

**(2008) 10 MAD CK 0105**

**In the Madras High Court**

**Case No :** Criminal O.P. No. 4032 of 2008 and M.P. No's. 1 and 3 of 2008

M.O. Hasan Kuthoos Maricar Ltd.

APPELLANT

Vs

Agate Madras International Finance Ltd., now changed into  
Agate Finance Ltd.

RESPONDENT

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**Date of Decision :** 14-10-2008

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 482, 561(A)  
Negotiable Instruments Act, 1881 (NI) — Section 138, 141

**Citation :** (2009) 1 LW(Cri) 71

**Hon'ble Judges :** K. Mohan Ram, J

**Bench :** Single Bench

**Advocate :** G.R. Swaminathan, for the Appellant; Sai Krishnan, for Sai Bharath and Ilan for R-1, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

K. Mohan Ram, J.—The above Criminal Original Petition has been filed by the petitioners, who are the accused (A-1 to A-3) on the file of the learned VII Metropolitan Magistrate, Egmore, Chennai. The first respondent herein is the complainant and the second respondent is the fourth accused in the said case. Apart from the aforesaid four accused, two other accused were also arrayed in the case initially and all of them are prosecuted for an offence u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act'). Earlier the fifth and sixth accused namely Mrs.U.Nargis and Mrs.F.Yasmin filed Criminal Original Petition No. 20972 of 1998 seeking quashing of the case as against them and a learned Judge of this Court by an order dated 04.12.2000 quashed the proceedings as against them in C.C. No. 7842 of 1998 on the file of the VII Metropolitan Magistrate, George Town, Chennai. The second petitioner and the second respondent herein also filed a quash petition in Criminal Original Petition No. 20971 of 1998 sought for quashing the proceedings as against them contending that they are not incharge of and responsible for the conduct of the business of the first accused / company, but the said contention was rejected and

the quash petition was dismissed by an order dated 30.10.2000. Thereafter the third petitioner herein filed a petition seeking discharge but the same was dismissed by the learned Magistrate and the said order of dismissal was challenged before this Court in CrI.R.C. No. 1499 of 2004 but the revision was also dismissed by an order dated 13.12.2007 with a direction to the trial court to expedite the trial and to complete the same as expeditiously as possible and more particularly within a period of five months from the date of receipt of a copy of that order.

2. While so the first petitioner sent a letter dated 19.01.2008 to the first respondent enclosing the following two demand drafts: ?1. I.O.B. D.D. No. 288095 dated 19.01.2008 for Rs. 5,93,750/- 2. I.O.B. D.D. No. 288098 dated 19.01.2008 for Rs. 5,93,750/-" In the said letter the first petitioner had stated that inspite of the sincere efforts taken to settle the dispute in an amicable manner the first respondent had refused to come to the settlement and the demand drafts are specifically paid in lieu of cheque Nos. 858124 dated 25.07.1998 for Rs. 5,93,750/- and 858125 dated 25.08.1998 for Rs. 5,93,750/- in full and final settlement of the complaint filed by the first respondent. It is further stated in the letter that they are paying interest at nine percent on the cheque amounts from the date of cheques till that date by separate demand drafts as follows:

1. I.O.B. D.D. No. 288094 dated 19.01.2008 for Rs. 5,06,860/-

2. I.O.B. D.D. No. 288093 dated 19.01.2008 for Rs. 5,02,458/-

The letter was followed by a telegram dated 21.01.2008 and in the said telegram it has been specifically stated that the demand drafts are being sent in full and final settlement of the first respondent's complaint in C.C. No. 7842 of 1998 on the file of the VIII Metropolitan Magistrate Court, Chennai. The said demand drafts and the communications were received by the first respondent and as evidenced by a communication of the Indian Overseas Bank, Pondicherry Main Branch, dated 14.02.2008, the said four demand drafts have been encashed by the first respondent on 23.01.2008. Thereafter the first respondent sent a reply dated 05.02.2008 acknowledging the receipts of the letter enclosed with the enclosures, but stated that they have received the same without prejudice to their right and interest to pursue the transaction pending before the VII Metropolitan Magistrate, George Town, Chennai, in C.C. No. 7842 of 1998 and other remedies. In such circumstances, the above Criminal Original Petition has been filed seeking to quash the proceedings in C.C. No. 7842 of 1998 in so far as petitioners 2 and 3 herein are concerned.

