In The High Court at Calcutta
Criminal Revisional Jurisdiction

Present :

The Hon'ble Justice Joymalya Bagchi

C.R.R. 2306 of 2015
with
C.R.A.N. 3420 of 2015

M/s. Gena Marketing Pvt. Ltd. and Anr.
Vs.
Somnath Guin

With

C.R.R. 2307 of 2015
with
C.R.A.N. 3448 of 2015

M/s. Gena Marketing Pvt. Ltd. and Anr.
Vs.
Somnath Guin

Mr. Ayan Bhattacharjee,
Mr. Anjan Dutta ...for the petitioner.

Mr. Sandipan Ganguly,
Mr. Soumyapriya Roy Chowdhury,
Mr. Rudradipta Nandy ...for the opposite party.

Heard on : February 16, 2016.

Judgment on: February 16, 2016.

Joymalya Bagchi, J.: C.R.R. 2306 of 2015 and C.R.R. 2307 of 2015 are taken up together.

Proceedings in C.R. 854 of 2010 and C.R. 853 of 2010 pending in the court of the learned Judicial Magistrate, 5th Court at Paschim Medinipur under Sections 138/141 of the Negotiable Instruments Act, 1881 have been assailed on the plea that the notice issued under

Section 138(b) of the Negotiable Instruments Act, 1881 was defective in law.

The factual matrix giving rise to the impugned prosecutions are to the effect cheques were drawn by the petitioner company through its director/authorized signatory, Vijay Kumar Kanoria. The cheques upon being presented for payment were returned unpaid with the endorsement "insufficient fund in your account". Thereupon the opposite party issued notices under Section 138(b) addressing it to Vijay Kumar Kanoria, son of Govind Prosad Kanoria, authorised signatory of Gena Marketing Pvt. Ltd. at the registered office of the company In spite of receipt of such notices, no payment was made and the impugned prosecutions were lodged. For the sake of adjudication, one of such notices sent under Section 138(b) of the Negotiable Instruments Act, 1881 is set out herein below :-

Date : 26.07.2010

To
Sri Vijoy Kumar Kanoria
Son of Govind Prosad Kanoria
Authroised signatory of
Gena Marketing Pvt. Ltd.
27A, Waterloo Street
Kolkata – 700 069.

Sub: Dishonour of cheque bearing cheque no. 272223
of State Bank of India, Esplanade, 9B, Esplanade Row Street, Calcutta, West Bengal – 700 069 dated 30.6.2010 amounting to Rs. 3,50,00,000/-

My Client : Somnath Guin son of Sri Jamini Kanta Guin, Rajmata Bhawan, Burrabazar, Medinipur Town, District : Pachim Medinipur.

Sir,

"Under instructions from and on behalf of my client above named, this is to inform you that the

cheque amounting to Rs. 3,50,00,000/- under reference has been deposited by my client to his Banker, Axis Bank Ltd., Kharagpur Branch on 8.7.2010, however, my client's banker through the letter dated 12th July, 2010 as served upon my client informed him that the said cheque has been dishonoured due to 'insufficient fund in your account'.

By this notice/letter I do hereby request you to make payment of the said amount of Rs. 3,50,00,000/- to my client within 15 (fifteen) days from the date of receipt of the instant notice/letter, failing which my client may be compelled to take appropriate steps under the provisions of law against you before the appropriate forum without any further reference to you."

Thanking you,

Yours faithfully,

(Pingal Bhattaharyya)
Advocate

Mr. Bhattacharjee, learned advocate appearing for the petitioners submitted that the notice under Section 138(b) of the Negotiable Instruments Act, 1881 is to be issued upon the drawer of the cheque. Admittedly, the petitioner no.1/company is the drawer of the cheque and notice being issued in the name of the petitioner no.2 does not comply with the aforesaid requirement of law. Hence the impugned prosecutions are liable to be quashed on such score.

Per contra, Mr. Sandipan Ganguly, learned advocate for the opposite party/complainant submitted that the notice was sent to the registered office of the company and although it bore the name of petitioner no.2, director/authorized signatory of the company, in effect, it was a notice to the company calling upon it to make payment in accordance with law to avoid penal liability.

