THE HIGH COURT OF SIKKIM: GANGTOK

(Criminal Appellate Jurisdiction)

DATED: 15th JULY, 2016

S.B.: HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl. A. No. 10 of 2015

Appellant : M/s Sikkim State Co-operative Bank Ltd.
Having its Head Office at Gangtok, Sikkim,
and Gyalshing Branch Office at Gyalshing,
West Sikkim.

Versus

Respondent: Shri Madan Lall Sharma,
S/o Shri S.R. Sharma,
Proprietor M/s Anil Traders,
Naya Bazaar,
Gyalshing,
West Sikkim.

Appearance

Mr. Jorgay Namka and Ms. Panila Theengh, Advocates for the Appellant.

Mr. K.T. Bhutia, Senior Advocate with Ms. Bandana Pradhan, Advocate for the Respondent.

Appeal under Section 378 of the Code of Criminal Procedure, 1973.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The questions that arise for consideration in this Appeal are;

(i) Whether there was service of Notice to the Respondent as envisaged under Section 138 of the Negotiable Instruments Act, 1881? and

(ii) Whether **Exhibit-C** (the Notice) issued to the Respondent, fulfils the requirements of Section 138(b) of the Negotiable Instruments Act, 1881 (hereinafter "NI Act")?

2. According to the Appellant, it had filed a Private Complaint Case No. 01 of 2014 under Section 138 of the NI Act, against the Respondent, before the Court of the learned Judicial Magistrate, West Sikkim at Gyalshing, on account of dishonour of cheque issued by the Respondent to it on 7.12.2013. The facts being that the Respondent had applied for cash credit of Rs.10,00,000/- (Rupees ten lakhs) only, from the Appellant Bank on 27.6.2009 and as on 7.12.2013 a sum of Rs.14,08,000/- (Rupees fourteen lakhs and eight thousand) only, was outstanding against the Respondent duly acknowledged by him. Towards repayment of the said loan, the Respondent issued Cheque bearing No. 32003446 dated 07.12.2013, drawn on the Union Bank of India, Gyalshing. The said cheque, when presented, was dishonoured, which was duly communicated to the Complainant vide Bank return Memo dated 11.12.2013. Thereafter, the Appellant issued a Legal Notice through its counsel on 7.1.2014, at the last known address of the Respondent demanding that he make the payment as covered by the dishonoured cheque, issued by him, within fifteen days from the receipt of the Legal Notice which was duly served on 9.1.2014. Despite receipt of Notice, the Respondent failed to comply with the demand, thus, being left with no option the Complainant filed the aforesaid Private Complaint Case. The Learned Trial Court after considering the evidence on record, as well as the documents exhibited took cognizance of the Case and summoned the Respondent, who sought time to settle the matter with the Complainant. On 5.3.2014, the Counsel for the Respondent undertook to pay Rs.4,00,000/- (Rupees four lakhs) only, as settlement. On failure to repay the amount, the

learned Trial Court on 21.3.2014 finding sufficient *prima facie* materials against the Respondent framed Charge under Section 138 of the NI Act. The Respondent being aggrieved by the said Order preferred a Revision before the Learned Sessions Judge, West Sikkim at Gyalshing, who rejected the same. Thereafter, the witnesses of the Appellant Bank were examined, the Accused was examined under Section 313 of the Code of Criminal Procedure, 1973. He sought to and was allowed to examine two witnesses in his defence. The learned Trial Court on examining the entire evidence, including the documentary evidence, convicted the Respondent and sentenced him to a fine of Rs.20,00,000/- (Rupees twenty lakhs) only, by its Judgment and Order on Sentence dated 30.7.2014. Both were assailed before the Learned Sessions Judge, West Sikkim at Gyalshing in Criminal Appeal No. 07 of 2014.

3. The Appellate Court vide its Judgment dated 22.4.2015, set aside the Judgment and Order on Sentence of the Learned Trial Court on the ground that the Notice served upon a person other than the Accused is not a proper service as required under Section 138(b) of the NI Act, placing reliance on ***M.D. Thomas vs. P.S. Jaleel & Another,*** since reported in (2009) 14 SCC 398. Being, thus aggrieved, the instant Appeal has been preferred.

