

**Dilip S. Dhanukar, Chairman and Managing Director, Indo Biotech Foods
Limited Vs India Equipment Leasing Ltd. and R.G. Kulkarni, Finance
Manager, Indo Biotech Foods Limited**

Court: Madras High Court

Date of Decision: Oct. 8, 2010

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 482

Evidence Act, 1872 â€” Section 114

General Clauses Act, 1897 â€” Section 27

Negotiable Instruments Act, 1881 (NI) â€” Section 138, 141, 141(2)

Citation: (2011) 4 CivCC 606 : (2011) 2 CTC 617 : (2011) 3 RCR(Civil) 632 : (2011) 3 RCR(Civil) 632 : (2011) 3 RCR(Criminal) 466 : (2011) 3 RCR(Criminal) 466

Hon'ble Judges: K. Mohan Ram, J

Bench: Single Bench

Advocate: Adrian D. Rozario, for the Appellant; G.M. Ramasubramanian, for Ram and Ram, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K. Mohan Ram, J.

As the question that arises for consideration in both the Criminal Original Petitions is one and the same and the parties are also same, both the above Criminal Original Petitions are being disposed of by this common order.

2. A complaint has been filed by the first Respondent/complainant against the petitioner and Respondents 2 and 3 in CrI.O.P. No. 433 of 2005 u/s

138 of the Negotiable Instruments Act (hereinafter referred to as "the Act") before the XIII Metropolitan Magistrate, Chennai, and the the same

has been taken on file as C.C. No. 6360 of 1997. The said complaint has been filed in respect of the dishonour of the following cheques, after

satisfying the statutory requirements:

Cheque Nos. Dated Amount

200390 04.03.1997 Rs. 1,59,296/-

200391 04.04.1997 Rs. 1,59,296/-

200392 04.05.1997 Rs. 1,59,296/-

3. A complaint has been filed by the first Respondent/complainant against the petitioner and Respondents 2 and 3 in CrI.O.P. No. 434 of 2005 u/s

138 of the Act before the XIII Metropolitan Magistrate, Chennai, and the the same has been taken on file as C.C. No. 6358 of 1997. The said

complaint has been filed in respect of the dishonour of the following cheques, after satisfying the statutory requirements:

Cheque Nos. Dated Amount

200387 04.12.1996 Rs. 1,59,256/-

200388 04.01.1997 Rs. 1,59,256/-

200389 04.02.1997 Rs. 1,59,256/-

4. In both the Criminal Original Petitions, the petitioner contends that the learned Magistrate ought not to have taken cognizance of the complaints,

in the absence of service of statutory notice u/s 138(b) of the Act, on the petitioner. It is contended that even in the complaints, there is no

averment to the effect that the individual statutory notice was sent to the petitioner herein demanding payment of the amounts covered by the

dishonoured cheques.

5. Heard the learned Counsel on either side.

6. In support of the aforesaid contentions, the learned Counsel for the petitioner submitted that unless a statutory notice is served, as contemplated

in the Act, no cause of action will arise for filing the complaint u/s 138 of the Act. In support of the said contentions, the learned Counsel based

reliance on the following decisions:

(i) (2006) II M.L.J. 134 (Y. Banumoorthy v. R. Janiikaraman). In the said decision, a learned Single Judge of this Court, in paragraph 11, has laid

down as follows:

11. It is not in dispute that the statutory notice was not issued to the second accused at all. It is the trite law that no prosecution u/s 138 of the

Negotiable Instruments Act, can be launched without issuance of the statutory notice. Therefore the proceedings as against the second accused is

found not sustainable.

(ii) (2001) M.L.J. 519 (Harish C. Chadda v. X.S. Financial Services Limited). In the said decision, a learned Single Judge of this Court, in

paragraph 7, has observed as follows:

7. ...The said presumption of guilty arises only when a notice is served u/s 138(b) of the Act calling upon such person to honour the notice by

making payment. Only in the event of failure to make payment within 15 days from the receipt of the notice, the cause of action for prosecuting

such director arises....

In the very same decision, in paragraph 7, it has been laid as follows:

Therefore, I hold that when the offence is committed by a company and by virtue of Section 141 of the Act and every person who at the time the

offence was committed was in charge of and was responsible to the company for the conduct of the business of the company, are presumed to be

guilty of the offence, those persons shall be also entitled to the notice u/s 138(b) of the Act. In the absence of such notice there cannot be cause of

action against those directors as they had no knowledge of the offence and there was no opportunity for them to exercise all due diligence to

prevent the commission of such offence.

