

(2010) 10 MAD CK 0256

Madras High Court

Case No: Criminal Original Petition No's. 433 and 434 of 2005 and Criminal M.P. No's. 194 and 195 of 2005

Dilip S. Dhanukar, Chairman and
Managing Director, Indo Biotech
Foods Limited

APPELLANT

Vs

India Equipment Leasing Ltd.
and R.G. Kulkarni, Finance
Manager, Indo Biotech Foods
Limited

RESPONDENT

Date of Decision: Oct. 8, 2010

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 482
- Evidence Act, 1872 - Section 114
- General Clauses Act, 1897 - Section 27
- Negotiable Instruments Act, 1881 (NI) - 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 Crl.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.