

If Demand Notice U/S 138 NI Act Mentions Correct Address Of Accused, Question Of Delivery Due To Variation In Postal Receipt To Be Decided At Trial: J&K&L HC

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HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

CRM(M) No.200/2022; 01.11.2022

TAMANNA versus KHUSHMEELA

Petitioner (s) through: M/s: Aatir Kawoosa & Areeb Kawoosa, Advocates.

Respondent (s) through: Mr. N. A. Ronga, Advocate.

1) The petitioner has challenged the complaint filed by the respondent against her for offences under Section 138, read with Section 142 of Negotiable Instruments Act (hereinafter, for short "the NI Act"), which is stated to be pending before the Court of Judicial Magistrate, 1st Class (Judge Small Causes), Srinagar (hereinafter referred to as the trial Magistrate).

2) It appears that the respondent has filed a complaint against the petitioner before the trial Magistrate alleging therein that the petitioner and her husband had approached her for a loan, for the purpose of setting up her business, as she was facing financial hardships. It is alleged in the impugned complaint that a total amount of Rs.62.00 lacs was advanced by the respondent/complainant to the petitioner and her husband had approached her for a loan, for the purpose of setting up her business, as she was facing financial hardships. It is alleged in the impugned complaint that a total amount of Rs.62.00 lacs was advanced by the respondent/complainant to the petitioner and for repayment of the said amount, the petitioner issued seven cheques in favour of the respondent/complainant. The details of these cheques, as given in the complaint, are as under:

S.No	Cheque no	Date	Amount
1.	532233	10.12.2020	RS. 10,00,000/
2.	768412	14.12.2020	Rs.2,00,000/
3.	532236	22.12.2020	RS.10,00,000/
4.	532237	05-01-2021	RS.10,00,000/
5.	532238	15-01-2021	RS.10,00,000/
6.	532239	20-01-2021	RS.10,00,000/
7.	532240	01-02-2021	RS.10,00,000/

3) It is further alleged in the complaint that the petitioner/accused filed a suit against the respondent/complainant, seeking an injunction that the respondent should not make any demand of money from her. According to the complainant, this was done by the accused in order to avoid the payment. The complainant, thereafter, presented the aforesaid seven cheques for payment before the J&K Bank Branch Mehjoor Nagar on 16.02.2021, but all the seven cheques were returned unpaid for 'insufficiency of funds' vide seven separate memos. The respondent/complainant is stated to have issued a notice of demand, which was sent to the petitioner/accused through registered post on 26.02.2021, but despite receipt of the said notice, the petitioner/accused did not pay the cheque amount within the statutory period, which compelled the respondent/accused to file the impugned complaint.

4) The petitioner/accused has challenged the impugned complaint as also order dated 26.03.2021 passed by the learned trial Magistrate, whereby cognizance of the offences was taken and process was issued against the petitioner. Challenge has also been thrown to order dated 21.04.2022 passed by learned trial Magistrate whereby, in an application filed by the respondent/complainant, the petitioner/accused has been directed to pay interim compensation to the tune of 20% of the cheque amount, which comes to Rs.12.40 lacs, to the respondent/complainant.

5) The grounds urged by the petitioner are that the statutory notice of demand was never served by the respondent/complainant upon her and the address of the petitioner/accused as mentioned in the postal receipt is incorrect, as such, it cannot be presumed that she has received the statutory notice of demand. It has also been contended that while taking cognizance of the offences and issuing process against the petitioner, the learned trial Magistrate has acted mechanically, inasmuch as description of 11 cheques instead of 07 cheques has been mentioned in the impugned order and it has been recorded in the order that the cheques were dishonoured through a single memo of dishonour which is against the records. It has also been contended that the order whereby interim compensation has been awarded in favour of the respondent/complainant is devoid of any reasons and, as such, the same is liable to be set aside.

6) I have heard learned counsel for the parties and perused the record of the case, including the trial court record.