In the very same decision, in paragraph 8, it has been held as under:

I am supported by the judgment of this Court made in Crl.O.P. No. 9530 of 1998, dated 7.7.1999, wherein this Court has held that in the

absence of statutory notice to the petitioner who was a Managing Director of the Company which is mandatory under the provisions of the

Negotiable Instruments Act, a complaint could be quashed....

(iii) In (2006) 2 MLJ 990 (B. Raman v. Shasun Chemicals and Drugs Ltd.,) the question posed before the Division Bench was as follows:

In the absence of individual notice u/s 138(b) of the Negotiable Instruments Act, to be served on the director of a company, can the said director

be prosecuted for the offence, committed by the company, u/s 138 of the Act?

Since there was two divergent views in the decisions reported in (2001) M.L.J. 519 (referred to supra), wherein Mr. Justice D. Murugesan held

that prosecution against the Director, who has not been served with the statutory notice, is not maintainable. In another decision rendered by Mr.

Justice Malai Subramanian, as he then was, in Sarvaraya Textiles Limited v. Integrated Finance Ltd. reported in 2001 (1) CTC 725, wherein, it is

held that the prosecution is maintainable, even though, notice has not been served on the Director, who is sought to be prosecuted, since notice

served on the company amounts to service of notice to all the Directors arrayed as accused, along with the company. While considering the said

question, a Division Bench of this Court, in paragraph 37, has laid down as under:

37. In the light of what is stated above, the answer to the question is, statutory notice to every person, including the director, who is sought to be

prosecuted, is mandatory.

(iv) Shakti Travel and Tours Vs. State of Bihar and Another, . In the said decision, it is held as follows:

...in the complaint itself having not been mentioned that the notice has been served, on the assertions made in para 8, the complainant itself is not

maintainable....

7. Countering the said submissions, the learned Counsel for the first Respondent submitted that though it has not been mentioned in the complaints

that the statutory notice was sent to the petitioner/second accused, since he is the Chairman-cum-Managing Director of the first accused company,

notice sent to the company will amount to notice to the petitioner also, therefore submitted that no separate notice need to be sent to the petitioner,

who is the Chairman cum Managing Director of the first accused company. He basing reliance on a decision of the Apex Court reported in (2007)

3 SCC (Cri) 236 (C.C. Alavi Haji v. Palapetty Muhammed) submitted that even assuming that no notice was served on the petitioner, since the

petitioner has not made the payment of the amounts covered by the dishonoured cheques within 15 days of the receipt of the summons from the

Court, the petitioner cannot contend that there was no proper service of notice. He also based reliance on a decision of this Court reported in

(2001 (1) CTC 725 (referred to supra) rendered by Mr. Justice Malai Subramanian.

8. Learned Counsel for the Respondents also relied upon the following decisions:

(i) S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, , a Full Bench of the Apex Court, has laid down as follows:

20(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be

admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a

company become liable u/s 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in

charge of and responsible for the conduct of business of the company. Therefore, they get covered u/s 141. So far as signatory of a cheque which

is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under Sub-section (2) of Section 141.

(ii) In (2007) 2 SCC (Cri) 444 (Everest Advertising (P) Ltd. v. State, Govt. of NCT of Delhi), in paragraph 23, it is laid down as follows:

23. ...A Chairman of a large Company may or may not be aware of the actual transaction. If in a given situation, cheques are issued in ordinary

course of business. The Managing Director or a Deputy Managing Director, in view of S.M.S. Pharmaceuticals Ltd. (supra) would be deemed to

be aware thereof. A Chairman or a Director of a Company need not be....

(iii) In M/s. Bilakchand Gyanchand Co. Vs. A. Chinnaswami, , the Apex Court, has held as under:

In our opinion, the High Court erred in quashing the complaint. It is evident that proceedings were initiated by the Appellant against A.

Chinnaswami who happened to be the Managing Director of Shakti Spinners Ltd. The cheques in question which were dishonoured were signed

by him. The process was issued by the Judicial Magistrate in his name. We see no infirmity in the notice issued u/s 138 addressed to A.

Chinnaswami, who was a signatory of the said cheques. The High Court, in our opinion, clearly fell in error in allowing the petition u/s 482 Code of

Criminal Procedure and in quashing the complaint & setting aside the proceedings pending before the Judicial Magistrate.

