

(2011) 03 BOM CK 0043

In the Bombay High Court

Case No : Criminal Writ Petition No's. 850 and 851 of 2010

ASR Systems Private Ltd. and Rohit Wadhwa, Managing
Director of ASR Systems Private Ltd.

APPELLANT

Vs

Kimberly Clark Hygiene Products Pvt. Ltd. and The State of
Maharashtra

RESPONDENT

Date of Decision : 17-03-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 177, 178, 179, 202, 482
Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 139

Citation : (2012) 1 BC 281 : (2011) 4 MhLj 275

Hon'ble Judges : J.H. Bhatia, J

Bench : Single Bench

Advocate : Mohan Pungliya and Neel M. Pungliya, for the Appellant; Abhay Ostwal and V.R. Bhosale, APP for R. No. 2/State, for the Respondent

Final Decision : Dismissed

Judgement

1. Rule. Rule made returnable forthwith.
2. As in both these petitions, parties are the same and questions raised are also similar, therefore, both of them can be disposed off by the common judgment.
3. Respondent No. 1, who is the original complainant is private limited company registered under the Companies Act having its office situated at Village: Mann Taluka: Mulshi, District: Pune. Petitioners before this Court are the original accused Nos. 1 and 2 respectively. Accused No. 1 is a private limited company situated at New Delhi and accused No. 2 is Managing Director of the said company. Complainant filed complaints u/s 138 of the Negotiable Instrument Act in the Court of J.M.F.C., Pune. According to the complainant, it deals in the business of sale of facial tissues, papers towels, paper napkins, etc. Accused are the distributors of the company. Accused in regular course of the business placed an order with the complainant and as per the orders, goods were supplied by the complainant to the accused. In the said transaction, accused incurred huge

liability as debt. To discharge the existing legal liability, the accused asked the complainant to deposit the cheques given by the accused as security to the complainant. Accordingly, complainant in one case deposited three cheques dated 25.2.2009 with its banker, i.e., City Bank, Pune through whom those cheques were presented to the drawee bank being Bank of Punjab Ltd., New Delhi for encashment. Two other cheques of same date, drawn against Centurion Bank of Punjab Ltd., New Delhi were also presented to the drawee bank through City Bank Pune. However, all those cheques were dishonoured and returned with remarks "Funds Insufficient". Thereafter, statutory notices were issued by the complainant from its head office at Pune to the accused making demand of the amount of the cheques. In spite of service of notice, accused persons failed to make the payment in respect of those cheques. Complainant filed complaint in respect of three cheques, which was registered as Criminal Case No. STC 0424164/2009 and after recording verification statement of one Prashant Ambedas Dhal an authorised representative of the complainant, the learned J.M.F.C., Pune issued process against both the accused u/s 138 of the Negotiable Instruments Act. In respect of two cheques drawn against Centurion Bank of Punjab Limited, New Delhi Branch, Criminal Case No. STC 0424166/2009 was registered. In that case also after recording the verification statement of the said Prashant Dhal, process was issued. Issuance of process in both these cases is sought to be quashed by filing these two petitions.

4. The learned Counsel for the Petitioner raised several grounds challenging the issuance of process. Firstly, according to the learned Counsel, process was issued without following mandatory provision of making enquiry u/s 202 of the Code of Criminal Procedure when the accused are not situated outside the local jurisdiction of the Magistrate taking cognizance. According to him, in this case, both the accused persons are situated in Delhi while complaints were filed before J.M.F.C., Pune, therefore, it was mandatory to hold enquiry u/s 202 Code of Criminal Procedure before the process could be issued. The learned Single Judge of this Court in *Bansilal S. Kabra v. Global Trade Finance Ltd.* 2010 (2) Bom C.R. Cri 754 held that provisions of Section 202 about holding of enquiry before issuance of process when the accused is living outside the territorial jurisdiction of the Magistrate is directive and not mandatory. In another case, the learned Single Judge of this Court held that the provision is mandatory but that application was rejected by the learned judge on the ground that the accused had come to the High Court at a belated stage. The learned Counsel pointed out that the question has been referred to the larger Bench in view of two conflicting decisions. However, merely because question is referred to the larger bench, all the matters can not be kept pending nor the proceedings can be stayed. The purpose of directing enquiry u/s 202 Code of Criminal Procedure is to avoid unnecessary inconvenience and harassment to the accused persons, who may be living outside territorial jurisdiction of the Court. However, where the contents of the complaint, verification statement and other documents produced alongwith the complaint make out prima-facie case for issuance of process, perusal of such