Both the parties relied on various authorities in support of their contentions.

Section 138(b) of the Negotiable Instruments Act, 1881, inter alia, requires the payee or the holder in due course of the cheque to give a notice in writing to the drawer of the cheque within thirty days from the receipt of information by him from the bank regarding the return of the cheque as unpaid.

Admittedly notices were given in writing within the stipulated time frame demanding payment of the dishonoured cheque. The moot issue which arises in the case is whether the notices which were issued in the name of Vijay Kumar Kanoria, director/authorised signatory of Gena Marketing Pvt. Ltd. would be construed to be a notice to the company itself for the purposes of the aforesaid sub-section.

The purpose of issuance of notice under Section 138(b) of the Negotiable Instruments Act is to give a chance to the drawer to rectify his omission [see ***Suman Sethi Vs. Ajay K. Churiwal And Another, (2000) SCC (Cri) 414 (Para-9)***].

Let me examine whether the notice under section 138(b) of the Act in this case meets such requirement. Petitioner no.2 to whom the notices were addressed is the director and authorised signatory of the company who represented the company throughout the transaction which is the subject-matter of the impugned prosecution. It is claimed that he had signed the agreement from which the liability arose in respect whereof the dishonoured cheque was issued. He is also alleged to be the signatory of the cheque and had received the notice of dishonour at the registered office of the company. Under such premises, the petitioner no.2 can be safely assumed to be the alter ego of the company. He is the principal director of the company and was

the human agency representing the company in the transaction which is the subject matter of prosecution. A corporate entity has to function through a human agency and the mental state of such human agency is attributable to the company. Hence, knowledge of petitioner no.2 of such notice and his response thereto can be attributed to the juristic entity as the former is nothing but the alter ego of such corporate entity.

The principle of alter ego and attribution of intent of the human agency, who is the alter ego of the company, upon the body corporate itself was approved and applied in criminal jurisprudence by the Apex Court in ***Iridium India Telecom Ltd. Vs. Motorola Incorporated & Ors. (2011) 1 SCC 74*** as follows:-

> "**55. ...virtually in all jurisdictions across the world governed by the rule of law, the companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing the necessary mens rea for the commission of criminal offences. The legal position in England and the United States has now crystallised to leave no manner of doubt that a corporation would be liable for crimes of intent."**
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> ***"59. The courts in England have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular state of mind. The aforesaid notion has been rejected by adopting the doctrine of attribution and imputation. In other words, the criminal intent of the "alter ego" of the company/body corporate i.e. the person or group of persons that guide the business of the company, would be imputed to the corporation."***

Similarly in ***Sunil Bharti Mittal Vs. Central Bureau of Investigation (2015) 4 SCC 609*** it has been held:

> ***"40. It is abundantly clear from the above that the principle which is laid down is to the effect that the criminal intent of the "alter ego" of the company, that is the personal group of persons that guide the business of the company, would be imputed to the company/corporation."***

Applying the aforesaid principle in the matter of giving notice under section 138(b) of the Act to the drawer, it can be safely construed that a notice addressed to a director/authorised signatory of a cheque who had represented the drawer company in the course of the transaction resulting in the issuance of the dishonoured cheque shall be deemed to be a notice issued upon the company itself inasmuch as the knowledge of the said human agency of the notice may be attributed to the body corporate itself.

It has finally been argued that the notice under section 138(b) of the Act must be construed strictly as it forms a part of a penal provision. Traditionally, penal provisions call for strict interpretation but such view is increasingly yielding to a more purposive interpretation in recent times. While interpreting the requirement of sending a notice under section 138(b) of the Act in this perspective the object and intention of the legislature must not be lost sight of and a narrow pedantic approach ought not to be taken so that a defaulter may escape penal consequences. Negotiable Instruments Act is a legislation operating in the commercial field and section 138 thereof was incorporated to give tooth and claw to the legislation so as to ensure greater accountability and creditability in commercial transactions relating to cheques. This legislative intention ought to be the guiding principle while construing the validity of notice issued under the aforesaid provision of law.

