

**MCRC.5458/2013**

Gokuldas  
V.  
Atal Bihari & Anr.

**04/04/2017**

Shri S.S.Rajput, counsel for the applicant.

Shri R.K.Bohare, counsel for the respondent no.1.

Shri Girdhari Singh Chauhan, Public Prosecutor for the respondent no.2/State.

This application under Section 482 of CrPC has been filed against the order dated 12/06/2013 passed by Additional Sessions Judge, Chachoda, District Guna in Criminal Revision No.283/2010 by which the order dated 22/11/2010 passed by JMFC, Chachoda, District Guna in Criminal Case No.689/2010 has been affirmed.

The necessary facts for the disposal of the present application in short are that a complaint under Section 138 of Negotiable Instruments Act and under Section 420 of IPC has been filed by the respondent no.1 against the applicant on the allegation that the applicant was in need of Rs.4,30,000/- and, therefore, the respondent no.1 had given the said amount but the same was not repaid. Accordingly, a cheque dated 26/07/2010 for Rs.4,30,000/- was given by the respondent no.1 to the applicant which stood bounced on the ground that the holder of the account has intimated the bank to stop payment as the said cheque has been stolen. Statutory notice was issued and since the payment was not made, therefore, the complaint under Section 138 of Negotiable Instruments Act was filed.

It is submitted by the counsel for the applicant that an objection was raised before the Magistrate contending

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inter alia that in the statutory notice, issued by the complainant/respondent no.1, it was alleged that the applicant had taken a loan of Rs.43,000/- and a cheque of Rs.43,000/- was given in lieu of repayment of loan amount which was presented before the bank and it has stood bounced whereas in the complaint it is alleged that the applicant had taken a loan of Rs.4,30,000/- and a cheque for an amount of Rs.4,30,000/- was given which stood bounced. It was submitted that as the notice under Section 138 of Negotiable Instruments Act was not issued for the amount of the cheque, therefore, the complaint, as filed by the respondent no.1, is not maintainable.

In reply to the said objection, it was contended by the counsel for the respondent no.1 that because of typographical error in the notice, issued under Section 138 of Negotiable Instruments Act, by mistake an amount of Rs.43,000/- was mentioned in the place of Rs.4,30,000/- and the said mistake in the statutory notice is merely an irregularity and not an illegality, therefore, at this stage, the complaint cannot be dismissed.

The objection raised by the applicant was rejected and the cognizance for offence under Section 138 of Negotiable Instruments Act was taken against the applicant.

Being aggrieved by the order dated 21/12/2010, the applicant filed a criminal revision which was registered as Criminal Revision No.283/2010. The

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Additional Sessions Judge, Chachoda, by order dated 12/08/2013, dismissed the revision only on the ground that whether the amount of Rs.43,000/-, as mentioned in the statutory notice, was because of typographical error or not, can only be decided after the evidence is led.

It is submitted by the counsel for the applicant that by issuing a notice under Section 138 of Negotiable Instruments Act, the holder in due course of the cheque has to make a demand of the payment of "said amount of money" to the drawer of the cheque and since the complaint has been filed on the allegation that a cheque of Rs.4,30,000/- was issued by the applicant but as the notice under Section 138 of Negotiable Instruments Act was given for an amount of Rs.43,000/- only, therefore, it cannot be said that the notice as issued under Section 138 of Negotiable Instruments Act was issued for the "said amount of money". Thus, it is submitted that as the notice under Section 138 of Negotiable Instruments Act was not issued for the "said amount of money", therefore, the complaint filed on the basis of the notice dated 23/08/2010 is bad and is not maintainable.

*Per contra*, it is submitted by the counsel for the respondent no.1 that although it was mentioned in the statutory notice issued under Section 138(b) of Negotiable Instruments Act that the applicant had taken a loan of Rs.43,000/- from the respondent no.1 and in lieu of repayment of the said loan amount a cheque of Rs.43,000/- was issued but as the number of the cheque

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as well as the date of issuance of such cheque is correctly mentioned in the notice, therefore, the Courts below did not commit any mistake in holding that whether there was any typographical error with regard to the amount mentioned in the notice or not, cannot be considered at this stage and it has to be ascertained only after the recording of the evidence.

