

11 SCOB [2019] HCD 55**HIGH COURT DIVISION**

CRIMINAL MISCELLANEOUS CASE NO.36422 OF 2014

M.D. Shahabur Rahman*..... Accused petitioner*

Vs.

The State and another*..... Opposite parties.*For the Convict-petitioner. **Mr. Kamrul Alam (Kamal)**, Advocate with Mr. Mohammad Hasib Uddin, AdvocateFor the State **Mr. Md. Jahangir Alam**, DAG with Mr. Md. Jashim Uddin, AAG, Mr. Md. Shafquat Hussain, AAG & Mr. Md. Altaf Hossen Amani, AAGFor the opposite party no.2 **Ms. Nargis Tanjima**, AdvocateDate of Judgement *29.10.2017***Present:****Mr. Justice Obaidul Hassan****And****Justice Krishna Debnath**

The intention of the lawmakers in respect of provision of service of notice upon the drawer is to inform him with a demand of the cheque money (dishonoured) by serving a notice by the petitioner. On this ground a criminal proceedings under section 138 of the Negotiable Instrument Act cannot be quashed. ... (Para-13)

JUDGEMENT**Obaidul Hassan, J.**

1. The instant Rule was issued calling upon the opposite parties to show cause as to why the Sessions Case No.106 of 2013 arising out of C.R. Case No.408 of 2012 under section 138 of the Negotiable Instruments Act, 1881, now pending in the Court of Joint Sessions Judge, 1st Court, Narail should not be quashed, and/or such other or further order of orders passed as to this Court may seem fit and proper.

2. The fact of the case, in short, is that one Md. Habibur Rahman as complainant filed a petition of complain on 10.12.2012 before the Chief Judicial Magistrate, Narail against the petitioner under section 138 of the Negotiable Instruments Act, 1881 (as amended in 1994) alleging *inter alia* that the accused person is a proprietor of S.K. Drug House, Narail and deals with medicine having good relation with the complainant. The accused person is debtor of Tk.20,00,000.00 to the complainant and in order to pay the said money to him the accused

gave a cheque to the complainant bearing no.8647506 dated 14.10.2012 of Pubali Bank Ltd., Narail Branch, Narail of current account no.15706 run in the name of the accused. The complainant deposited the said cheque to the bank on 17.10.2012 for encashment but it was dishonored due to insufficient fund. The complainant through his advocate published a notice on 19.10.2012 in a newspaper namely the “Daily Kalbela” asking the accused to pay the cheque amount to the complainant within 30 days but the accused did not pay the cheque amount to the complainant, due to non-payment of the cheque money within the said period, cause action arose and hence the case.

3. On receipt of such petition of complaint the Chief Judicial Magistrate, Narail examined the complainant on 10.12.2012 under section 200 of the Code of Criminal Procedure and took cognizance against the petitioner under section 138 of the Negotiable Instruments Act, 1881 (as amended in 1994) (hereinafter Act, 1881) and issued summons against him by order dated 10.12.2012 and the petitioner surrendered before the Court concerned and was granted bail on 18.02.2013. Thereafter, the case was registered as Sessions Case No.106 of 2013 and on transfer it was sent to the Court of Additional Sessions Judge, Court No.1, Narail and the petitioner was granted bail by the learned Judge and contested the case by appearing in the Court regularly. The learned Judge framed charge against the petitioner under section 138 of the Act, 1881 on 02.07.2013.

4. Mr. Kamrul Alam (Kamal), the learned advocate appearing on behalf of the petitioner submitted that sub-section (1A) of section 138 of the Act, 1881 was inserted by the Negotiable Instruments (Amendment) Act, 2006 (Act No.III of 2006) where it is clearly states that the notice required to be served by sending it by registered post with acknowledgement due to that person at his usual or last known place of abode or business in Bangladesh; or by publication in a daily Bangla national news paper having wide circulation. So out of three alternatives one provision is publication of the notice in a Daily Bangla National newspaper having wide circulation, but in this case the petitioner has published the notice in a newspaper namely “Doinik Kalbela” which is not a national category newspaper and also has not got wide circulation. Not only that there is no circulation of the newspaper in Narail District and hence the complainant has not complied with the mandatory provision of sub-section (1A) of section 138 of the Negotiable Instruments Act, 1881 and the continuation of the proceeding of the present case is illegal, unlawful and also an abuse of the process of the Court and as such the proceeding of the case is liable to be quashed for the ends of justice.