3. The above Criminal Original Petition was admitted and interim stay has been granted in M.P. No. 1 of 2008 by an order dated 27.02.2008. The first respondent has filed M.P. No. 3 of 2008 to vacate the interim stay granted by this Court. When the above M.P. Nos. 2 and 3 of 2008 came up for hearing, with consent of the learned Counsel on either side, the main Criminal Original Petition itself has

been taken up for final disposal.

4. Heard the learned Counsel on either side.

5. Learned Counsel for the petitioners submitted that petitioners 2 and 3 are merely name lenders and they have not played any active roles in the affairs of the company and as such vicarious liability cannot be fastened on petitioners 2 and 3 since material averments are wholly absent in the complaint. Learned Counsel for the petitioners drew the attention of this Court to the allegations contained in paragraph 3 of the complaint, which reads as follows:

3. ...The accused No. 2 to 4 are the directors of the 1st accused company and are responsible for the day to day affairs and conduct of the business. and submitted that unless it is specifically stated that the petitioners are in-charge of and responsible for the conduct of the business of the company and further unless it is stated as to how petitioners 2 and 3 are in-charge of and responsible for the conduct of the business of the company they could not be made vicariously liable for the offence u/s 138 of the Act by invoking the provisions contained in Section 141 of the Act.

6. Learned Counsel for the petitioners further submitted that when admittedly the four demand drafts sent by the first petitioner in full and final settlement of the claim of the first respondent in C.C. No. 7842 of 1998 had been accepted and the demand drafts en-cashed as early as on 23.01.2008 and having kept quite till 05.02.2008 it is not open to the first respondent to send a reply stating that they had received the demand drafts without prejudice to their right and interest to pursue the further proceedings in C.C. No. 7842 of 1998 as an after thought. He further submitted that if the first respondent was not willing to accept the demand drafts sent by the first petitioner in full and final settlement of its claim the demand drafts ought to have been returned but admittedly the demand drafts have been en-cashed and till date the amounts covered by the demand drafts have not been returned to the petitioners. He further submitted that having realised the amounts under the demand drafts it is not fair or equitable on the part of the first respondent to pursue with the proceedings in the trial court and the intentions of the first respondent cannot be said to be honest. In support of his said contentions the learned Counsel for the petitioners relied on a decision of the Bombay High Court reported in 2006 CRI. L.J. 618 (Usha Badri Poonawalla v. Kurien Babu). In that case, memorandum of understanding was reached between the parties and the complainant agreed to withdraw the complaint and thereafter the complaint though accepted the execution of the memorandum of understanding and receipt of the money under the memorandum of understanding wanted to prosecute the case further only on the ground that he was to receive some money more than what is mentioned in the memorandum of understanding; while considering such a plea the learned Judge of the Bombay High Court held that the continuation of the proceedings amounts to abuse of process of law and quashed the proceedings.

7. Countering the said submissions the learned Counsel for the first respondent submitted that mere payment of the amounts covered by the cheques issued in the year 1998 and the interest at 9% payable on the said amounts will not wipe out the offence already committed by the accused and hence the criminal proceedings sought to be quashed cannot be quashed. He further submitted that by its reply dated 05.02.2008 the first respondent had categorically stated that they have received the demand drafts without prejudice to their right and interest to pursue the prosecution in C.C. No. 7842 of 1998 and as such merely based on the subsequent payment, the proceedings cannot be quashed. In support of his said contentions, the learned Counsel for the first respondent relied upon a decision of the Apex Court reported in *Rajneesh Aggarwal Vs. Amit J. Bhalla*, . In the said decision in paragraph 7 it is held as under:

7. So far as the question of deposit of the money during the pendency of these appeals is concerned, we may state that in course of hearing the parties wanted to settle the matter in Court and it is in that connection, to prove the bona fide, the respondent deposited the amount covered under all the three cheques in the Court, but the complainant's counsel insisted that if there is going to be a settlement, then all the pending cases between the parties should be settled, which was, however not agreed to by the respondent and, therefore, the matter could not be settled. So far as the criminal complaint is concerned, once the offence is committed, any payment made subsequent thereto will not absolve the accused of the liability of criminal offence, though in the matter of awarding of sentence, it may have some effect on the court trying the offence. But by no stretch of imagination, a criminal proceeding could be quashed on account of deposit of money in the court or that an order of quashing of criminal proceeding, which is otherwise unsustainable in law, could be sustained because of the deposit of money in this Court. In this view of the matter, the so-called deposit of money by the respondent in this Court is of no consequence.

8. Learned Counsel for the first respondent further submitted that as stated in the petition for vacating the stay totally a sum of Rs. 1,90,00,000/- was borrowed by the first accused from the complainant in the year 1997 which was secured by mortgage of immovable properties and from then on the accused has been evading to make the payments due to the complainant; the accused had undertaken to pay interest at 24% and also undertook to pay penal interest and damages on belated payments to the complainant and hence the first respondent was not willing to compound the offence in C.C. No. 7842 of 1998. He further submitted that there are material allegations and averments in the complaint to proceed against petitioners 2 and 3 by invoking Section 141 of the Act. He further submitted that the first respondent had been perusing the complaint for the last ten years and the earlier quash petition filed by petitioners 2 and 3 has been dismissed and as such the present Criminal Original Petition is not maintainable and further this Court while dismissing Criminal Revision Case No. 1499 of 2004 had directed early disposal of the case and the present Criminal Original Petition has been filed only to further drag on the proceedings.

9. I have carefully considered the said submissions made by the learned Counsel on either side.

10. Since an objection has been raised as to the maintainability of the above Criminal Original Petition on the ground that earlier Criminal Original Petition No. 20971 of 1998 filed by the second petitioner and the second respondent herein was dismissed by a learned Judge of this Court by an order dated 30.10.2007 the said objection has to be considered at first.

11. It is to be borne in mind that this Court has power u/s 482 of the Cr.P.C., to quash a proceeding. It will be necessary to refer to a decision of the Apex Court which considered the scope of the power of this Court u/s 561(A) of the old Code. Section 482 of the present Code corresponds to Section 561 (A) of the Code of 1898. The Apex Court in a case reported in Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Mohan Singh and Others, has taken a view that though earlier application u/s 561 (A) is rejected by the High Court, a fresh application for quashing can be entertained in a changed set of circumstances. In the case before the Apex Court by order dated 12th December 1968 the High Court refused to quash the proceedings of a complaint. However, on a subsequent petition, by order dated 17th April 1970 the High Court quashed the complaint. A submission was made before the Apex Court that the subsequent application for quashing could not have been entertained by the High Court. The Apex Court held that Section 561 (A) preserves inherent powers of the High Court to make such order as it deemed fit to prevent abuse of the process of law or to secure ends of justice and the High Court must therefore excise its inherent powers having regard to the situation prevailing at the point of time when its inherent jurisdiction is sought to be invoked. The Apex Court has proceeded to hold thus:

It is difficult to see how in these circumstances, it could ever be contended that what the High Court was being asked to do by making the subsequent application was to review or revise the order made by it on the earlier application. Section 561-A preserves the inherent power of the High Court to make such orders as it deems fit to prevent abuse of the process of the Court or to secure the ends of justice and the High Court must, therefore, exercise its inherent powers having regard to the situation prevailing at the particular point of time when its inherent jurisdiction is sought to be invoked. The High Court was in the circumstances entitled to entertain the subsequent application of Respondents 1 and 2 and consider whether on the facts and circumstances then obtaining the continuance of the proceeding against the respondents constituted an abuse of the process of the Court or its quashing was necessary to secure the ends of justice.

The ratio of the decision of the Apex Court in the case of Superintendent and Remembrancer (referred to supra) is squarely applicable to the facts of this case. When an application for quashing is made the fact situation prevailing as of today will have to be considered.

