HIGH COURT OF GUJARAT

CHEMOX LABORATORIES LIMITED

Versus

GUJARAT NARMADA VALLEY FERTILISERS COMPANY LIMITED

Date of Decision: 19 September 2002

Citation: 2002 LawSuit(Guj) 693

Hon'ble Judges: D H Waghela

Eq. Citations: 2003 1 GLR 424, 2003 2 GLH 155, 2003 3 RCR(Cri) 117, 2003 3 BankCas 446, 2003 2 GCD 1629, 2003 2 DCR 387

Case Type: Misc Criminal Application; Misc Criminal Appea

Case No: 3934 of 1999; 798 of 2000, 1451 of 2002, 3935 of 1999, 799 of 2000, 1454 of 2002, 3936 of 1999, 800 of 2000; 1453 of 2002

Subject: Civil, Criminal

Editor's Note:
Criminal Procedure Code, 1974 - Sec 178, Sec 204, Sec 482(d) - Negotiable Instruments Act, 1881 - Sec 138, 141, 142, - Territorial jurisdiction - Quashing of process - Absence of avernment regarding limitations or absence of list of witnesses cannot ipso facto be ground for quashing issuance of process - Court has a duty to puruse complaint with a pragmatic perception - Authorizes to file complaint - Plea that the complaint is signed and presented by a person is not authorized person - It is open to de jure complaint company to seek permission of Court for sending any other person to represent the Company in Court - Even presuming that initially there was no authority still company can at any stage rectify that defect - Held, No substance in this petition - Petition dismissed

Acts Referred:
Code of Criminal Procedure, 1973 Sec 178(d), Sec 482, Sec 204
Negotiable Instruments Act, 1881 Sec 141, Sec 138, Sec 142

Final Decision: Petition dismissed

Advocates: B N Keshwani, Nandish Y Chudgar, Prabhav A Mehta, Nanavati Associates, Sudhanshu S Patel

Cases Cited in (+): 4
Cases Referred in (+): 17

D.H. WAGHELA, J.

[1] These petitions under Sec. 482 of the Code of Criminal Procedure, 1973 (the Cr.P.C. for short) between the same set of parties are argued and heard together on common issues involved and are disposed of by this judgment. The few relevant facts and documents to be found in the first Misc. Criminal Application No. 3934 of 1999 are admittedly representative of all the cases, and therefore, the arguments were based on them. The common prayers of the petitioners are aimed at quashing of the complaints or setting aside the process issued, in the consequent criminal cases, by the learned Chief Judicial Magistrate, Bharuch in respect of the alleged offence punishable under the provisions of Sec. 138 read with Sec. 141 of the Negotiable Instruments Act, 1881 (the Act for brief). The main controversy regarding territorial jurisdiction of the Court has already travelled through two judicial proceedings in the form of an application made in the trial Court for transferring the case to the Court of competent jurisdiction and the groups of criminal revision applications preferred from the adverse order in the aforesaid earlier proceedings. Thus, this is practically a third attempt at re-agitating the same issues with the invocation of additional powers and making of additional prayers for quashing in exercise of the jurisdiction of this Court under Sec. 482 of the Cr.P.C.

[2] There is no dispute about the fact that the petitioners have issued a number of cheques to the respondent No. 1 in the course of their business dealings, that they have been dishonoured and that the complaints have come to be filed after issuance of the demand notices in respect of such cheques. There is also no dispute about the fact that the cheques that bounced were drawn on a bank at Mumbai, they were submitted for realization in an account at Mumbai, and accordingly, they can also be said to have been dishonoured at Mumbai. The complaints were filed in the Court of the Judicial Magistrate, First Class at Bharuch on the strength of the averments that the payee had its registered office within the territorial jurisdiction of the Court at Bharuch, the business dealing pursuant to which the cheques had been issued had taken place at Bharuch insofar as the goods were supplied by the payee at Bharuch, and by the notice demanding payment after dishonour of the cheques, the payment was demanded and required to be made at Bharuch. The demand notices were issued and addressed to the accused No. 2 as director of the accused No. 1-Company. The complaints were admittedly signed by an officer of the complainant company with his averment that he was authorized by the company to file the complaints. And, a statement of the complainant was also recorded below the complaint. Broadly on this basis, the order to

issue process came to be made as early as in the year 1997. It is not clear as to whether the cases have proceeded an inch forward after that.