Heard the learned counsel for the parties.

The centripetal question for adjudication in the present applicant in short is that whether the statutory notice issued under Section 138(b) of Negotiable Instruments Act was issued for the "said amount of money" or not.

Section 138 of Negotiable Instruments Act reads as under:-

**"138. Dishonour of cheque for insufficiency, etc., of funds in the account.** —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, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for 19 [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this

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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 a notice in writing, to the drawer of the cheque, 20 [within thirty days] of the receipt of 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.

Explanation.— For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.]”

The Supreme Court in the case of **Kusum Ingots & Alloys Ltd. v. Pennar Peterson Securities Ltd. & Ors.** reported in **(2000) 2 SCC 745** has held as under:-

“**10.** On a reading of the provisions of Section 138 NI Act it is clear that the ingredients which are to be satisfied for making out a case under the provision are :

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(ii) that 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;

(iii) that cheque is returned by the bank unpaid. either because of the amount of money standing to the credit of the account is insufficient to honour the cheque

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or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(iv) the payee or the holder in due course of the cheque 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;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice;

**11.** If the aforementioned ingredients are satisfied then the person who has drawn the cheque shall be deemed to have committed an offence. In the explanation to the section clarification is made that the phrase "debt or other liability" means a legally enforceable debt or other liability."

Thus, it is clear that in order to constitute a cause of action, it is necessary for the holder, in due course of the cheque, must make a demand for the payment of the "said amount of money" by giving a notice in writing to the drawer of the cheque.

"Said amount of money" has been considered by the Supreme Court in the case of **Suman Sethi v. Ajay K.Churiwal & Anr.** reported in **(2000) 2 SCC 380** which reads as under:-

**7.** There is no ambiguity or doubt in the language of Section 138. Reading the entire Section as a whole and applying commonsense, from the words, as stated above, it is clear that the legislature intended that in notice under clause (b) to the proviso, the demand has to be made

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for the cheque amount. According to Dr. Dhawan, the notice of demand should not contain anything more or less than what is due under the cheque.

**8.** It is 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 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 dishonored cheque, notice might well fail to meet the legal requirement and may be regarded as bad."

The Supreme Court in the case of **Central Bank of India & Anr. v. Saxons Farms & Ors.** reported in **(1999) 8 SCC 221** has held as under:-

"8. The object of 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 Act."

The Supreme Court **K.R.Indira v. Dr. G.Adinarayana** reported in **(2003) 8 SCC 300** has held as under:-

**8.** As was observed by this Court in **Central Bank of India and Anr. v. Saxons Farms and Ors.**, [1999] 8 SCC 221 the object of the notice is to give a chance to

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the drawer of the cheque to rectify his omission. The demand in the notice has to be in relation to 'said amount of money' as described in provision. The expression 'payment of any amount of money' as appearing in the main portion of Section 138 of the Act goes to show 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 under Section 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.

**9.** In *Suman Sethi v. Ajay K. Churiwal and Another*, [2000] 2 SCC 380 it was held that the legislative intent as evident from Section 138 of the Act is that if for the dishonoured cheque demand is not met within 15 days of the receipt of the notice the drawer is liable for conviction. If the cheque amount is paid within the above period or before the complaint is filed the legal liability under Section 138 ceases to be operative and for the recovery of other demands such as compensation, costs, interests etc. separate proceedings would lie. If in a notice any other sum is indicated in addition to the amount covered by the cheque, that does not invalidate the notice.

