Karnataka High Court V. N. Samant vs K.G.N. Traders And Another on 12 August, 1994 Equivalent citations: 1994 CriLJ 3115, ILR 1994 KAR 2991 Author: S Venkataraman Bench: S Venkataraman JUDGMENT S. Venkataraman, J. 1. This petition is filed by the first accused in C.C. No. 20939 of 1993 on the file of the Chief Metropolitan Magistrate, Bangalore, against the issue of process to the petitioner and also for quashing the entire proceedings. For the purpose of convenience, the parties will be referred to by their rank in the lower court. 2. The first defendant has filed the complaint against the petitioner and another person for an offence under section 138 of the Negotiable Instruments Ad (for short "the Act"), alleging that in respect of G.I. sheets which had been supplied by the complainant on the orders issued by the accused, a cheque for Rs. 1,15,000 was issued by the accused on May 27, 1993, that when the cheque was presented for realisation on May 28, 1993, it was returned with an endorsement "exceeds arrangement" dated May 31, 1993, that the complainant got issued a legal notice dated June 8, 1993, demanding payment of the amount, that the notices were sent both by registered post acknowledgment due as well as by certificate of posting to both the accused, that while the first accused received the notice the second-accused refused the same, that the first accused sent a reply in which he admitted the issuance of the cheque but made other false allegations and that as the accused had failed to pay the amount in spite of the notice they have committed offence under section 138 of the Act and also under section 420 of the Indian Penal Code. 3. The Magistrate, after recording the sworn statement of the complainant and after perusing the complaint and the sworn statement as well as documents, issued summons to both the accused persons. Learned counsel for the petitioner has urged the following grounds in support of the petition : (1) The Magistrate has taken cognizance of the offence after recording the sworn statement which is illegal and it vitiates the proceedings. (2) The notices as well as the cheque produced along with the complaint would show that it was the partnership firm which had issued the cheque and as such it is the firm which has committed the offence, if at all and as the firm itself is not made an accused and as the complaint also does not indicate that the offence is committed by the firm, prosecution of the accused persons in their individual capacity cannot be sustained. (3) The complainant has issued a notice giving only seven days' time for payment and this is in contravention of the proviso to section 138 of the Act and that as such the offence under section 138 cannot be said to have been committed. So far as the first contention is concerned it is no doubt true that in some of the decisions of this court and especially in State v. Papireddy , it has been held that cognizance should precede the recording of the sworn statement and that if the Magistrate straightaway on receipt of the complaint records the sworn statement and thereafter he takes cognizance, it would be in contravention of section 200 of the Criminal Procedure Code. But it is equally well-settled that when a Magistrate after receiving the complaint applies his mind to take further steps under Chapter XV then he must be deemed to have taken cognizance of the offence and that it is not necessary that the Magistrate should pass a specific order stating that he has taken cognizance of the offence. In the present case, it is seen that when the complaint was presented

before the Magistrate he has passed the following order on the complaint itself : "Presented by the complainant on July 6, 1993. Check and register as P.C.R. and put up on July 17, 1993". On July 17, 1993, when the matter was brought before him the Magistrate has thereafter proceeded to record the sworn statement of the complainant. On July 24, 1993, to which date the case had been adjourned for hearing, the complainant was recalled and his further statement was recorded. After two more adjournments and after hearing the complainant the Magistrate has passed the following order : "Heard. Sworn statement of the complainant recorded. Perused the sworn statement and the complaint. Cognizance taken. On a perusal of the sworn statement of the complainant, complaint and the documents I am satisfied that there exists prima facie case to proceed against the accused. Register C.C. and issue summons to accused by November 23, 1993." 4. This portion of the order would appear to indicate that the magistrate has taken cognizance after the statement of the complainant was recorded. But as the Magistrate had, on the very day the complaint was filed, directed that it should be registered and put up before him and when it was put up before him he has examined the complainant on two occasions, would indicate that he had by those acts already taken cognizance of the offence. In fact in State v. Papireddy , this court has referred to an earlier decision in D. P. Sharma v. C. R. Gandha [1982] 2 KLC 358. That was also a case where the magistrate made a note on the complaint itself stating that the complaint was presented at 3 p.m. and directing that it be registered as P.C. and be called on February 6, 1980. That endorsement was interpreted by this court as showing that the magistrate had applied his mind to the contents of the complaint and that, therefore, he adjourned the case for recording the sworn statement of the complainant as required under section 200, Criminal Procedure Code. It was also held that those facts leave no doubt in the mind of the court that the magistrate did apply his mind to the contents of the complaint and found that it was a fit case for taking cognizance. In the present case also the same is the position. From the fact that the magistrate on receipt of the complaint directed that it be registered and then adjourned the case to another date and that on that date as well as on subsequent dates examined the complainant would clearly indicate that he had taken cognizance of the offence and had decided to take further steps under Chapter XV. The mere fact that while passing a formal order issuing process the magistrate has again stated that cognizance is taken does not take away the effect of his earlier action which indicated that he had already taken cognizance. The second order regarding taking of cognizance is only superfluous and this cannot vitiate the entire proceedings. 5. Coming to the second contention it is seen that the cheque on the basis of which the complaint is filed as well as the notice issued by the complainant have been produced along with the complaint. The cheque has been issued by both the accused persons as partners of "Vikas Services". They have put their signatures "for Vikas Services". The notice issued by the complainant is also addressed to Vikas Services by its partners, V. N. Samnath and Surendra Shetty. It is now not disputed that actually the cheque is issued by the firm. 6. Section 141 of the Act provides that if the person committing an offence under section 138