[3] The learned Counsel Mr. B. N. Keshwani strenuously assailed the complaints and the issuance of process on the grounds that the order to issue the process was without application of mind, that the Court at Bharuch had no territorial jurisdiction, that the demand notices were not legal, that the complaints were lacking in essential particulars and that the original complaints were nothing but abuse of the process of Court resulting into great injustice to the petitioners. The aggregate amount involved in these matters, as stated at the Bar, is exceeding Rs. 5 crores involving dishonour of around 157 cheques.

[4] Elaborating the arguments, learned Counsel Mr. Keshwani submitted that the processes were ordered to be issued by the trial Court mechanically and without proper application of mind. It cannot be gainsaid that issuance of process is a serious matter. However, the application of mind and writing of a detailed order at the time of issuing process to reflect the application of mind are two different things. It is well settled since the judgment of the Supreme Court in Smt. Nagawwa v. Veeranna Shivalingappa Kongalgi, AIR 1976 SC 1947 that, once the Magistrate has exercised his discretion, it is not for the High Court or even the Supreme Court to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. And, the order of issuing process against the accused can be quashed only in rare cases, such as, where the complaint and the statement recorded thereunder make out absolutely no case against the accused or where the allegations are so patently absurd and inherently improbable that no prudent person can find sufficient ground for proceeding or where the issuance of process is capricious and arbitrary, or where the complaint suffers from fundamental legal defects. Examining the complaints from this angle in light of the subsequent observations of the Supreme Court in Pepsi Foods Ltd. v. Special Judicial Magistrate, 1988 SCC (Cri.) 1400, it was found that the text of the complaints, statements made thereunder and the documents annexed with the complaints did disclose sufficient material to proceed and order issuance of process. Therefore, the requirements envisaged in Para 28 of the Pepsi Food Ltd., (supra) judgment cannot be said to have been ignored. The insistence of the petitioners that the learned Magistrate ought to have set out the allegations made in the complaints and ought to have also stated that in his opinion the complaints disclosed the ingredients of the offence etc. is supported by the judgment of the Allahabad High Court in Kailash Chaudhari & Ors. v. State of U. P., 1994 Cri.LJ 67. It is not substantiated by any other legal dicta and this Court respectfully disagrees with that view.

4.1 An allied argument was based upon the submissions that it was not averred in the complaints that they were filed within the period of limitation and that the complaints were admittedly not accompanied by a list of witnesses as required by the express provisions of Sec. 204. The learned Counsel relied upon a judgment of this Court in Dhanji Mavji v. Gadhvi Govind Jiva, 1974 GLR 136, and submitted that the requirement was mandatory and the lapse was fatal to the prosecution. After referring to that judgment, a view is taken in the later judgment of this Court in A. P. Jain v. C. N. Jotwani, 1977 GLR 299 that, in the aforesaid earlier case, the complaint itself contained a statement that there were other witnesses who were intended to be examined, and therefore, it was not an authority for the proposition that there was a mandatory obligation to make a negative declaration to the effect that no witness was sought to be examined. In such circumstances, the absence of any averment regarding limitation or the absence of list of witnesses cannot ipso facto be a ground for quashing issuance of the process. A similar view is taken by the Kerala High Court in Madhavan Nambiar v. Govindan, 1982 Cri.LJ 683, wherein, relying upon a Supreme Court judgment in Mown v. Superintendent, Special Jail, 1972 SCC (Cri.) 184, it is observed that if the purposes of disclosing material against the accused were served by the complaint, the omission to file a list of witnesses will not vitiate the proceedings, and at the most, the Court may insist on a list of witnesses being filed and refuse to issue process before such a list is made available. In Kanhu Ram v. Durga Ram, 1980 Cri.LJ 518, the Himachal Pradesh High Court (through T. U. Mehta, C.J.) has, dealing with the same arguments, taken the view that even if filing of a list contemplated by sub-sec. (2) of Sec. 204 is considered to be mandatory, the provisions contained in Sec. 465 of the Act have to be taken into consideration. The crucial question, therefore, would be whether, even if it is believed that the order issuing process was illegal, that order resulted in failure of justice? The answer to such question at this stage would obviously be in the negative since the trial has not yet proceeded further and the complainant can be asked to furnish a list of witnesses before evidence is recorded in the case so that the accused is put to notice and the purposes of the provision can be served. The following passage from the judgment of the Kerala High Court in M.O.H. Iqbal v. M. Uthaman, 1995 (82) Company Cases 726, by K. T. Thomas, J. (as His Lordship then was) can sum up the discussion as far as the grievances about the averments or lack of them in the complaint are concerned :

