

(2003) 09 CAL CK 0007

Calcutta High Court

Case No: C.R.R. No's. 156 and 157 of 2003

Jenson and Nicholson (India) Ltd.
and Others

APPELLANT

Vs

Seacem Paints (India) Private
Limited

RESPONDENT

Date of Decision: Sept. 5, 2003

Acts Referred:

- Companies Act, 1956 - Section 2(26)
- Criminal Procedure Code, 1973 (CrPC) - Section 482
- Negotiable Instruments Act, 1881 (NI) - Section 138, 141, 141(1), 141(2), 142

Citation: (2004) 1 CHN 305

Hon'ble Judges: Pradip Kumar Biswas, J

Bench: Single Bench

Advocate: Joymalya Bagchi, Kaushik Chatterjee and Sharmila Talukdar, for the Appellant;
Milon Mukherjee, Debasish Roy and Rajeev Ginodia, for the Respondent

Judgement

Pradip Kumar Biswas, J.

Since in these two matters, common question of law and facts are involved, those are being disposed of analogously by this single order.

2. In C.R.R No. 156 of 2003 petitioner M/s. Jenson & Nicholson (India) Ltd. and two others came up before this Court with an application u/s 482 of the Code of Criminal Procedure seeking for quashing of the proceeding in connection with Case No.C-3894/02(T.R. No. 1838/02) now pending before the Learned Judicial Magistrate, 2nd Court, Alipore, South 24-Parganas u/s 138 of the Negotiable Instruments Act, 1881 and all orders passed therein including orders dated 12.8.03 and 19.9.02.

3. Similarly, in C.R.R. No. 157 of 2003, M/s. Jenson & Nicholson (India) Ltd., and two others have also come up before this Court with an application u/s 482 of the Code of Criminal Procedure seeking for quashing of proceeding in connection with Case

No. C-3898/02 (T.R. No. 1837/02) now pending before the learned Judicial Magistrate, 2nd Court, Alipore, South 24-Parganas u/s 138 of the N. I. Act, 1881 and all orders passed therein including orders dated 12.08.02 and 7.10.02.

4. The short facts leading to the filing of this revisional application are as under:--

The opposite party/complainant lodged a written complaint against the present petitioners and two others before the Ld. Sub-Divisional Judicial Magistrate, Alipore, South 24-Parganas alleging that the petitioner No. 1 company issued four cheques bearing Nos. 342976 dated 2.2.02 for Rs. 90,000/-, bearing No. 342977 dated 8.2.02 for Rs. 90,000/-, No. 342978 dated 27.2.02 for Rs. 70,000/- and No. 342979 dated 2.3.02 for Rs. 90,000/- drawn on Bank of India, Calcutta Corporate Banking Branch against the bills raised by opposite party herein ; that upon deposit of cheques on 20.6.02, the cheques were dishonored with the instruction "Payment stopped by the drawer" on 21.6.02 and the intimation was received by opposite party on 22.6.02 and a demand notice was issued by the company through registered post of A/D on 27.06.02 and the said notice was received by the petitioners on 28.06.02 and thereafter petitioner No. 1 company paid a sum of Rs. 1,80,000/- in lieu of cheques bearing Nos. 342976 dated 2.2.02 for Rs. 90,000/- and No. 342977 dated 8.2.02 for Rs. 90,000/- but the amount covered by Cheque No. 342978 and Cheque No. 342979 remain unpaid.

5. It has also been alleged that the Ld. S.D.J.M., Alipore without application of mind and quite mechanically has passed the order in question in the matter of taking cognizance and it has been alleged by the petitioners that the allegations in the petition of complaint, even if believed to be true and accepted in its entirety do not disclose the essential ingredients of the alleged offence and that throughout the length and breadth of the petition of complaint, there is no averment that the petitioner Nos. 2 and 3 were responsible with the day to day affairs of the company at the time of commission of the alleged offence and the impugned prosecution was filed beyond time in view of the provision as envisaged u/s 142 of the N. I. Act, 1881 and the petitioners have no existing liability or debt and on these grounds they have come up for quashing of these proceedings.

6. Sri Joymalya Bagchi, learned advocate appearing for the petitioners in course of his submission has argued mainly that simply by nomenclating the petitioner Nos. 2 and 3 respectively as Chairman-cum-Managing Director and Joint Managing Director in the petition of complaint, the mandatory requirements of Section 141 of the N.I. Act have not been complied with as it is quite settled position of law that in instituting a complaint case u/s 138 of the N.I. Act, a person other than the company can be proceeded with only when it is proved or alleged that such person was in charge and/or was responsible to the company for conducting its business, but in the instant case, none of the kind being disclosed in the petition of complaint, the aforesaid petition of complaint cannot at all be maintained against them and as such the present case cannot be allowed to be proceeded with against these

accused persons.