5. He also submitted that the complainant has filed the case under Negotiable Instruments Act, 1881 on account of dishonoring of cheque which is a special law and its provisions will have to follow strictly and it is the normal practice that after receiving news of dishonouring of the cheque a notice through registered post with acknowledgement is to be sent in order to give opportunity to the drawer of the cheque to pay the cheque money and in case of failing to pay the cheque money within the stipulated period the cause of action arises and then the complainant may file a case, but without sending notice as per law no valid cause of action arises under section 141 of the Negotiable Instruments Act, 1881 and thus the continuation of the proceeding of the present case is illegal, unlawful and also an abuse of the process of the Court and as such the proceeding of the case is liable to be quashed for the ends of justice. In support of his submission he referred a decision in the case of **Sonali Bank Limited and others vs. Prime Global Limited and others**, reported in **63 DLR (AD) 99**.

6. Ms. Tanzima Nargis, the learned advocate appearing on behalf of the opposite party no.2 submitted that the submission of the learned advocate for the petitioner is not sustainable

in the eye of law. She also submitted that the notice was published in the daily newspaper namely "Daily Kalbela" which is a widely circulated newspaper and the petitioner has just taken a plea to drag the case and he has not come to the Court with clean hands.

7. We have considered the submissions of the learned advocates, perused the application and gone through the decision cited by the learned advocate for the petitioner. It appears from the record that the petitioner gave a cheque to the complainant being no.8647506 on 14.10.2012 of Pubali Bank Ltd, Narail Branch, Narail. The said cheque was deposited to the bank on 17.10.2012 for encashment but it was dishonored due to insufficient fund. Thereafter, the complainant on 19.10.2012 gave a notice through the newspaper namely "Daily Kalbela" requesting the petitioner to pay the cheque amount to the complainant within 30 days. Since the petitioner did not pay the cheque amount to the complainant he lodged a petition of complaint against the petitioner in the Court of Chief Judicial Magistrate, Narail on 10.12.2012. The Chief Judicial Magistrate upon examination of the complainant under section 200 of the Code of Criminal Procedure took cognizance and issued summons to the accused petitioner to appear before the Court and ultimately the petitioner on 18.02.2013 surrendered before the concerned Court and got bail. In this case charge was framed on 02.07.2013. In the record we do not find any application filed under section 241A of the Code of Criminal Procedure for discharging the petitioner from the charge.

8. After framing of charge one witness was examined on 20.07.2014. On that date the accused petitioner took time and the next date was fixed on 16.09.2014. It also appears from the record that on 16.09.2014 the petitioner filed an application under section 561A of the Code of Criminal Procedure and he obtained Rule and got order of stay of the proceeding. The petitioner's only ground for quashment of the proceeding is that the complainant did not serve any notice following the provision of section 138(1A) of the Act, 1881. The complainant gave a paper notification in a newspaper namely "Daily Kalbela" which is not a newspaper having wide circulation as has been contemplated in section 138(1A) (c) of the Act, 1881. Since the present Act is a very special law the complainant should have complied with the provision of law in *Toto*. Since the said provision has not been complied with the proceeding is liable to be quashed. In support of his submission the learned advocate for the petitioner has submitted a list of print media in which the number of publications of the newspapers have been mentioned. This list has been prepared by the Publication and Information Department (PID). In support of his submission the learned advocate also referred a decision in the case of ***Sonali Bank Limited and others vs. Prime Global Limited and others*** reported in **63 DLR (AD)99** in which our Apex Court has opined that "*the learned Judge should be careful that the publication of the summons through the national newspapers should be in one of the top 10(ten) newspapers which has got the highest circulation in the country. The figure of circulation can very well be obtained from the Publication and Information Department (PID) of the Government. These steps would ensure due diligence in the service of summons from the office of the Court upon the defendants.*" Mr. Kamrul Alam the learned advocate relying on the said observation made by our Apex Court contented that the aforementioned all the newspapers of the present case are not top most wide circulated newspapers as per the PID of the Government and as such the notices published in the said newspaper was published in violation of section 138(1A)(c) of the Act, 1881 and as such the proceeding is liable to be quashed. On perusal of the decision enunciated in 63 DLR (AD) 99 it appears that the judgment was passed in Artha Rin Case. In the said case the trial Court without being satisfied whether the service of notice was done through the process server or alternatively through registered post has published the summons through a newspaper which was not a widely circulated newspaper. The Hon'ble Appellate