In ***Standard Chartered Bank & Ors. Vs. Directorate of Enforcement & Ors. (2005) 4 SCC 530***, a Constitution Bench while upholding purposive construction of penal statutes, inter alia, held that –

> ***"24. The distinction between a strict construction and a more free one has disappeared in modern times and now mostly the question is "what is true construction of the statute?" A passage in Craies on Statute Law, 7th Edn. reads to the following effect:***
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> ***"The distinction between a strict and a liberal construction has almost disappeared with regard to all classes of statutes, so that all statutes, whether penal or not, are now construed by substantially the same rules. 'All modern Acts are framed with regard to equitable as well as legal principles.' 'A hundred years ago,' said the court in Lyons' case, 'statutes were required to be perfectly precise and resort was not had to a reasonable construction of the Act, and thereby criminals were often allowed to escape. This is not the present mode of construing Acts of Parliament. They are construed now with reference to the true meaning and real intention of the legislature."***
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> ***At p. 532 of the same book, observations of Sedgwick are quoted as under:***
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> ***"The more correct version of the doctrine appears to be that statutes of this class are to be fairly construed and faithfully applied according to the intent of the legislature, without unwarrantable severity on the one hand or unjustifiable lenity on the other, in cases of doubt the courts inclining to mercy."***

The Court further held that even in interpretation of penal statutes the mischief Rule or Heydon's Rule may be resorted to:-

> ***"36. The rule of interpretation requiring strict construction of penal statutes does not warrant a narrow and pedantic construction of a provision so as to leave loopholes for the offender to escape (see Murlidhar Meghraj Loya v. State of Maharashtra). A penal statute has to also be so construed as to avoid a lacuna and to suppress mischief and to advance a remedy in the light of the rule in Heydon's case. A common-sense approach for solving a question of***

applicability of a penal statute is not ruled out by the rule of strict construction. (See State of A.P. v. Bathu Prakasa Rao and also G.P. Singh on Principles of Statutory Interpretation, 9th Edn., 2004, Chapter 11, Synopsis 3 at pp. 754 to 756.)"

Similarly, the Apex Court applied purposive interpretation in defining the expression 'dowry' under section 304B of Indian Penal Code. In ***Rajinder Singh Vs. State of Punjab (2015) 6 SCC 477***, the Court at paragraph 14 to 20 of the said report quoted with approval the said proposition enunciated in **Standard Chartered (supra)** and held that a penal statute must be given a fair, pragmatic and commonsense interpretation so as to fulfil its object. In this perspective, I am unable to accept the contention of the petitioners that notice under section 138(b) of the Negotiable Instruments Act must receive a strict and pedantic interpretation. On the other hand, a pragmatic interpretation of such notice, which furthers the intention of the legislature is to be adhered to.

Finally, no prejudice has been caused to the petitioners in the instant case in the manner in which the notice was given. Admittedly, notice was received by the petitioner no.2, that is, the alter ego of the company who was acting on its behalf and, hence, the company ought to be attributed with the requisite knowledge of such notices. The knowledge of petitioner no.2 with regard to the notice of dishonor being imputed upon the accused company, there cannot be any escape from the conclusion that the drawer of the cheque, that is the company itself, had sufficient notice of dishonor of the cheque as required in law and no prejudice can be shown to have been caused to the petitioner company on such account.

The issue as to whether a notice issued upon the director/authorized signatory of the company can be deemed to be a valid notice under Section 138(b) of the Negotiable Instruments Act fell for consideration **Bilakchand Gyanchand Co. Vs. A. Chinnaswami** reported in **(1999) 5 SCC 693** and **Rajneesh Aggarwal Vs. Amit J. Bhalla** reported in **(2001)1 SCC 631**. In **Bilakchand (supra)**, notice issued upon the Managing Director/signatory was held to be a valid notice under Section 138(b) of the Act. In **Rajneesh (supra)** the Apex Court observed as follows:-