4. The grounds canvassed in this Appeal are that the learned Appellate Court has erred in holding that the case of the Complainant does not fall within the ambit of the NI Act which is contrary to the evidence on record and findings of the learned Trial Court. That, the Appellate Court has also erred in holding that the Notice issued to the Accused was not served to the Addressee, and hence did not comply with the provisions of Section 138(b) of the NI Act, thus arriving at a wrong finding. It was contended by learned Counsel for the Appellant that the evidence before the learned Trial

Court clearly indicates commission of the offence under Section 138 of the NI Act. The further arguments pivoted around the point of service of Notice. According to him, merely because the Respondent did not receive the Notice from the Postman cannot wish away the fact that his son had indeed received the Notice and had made it over the Respondent on 29.1.2014. While placing reliance on ***Rekha Mahindra Shah vs. Gautam United Parmar and Anr. : 2013 CRI. L.J. 2415***, he endeavoured to bring home this point in view of the findings therein. In the said Judgment, while dealing with service of notice on the husband of the appellant, the High Court of Bombay held that the notice was issued and served, although the applicant did not receive it personally, but was received by her husband. That, both the courts below did not commit any error in holding that the notice is duly served and received as well. Further, to fortify his submissions reliance was also placed on ***C.C. Alavi Haji vs. Palapetty Muhammed and Another : (2007) 6 SCC 555***, wherein the Hon'ble Apex Court while discussing the matter of service of notice held that where the payee dispatches the notice by registered post with correct address to the drawer of the cheque, the principle incorporated in Section 27 of the General Clauses Act, would be attracted. In the matter at hand, it is contended that the correct address was given on the Notice, on the basis of which the son of the Respondent duly received it, therefore, the Respondent cannot now turn around and raise the bogey of non service. To further buttress his point, assistance was also taken of the decision of the Hon'ble Apex Court in ***Indo Automobiles vs. Jai Durga Enterprises And Others : (2008) 8 SCC 529,*** wherein the Hon'ble Apex Court while discussing the case of ***K. Bhaskaran vs. Sankaran Vaidhyan Balan : (1999) 7 SCC 510,*** held that the context of Section 138(b) of the NI Act, invites a liberal interpretation favouring the person who has the statutory obligation to give notice under the Act because he must be presumed to be the loser in the transaction, and provision itself has

been made in his interest and if a strict interpretation is asked for that would give a handle to the trickster cheque drawer. Hence, the Judgment and Order of the learned first Appellate Court be set aside.

5. *Per contra*, the thrust of the arguments advanced by learned Senior Counsel for the Respondent, pivoted around the defects in the Notice issued under Section 138 of the NI Act, purportedly issued to the Respondent, however, the fact of service of Notice was duly acknowledged during the course of the arguments. He has walked this Court in detail through the provisions of Section 138 of the NI Act, and contends that as per Section 138(b), there must be a specific demand mentioning the amount due. That, **Exhibit-C**, purportedly the Notice, issued by the Appellant does not mention that the Respondent owes the Bank Rs.14,08,000/- (Rupees fourteen lakhs and eight thousand) only. It is further argued that on careful perusal of **Exhibit-C**, his stand would be vindicated leading to the undeniable fact that the Notice is defective. That, the learned Trial Court failed to examine the Notice in the first instance. Reliance was placed on the decision of ***M/s Rahul Builders vs. M/s Arihant Fertilizers & Chemical & Anr. : 2008 CRI. L.J. 452***, wherein it was, *inter alia*, held that unless a notice is served in conformity with Proviso (b) appended to Section 138 of the Act, the complaint petition would not be maintainable. That, 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. The decision in ***Suman Sethi vs. Ajay K. Churiwal and another : AIR 2000 SC 828,*** was also invoked wherein at Paragraph 8, it was held as follows;

> "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. cheque amount. If no such demand is made the notice no doubt would fall short of its legal requirement. Where in addition to "said amount" there is also 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 up breakup 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, notice might well fail to meet the legal requirement and may be regarded as bad."
>
> (*emphasis supplied*)