7) The first ground that has been urged by learned counsel for the petitioner is that the address of the petitioner/accused mentioned in the postal receipt is incomplete and incorrect and, as such, it cannot be stated that the notice of demand has been served upon the petitioner. Learned counsel for the petitioner has submitted that for giving cause of action in favour of the drawee of a cheque, it is necessary that the drawer of the cheque must have failed to pay the cheque amount within the statutory period, despite having received the notice of demand. According to the learned counsel, in the instant case, notice of demand has not been served upon the petitioner, as such, no cause of action arose in favour of the respondent/complainant to file the impugned complaint against the petitioner. In this regard, learned counsel for the petitioner has relied upon the judgment of this Court in the case of **Engineering Control vs. Bandy Infratech Pvt. Ltd.** (CRMC No.381/2018 decided on 08.07.2022. Reliance has also been placed upon the judgments of the Supreme Court in the cases of **Harman Electronics Private Limited and another vs. National Panasonic India Private Ltd.** (2009) 1 SCC 720, and **C. C. Alavi Haji vs. Palapetty Muhammad and another**, (2007) 14 SCC 750.

8) There can be no dispute to the legal position that mere issuance of notice would not by itself give rise to a cause of action, and the same would arise only when the notice has been communicated to the drawer of the cheque, who, despite having been communicated the notice of demand, fails to liquidate the cheque amount within the stipulated period. It can also not be disputed that presumption of receipt of notice by drawer of the cheque can be raised only if the notice has been dispatched through registered post, to his correct address and such inference cannot be drawn if the notice has been sent on the incorrect address of the drawer of the cheque.

9) The question that falls for determination in the instant case is as to whether the notice of demand has been dispatched by the respondent/complainant on the wrong address of the petitioner/accused, as has been claimed by her. A perusal of the record shows that in the notice of demand, address of the petitioner is shown as under:

Tamanna

W/o Farooq Ahmad Wangnoo

R/O Pati Kursoo Rajbagh Srinagar Pin Code 190008

10) It is not in dispute that the aforesaid particulars reflect the correct address of the petitioner. In the postal receipt annexed with the complaint, it is recorded that the item has been dispatched to "Tamanna Farooq, Srinagar, Pin Code 190008, Jawahar Nagar from Advocate Sarnawaz Thakur, Srinagar". The Pin Code for Jawahar Nagar and Rajbagh, Srinagar is the same i.e. 190008. In the postal receipt, full address of the petitioner is not reflected. So it is not discernible from the postal receipt as to whether the residence of the petitioner was shown as Rajbagh or Jawahar Nagar but one thing is clear that the respondent/complainant, while issuing notice of demand to the petitioner/accused, has reflected her correct address on the notice of demand. However, the postal receipt does not bear full address of the petitioner. In such circumstances, it would not be open to this Court to accept the contention of the petitioner that the notice of demand has been dispatched by the respondent/complainant on incorrect address of the petitioner.

11) In the case of **Engineering Control** (supra), on which the learned counsel for the petitioner has placed reliance, the notice of demand was addressed and dispatched on an address which was palpably incorrect. In the said case, even in the complaint, same address was mentioned and when process was issued by learned trial Magistrate against the accused in the said case, it was reported that the said address is wrong. It is in those circumstances that this Court came to the conclusion that the notice of demand in the said case had been sent on a wrong address and, as such, presumption of service could not be raised. The facts of the instant case are entirely different, inasmuch as correct address of the petitioner is mentioned in the complaint as well as in the notice of demand. In the postal receipt full address of the petitioner is not mentioned. Therefore, it cannot be presumed that the notice was sent on a wrong address. In these circumstances, the question whether the notice of demand has been actually received by the petitioner/accused can be determined only during the trial of the case and not at this stage of the proceedings. The argument of learned counsel for the petitioners that the impugned complaint deserves to be quashed on the aforesaid ground is, therefore, without any merit.

12) It has been next contended by learned counsel for the petitioner that impugned order dated 26.03.2021 passed by learned trial Magistrate, whereby cognizance of offences has been taken and process has been issued against the petitioner, is mechanical in nature, inasmuch as it reflects wrong particulars of the cheques and the memos of dishonour. In order to appreciate this argument, it would be apt to reproduce the impugned order passed by learned trial Magistrate. It reads as under:

"1. The instant complaint U/S 138 N.I.Act has been presented before this court after the same has been assigned by LD. CJM Srinagar for its disposal under law. Office is directed to diarize the same.