Division considering the facts and circumstances of the said case was pleased to set aside the judgment and order of High Court Division passed in the writ petition making the Rule absolute and sent back the case on remand to the Artha Rin Adalat for expeditious disposal with the observations that “the learned Judges should be careful that the publication of the summons through the national newspapers should be in one of the top 10(ten) newspapers which has got the highest circulation in the country. The figure of circulation can very well be obtained from the Publication and Information Department (PID) of the Government. These steps would ensure due diligence in the service of summons from the office of the Court upon the defendants.”

9. It appears from the fact of the above mentioned case that due to non-service of summons properly the defendant of the Artha Rin case was deprived from placing his grievance before the Court. Thus, the Hon’ble Appellate Division gave the opportunity to the defendant to contest the case setting aside the *ex-parte* decree, but did not reject the plaint for non publication of notices in the widely circulated newspaper.

10. The observations made in the aforementioned judgment is a pre-cautionary direction upon the Artha Rin Adalat to publish the summons in a newspaper which is widely circulated. This reported case is quite distinguishable from the present criminal case. Thus, this decision is not helpful in any way to the present case. Now let us see what is the provision of law and what was the intention of the legislature in enacting of this act. Regarding the service of notice in a case under section 138 of the Act, 1881 for dishonor of a cheque the very intention of legislature was to give an opportunity to the drawer to make payment of the cheque money to the drawee on demand and for the purpose of the notice legislature has provided 3 options in section 138 (1A) (c) of the Act, 1881. The provision of section 138(1A) of the Act, 1881 runs as follows:

138[1].....

“(1A) The notice required to be served under Clause (b) of sub-section (1) shall be served in the following manner:

(a) by delivering it to the person on whom it is to be served; or

(b) by sending it by registered post with acknowledgement due to that person at his usual or last known place of abode or business in Bangladesh; or

(c) by publication in a daily Bangla national news paper having wide circulation.”

11. On perusal of section 138 of the Act, 1881 it appears that there are 3 ways to serve notice as per provision of section 138(1)(B) and publication of notice in the widely circulated national newspaper is one of those 3 provisions as provided in section 138(1A) of the Act, 1881, but nowhere of the Negotiable Instruments Act it has been mentioned that which paper will be treated as the widely circulated national newspaper or how the meaning of widely circulated newspaper could be determined. The learned advocate for the petitioner placed a list of daily newspapers of Bangladesh circulated by the Directorate of the Publication and Film, Dhaka before us.

12. We have also gone through the list, but it appears that this list has been prepared by the Directorate (Adhidoptor), but the same was not notified vide gazette notification. Thus, reliance cannot be put on the list as supplied by the petitioner as an authentic one.

13. The intention of the lawmakers in respect of provision of service of notice upon the drawer is to inform him with a demand of the cheque money (dishonoured) by serving a notice by the petitioner. This provision is provided in section 138(1A) of the Act, 1881.

14. The purpose of notice is only to inform the drawer. In this case when the petitioner went to the Court on 18.02.2013 after receiving summons he became aware about his offence. After knowing about the case even after appearing at the time of framing of charge against him, drawer did not pay the money and did not say that he did not give the cheque to the petitioner. By filing this petition for the first time he came to this Court to quash the proceeding raising a very technical point.