material itself is preliminary enquiry and if the Court is satisfied that prima-facie case is made out , process can be issued. Therefore, in my opinion, said provision in Section 202 Code of Criminal Procedure is directory in nature and merely because Magistrate has not recorded statements of several witnesses before issuing process, process can not be quashed. In the present case, complainant had produced relevant documents including original cheques , documents about return of the same as dishonoured by the drawee bank, notices issued by the complainant to the accused, documents showing receipt of the same by the accused and the verification statement to the effect that payment was not made in spite of notice. In my opinion, this was sufficient material for the learned Magistrate to issue process.

5. Next ground taken by the learned Counsel for the Petitioner is that from language of the complaint itself it appears that the cheques were handed over by the accused to the complainant and those cheques must have been blank cheques in which contents including dates were written before the presentation of those cheques to the drawee bank. The learned Counsel contended that as those cheques were handed over by the accused to the complainant only as security and not in discharge of any existing debt or liability , provisions of Section 138 can not be invoked and on that grounds also complaint is liable to be dismissed. In paragraph 3 of the complaint, it is specifically mentioned that in the regular course of the business, accused had placed orders and goods were supplied by the complainant to the accused and in the said transaction accused had incurred huge liabilities as debt. To discharge the said existing and legal liability in part, the accused had asked the complainant to deposit cheques given by the accused as security to the complainant. From this it appears that blank cheques must have been given by the accused to the complainant. However, after the accused had incurred huge liability on account of supplies made by the complainant to the accused, he requested the complainant to present those cheques to the drawee bank for encashment in discharge of the legally enforceable debt or liability. It is true that date on all the cheques in both the cases date is 25.2.2009 and immediately thereafter, those cheques were presented to the concerned drawee banks, therefore, there is reason to believe that blank cheques were handed over by the accused to the complainant and those inchoate cheques were filled in and completed by the complainant. Question is whether on 25.2.2009, when the cheques were completed and presented, there was any existing debt or liability of the accused towards the complainant. According to the complainant, there was such liability. Whether there was infact any liability or not will have to be examined and scrutinised at the time of recording of evidence. In the trial, if it is found that on that date, there was no such liability and the cheques were misused by the complainant, the trial Court will have to acquit the accused persons but if it is found that there was existing liability on that day and, therefore, accused had asked the complainant to complete inchoate cheques and to present to the drawee bank, accused may be held guilty u/s 138 of the Negotiable Instruments Act, on his

failure to make the payment in spite of notice demanding payment after the cheques were dishonoured.

6. In Subhiksha Trading Services Ltd. And Ors. v. Kotak Mahindra Bank Ltd. and Anr. 2010 (3) Bom C.R. Cri 649 also this question had arisen . The learned Single Judge observed thus in paragraph 9:

9 So far as question of existence of debt or liability is concerned, it is quite well settled that this issue has to be decided only during the trial and cannot be decided earlier in view of the presumption under Sections 118 and 139 of the Negotiable Instruments Act. Though reliance is placed on one of the documents to show that the credit facility was extended till 31st January, 2009. This fact has been disputed by the complainant and, therefore, it cannot be gone into by this Court u/s 482 of the Code of Criminal Procedure Code....

In the present case, also in my opinion taking into consideration the above stated allegations of the complainant, all these questions can be decided into at the time of trial and not in this petition.

7 The learned Counsel for the Petitioners vehemently contended that accused are situated at Delhi; That the cheque were issued by them at Delhi against their accounts with the banks situated at Delhi and thus, drawee banks are at Delhi. The cheques were presented to the drawee banks at Delhi and the cheques were dishonoured by the drawee banks at Delhi. Notice, though issued from Pune by the complainant was actually received by the accused at Delhi and thus, no part of the transaction had taken place at Pune and, therefore, the learned J.M.F.C., Pune has no territorial jurisdiction to entertain the complaint. In support of this contention, the learned Counsel placed reliance upon M/s Harman Electronics (P) Ltd. v. National Panasonic India Ltd. 2009(1) ALL MR 479 as well as Ahuja Nandkishore Dongre v. State of Maharashtra 2007 Criminal Law Journal 115. On the other hand, the learned Counsel for the complainant placed reliance upon K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another, . Question of jurisdiction in the complaint u/s 138 of the Negotiable Instruments Act was the subject matter for consideration in K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another, . The Supreme Court considered provisions of Section 138 in the light of Sections 177, 178 and 179 of the Code of Criminal Procedure and observed as follows in paragraph 14 to 16 of the judgment:

14. The offence u/s 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.

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 u/s 138 of the Code. In this context a reference to Section 178(d) of the Code is useful. It is extracted below:

178.(a)-(c) * * *

(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.