7. In support of his contention he has placed his reliance upon the decisions reported in Smt. Katta Sujatha Vs. Fertilizers and Chem. Travancore Ltd. and Another, and also in 2002 C.Cr.L.R.(Cal) 111 in Karnataka Agro Chemicals and Ors. v. Satyendra Nath Biswas and with reference to the aforesaid decisions, it has been contended by him that the primary onus lies with the complainant in an offence u/s 138 read with Section 141 of the N. I. Act to show that the persons sought to be proceeded against were in charge of and were also responsible to the company for the conduct of the business of the company and in order to constitute an offence u/s 138 of the N.I. Act when a company is at the dock, such an averment u/s 141 of the N.I Act is absolutely necessary in order to establish a *prima facie* case in the absence of which process should not be issued against such persons even though they were connected in the affairs of the company by implication and in other words in the absence of any averment in the petition of complaint to the above effect, such persons cannot be proceeded with.

8. He has further contended that the "person in charge" must mean that the person should be in overall control of the day-to-day business of the company or firm. The person may be a party to the policy being followed by a company and, yet not be in charge of the business of the company or may be in charge of but not in overall charge or may be in charge of only some part of the business.

9. So, referring to the petition of complaint, it has been contended by him that since there is no such clear averment in the petition of complaint against these petitioners that they were in charge of and were responsible to the company for the conduct of the business of the company, the present case cannot be proceeded with against them in the light of those decisions and the law enunciated therein.

10. In opposing the aforesaid contention, Sri Debasish Roy, learned advocate appearing for the opposite party/ complainant has contended that from the cause title of the petition of complaint it will be crystal clear that the petitioner Nos. 2 and 3 have been described in the petition of complaint as Chairman-cum-Managing Director and the Joint Managing Director respectively and the said mentioning of their designation read with the definitions of Section 2(26) of the Companies Act, 1956 will make it abundantly clear that they were certainly persons in charge or responsible to the company for the management of the day-to-day affairs of the company.

11. In support of his contention, placing his reliance on a decision reported in 1998 C.Cr.L.R.(Cal) 287 in the case of Mohan Kumar Mukherjee v. Ledo Tea Company Limited, it has been contended by Sri Roy that although it was held by His Lordship Asish Baran Mukherjee (as His Lordship then was) that "the primary onus lies with the complainant in an offence u/s 141 of N.I. Act to show that the persons sought to be proceeded against were in charge of and was responsible to the company for the

conduct of the business of the company. In order to constitute an offence u/s 138 of N. I. Act when a company is at the dock, such an averment u/s 141 of N. I. Act is absolutely necessary in order to establish a *prima facie* case in the absence of which process should not be issued against such persons even though they were connected with the affairs of the company by implication", yet, His Lordship was pleased to observe further that "besides a scrutiny of event the cause title of the complaint will reveal that one of the persons who have been made accused has been designated as the Managing Director while the present petitioner has been simply designated as Director. It is quite natural that the Managing Director in the fitness of things should be deemed to be in charge of and was responsible to the company for the conduct of business" and that being the position on the strength of the principles, enunciated by His Lordship, the inclusion of the names of the petitioner Nos. 2 and 3 in the petition of complaint as a Chairman-cum-Managing Director and Joint Managing Director it should be presumed that they were in charge of and were responsible for day-to-day affairs of the company for the conduct of the business of the company and that being the position in the instant case, the petition of complaint having fulfilled the requirement of law no exception could be taken on that count and thereby quashing, as prayed for against them could not be and should not be allowed.

12. Drawing my attention to another decision reported in 1999(105) Cri.LJ 2693(Mad) in the case of Natasha Singh and Anr. v. Klen and Marshalls of Manufacturers & Exporters Pvt. Ltd., it has been contended by Sri Roy that in the aforesaid decision it has been held by His Lordship that "Section 141(2) of N. I. Act starts with non-obstante clause. Under Sub-section (1), the persons in charge of and responsible to the company shall be deemed to be guilty of the offence. But, under Sub-section (2), even the persons who are not stated to be in charge of and responsible to the company can be prosecuted, if it is alleged and proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any of those persons prosecuted." In the aforesaid decision, it has further been observed that "in the instant case besides stating about the positions they hold it is specifically mentioned in the complaint that they were responsible for the non-payment of the cheque amount after receipt of notice within the statutory period, which alone would create the offence".