**10.** The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence : (1) drawing the cheque by a person on account maintained by him with a banker, for payment to another person from out of that account for discharge in whole/part any debt or liability, (2) presentation of the cheque by the payee or the holder in due



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course to the bank, (3) returning the cheque unpaid by the drawee bank for want of sufficient funds to the credit of the drawer or any arrangement with the banker to pay the sum covered by the cheque, (4) giving notice in writing to the drawer of the cheque within 15 days of the receipt of information by the payee from the bank regarding the return of the cheque as unpaid demanding payment of the cheque amount, (5) failure of the drawer to make payment to the payee or the holder in due course of the cheque, of the amount covered by the cheque within 15 days of the receipt of the notice.

**11.** Strong reliance was placed by learned counsel for the appellants in Suman Sethi's case (supra) to contend that if the indication in the notice of other amounts than that covered by the cheque issued, does not as held by this Court invalidate the notice, there is no reason as to why a consolidated notice for two complainants cannot be issued. The extreme plea as is sought to be raised in this case based upon Suman Sethi's case (supra) is clearly untenable. Though no formal notice is prescribed in the provision, the statutory provision indicates unmistakable terms as to what should be clearly indicated in the notice and what manner of demand it should make. In Suman Sethi's case (supra) on considering the contents of the notice, it was observed that there was specific demand in respect of the amount covered by the cheque and the fact that certain additional demands incidental to it, in the form of expenses incurred for clearance and notice charges were also made did not vitiate the notice. In a given case if the consolidated notice is found to provide sufficient information envisaged by the statutory provision and there was a specific demand for the payment of the sum covered by the cheque dishonoured, mere fact that it was consolidated notice, and/or that further demands in addition to

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the statutorily envisaged demand was also found to have been made may not invalidate the same. This position could not be disputed by learned counsel for the respondent. However, according to the respondent, the notice in question is not separable in that way and that there was no specific demand made for payment of the amount covered by the cheque. We have perused the contents of the notice. Significantly, not only the cheque amounts were different from the alleged loan amounts but the demand was made not of the cheque amounts but only the loan amount as though it is a demand for the loan amount and not the demand for payment of the cheque amount; nor could it be said that it was a demand for payment of the cheque amount and in addition thereto made further demands as well. What is necessary is making of a demand for the amount covered by the bounced cheque which is conspicuously absent in the notice issued in this case. The notice in question is imperfect in this case not because it had any further or additional claims as well but it did not specifically contain any demand for the payment of the cheque amount, the non-compliance with such a demand only being the incriminating circumstance which expose the drawer for being proceeded against under Section 138 of the Act. That being the position, the ultimate conclusion arrived at by the trial Court and the High Court do not call for interference in these appeals, though for different reasons indicated by us. The appeals are, accordingly dismissed."

In the present case, the relevant portions of the notice issued by the respondent no.1 are as under:-

"1. यह कि मेरा पक्षकार व आप सूचना पत्र ग्रहिता एक दूसरे से परिचित होकर आप लोगों के मध्य स्नेह पूर्ण संबंध रहे है तथा आप सूचनापत्र ग्रहिता कुम्भराज जिला गुना में गल्ले का व्यापार करता है, आपको आपके व्यवसाय में रूपयों की

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आवश्यकता होने के कारण आपके द्वारा मेरे पक्षकार से नगद-राशी 43,000/- रूपया प्राप्त किये गये थे जिनकी अदायगी हेतु आपके द्वारा मेरे पक्षकार को मौखिक वचन दिया गया था।

2. यह कि आपके द्वारा काफी समय व्यतीत होने के उपरान्त भी मेरे पक्षकार को रूपया अदा न करने पर मेरे पक्षकार के द्वारा आपसे रूपयों की माँग की जाने पर आपके द्वारा आपके बैंक खाते का चेक क्रमांक -893576 दिनांक 26.07.2010 स्टेट बैंक ऑफ इन्दौर शाखा कुम्भराज 43000/- रू0 का हस्ताक्षर कर एवं मेरे पक्षकार को यह विश्वास दिलाते हुये दिया कि उक्त चेक बैंक में पेश करते ही चेक में वर्णित राशी का भुगतान न बैंक द्वारा मेरे पक्षकार को कर देवेगी।