12. The facts narrated above clearly shows that as on today the entire amount covered by the two cheques in question together with interest at 9% from the date of cheque till the date of demand drafts have been paid and the demand drafts have been en-cashed by the first respondent and till date the said amounts realised by en-cashing the demand drafts have not been returned by the first respondent to the petitioners. The first respondent wants to retain the said amounts and at the same time wants to further continue with the proceedings in C.C.No.7842 of 1998 on the sole ground that the first respondent had received the demand drafts without prejudice to their right and interest to pursue with the proceedings in the criminal case.

13. At this juncture it will be relevant to refer a decision of the Apex Court reported in *Rajneesh Aggarwal Vs. Amit J. Bhalla*, relied upon by the learned Counsel for the first respondent himself. In the said decision in paragraph 8 it is stated as follows:

8. In the aforesaid premises, we set aside the impugned orders of the High Court and allow these appeals and direct that the criminal proceedings would be continued. The money which had been deposited by the accused in this Court, may be refunded to the accused through his counsel. The Magistrate is directed to dispose of the proceedings at an early date." In that case pending trial the accused had deposited the amount covered by the dishonoured cheque but the complainant therein did not agree for any settlement but yet when a quash petition was filed before the High Court the same was allowed but the order of the High Court was set-aside by the Apex Court and while setting aside the order of the High Court the Apex Court has made the aforesaid observations. While allowing the appeal the Apex Court has directed the money which has been deposited by the accused in the Court was directed to be refunded to the accused through his counsel.

14. When the above Criminal Original Petition was being heard, this Court posed a query to the learned Counsel for the first respondent as to whether the first respondent is willing to return back the amounts realised by the first respondent by en-cashing the four demand drafts sent by the first petitioner. But the learned Counsel for the first respondent did not give any positive reply which shows that the first respondent while wanting to retain the money wants to continue with the further proceedings in the criminal case, which in the considered view of this Court, amounts to clear abuse of process of law.

15. It has to be further pointed out that admittedly the demand drafts were obtained on 19.01.2008 and sent on the same day with a covering letter followed by a telegram dated 21.01.2008 informing the first respondent that the Demand Drafts are sent in lieu of the dishonoured cheques and in full and final settlement of the first respondent's complaint in C.C. No. 7842 of 1998 on the file of the VIII Metropolitan Magistrate Court, Chennai. Therefore it is clear that the first respondent with full knowledge that the demand drafts have been sent by the first petitioner in full and final settlement of its claim only had chosen to encash

the demand drafts and retained the amounts. Had the first respondent not accepted the proposal of the first petitioner, the first respondent need not have en-cashed the demand drafts subsequently on 23.01.2008 as evidenced by the letter of the Indian Overseas Bank, dated 14.02.2008. The said en-cashment on 23.01.2008 is not disputed by the first respondent before this Court. Therefore this Court is of the considered view that any further continuance of the proceedings in C.C. No. 7842 of 1998 will amount to clear abuse of process of law.

16. It is also pertinent to point out that though the Criminal Original Petition No. 20971 of 1998 filed by the second petitioner and the second respondent herein was dismissed by this Court by a learned Judge of this Court by an order dated 30.10.2000 in the light of the aforesaid subsequent events and also in view of the decision of the three Judges Bench of the Apex Court rendered in the case of S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, and the decision of the Apex Court reported in S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, , this Court is of the considered view that the above Criminal Original Petition is maintainable. In S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, the Apex Court after referring to the three Judges Bench decision of the Apex Court and the various other decisions while considering the following averments made in the complaint in that case namely: "The Accused No. 1 is a duly incorporated Company, having its registered office at the address mentioned above, represented by the Director, Accused No. 2. The Accused No. 3 and 4 are also the Directors of Accused No. 1 company and accused 2 to 4 are actively involved in the management of the affairs of Accused No. 1 Company." in paragraphs 20 and 23 of the decision has laid down as under:

20. The liability of a Director must be determined on the date on which the offence is committed. Only because Respondent 1 herein was a party to a purported resolution dated 15-2-1995 by itself does not lead to an inference that she was actively associated with the management of the affairs of the Company. This Court in this case has categorically held that there may be a large number of Directors but some of them may not associate themselves in the management of the day-to-day affairs of the Company and, thus, are not responsible for the conduct of the business of the Company. The averments must state that the person who is vicariously liable for commission of the offence of the Company both was in charge of and was responsible for the conduct of the business of the Company. Requirements laid down therein must be read conjointly and not disjunctively. When a legal fiction is raised, the ingredients therefore must be satisfied.