A combined reading of the relevant provisions would amplify the position that if the facts set out in a complaint would constitute the offence alleged to have been committed by some person, the Magistrate has power to take cognizance of the offence under Sec. 138 of the Act. It must be borne in mind that no form is prescribed for drafting a complaint. A meticulous scrutiny of the complaint may not

be warranted at the initial stage to ascertain whether all the elements of the offence have been expressly categorized therein. It is enough that a pragmatic assessment is made after perusing the complaint to decide whether the complaint discloses the offence under Sec. 138 of the Act. If the complaint is prepared by a layman one cannot expect skilful draftsmanship being reflected therein. It may be inartistically worded or clumsily prepared. Yet it may contain the allegations from which a Magistrate can see the offence disclosed. Dismissing such complaint on the premise that elements of the offence have not been expressly categorized in the complaint may result in miscarriage of justice. Hence, the Court has a duty to peruse the complaint with a pragmatic perception.

[5] As recently observed by the Supreme Court in Kanti Bhadra Shah v. State of West Bengal, AIR 2000 SC 522, the time has reached to adopt all possible measures to expedite the Court procedures and to chalk out measures to avert all roadblocks causing avoidable delays. If a Magistrate is to write detailed orders at different stages, the snail-paced progress of proceedings in trial Courts would further be slowed down. It is quite unnecessary to write detailed orders at stages, such as, issuing process, remanding the accused to custody, framing of charges or passing over to next stages in the trial.

[6] The main grievance of the petitioner voicing which the learned Counsel was at his elaborate best was about the territorial jurisdiction of the Court insofar as the essential ingredients constituting the offence of dishonour of the cheques had taken place in Mumbai, according to the submission. Relying upon the judgment of the Supreme Court in Sadanandan Bhadran v. Madhavan Sunil Kumar, 1998 (6) SCC 514, it was submitted that the main part of Sec. 138 creates an offence when a cheque is returned by the bank unpaid for any of the reasons mentioned therein. The proviso to Sec. 138 lays down the conditions precedent to applicability of the whole Section for the purpose of prosecution. However, under the general provisions of the Cr.P.C. as contained in Secs. 177 and 178, the place of inquiry or trial can only be where the essential ingredients of the offence can be said to have been committed, according to the submission. The learned Counsel also relied upon the judgment of the Supreme Court in Central Bank of India v. Saxons Farms, 1999 (8) SCC 221, in support of the submission that the conditions contained in the proviso to Sec. 138 of the Act were only conditions precedent for filing of a complaint and the later judgment of the Larger Bench of the Supreme Court in Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd., 2001 (3) SCC 609, was also pressed into service to buttress the submission that the penal provisions of Sec. 138 of the Act have to be so strictly interpreted that no one can ingeniously, insidiously, guilefully or strategically be prosecuted. It was seen that in all these judgments relied upon on behalf of the petitioners, the territorial jurisdiction of

the Court was not in issue. Territorial jurisdiction of a Criminal Court in the case under the Negotiable Instruments Act was directly in issue in the judgment of the Supreme Court in K. Bhaskaran v. Sankaran Vaidhyan Balan, 1999 (7) SCC 510, wherein the law on the subject is laid down in the following terms :

> 14. The offence under Sec. 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence : (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice.
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> 15. It is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at five different localities. But a concatenation of all the above five is a sine qua non for the completion of the offence under Sec. 138 of the Act. In this context a reference to Sec. 178(d) of the Code is useful. It is extracted below :
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> 178. (a) - (c) * * *
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> (d) where the offence consists of several acts done in different local areas, it may be enquired into or tried by a Court having jurisdiction over any of such local areas.
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> 16. Thus, it is clear, if the five different acts were done in five different localities any one of the Courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Sec. 138 of the Act. In other words, the complainant can choose any one of those Courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done. As the amplitude stands so widened and so expansive, it is an idle exercise to raise jurisdictional question regarding the offence under Sec. 138 of the Act.