15. In absence of gazette notification of widely circulated national daily newspaper the concerned Court is the proper authority to see whether the demand notice requesting for the payment of cheque money has been served through a daily newspaper, whether it is widely circulated or not. In the present case the accused petitioner knowing fully well about the demand of the complainant, he never met the demand of the complainant rather he took a plea of quashment of the proceeding on a technical point for non publication of the notice in the widely circulated newspaper. It was the duty of the accused petitioner to offer or to pay the cheque amount to the complainant after knowing of the fact of that cheque has been dishonored, at list during pendency of the case. The legislature's intension for enacting this law was to enable the drawer to make payment in favour of the drawee of the cheque amount. Since the petitioner on 18.02.2013 could come to know that the cheque he gave has been dishonored due to insufficient fund it was his duty to make payment in favour of the complainant but without doing so he has taken a plea of non publication of the notice in a widely circulated paper and came to the Court for quashing the proceeding. We are of the view that the petitioner had no intention to make payment of the cheque amount rather he took this plea of non publication of notice in the widely circulated newspaper only to drag the case and to delay the payment in favour of the drawee.

16.3 In an unreported case being numbered Criminal Miscellaneous Case No.33386 of 2015 (*Mohammad Nasiruddin Monir vs. The State and another*) a Bench of our High Court Division comprising Mr. Justice Md. Habibul Gani and Mr. Justice Md. Akram Hossain Chowdhury has taken the similar view. We are fully agreeable with the view taken by our learned brothers in the aforementioned case. Since the names of widely circulated newspaper has not been published by the government by any gazette notification, the trial Court is the only competent authority to decide whether the newspaper wherein the notices demanding cheque money were published is a widely circulated newspaper or not for the purpose of initiating proceeding against the drawer regarding dishonour of cheque. Their Lordships also observed that it is true that the Negotiable Instruments Act is a special law and the provisions of the Act should be followed strictly. But the purpose and intention of the legislature in making law also should be taken into consideration while reading and interpreting the law. The purpose of section 138 of the Negotiable Instruments Act regarding publishing demand notice in the widely circulated newspaper is not to frustrate a legitimate demand of a citizen, but to aiding the same.

17. We are fully agreeable with their Lordships' aforesaid observation and to substantiate our view we like to take help from the decision taken in the case of *Sattaya Narayan Poddar vs. The State and another* reported in *53 DLR 403* which was affirmed by our Apex Court in the case of *Sarwar Hossain Moni vs the State and another* reported in *16 BLC(AD)71*.

18. In the case of Sattya Narayan Poddar the notice was served upon the drawer giving 15 days time for payment of cheque money and time limitation for filing the case was next 15 days from the expiry of 15 days time given in the notice. The case was filed earlier to the

stipulated time and on the ground prematurity the Rule was issued and subsequently by a decision reported in **53 DLR 403** the Rule was discharged holding that *“Even though the case is premature and it was filed before the expiry of 15 days from date of receipt of the notice, the proceeding is not liable to be quashed.”*

19. In that case procedure for filing of the case under section 138 of Act, 1881 was violated and despite of violation of established procedure for filing of the case the learned Judges did not quash the proceeding, holding that knowing about the dishonor of the cheque during pendency of the case the accused petitioner did not take any step to make payment of the cheque money and this decision has been affirmed by our Appellate Division in the case of **Sarwar Hossain Moni vs. the State and another** reported in **16 BLC (AD) 71** holding that *“High Court division has arrived at a correct decision that on perusal of the petition of complaint and provision of section 138 of the Act, 1881 and in view of decisions reported in 53 DLR 403 and 15 BCL 39 the instant proceeding is not liable to be quashed.”*

20. It appears from the above cited cases that despite of violation of the provision of section 138 of the Negotiable Instruments Act, 1881 for filing the case the High Court Division and the Honorable Appellate Division were not inclined to quash the proceeding as the petitioner did not make any payment after knowing about the dishonour of the cheque. Taking the same view we are also in a position to hold that the accused petitioner at the time of obtaining bail came to know that the cheque he gave was dishonored, when he came to know about the dishonor of the cheque he could have made payment of the cheque money to the complainant, but he intentionally did not do so.

21. We are of the view that the petitioner has come to the Court only to drag the case and not to make any payment of the cheque amount to the complainant and he has not come to the Court with clean hands. Thus, the Rule is liable to be discharged.

22. Accordingly, the Rule is **discharged**.

23. Communicate a copy of this judgment at once.