23. On a plain reading of the averments made in the complaint petition, we are satisfied that the statutory requirements as contemplated u/s 141 of the Act were not satisfied.

If in the light of the above said law laid down by the Apex Court the averments in the complaint are considered the same do not satisfy the legal requirements to

invoke Section 141 of the Act and proceed against the third petitioner herein any further. For the aforesaid reasons the contentions raised by the learned Counsel for the first respondent cannot be countenanced.

17. One another important aspect to be noticed in this case is that in the vacate stay petition the first respondent has stated that the first accused had borrowed a huge amount from the complainant in the year 1997 and the same has been secured by mortgage of immovable properties and hence if the first respondent is not satisfied with the 9% interest paid by the first petitioner and ultimately the first respondent take recourse to legal proceedings to enforce the security the disputed interest amount can also be claimed in such proceedings and as such no prejudice whatsoever will be caused to the first respondent if the proceedings in C.C. No. 7842 of 1998 are quashed.

18. Though in the above quash petition the petitioners have sought for quashing of further proceedings in C.C. No. 7842 of 1998 in so far as petitioners 2 and 3 are concerned this Court is of the considered view that since the first respondent had accepted the demand drafts and encashed the same and realised the entire amounts covered by the demand drafts and retained the same and so far the first respondent had not chosen to return back the same as observed above and when this Court is inclined to quash the proceedings on that ground the benefit of such order should not be confined only to petitioners 2 and 3 alone but such benefits should also be made available to the first petitioner and the second respondent herein who are also co-accused in the case.

19. The above view of mine is supported by the law laid down by the Apex Court in the decision reported in State of U.P. Vs. R.K. Srivastava and Another, . In that case, the Allahabad High Court has quashed the criminal proceedings being Crime case No. 40 of 1983 in the Court of Special Judge, Anti-Corruption, only as against one of the accused namely R.K.Srivastava and as against the other two accused, the case was not quashed. The said judgement of the Allahabad High Court was challenged before the Apex Court by the State of U.P. v. R.K.Srivastava and Anr. with State Bank of India v. R.K.Srivastava and Ors. While dealing with such appeals the Hon "ble Apex Court has laid down as under:

6. The High Court has rightly held that as the criminal proceedings have been started against the respondent on the basis of an FIR which does not contain any definite accusation, it amounts to an abuse of process of the court and, as such, is liable to be quashed. We entirely agree with the view expressed by the High Court.

7. The High Court has quashed the proceedings only as against Respondent 1, R.K. Srivastava. In our opinion, when the allegations in the FIR are the same against all the accused persons, the entire proceedings as against all the accused persons including the said P.C. Saxena and the said Shri Sarwant Singh should be quashed.

8. Accordingly, while we uphold the judgment of the High Court, we quash the

entire criminal proceedings being Crime Case No. 40 of 1983 also as against the accused P.C. Saxena and Shri Sarwant Singh. The appeals are disposed of as above.

Thus it is clear that when a complaint or FIR is sought to be quashed by one of the accused alone and ultimately the complaint / FIR is quashed on the ground that the allegations contained in the complaint / FIR do not reveal the commission of any offence the benefit of such order of quashing shall be extended to the other co-accused though they have not sought for quashing of the same. The above legal principle is applicable to the facts of this case as stated above.

20. For the aforesaid reasons all further proceedings in C.C. No. 7842 of 1998 on the file of the Metropolitan Magistrate No. XII, George Town, Chennai, are hereby quashed and the above Criminal Original Petition is allowed. Consequently the connected MPs are closed.