

19.01.2016 Ms. Salina Akter Chowdhury, Advocate

..... For the petitioner.

Mr. Forhad Ahmed, D.A.G with

Mr. Bashir Ahmed, A.A.G.

.....For the State.

This is an application under section 561-A of the Code of Criminal Procedure.

In this application the proceedings under section 138 of the Negotiable Instruments Act, 1881 has been challenged on the ground that the notice has been served in the 'Daily Sangram' newspaper which is not a National Newspaper having wide circulation and accordingly is a violation of the provision as laid down under section 138(IA)(c) of the Negotiable Instruments Act. Since the notice has not been properly served and the dispute between the parties is of civil in nature, as such the impugned proceedings is an abuse of the process of the Court and the same is liable to be quashed.

We have gone through the documents annexed to the application.

On perusal of the complaint petition it appears that the complainant petitioner placed the cheque for encashment to the bank and ultimately when it was dishonoured on the ground of

insufficiency of cash on 24.10.2013. Thereafter, within time, the complainant served a legal notice, claiming the demand of money on 13.11.2013, taking procedure under section 138 of the Negotiable Instrument Act by way of publishing a notice in the Daily Newspaper named 'Daily Sangram'.

It has been alleged that the notice has not properly been served and as such the proceeding is an abuse of the process of Court and is liable to be quashed.

Regarding the service of notice sub section (IA) of section 138 of the Negotiable Instrument Act provides that-

[(IA) 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 newspaper having wide circulation.]

From the above provision of law, we find that the legislature provides three modes to serve a notice upon the opposite party/accused with a demand to repay the money, to make him aware before initiation of a criminal proceeding, under Negotiable Instrument Act. The above mode of service of notice are not alternative to each other, rather any one of the above mode is enough and exhaustive.

In this case complainant claimed to have serve a notice through newspaper (under clause (c) of sub-section 1(A) of section 138 of the Negotiable Instrument Act). The question raised that the newspaper 'Daily Sangram' is not having 'wide circulation' as contemplated under law.

There is no guideline framed under the law on the term 'wide circulation'. But in the case of Sonali Bank Ltd and ors – Vs- Prime Global Limited and ors reported in 63DLR(AD)99, their lordships in a suit under Artha Rin Adalat Ain, has held that-

'13. Besides, 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.’

The whole object under sub-section 1(A) of section 138 of the Negotiable Instrument Act (N.I.Act) is to make aware with a demand to pay the money, within a time, before initiating a criminal proceeding under section 138 of the N.I.Act. If the respondent did not pay heed to the demand after expiry of the stipulated time, cause of action will arise to institute a case, for bouncing the cheque, with the allegation that he has committed an offence under the Negotiable Instrument Act (N.I.Act). So by way of any one of the above three stated modes mentioned in sub-section (IA) of section 138 of the N.I.Act, the petitioner can make him aware before institution of a case under this Act, and it is sufficient to fulfill the legal requirement.

When the accused respondent gave the cheque, he had actual and constructive knowledge about the state of his own bank account. Therefore, when the cheque was dishonoured by the bank on the ground of ‘insufficiency of fund’ in the respondent’s account, a proceeding under section 138 of the N.I.Act can not be frustrated merely on a technical ground.

Whether a notice has been published in a daily Bangla National Newspaper having wide circulation or not is obviously a matter of fact and can be decided on merit after taking evidence by the trial court. If a daily national newspaper is very much available in around the area where the accused usually resides or having business can be said to have wide circulation. However since this is absolutely a discretion of the trial court to determine the question about the wide circulation of the daily newspaper, we are of the view that this question of fact is out of the ambit of jurisdiction under section 561A of the Code of Criminal Procedure, and can not be quashed.

In a number of cases it has already been settled that the inherent powers under section 561A of the Code, under the following categories of cases, wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice,

- 1) 'Where the allegations made in the first information report or 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 a case against the accused.

- 2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
- 3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
- 4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under section 155(2) of the Code.
- 5) Where the allegations made in the FIR or complaint are so absurd and inherently

improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

- 6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and /or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
- 7) Where a criminal proceedings is manifestly attended with mala fide and/or where the proceedings is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.'

Regard being had to the above law, fact and circumstance of the case, we do not find any ground to either interfere in the impugned criminal proceedings or to issue rule to quash the said proceedings in any manner.

Accordingly the application is rejected summarily.

Communicate the order at once.

(A.K.M.Asaduzzaman, J).

(Md. Ashraful Kamal, J.)