2. *Perusal of the complaint and the annexure enclosed with the complaint reveals that, three Cheques bearing No's 857621 dt.07.03.2020, 857624 dt.08.03.2020, 276676 dt.10.03.2020, 857662 dt.12.03.2020, 532233 dt.10.12.2020, 768412 dt.14.12.2020, 532236 dt.22.12.2020, 532237 dt.05.01.2020, 532238 dt.15.01.2021, 532239 dt.20.01.2021 and 532240 dt 01.02.2021 alleged to have been issued by the accused person to the complainant. The cheques came to be presented on the drawee bank on same date. The bank issued one memo for the cheque. The cheques came to be bounced due to the reason of insufficiency of funds in A/c No.111881, 10214 and 8091 the accused. The complainant caused issuance of statutory demand notice through his layer on 26.02.2021. Despite of lapse of more than 15 days from the date of issuance of the demand notice, the accused has not paid the cheque amount and hence the instant complaint has been filed. Statement of the complainant has also been recorded on oath in support of the complaint.*

3. *Considering the complaint as well as the material enclosed, prima facie it appears that there is sufficient material to proceed against the accused for the commission of offence U/S 138 N.I. Act. Hence office is directed to issue summons to the accused calling upon him to cause appearance before this court on the next date of facing the trial of the instant case."*

13) From a perusal of the aforesaid order, it is clear that cheques bearing No.857621 dated 07.03.2020, 857624 dated 08.03.2020, 2776676 dated 10.03.2020 and 857662 dated 12.03.2020, which are not subject matter of the impugned complaint, still find mention in the impugned order. As per the said order, these cheques, along with other cheques, which are subject matter of the impugned complaint, were issued by the accused person in favour of the complainant, which is not a fact. Even as per the case the respondent/complainant, only seven cheques, details whereof are given hereinbefore, are alleged to have been issued by the petitioner/accused in favour of the respondent/complainant. Thus, inclusion of other four cheques in the impugned order reflects non-application of mind on the part of the learned trial Magistrate. The non-application of mind on the part of learned trial Magistrate does not end here. He has in the later part of the order recorded that the bank has issued one memo for all the cheques, whereas the fact of the matter remains that seven different memos of dishonour have been issued by the bank, in respect of seven cheques, which are subject matter of the impugned complaint.

14) Learned counsel for the respondent/complainant has submitted that these are only typographical errors and the same deserves to be ignored. I am afraid, the errors made by the learned trial Magistrate in recording the particulars of the cheques and the memos cannot be termed as typographical in nature. These errors are relating to essential aspects of the case and the same clearly reflects that the learned trial Magistrate, while passing the impugned order, has approached the case in a mechanical and negligent manner.

15) A Magistrate while issuing process against an accused in a criminal case has to meticulously examine the record, go through the contents of the complaint and thereafter satisfy himself about the facts alleged in the complaint. After undertaking this exercise, the Magistrate has to be opine as to what offences are made out against the person sought to be summoned. It is to be noted that once a person is summoned in a criminal case, he is exposed to threat of arrest, unless he seeks bail from the concerned court. So, an order of issuance of process against an accused has to be passed by a Magistrate with due diligence and with full sense of responsibility. The impugned order dated 26.03.2021, passed by the learned trial Magistrate clearly reflects non-application of mind on his part and, as such, is not sustainable in law.

16) For the foregoing reasons, the petition is partly allowed and impugned order dated 26.03.2021 passed by the learned trial Magistrate, whereby process has been issued against the petitioner, is set aside and the case is remanded to the learned trial Court with a direction to pass a fresh order of cognizance on the basis of the material available before him after hearing the complainant/ respondent.

17) Since the initial order of issuance of process against the petitioner stands set aside, as such, without going into the merits of impugned order dated 21.04.2022 passed subsequently by the learned trial Magistrate, the same is set aside. However, it shall be open to the learned trial Magistrate to pass a fresh order under Section 143-A of NI Act at the appropriate stage, after hearing the parties.

18) A copy of this order be sent to the learned trial Magistrate for information and compliance.

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