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 u/s 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 u/s 138 of the Act.

As held by the Supreme Court in K. Bhaskaran (Supra), if the aforesaid five different acts were done in five different localities, any of the Courts within the jurisdiction of which any such act was done would have the jurisdiction to entertain the complaint u/s 138 of the Negotiable Instruments Act.

8. In Ahuja N. Dongre (Supra), after referring to the paragraph 14 of the judgment from K. Bhaskaran (Supra), the learned Judge of this Court had held that presentation of cheque has to be to the drawee bank and when the cheque is deposited by the payee to his banker for presentation before the drawee bank, payee's banker only acts as an intermediary and is not the bank to whom the cheque is presented. I had also taken the same view in Prabhu Dayal Modi v. Euro Developers Pvt. Ltd., Jaipur and Anr. 2010 (6) Mh.L.J. In the present case, cheque was issued by the accused at Delhi against their accounts maintained with the banks at Delhi and, therefore, it was expected that cheques would be presented to those banks at Delhi, where the accounts were maintained, for the purpose of encashment. Merely because cheques were deposited by the complainant with its bankers at Pune for presentation to the drawee bank at Delhi, the complainant's banker at Pune does not become banker to whom the cheque was presented. Naturally, it must be held that cheques were presented with the drawee bank at Delhi and cheques were also dishonoured at Delhi. In view of this, out of five acts, which form the components of the offence u/s 138 as held in K. Bhaskaran, first three acts, that is, drawing of the cheque, presentation of the cheque to the drawee bank and returning the cheque unpaid by the drawee bank had taken place at Delhi. Remaining two acts, which also form components of the offence u/s 138 of the Negotiable Instruments Act as per K. Bhaskaran had taken place at Pune. Notice was issued by the complainant from Pune making demand of the money of the bounced cheques. Accused was expected to make the payment to the complainant at Pune. His failure to make the payment within 15 days after the receipt of notice to the complainant at Pune gives jurisdiction to the Court at Pune.

9. In Harman Electronics (P) Limited (Supra), question was if the company has head office at one place and branches at different places and whole of the transaction had taken place within the area where its branch is situated and not where the head office is situated, whether the notice could be issued from place where its head office is situated. In that case, the accused/Appellant was resident of Chandigarh and was carrying on business at Chandigarh. Complainant had its head office at Delhi but also had branch office at Chandigarh. Transaction between the parties had taken place at Chandigarh and accused had issued cheque in favour of the complainant at Chandigarh against its banker situated at Chandigarh and thus, bank at Chandigarh was drawee bank. However, the complainant deposited the cheque with its banker at Delhi, which intturn presented the same to the drawee bank at Chandigarh. Cheque was dishonoured and the complainant issued notice for payment from Delhi. As the payment was not made, the complainant filed the complaint u/s 138 of the Negotiable Instruments Act at Delhi. The Supreme Court held that companies or financial institutions having several branches has to file complaint at the place where the transaction had taken place, cheque was drawn, presented and dishonoured and that merely because, the company had issued notice from the place where its head office is situated and where no part of the transaction had taken place, it could not file complaint before the Magistrate having jurisdiction over the area where the head office is situated. After having considered different provisions of law and judgment in K. Bhaskaran as well as in M/s. Dalmia Cement (Bharat) Ltd. Vs. M/s. Galaxy Traders and Agencies Ltd., , the Supreme Court in M/s Harman Electronics observed thus in paragraph 14

14 It is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of a cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence u/s 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in the provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would.

