. The process has been issued by the Court below. Feeling aggrieved of this, present petition has been filed seeking quashment of the complaint.

I have heard learned counsel for the parties and perused the record.

The ground for seeking quashment of the complaint by the petitioner relates to two issues; a) that the claim through the cheques was neither debt nor any liability which was legally enforceable. b) that statutory notice issued does

not make demand in terms of Section 138 of Negotiable Instrument Act.

On the other hand respondent contended that the amount for which the cheques have been issued is legally enforceable debt arising out of the business transaction between the petitioner and the respondent and the notice has been issued strictly in consonance with the aforesaid act.

Scanning through the contents of the complaint, it emerges that the respondent has been supplying coal to the petitioner who runs Brick Kiln. On account of supply so made, the present liability was raised against the petitioner. The complaint clearly reveals that an amount of Rs. 31,50,000/- was payable by the petitioner to the respondent and in lieu of that cheques were

issued. The said cheques could not be encashed, as it exceeds arrangement as revealed in the memo issued by the bank. It is also revealed that notice has been issued to the petitioner to make the payment within 15 days and on his failure to pay the same, the present complaint has been filed.

The grievance of the petitioner is that the amount for which the cheques have been issued is not legally enforceable debt. The contention of the petitioner that it is not legally enforceable debt, cannot be drawn at this stage. This court cannot examine the merit of the complaint to hold that the cheques were issued for any debt or existing liability. Onus to prove the non- existence of a debt or liability lay on the drawer and had to be discharged at the trial. Burden of proving of

non-existence of any debt or liability is on the accused to be discharged at the trial. Prior to that complaint cannot be quashed by High Court under section 482 CRPC. I fortify my view with the judgement of the Supreme Court titled M.M.T.C Limited and another V/s Medchl Chemicals and Pharma Private Limited and another reported as (2002) 1 Supreme Court Cases 234, in which the Apex Court held as under:-

“ The law is well settled that the power of quashing criminal proceedings should be exercised very stringently and with circumspection. 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. The inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or

caprice. At this stage the Court could not have gone into merits and/or come to a conclusion that there was no existing debt or liability.

There is no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of providing that there was no existing debt or liability was on the respondents. This they had to discharge in the trial. At this stage, merely on the basis of averments in the petitions filed by them the High court could not have concluded that there was no existing debt or liability.”

The second question is that there is no demand made by the respondent while issuing statutory notice to the petitioner to make the payment. It is contended that the notice does not specifically make the demand from the petitioner

to pay this amount within 15 days. I have perused the contents of the notice. For facility of reference, relevant portion of the notice is reproduced below:-

“It is quite pertinent to submit that M/S Om Brick Kiln and M/S New Om Brick Kiln are two proprietorship concerns and you are the sole proprietor of both the concerns and in order to discharge the liability of two concerns, you issued two cheques on behalf of M/S Om Brick Kiln in order to discharge the liability of your two concerns.”

The object of the notice is to give a chance to the drawer of the cheque to rectify his omission and also to protect an honest drawer. Service of notice of demand in Clause (b) of the proviso -2 section 138 is a condition precedent for filing a complaint under section 138 of the Negotiable Instruments

Act. Even though no form of notice is prescribed in Clause (b) of the proviso 2 of section 138, the requirement is that the notice shall be given in writing within 15 days of receipt of information from the bank regarding return of the cheque as un-paid and in the notice a demand for payment of the amount of the cheque has to be made.

In the present case, there is no dispute that the notice was not sent in writing within statutory period of 15 days from the date of information received by the bank. The only question that needs to be examined is whether there was demand of payment. The last portion of notice clearly mentions that two cheques have been issued to discharge the liability of the two concerns within a period of 15 days from the date of receipt of this notice, failing which appropriate

remedy under law would be initiated. This in my opinion is a clear demand as prescribed under section 138 of the Negotiable Instrument Act. I fortify my view with the judgment of the Apex Court in case titled as Central Bank of India and another V/s Saxons Farms and Ors. reported as (1999) 8 Supreme Court Cases 221, in which the Apex Court has held as under:-

“The object of the notice is to give a chance to the drawer of the cheque to rectify his omission and also to protect an honest drawer. Service of notice of demand in Clause (B) of the proviso to section 138 is a condition precedent for filing a complaint under section 138 of the Negotiable Instruments Act, 1881. Even though no form of notice is prescribed in Clause (B) of the proviso 2 of section 138, the requirement is that the notice shall be given in writing within

15 days of receipt of information from the bank regarding return of the cheque as un-paid and in the notice a demand for payment of the amount of the cheque has to be made.

Regarding demand for payment, the High Court was of the opinion that “the intention in the notice was that cheque was being presented again and the applicant/petitioner should arrange the payment on re-presentation of the cheque”. But a cheque can be presented any number of times to the bank within the period of its validity. The appellant Bank had a legal right to re-present the cheques to the Bank as indicated in the notices and, therefore, the respondents could have arranged payment either through the Bank or directly to the appellant Bank. By not doing so the provision of Section 138 is clearly attracted.

In fact in the present case, the last lines of the notice reads as under:

“Kindly arrange to make the payment to avoid the unpleasant action of my client” is a clear demand required by clause 9b) of Section 138 proviso.

The High Court erred in overlooking this line in the notice and in holding that there was no demand of payment.”

There is no other plea raised by the petitioner in the complaint.

For the reasons stated hereinabove, I find no force in this petition which is dismissed along with connected CrMP. Parties are directed to appear before the court below on 18-8-2009.

**(Sunil Hali)
Judge**

Jammu: 31-7-2009
RSB, Secy.

