S.138 NI Act | Whether Demand Notice Issued To Correct Address Is Matter Of Evidence, Not Reason To Quash Complaint: Kerala High Court

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IN THE HIGH COURT OF KERALA AT ERNAKULAM
A. BADHARUDEEN, J.
15 November, 2022
Crl.M.C.Nos.226 of 2022, 1686 of 2022 and Crl.M.C.No.1691 of 2022
K.P.RAMACHANDRAN NAIR *versus* **STATE OF KERALA**

Petitioners / Accused by Adv K.K. Sathish

Respondents / State & Complainant by Adv K. Rakesh for R2, Senior Public Prosecutor Renjit George, Public Prosecutor G. Sudheer

COMMON ORDER

These are Criminal Miscellaneous Cases filed under Section 482 of the Code of Criminal Procedure (hereinafter referred to as `Cr.P.C' for convenience). The petitioners in Crl.M.C.Nos.226/2022, 1986/2022 and 1691/2022, who are accused Nos.1 and 2 in S.T.Nos.335/2019, 336/2019 and 337/2019 respectively, on the file of the Judicial First Class Magistrate Court-II, (Forest Offences), Manjeri, seek quashment of Annexure-A9 complaints in the above cases. The respondents herein are State of Kerala as well as the original complainant in the above cases.

2. Heard the learned counsel for the petitioners as well as the learned Public Prosecutor and the learned counsel for the 2nd respondent.

3. It is argued by the learned counsel for the petitioners that there was no proper legal notice mandated under Section 138(b) of the Negotiable Instruments Act (hereinafter referred to as `N.I Act' for short) and therefore, the entire cognizance is bad in law. Accordingly, he pressed for quashment of the respective complaints. The crux of the argument of the learned counsel for the petitioners is that on dishonour of the cheques alleged to be issued by KAYPEE WIRE PRODUCTS, the 2nd respondent herein/the complainant in all these cases issued notices in a wrong address and as such the notices were returned with the endorsement `no such addressee'. Therefore, the complaints are liable to be quashed, for want of notice. In support of this contention, the learned counsel placed 2 decisions. The first decision cited is one reported in [2012 KHC 4244 : 2012(12) KLD 16 : 2012 (2) KHC SN 36 : 2012 (4) SCALE 644 : 2012 (2) KLJ 456 : 2012 (2) KLT 736 : 2012 (5) SCC 661 : AIR 2012 SC 2795 : 2012 CriLJ 2525], ***Aneeta Hada & Ors. V. M/s.Godfather Travels & Tours Pvt. Ltd. & anr.*** In the said decision, the Apex Court considered maintainability of prosecution under Section 141 of the N.I Act and held that arraigning a company as an accused is imperative and no prosecution would lie without arraigning the company as an accused.

4. In response to this argument, the learned counsel for the 2nd respondent placed a decision of the Apex Court reported in [2021(6) KHC 368 : 2021 KHC OnLine 6691 : 2021 (13) SCALE 392 : 2021 (4) KLJ 834 : AIR 2021 SC 5726 : 2021 (6) KLT OnLine 1136 : 2022 (2) SCC 355 : 2021 SCC OnLine SC 1031 : 2022 (1) SCC (Cri) 514], ***Bhupesh Rathod v. Dayashankar Prasad Chaurasia & anr.*** and argued that in the said decision the Apex Court held, while considering the format of the complaint, that *it is quite apparent that the Managing Director has filed the complaint on behalf of the Company. There could be a format where the Company's name is described first, suing through the Managing Director but there cannot be a fundamental defect merely because the name of the Managing Director is stated first followed by the post held in the Company.*

5. As far as the decision in ***Aneeta Hada & Ors. V. M/s.Godfather Travels & Tours Pvt. Ltd. & anr.***'s case (*supra*), the said ratio has no application in the present cases since in the

present complaints the company is the 3rd accused where partners got arrayed as accused Nos.1 and 2.

6. The second decision cited by the learned counsel for the petitioners is the decision of this Court reported in [2022 KHC 347 : 2022 (2) KLD 84 : 2022 KHC OnLine 347], ***Preesa Foods and Spices (India) Private Limited v. State of Kerala & Ors.*** and it is argued that 5 ingredients are essential and mandatory to be complied with by the person launching a prosecution under Section 140 of the N.I Act alleging commission of offence punishable under Section 138 of the N.I Act for enabling a court to take cognizance. In para.21 of this judgment, this Court summarized the 5 ingredients as under:

"21. xxxx xxxx xxxx xxxx When the drawer of the cheque is a company, demand notice as demanded by clause (b) of proviso to S.138 NI Act must be issued to the company, represented by it's Managing Director. If notice is not issued, the complainant can be taken to have failed to comply with the mandatory requirements under the NI Act, which is very crucial for the prosecution to be successful and fruitful. Company must be arraigned as first accused in the cause title, represented by it's Managing Director. Apart from that in the complaint necessary pleas about the involvement of the accused in the affairs of the company must also be incorporated. xxx xxx xxx.

Based on the above decision, it is argued by the learned counsel for the petitioners that in these matters, the above 5 ingredients were not complied with. According to him, in these cases, the company is not arraigned as the first accused, instead as third accused. This argument appears to be bereft of any merit for the reason that once an accused, who must be in the party array, got arrayed, the status of the accused as first, second or third, etc. has no much significance and the decision reported in ***Preesa Foods and Spices (India) Private Limited v. State of Kerala &*** Ors.'s case (*supra*) has to be read and understood in this way. The learned counsel given much emphasis to demand notices, as I have already pointed out, since the notices issued in these matters returned with the endorsement "no such addressee".