In paragraph 25, Their Lordships further observed thus

25 We cannot, as things stand today, be oblivious of the fact that a banking institution holding several cheques signed by the same borrower can not only

present the cheque for its encashment at four different places but also may serve notices from four different places so as to enable it to file four complaint cases at four different places. This only causes grave harassment to the accused. It is, therefore, necessary in a case of this nature to strike a balance between the right of the complainant and the right of an accused vis-a-vis the provisions of the Code of Criminal Procedure.

In view of the facts, the Supreme Court held that the complaint could be filed at Chandigarh and not at Delhi. In view of the judgment in *K. Bhaskaran (Supra)*, issuance of notice is one of the components of Section 138 and if the complainant has issued notice from office or place of its work, Court within whose jurisdiction the office or place of residence or work is situated, has jurisdiction. In *Harman* case emphasis was given on the communication of the notice but finally the Supreme Court observed that it is necessary in a case of this nature to strike a balance between the right of the complainant and the right of an accused vis-a-vis the provisions of the Code of Criminal Procedure. If the complainant is company or financial institution having number of branches besides head office and the whole of the cause of action take place at its branch office, it can not issue notice from its head office giving jurisdiction to the Court within whose territorial jurisdiction head office is situated. In *Harman* case emphasis was put on this aspect. Therefore, if complainant is running his business or residing at particular place and has no branches, he could issue notice to the accused for making payment of the cheque amount after its dishonour from the place of his business or residence. It will appear that when the cheque is issued and presented to the drawee bank, cheque is expected to be encashed at the place where the drawee bank is situated. Till that time complainant is expected to approach drawee bank for encashment. However, once cheque has been dishonoured, complainant can not be expected to run after the accused. After the cheque is dishonoured, the complainant has to issue notice demanding the payment of the cheque amount. Then the accused is expected to make the payment to the complainant at the place of his work or at the place of his residence.

10. In *Ahuja Nandkishore Dongre (Supra)*, decided by the learned Single Judge of this Court, complainant was resident of the village: Soyjana, Taluka: Manora, District: Washim, while the accused was resident of Bhandara. The complainant was posted as a driver with MSRTC at Bhandara. Because of the friendly relationship with the accused, he had advanced hand loan to the accused. The accused issued three cheques of different amounts for repayment of hand loan. Cheques were drawn against Bank of India Bhandara Branch. Complainant presented those cheques for encashment at Digras branch of Yavatmal Urban Co-operative Bank where neither the complainant was residing nor working for his livelihood nor the accused was residing. He had only opened an account at Digras and deposited his cheque at Digras Branch of the bank for presentation to Bank of India at Bhandara, which was drawee bank. After the cheque was dishonoured, notice was issued by an advocate of the complainant from Digras,

because the advocate was having his office at Digras . Notice clearly indicated that it was issued by the advocate as per the instructions and power given to him by the complainant residing at Soyjana, District: Washim for payment to him. It means payment was to be made to the complainant at Soyjana and not at Digras. In these circumstances, in Ahuja N. Dongre v. State of Maharashtra (Supra), it was held that J.M.F.C., Digras could not have jurisdiction to entertain complaint merely because cheque was deposited with bank at Digras or because notice was issued from Digras. In paragraph 28 of Ahuja N. Dongre, the learned Judge observed thus,

28 ... Though complainant may have accounts at several places, it does not follow that the complainant could file complaint at a place where he had account, because jurisdiction would have to be gathered from the place where money was intended to be paid....

From this it is clear that the learned Judge was of the opinion that the Court within whose local limits, the place where the payment was intended to be made, is situated has the jurisdiction. In the present case, the complainant does not have any branch. The complainant has its office at Pune and is carrying on business at Pune. Orders were received by the complainant at Pune and supplies were also made from Pune ,though the cheques were issued by the accused from Delhi. In view of these facts, complainant was expected to issue notice for payment of the cheque amount after they were dishonoured from its office at Pune and on receipt of such notice, the accused were expected to make the payment to the complainant at Pune. In view of this, some cause of action had taken place at Pune and some component of the offences u/s 138 as explained In K. Bhaskaran, had taken place at Pune. Therefore, J.M.F.C. Pune has jurisdiction to entertain the complaint.

11 In view of the above, I do not see any reason to quash the proceedings. Therefore, the petitions stand dismissed in view of the observations made above.

12 At this stage, the learned Counsel for the Petitioner seeks stay to this order. The learned Counsel for the Respondent has no objection. Therefore, the trial Court shall not proceed with the case for further six weeks.