6.1 In view of the above binding ratio, there could not have been any scope for further argument as far as the issue of territorial jurisdiction was concerned. However, the learned Counsel for the petitioners dwelt for a considerable length of time, in the teeth of opposition, to canvass that the above view taken by the Supreme Court was erroneous and per incuriam. He cited several judgments and discussed the ratio thereof to submit that this Court could take a different view of the matter and ignore or explain the aforesaid judgment in K. Bhaskaran (supra). That unfortunate waste of time need not be repeated by reproducing the arguments in detail and in dwelling upon the judgments cited by the learned

Counsel. The learned Counsel went to the length of suggesting that the ratio of the judgment in K. Bhaskaran (supra) was in conflict with the earlier and the later judgments and that this Court can, by delving into the law of precedents, declare that. Suffice it to state that no conflict of opinion on the point of territorial jurisdiction was found to be traceable in earlier or later judgments referred by the learned Counsel.

[7] The other peripheral issues involving issuance of the notice by the payee and its service upon the drawer were based upon the submission that demand notices were addressed to the petitioner No. 2, whereas the drawer of the cheques was the company, i.e. petitioner No. 1. The learned Counsel relied upon the judgment of the Bombay High Court in A. Chinnaswami v. M/s. Bilakchand Gyanchand Company, 1998 (3) Crimes 395, and the judgment of the Supreme Court overruling that judgment to submit that the cheques in that case were signed by managing director himself. The learned Counsel for the respondents relied in this regard upon the provisions of Sec. 51 of the Companies Act and the observations of the Supreme Court in Rajneesh Aggarwal v. Amit J. Bhalla, AIR 2001 SC 518, wherein the pertinent observations as under are made :

6 ..... The object of issuing notice indicating the factum of dishonour of

the cheques is to give an opportunity to the drawer to make payment within 15 days, so that it will not be necessary for the payee to proceed against in any criminal action, even though the bank dishonoured the cheques. It is Amit Bhalla, who had signed the cheques as the Director of M/s. Bhalla Techtran Industries Ltd. When the notice was issued to said Shri Amit Bhalla, Director of M/s. Bhalla Techtran Industries Ltd., it was incumbent upon Shri Bhalla, to see that the payments are made within the stipulated period of 15 days. It is not disputed that Shri Bhalla has not signed the cheques, nor is it disputed that Shri Bhalla was not (sic.) the Director of the company. Bearing in mind the object of issuance of such notice, it must be held that the notices cannot be construed in a narrow technical way without examining the substance of the matter.

The provisions of Sec. 51 of the Companies Act clearly provide as under :

Sec. 51 Service of documents on company : A document may be served on a company or an officer thereof by sending it to the company or officer at the registered office of the company by post under a certificate of posting or by registered post or by leaving it at its registered office.

In the facts of the present case, there is no dispute about the fact that the petitioner No. 2 is a director of the petitioner No. 1, and therefore, notice to the

petitioner No. 2 can safely be construed to be a notice to the petitioner No. 1. The learned Counsel pointed out the words in the notice to suggest that the demand was made from the director personally and not from the drawer company. The observations of the Supreme Court quoted hereinabove clearly debars such narrow technical analysis of the language of the notice.