7. Repelling this argument, the learned counsel for the 2nd respondent submitted that notices were issued in Malayalam language and the address in the notices also were written in Malayalam language. In English language, the name of the Company is `KAYPEE WIRE PRODUCTS" and in Malayalam when the notices were issued it was written as "ക(KAY). പീ (PEE) and it was for the said reason, the notices were returned. According to the learned counsel for the 2nd respondent, though notices were returned, it could not be held that there were no proper legal notices in these matters since issuance of notices in the correct address alone would suffice the mandate of notice. He also submitted that whether the notices were issued in the correct address of the accused, is a matter of evidence.

8. On perusal of Annexures-A6, A7 and A8 notices issued in all these cases, notices were returned unserved. However, the photographs of the returned notices produced before this Court would go to show that notices were issued in the name of the accused by showing the name of the firm as "ക(KAY). പ(PEE) Wire Products. Therefore, it has to be held that the issuance of notices in the correct address is a matter of evidence and, therefore, the same is not a reason to quash the complaints. It is relevant to note that the legal position in so far as service of legal notice is well settled. The Apex Court considered the relevant provisions of the Evidence Act as well as General Clauses Act and Negotiable Instruments Act, 1881 in the decision reported in [2007 (2) KHC 932 : 2007 (2) KLD 148 : ILR 2007 (3) Ker. 203 : 2007 (6) SCC 555 : JT 2007 (7) SC 498 : 2007 (3) KLT 77 : 2007 (3) KLJ 81 : 2007 CriLJ 3214 : 2007 (3) SCC (Cri) 236 : 2007 (2) Guj LH 512 : 2008 (1) MPLJ 441 : 2008 (1) Mah LJ 44], ***C.C.Alavi Haji v. Palapetty Muhammed & anr.*** and held as under:

"Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in

the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement `refused' or `not available in the house' or `house locked' or `shop closed' or `addressee not in station', due service has to be presumed."

9. It is submitted by the learned counsel for the petitioners that in a latest decision reported in [2022 KHC 6464 : 2022 (1) KLD 881 : 2022 KHC OnLine 6464 : 2022 (6) SCALE 794 : 2022 (3) KLT SN 57 : 2022 (3) KLT OnLine 1037], ***Rathish Babu Unnikrishnan v. State (Govt. of NCT of Delhi) & anr.***, the Apex Court held that the High Court should be slow to grant relief of quashing a complaint at a pre-trial stage when factual controversy is in the realm of possibility, particularly, because of the legal presumption. In paragraphs 16 to 18 of the judgment, the Apex Court embodied the principles as under:

"16. The proposition of law as set out above makes it abundantly clear that the Court should be slow to grant the relief of quashing a complaint at a pre-trial stage, when the factual controversy is in the realm of possibility particularly because of the legal presumption, as in this matter. What is also of note is that the factual defence without having to adduce any evidence need to be of an unimpeachable quality, so as to altogether disprove the allegations made in the complaint.

17. The consequences of scuttling the criminal process at a pretrial stage can be grave and irreparable. Quashing proceedings at preliminary stages will result in finality without the parties having had an opportunity to adduce evidence and the consequence then is that the proper forum i.e., the Trial Court is ousted from weighing the material evidence. If this is allowed, the accused may be given an un-merited advantage in the criminal process. Also because of the legal presumption, when the cheque and the signature are not disputed by the appellant, the balance of convenience at this stage is in favour of the complainant/prosecution, as the accused will have due opportunity to adduce defence evidence during the trial, to rebut the presumption.

18. Situated thus, to non-suit the complainant, at the stage of the summoning order, when the factual controversy is yet to be canvassed and considered by the Trial Court will not in our opinion be judicious. Based upon a prima facie impression, an element of criminality cannot entirely be ruled out here subject to the determination by the Trial Court. Therefore, when the proceedings are at a nascent stage, scuttling of the criminal process is not merited."

11. In the decision reported in [1976 (3) SCC 736], ***Smt.Nagawwa v. Veeranna Shivalingappa Konjalgi***, the Apex Court enumerated the list of cases where an order of the Magistrate issuing process against the accused can be quashed or set aside. The same are as under:

"(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complainant does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patentlyabsurd and inherently improbable so that no prudent person can ever reach a conclusion that there is a sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuingprocess is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects such as, want of sanction, or absence of a complaint by legally competent authority and the like."

That apart, in the decisions reported in [1988(1) SCC 692], ***Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre***; [1992 Supp (1) SCC 335], ***State of Haryana v. Bhajan Lal***; [1995 (6) SCC 194], ***Rupan Deol Bajaj v. Kanwar Pal Singh Gill***; [1996 (5) SCC 591], ***Central Bureau of Investigation v. Duncans Agro Industries Ltd.***; [1996 (8) SCC 164], ***State of Bihar v. Rajendra Agrawalla***; [1999 (3) SCC 259], ***Rajesh Bajaj v. State NCT of Delhi***; [2000 (3) SCC 269], ***Medchl Chemicals & Pharma (P) Ltd. v. Biological E.Ltd.***; [2000 (4) SCC 168], ***Hridaya Ranjan Prasad Verma v. State of Bihar***; [2001(8) SCC 645], ***M.Krishnan v. Vijay Singh***; [2005(1) SCC 122], ***Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque***, the Apex Court summarised the principles while quashing a complaint. The principles are as under:

(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the Court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

12. Thus the law is no more *res integra* on the point that a complaint can be quashed only when it falls under the category of cases as per the principles set out by the Apex Court, extracted herein above.

In these matters it is emphatically clear that notices were issued in Malayalam language as indicated herein above and, therefore, whether the same amount to proper notices is a matter of evidence. In such a case, the complaints cannot be quashed without giving an opportunity to the complainant to prove issuance of legal notice. Therefore, all these petitions are found to be meritless and are accordingly dismissed.