6. To further buttress his submissions, learned Senior Counsel also placed reliance on ***Yankay Drugs and Pharmaceuticals Limited vs. Citi Bank and Another : 2001 CRI. L. J. 4157***, wherein it was held, *inter alia*, at Paragraph 12 as follows;

> "12. In this case on hand, the amount covered by the cheque, which was dishonoured by the bank is Rs.9,972/-. But in the notice issued under Section 138(b) of the Act the complainant failed to make any demand for payment of the said amount, instead it was stated in the notice that the cheque, which was dishonoured, was issued for Rs.3,871/-. From this it is clear that the notice clearly fell short of the statutory requirement under Section 138(b) of the Act."

7. In the second limb of his argument, he disputes the fact that the Respondent had issued the cheque for an amount of Rs.14,08,000/- (Rupees fourteen lakhs and eight thousand) only. Taking the stand that the Respondent had issued ten blank cheques against the loan taken by him, having duly signed the cheques but without inserting the dates. It is expostulated that on the relevant date i.e. 7.12.2013, the Bank has filled in the details in the cheque and presented it for encashment, without the knowledge of the Respondent and therefore, he is not liable for any consequences that arise on presentation of such a cheque in the absence of the Respondent's knowledge.

8. I have heard the rival contentions of both learned Counsel and given due consideration to the same. I have also carefully perused the entire records of the matter including the evidence on record, the Judgment and Order on Sentence of the learned Judicial Magistrate, West Sikkim at Gyalshing and the impugned Judgment of the learned Sessions Judge, West Sikkim at Gyalshing. Decisions of the Hon'ble Apex Court relied on by learned Counsel for the parties have also been perused by me.

9. Learned Counsel for the Appellant had painstakingly argued on the point of service of notice contending that the Notice had been duly served on the Respondent, as before the learned Court of the Magistrate, West Sikkim at Gyalshing, it was contended that the Notice was not served and further, the learned Sessions Court, West Sikkim at Gyalshing, also set aside the Judgment of the Learned Trial Court on the grounds of non-service of summons on the Respondent. The arguments before this Court placed by learned Senior Counsel for the Respondent, however, clearly indicates that he has no quarrel with the service of Notice. *Inasmuch* as, he admits receipt of the Notice, therefore, this point requires no further discussion. The first question set out above is consequently settled.

10. Now dealing with the second question, it has been pointed out by learned Senior Counsel that the provisions of Section 138(b) of the NI Act, have not been complied with since the specific amount of the cheque has not been mentioned in the Notice.

11. On this point, on careful perusal of **Exhibit-C**, it is clear that the Respondent has been given notice of the amount due from him duly recapitulating that on 27.6.2009 he was sanctioned a cash credit loan with a limit of Rs.10,00,000/- (Rupees ten lakhs) only, for a

period of 12 months. The said loan amount was sanctioned at the interest rate of 13% per annum with an additional penal interest of 2% per annum to be charged in case of default. It has also been laid out in the Notice that he failed to settle the outstanding despite repeated reminders, but on 7.12.2013 issued a cheque bearing No. 32003446 in the name of the Complainant Bank to deposit it with the assurance of sufficient funds in his account. However, what cannot be lost sight of is the glaring fact that the specific amount of the dishonoured cheque being Rs.14,08,000/- (Rupees fourteen lakhs and eight thousand) only, has not been specified in the Notice which makes the Notice fall short of its legal requisites. For better appreciation, the relevant portions of the Notice are extracted herein below;

> "……
> 1. That on 27.06.2009, you were sanctioned a Cash Credit Loan with a limit of Rs.10,00,000/- (Rupees lakh only) *(sic)* by my client for a period of 12 months.
> 2. That the said loan amount was sanctioned to you at the interest rate of 13 % P.A. and an additional 2% P.A, Penal Interest was to be charged in case of default.
> 3. ……
> 4. ……
> 5. That my client, on several occasions had verbally informed you about the outstanding amount payable by you, however despite several assurances from your side, you had not settled the same. However, you assured my client that you had credited your account No 574401010050021, maintained in my client's Bank, i.e, Union Bank of India and issued a Cheque bearing No.: 32003446, dated 07.12.2013 in the name of my client requesting my client to deposit the same in the bank and also assured that there is sufficient balance in your account and the cheque would not be returned without encashment.
> 6. ……...
> 7. ……"

12. In ***M/s Rahul Builders*** case (supra), the Hon'ble Apex Court discussed the observation made in ***Suman Sethi's*** case (supra) and concluded that;

> "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."