> ***"The object of issuing notice indicating the factum of dishonour of the cheques is to give an opportunity to the drawer to make the 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, 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 (sic alleged) that Shri Bhalla has not signed the cheques, nor is it disputed (sic alleged) that Shri Bhalla was not 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. We really fail to understand as to why the judgment of this Court in Bilakchand Gyanchand Co. will have no application. In that case also criminal proceedings had been initiated against A. Chinnaswami, who was the Managing Director of the company and the cheques in question had been signed by him. In the aforesaid premises, we have no hesitation to come to the conclusion that the High Court committed error in recording a finding that there was no notice to the drawer of the cheque, as required under Section 138 of the Negotiable Instruments Act. In our opinion, after the cheques were dischonoured by the bank the payee had served due notice and yet there was failure on the part of the accused to pay the money, who had signed the cheques, as the Director of the company."***

In response to the said authorities, Mr. Bhattacharjee has strenuously argued that the law in this regard has undergone a sea change after ratio in ***Aneeta Hada Vs. Godfather Travel & Tours Pvt. Ltd.*** reported in ***(2012) 5 SCC 661*** and ***Krishna Texport and Capital Markets Limited Vs. Ila A. Agarwal and Ors.*** reported in ***(2015)8 SCC 28.***

I am unable to subscribe such contention. The issue before me did not fall for consideration in the aforesaid cases relied on by Mr. Bhattacharjee. In **Aneeta Hada** the Apex Court was concerned as to whether prosecution of a director could be maintained in the absence of prosecution of the accused company. The Apex Court held that the prosecution of an accused company was sine qua non for prosecution of a director save and except where prosecution of the company is a legal impossibility. In **Krishna Texport (supra)** the issue was just the reverse. The notice had been served on the accused company but not on the directors. In such situation, the Apex Court while upholding such prosecution inter alia, held as follows:

> **"The persons who are in charge of the affairs of the company and running its affairs must naturally be aware of the notice of demand under Section 138 of the Act issued to such company. It is precisely for this reason that no notice is additionally contemplated to be given to such Directors."**

Hence, I am of the opinion that the aforesaid authorities relied on by Mr. Bhattacharjee do not answer the issue raised before this Court which has been squarely answered in **Bilakchand** and **Rajneesh (supra)**.

The other authorities relied upon by Mr. Bhattacharya are not applicable to the facts of the case. In ***1991 C.Cr.LR (Cal) 171 (Dilip Kumar Jaiswal Vs. Debapriya Banerjee)*** and ***2005 Cri.LJ 1931 (M/s. Target Overseas Exports Pvt. Ltd. & Ors. Vs. A.M. Iqbal & Anr.)*** the issue was whether notice of dishonour was required to be given to the directors of the company when notice had been served upon the company itself. In ***2015 ACD 886 (HP) [M/s. Century Vision Organic Farms Pvt. Ltd. Vs. Pushpa Bhanot]*** the Court did not consider the ratio in ***Bilakchand (supra)*** and ***Rajneesh (supra)***. In ***(2013) 2 CLT 139/(HC) [SSS Loha Marketing Pvt. Ltd. Vs. Bibby Financial Services India Pvt. Ltd.]*** the Court was dealing with a notice under section 434 of the Companies Act, which had not been sent to the registered office of the company. In the instant case, the notice of dishonour was sent to the registered office of the company and was received by petitioner no.2 who is the director and alter ego of the company being the human agency who represented the company throughout the transaction which is the subject matter in the instant prosecution. In ***(1999) 4 SCC 197 [Orissa State Ware Housing Corporation Vs. Commissioner of Income Tax]*** the Apex Court was dealing with a fiscal statute and held that the court must ascribe natural and ordinary meaning to the words used by the legislature and not substitute its own observation in place of legislative intent.

As in the factual matrix, I find that the legislative intent of making the drawer of the cheque, that is, the juristic entity aware of its dishonour by way of a notice in writing is well achieved by giving notice to its alter ego and human agency, namely, the petitioner no.2, I am of

the view that ratio of the aforesaid decision has no manner of application in the instant case.

In view of the aforesaid discussion I hold that the petitioner no.1 company had sufficient notice of dishonor of the cheques and had failed to make payment within the stipulated time and the impugned prosecutions are not liable to be quashed on such score.

For the aforesaid reasons, both the revision petitions are dismissed. The trial court is directed to proceed with the case in accordance law with utmost expedition.

Let Photostat certified copy of this order be given to the parties, if applied for, on urgent basis upon compliance of all formalities.

(Joymalya Bagchi, J.)