7.1 Referring to the averments contained in the complaints and the documents filed therewith, it was sought to be argued that the factum of actual service of notice and the factum of the complainant being duly and properly authorized by the company to file the complaints were not either emerging or substantiated. Obviously, these are the matters of evidence to be led before the trial Court and it would be highly improper and hazardous at this stage to comment upon the evidentiary value of any material or the likely defence of the petitioners at the time of trial. The issue was, however, specifically raised to submit that, in the facts of these cases, the complainant who actually signed the complaints was not the payee, and therefore, the Court ought not to have taken cognizance of the complaints by strictly applying the provisions of clause (a) of Sec. 142 of the Act. the judgment of the Madras High Court in K. N. Sankaranarayanan v. Shree Consultations & Services Pvt. Ltd., 1994 Comp. Cases 558, relating to the power of a particular director to institute a suit was cited in support of the submission that even a director was required to be authorized by a resolution of the Board of Directors. The judgment of the Delhi High Court in Nebro Ltd. v. National Insurance Co. Ltd., was cited in support of the submission that Sec. 291 of the Companies Act, 1956 requires authorization to institute a suit on behalf of the company and Order 29, Rule 1 of the Code of Civil Procedure does not authorize the persons mentioned therein to institute suits on behalf of the company, but only authorizes them to sign and verify the pleadings. Apart from these judgments related to civil proceedings, a direct judgment of the Andhra Pradesh High Court on the subject of complaint in the case of dishonour of cheque was cited to submit that where a cheque is issued in favour of a company, the payee is the company itself, and hence, one of the directors can present a complaint only if there was a proper authorization in his favour. Where no such authorization is proved, a complaint instituted by a director would not be maintainable, according to the judgment in Swastik Coaters Pvt. Ltd. v. Deepak Brothers, 1997 Company Cases 564]. It must be noted that judgment was rendered in appeal from acquittal, and after discussion of evidence, the authorization was found to be not proved.

Learned Counsel Mr. Chudgar appearing for the respondent pointed out from a recent judgment of the Supreme Court in M.M.T.C. Ltd. v. M/s. Medchl Chemicals & Pharma (P.) Ltd., 2002 Cri.LJ 266, that the criterion fixed for the complainant under

Sec. 142 would be satisfied where the complaint is in the name and on behalf of the company who is the payee of the cheque. Merely because the complaint is signed and presented by a person, who is neither an authorized agent nor a person empowered under the Articles of Association or by any resolution of the Board to do so is no ground to quash the complaint. It is open to the de jure complainant company to seek permission of the Court for sending any other person to represent the company in the Court. It is clearly held that, even presuming that initially there was no authority, still the company can, at any stage, rectify that defect. Thus, there is no substance also in the last of the submissions of the petitioners.

[8] In the facts and circumstances and for the reasons discussed hereinabove, the petitions are dismissed and Rule in each petition is discharged with no order as to costs. Whichever interim relief is operating in any of the matters, it shall stand vacated and the other Misc. Criminal Applications connected with these petitions shall also stand disposed of.

[9] It is seen that the trial of the original cases in the Criminal Court has been unduly delayed by several proceedings at the threshold and the issues are agitated and re-agitated at considerable cost of time. An order imposing special costs was not made in view of the plea of the learned Counsel for the petitioners that the petitioners had bona fide carried on the legal battle till this stage. However, now the injunction against further proceedings in the trial Court being vacated, the proceedings in the trial Court shall be given due priority and the cases shall have to be expeditiously heard, preferably on day-to-day basis, and should hopefully be disposed of within a reasonable period of six months.

[10] As this judgment was dictated and pronounced in the open Court today, learned Counsel Mr. Keshwani sought under Art. 134A of the Constitution, the certificate that this is a fit case for appeal to the Supreme Court in terms of the provisions of clause (c) of Art. 134(1). The request made on behalf of the petitioners was objected by the learned Counsel for the respondents. The learned Counsel Mr. Keshwani again sought to argue at length and insisted upon recording his argument that the certificate of the nature referred to in clause (c) of Art. 134 was, in the facts and circumstances, required to be issued as the case involved substantial question of law of general importance and the conflicts in the judgments of the Supreme Court apparent to him were required to be examined by the Supreme Court. However, in fact, the petitions are decided on the basis of law settled by the Supreme Court and no substantial question of law as to interpretation of the Constitution has arisen. Therefore, the oral application for certificate under Art. 134A made by the learned Counsel for the petitioners is rejected.