13. Similarly, as already mentioned for reasons best known to the Appellant, the cheque amount has not been categorically specified in the Notice and hence, I have to agree with the submissions of Learned Senior Counsel for the Respondent that the Notice is not in conformity with the provisions of Section 138(b) of the NI Act. This Court is alive to the fact that a wide interpretation has to be given to the provision of Section 138(b) of the NI Act, so that the wrongdoer does not benefit by raising the question of shortfalls in the technicalities. However, when there is a categorical legal requirement, the party demanding payment cannot circumvent the provisions. At the same time the fact of non-exhibition of **Exhibit-C** by the Appellant in the learned Trial Court needs to be mulled over, it is only on an Application filed by the Respondent before this Court seeking to exhibit a copy of **Exhibit-C**, which was in the possession of the Appellant Bank, duly filed by them before the learned Trial Court and allowed by Order of this Court dated 13.4.2016, that the document came to be exhibited before the learned Trial Court, despite vehement opposition to the Application by the Appellant.

14. Without the benefit of having examined **Exhibit-C**, the learned Trial Court in its Judgment at Paragraph 22, held as follows;

> "22. With regard to the notice issued by the complainant bank to the accused, upon a proper edification of the evidence, it is firstly inferred that although the complainant bank has not exhibited the legal notice issued to the accused, however I cannot reject their case on mere non-exhibition of the notice when PW-4 examined by the complainant bank has proved that legal notice was issued by him to the complainant bank, which could not be discarded by defence. Also the denial of its existence by defence does not hold

> much weight when the witnesses of the defence itself have duly acknowledged its receipt in their evidence."

15. The observation of the learned Trial Court that there was compliance of procedural aspects merely relying on the evidence of PW-4, cannot be countenanced as the learned Court had no opportunity of examining **Exhibit-C**. The Court has failed to take into consideration that the "said amount" has not been disclosed in the Notice. On the other hand, it would be pertinent to point out that the argument of the Respondent that he had given blank cheques to the Appellant cuts no ice, in view of the non production of counterfoils before the learned Trial Court to substantiate this point. However, this argument has no bearing now, for the reason that in the first instance the Appellant has failed to abide by the provision of Section 138(b) of the NI Act, as already reflected in the foregoing discussions.

16. Accordingly, the Judgment and Order on Sentence of the learned Trial Court in Case No. 01 of 2014 dated 30.7.2014, is set aside.

17. The acquittal of the Respondent by the learned first Appellate Court is upheld but for a different reason, i.e. the learned Court of Sessions while relying on ***M.D. Thomas's*** case (supra), was of the opinion that since the Notice was not served upon the Respondent / Accused but on his son, the requirements in terms of Clause (b) of the proviso of Section 138 of the NI Act had not been complied with. Now, however, the Respondent admits receipt of the Notice. It was also observed that PW-4, has deposed that he specifically mentioned the cheque number, date and the amount. This is contrary to the contents of **Exhibit-C**, therefore, this opinion is not tenable.

18. Hence, in view of the discussions hereinabove, the Respondent is accordingly acquitted of the Charge under Section 138 of the NI Act.

19. Appeal is dismissed.

20. Copy of this Judgment be sent to the Courts of the learned Sessions Judge, West Sikkim at Gyalshing and the learned Judicial Magistrate, West Sikkim at Gyalshing for information, along with its records.

21. No order as to costs.

Sd/-
(Meenakshi Madan Rai)
Judge
15.7.2016

Approved for reporting : **Yes**
Internet : **Yes**

bp