9. I have considered the aforesaid submissions made by the learned Counsel on either side and perused the materials available on record.

10. The learned Counsel for the first Respondent basing reliance on a decision reported in (2007) 3 SCC (Cri) 236 (referred to supra) submitted

that even assuming that no notice was served on the petitioner, since the petitioner has not made the payment of the amounts covered by the

dishonoured cheques within 15 days of the receipt of the summons from the Court, the petitioner cannot contend that there was no proper service

of notice. The said contention of the learned Counsel for the first Respondent cannot be countenanced, since, in the said decision, the facts are

different, namely, in that case, though notice was sent by the complainant, the contention of the accused was that he did not receive the notice sent

by post. Only taking that into consideration, the Apex Court has held as follows:

17. ...Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect

of the complaint u/s 138 of the Act, make payment of the cheque amount and submit to the court that he had made payment within 15 days of

receipt of summons (by receiving a copy of the complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who

does not pay within 15 days of receipt of the summons from the court along with the copy of the complaint u/s 138 of the Act, cannot obviously

contend that there was no proper service of notice as required u/s 138, by ignoring statutory presumption to the contrary u/s 27 of the GC Act and

Section 114 of the Evidence Act...

Therefore, the said decision does not apply to the facts of the case on hand.

11. As far as the contention of the learned Counsel for the first Respondent based on S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another,

is concerned, in that decision, what is laid down is that the Managing Director or the Joint Managing Director would be admittedly incharge of the

company for the conduct of the business. Therefore, the said decision is not of any assistance to the contentions put forth by the learned Counsel

for the first Respondent. Similarly, the contention of the learned Counsel based on (2007) 2 SCC (Cri) 444 (referred to supra) also not applicable

to the facts of this case, as the facts of that case are totally different and the issue that arose for consideration before the Apex Court in that case is

also totally different.

12. Now it has to be seen as to whether the contentions put forth by the learned Counsel for the petitioner on the basis of the decisions relied upon

by him are sustainable.

13. At the outset it has to be pointed out that in the complaints, it has not been stated that the statutory notice was sent to the petitioner. Therefore,

the question of his complying with the demand within 15 days from the date of receipt of the summons from the Court does not arise. The

contention that notice to the company will amount to notice to the petitioner, who happens to be the Chairman cum Managing Director of the

Company, cannot be countenanced for the following reasons:

(i) In (2006) II M.L.J. 134 (referred to supra), a learned Single Judge of this Court has held that no prosecution u/s 138 of the Act, can be

launched without issuance of the statutory notice.

(ii) Another learned Single Judge of this Court in the judgment dated 07.07.1999 rendered in CrI.O.P. No. 9530 of 1998 has held that in the

absence of statutory notice to the petitioner, who was a Managing Director of the Company, which is mandatory under the provisions of the

Negotiable Instruments Act, a complaint could be quashed.

(iii) The aforesaid judgment, dated 07.07.1999, has been followed by Mr. Justice D. Murugesan, in (2001) M.L.J. 519 (referred to supra). The

decision reported in (2001) M.L.J. 519 (referred to supra) of Mr. Justice D. Murugesan, has been affirmed by a Division Bench of this Court in

(2006) II MLJ 990 (referred to supra).

14. A contention has been raised by the petitioner that he is only the Chairman of the first accused company and not the Managing Director,

whereas, in the complaints, it has been specifically stated that he is the Chairman cum Managing Director and therefore this disputed question

cannot be gone into in a Criminal Original Petition. But even assuming that he is the Chairman cum Managing Director of the first accused

company, in the light of the Division Bench decision reported in (2006) II MLJ 990 (referred to supra), it has to be held that in the absence of

statutory notice addressed to the petitioner individually the notice sent to the company will not amount to the individual notice to the petitioner and

therefore the contention of the learned Counsel for the petitioner has to be countenanced.

15. For the aforesaid reasons, all further proceedings in C.C. Nos. 6360 and 6358 of 1997, respectively, on the file of the XIII Metropolitan

Magistrate, Chennai, as against the petitioner in Criminal Original Petition Nos. 433 and 434 of 2005, are quashed and it is made clear that as

against the other accused, the proceedings may be continued. The Criminal Original Petitions are allowed. Consequently, the connected Crl.M.Ps

are closed.