13. Sri Roy placing his reliance on the principles enunciated in the aforesaid decision has submitted before me that in the instant case besides stating about the positions of the petitioner Nos. 2 and 3 it has been clearly averred that the accused persons after receipt of the demand notice called upon the representative of the complainant company and repaid Rs. 1,80,000/- leaving behind the aggregate amount of Rs. 1,60,000/- in respect of the Cheque No. 342978 dated 27.2.02 for Rs. 70,000/- and Cheque No. 342979 dated 2.3.02 for Rs. 90,000/- and that being the position, certainly as per the principle laid down in the aforesaid decision these two petitioners being responsible for the non-payment of the cheque amount after

receipt of the demand notice within this statutory period, certainly they will be covered by the provision of Section 141(2) of the N.I. Act and since those averment covering Sub-section (2) of Section 141 are very much available in the petition of complaint against these two petitioners, no quashing is permissible.

14. Again Sri Roy referring to a decision reported in 2000(106) Cri.L.J. 4117 (AP) in the case of Rohinton Noria v. N. C. C. Finance Ltd. and Anr., has submitted that whether or not particular accused persons were in charge of and responsible to the company, for the conduct of the business of the company for roping in the directors of the company by way of invoking the provisions of Section 141 of the N.I. Act without ascertaining the fact that whether or not they were really in charge of and were responsible for the conduct of the business of the company has been deprecated by His Lordship, yet, it has further been held that the same being question of fact that has to be adjudicated during trial after taking of evidence in this regard.

15. It has therefore been submitted by Sri Roy that the question as to whether the present petitioners were responsible with the day-to-day affairs of company or not being a question of fact, cannot be adjudicated upon at this stage and on the available materials, wherein some sort of allegation u/s 141(2) of the N.I. Act have been made against the present petitioners specially against the petitioner Nos. 2 and 3, no quashing as prayed for is permissible.

16. Again referring to a decision reported in 2001(107) Cri.L.J. 1586 (AP) in the case of Asit Kr. Mukherjee v. T.T.K. Pharma Ltd. and Ors., it has been submitted by Sri Roy that from reading of the complaint petition it would clearly reveal that besides mentioning the position of the petitioner Nos. 2 and 3 in the company the wholesome allegation in the plaint are sufficiently indicative of the fact that the petitioners were associated with the day-to-day management of the company and besides that there being clear averment that they were responsible for the non-payment of the cheque amount after receipt of the demand notice within the statutory period, the ingredients of the offence u/s 141 have been clearly made out and as such there is *prima facie* case against these petitioners and at this stage upon the settled parameters prayer for quashing of the criminal prosecution as made by the petitioner cannot at all be entertained.

17. Now, I have given my anxious consideration with regard to the submissions made by the parties and I have also gone through the decisions cited at the bar with meticulous care. Now, examining the present petition of complaint in the light of the decisions cited above, it is quite clear that there is no specific averment in the petition of complaint that the petitioner Nos. 2 and 3 were person in charge or responsible to the company in respect of the management and administration of the company, but there was some sort of allegation that the petitioner Nos. 2 and 3 were however responsible for the non-payment of the cheque amount after receipt of the demand notice within the statutory period and they have also been shown as

Chairman-cum-Managing Director and Joint Managing Director in the petition of complaint., yet applying the ratio of the decisions of the Apex Court reported in Smt. Katta Sujatha Vs. Fertilizers and Chem. Travancore Ltd. and Another, and J. T. 2000(Supple)S.C 519 (K.P.G. Nair v. Jindal Menthol India Ltd., which are authoritative pronouncements covering the field itself, the decisions reported in 1998 C.Cr.L.R. Cal 287(Supra), 1999(105) Cri. L. J. 2693 (Mad)(Supra), 2000(106) Cri. L. J. 4117(AP)(Supra), 2001(107) Cri. L. J. 1586 (AP)(Supra), in my humble opinion, have no manner of application in the facts and circumstances of this case and as such upon overall assessment of the materials available in the instant case and reading the petition of complaint as a whole with allied matters involved in this case, I hold with certainty that the allegations contained in the petition of complaint do not at all make out a case against petitioner Nos. 2 and 3 for being proceeded against u/s 138/141 of the N.I Act.

18. I am also fortified to hold so in view of my decision, reported in 2002 C. Cr. L R Cal 111(supra), wherein placing reliance on a decision reported in J. T 2002 SC 519 (supra) the criminal proceeding was quashed against some of the petitioners for the reason that there was no specific allegation against the petitioner Nos. 2 to 5 in the aforesaid case and no allegation was also there that they were responsible in respect of the management, administration of the company and were involved with regard to the concerned matter directly.

19. So to conclude, I hold that this is a fit case where quashing of the petition of complaint in so far as it relates to the petitioner Nos. 2 and 3 should be allowed. Thus, the proceedings of Case No. C-3894 of 2002 and Case No. C-3898 of 2002 now pending before the Ld. Judicial Magistrate, 2nd Court at Alipore, South 24-Parganas in so far as it relates to the petitioner Nos. 2 and 3 be quashed.

20. This Judgment covers both the revisional application.

21. Urgent xerox certified copies, if applied for, be made available to the parties with utmost expedition.