अतः आपको इस सूचना पत्र के माध्यम से सूचित किया जाता है कि आप सूचना पत्र प्राप्ती के 15 दिवस के अन्दर चेक में वर्णित राशी-43,000/- रूपये का नगद भुगतान कर रसीद प्राप्त करें अन्यथा मेरे पक्षकार को आपके विरुद्ध रूपया वसूली हेतु सक्षम न्यायालय में कार्यवाही करेगा जिसमें होने वाले समस्त व्यय को जबाब दारी आपकी होगी तथा इस सूचना पत्र का व्यय 500/- रूपया भी आपसे वसूल किया जायेगा।”

Thus, in the notice, it was the specific case of the complainant/respondent no.1 that the applicant had taken a loan of Rs.43,000/- and in lieu of repayment of the said loan, a cheque for an amount of Rs.43,000/- was issued.

Merely by saying that the amount so mentioned in the statutory notice was incorrect because of typographical error, in the considered opinion of this Court, the complainant cannot get rid of the notice issued by him under Section 138(b) of Negotiable Instruments Act. The provisions of Section 138 of Negotiable Instruments Act are penal in nature and, therefore, the provisions are to be construed strictly.

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The Supreme Court in the case of **Aparna A. Shah v. Sheth Developers Private Ltd. & Anr.** reported in **(2013) 8 SCC 71** has held as under:-

“13. In order to constitute an offence under Section 138 of the N.I. Act, this Court, in *Jugesh Sehgal vs. Shamsheer Singh Gogi*, (2009) 14 SCC 683, noted the following ingredients which are required to be fulfilled:

“(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account;

(ii) the cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;

(iii) that 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;

(iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account 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;

(v) the payee or the holder in due course of the cheque 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;

(vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

Being cumulative, it is only when all the aforementioned ingredients are satisfied that the person who had drawn the cheque

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can be deemed to have committed an offence under Section 138 of the Act.”

Considering the language used in Section 138 and taking note of background agreement pursuant to which a cheque is issued by more than one person, we are of the view that it is only the “drawer” of the cheque who can be made liable for the penal action under the provisions of the N.I. Act. It is settled law that strict interpretation is required to be given to penal statutes.”

Thus, if the statutory notice issued under Section 138(b) of Negotiable Instruments Act is considered in the light of the provisions of Section 138 of Negotiable Instruments Act as well as the averments made in the complaint, it is clear that the complaint has been filed on the ground that a cheque of Rs.4,30,000/- was issued in lieu of repayment of loan of Rs.4,30,000/- which was taken by the complainant and as it stood bounced, therefore, the applicant has committed an offence under Section 138 of Negotiable Instruments Act. Whereas the notice under Section 138 of Negotiable Instruments Act was issued on the ground that a cheque of Rs.43,000/- was given in lieu of repayment of loan amount of Rs.43,000/- which was taken by the applicant and a demand for payment of Rs.43,000/- was made. Thus, this Court is of the considered opinion that as the notice under Section 138(b) of Negotiable Instruments Act was not issued for “said amount of money” i.e., the cheque amount, therefore, it cannot be said that the complaint filed by the respondent no.1 prima facie discloses the commission of an offence under Section 138 of

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Negotiable Instruments Act. As the offence under Section 138 of Negotiable Instruments Act is a technical offence, therefore, every technical formalities as required under Section of 138 of Negotiable Instruments Act must be complied with strictly.

Hence, the application filed under Section 482 of CrPC is **allowed**. The Further proceedings in Criminal Case No.689/2010 pending in the Court of JMFC, Chachoda, District Guna against the applicant for offence under Section 138 of Negotiable Instruments Act are quashed.

AKS

**(G.S.Ahluwalia)**  
**Judge**