is a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The Explanation to that section provides that the company means and includes a firm also. 7. In the present case as the cheque has been issued by the firm it is obvious that the person committing the offence under section 138 is the firm. As per section 141 when the person committing the offence is a firm, every one who was in charge of and responsible to the company for the conduct of the business at the time of the commission of an offence as well as the firm can be proceeded against and punished. 8. The question is whether in the present case the prosecution of the accused persons without the firm being impleaded as an accused is not maintainable. At this stage I may refer to an argument by learned counsel for the petitioner that the complaint does not indicate that the offence is committed by the firm that the accused are being prosecuted as persons who were in charge of and were responsible to the firm for the conduct of the business and that as such the complaint as framed is not at all maintainable. It is no doubt true that the firm as such is not arrayed as an accused. The two persons who are arrayed as accused are described as hereunder : (1) V. V. Samnath, Vikas Services, Partner, 1st Floor, III Cross, B.T.S. Road, Wilson Garden, Bangalore-27. (2) Surendra Shetty, Vikas Services, Partner, 1st Floor, III Cross, B.T.S. Road, Wilson Garden, Bangalore-27. 9. The description of the two accused persons shows that they are being prosecuted because they are the partners of Vikas Services. Though in the complaint it is not specifically alleged that the accused as partners of the firm had placed orders or that the accused had issued the cheque as partners of the firm, the documents filed along with the complaint clearly indicate this position. In fact it is on the basis of the documents which had been filed by the complainant in the trial court that learned counsel for the petitioner is able to demonstrate that it is the firm which had issued the cheque and that it is the firm to which the complainant has also issued notices. At the stage of issuing process the court is required to find out not only from the averments in the complaint but also from the sworn statement of the complainant and other documents filed along with the complaint as to what is the offence made out and to whom the process will have to be issued. As such from the documents along with the complaint it can be spelt out that the offence has been committed by the firm and from the description of the accused it can be made out that they who had actually issued the cheque on behalf of the firm were being prosecuted in their capacity as partners of the firm. 10. Learned counsel for the petitioner relied on the decision of the Madras High Court in Krishna Bai v. Arathi Press [1991] LW Crl. 513; [1994] 80 Comp Cas 750 and which is also extracted in the book Criminal Prosecution on Dishonour of Cheques, 1994 edition, to contend that in the absence of the company as an accused the prosecution of partners is not maintainable. In that case it has been held that a complaint filed against the managing director of the company without the company being made an accused is not maintainable. 11. The Madras High Court in the above case has relied on the decision of

the Supreme Court in U.P. Pollution Control Board v. Modi Distillery , to hold that without the company being impleaded as an accused, the prosecution cannot proceed against the persons who are in charge of and responsible to the company for the conduct of the business. In U.P. Pollution Control Board v. Modi Distillery , the Supreme Court has observed as hereunder : "Although as a pure proposition of law in the abstract the learned single judge's view that there can be no vicarious liability of the chairman, vice-chairman, managing director and members of the board of directors under sub-section (1) or (2) of section 47 of the Act unless there was a prosecution against Modi Industries Limited, the company owning the industrial unit, can be termed as correct, the objection raised by the petitioners before the High Court ought to have been viewed not in isolation but in the conspectus of facts and events and not in vacuum. We have already pointed out that the technical flaw in the complaint is attributable to the failure of the industrial unit to furnish the requisite information called for by the board. Furthermore, the legal infirmity is of such a nature which could be easily cured. Another circumstance which brings out the narrow perspective of the learned single judge is his failure to appreciate the fact that the averment in paragraph 2 has to be construed in the light of the averments contained in paragraphs 17, 18 and 19 which are to the effect that the chairman, vice-chairman, managing director and members of the board of directors were also liable for the alleged offence committed by the company." 12. In the above case, the Supreme Court has only observed that the proposition may be correct in the abstract, but it has not laid down specifically that no prosecution against the persons in charge of and responsible to the company for the conduct of the business can be prosecuted without the company itself being prosecuted. It may also be noted that the Supreme Court has said that the legal infirmity, if any, can be easily cured. It is open to the magistrate under section 319 of the Criminal Procedure Code, if he finds that the company has committed the offence, to issue summons to the company. That apart, this question had arisen for consideration before the Supreme Court in Sheoratan Agarwal v. State of Madhya Pradesh, . The Supreme Court dealt with section 10 of the Essential Commodities Act which is similar to section 141 of the Negotiable Instruments Act. Dealing with the question as to whether the person in charge of and responsible to the company for the conduct of business can be prosecuted without the company itself being prosecuted, the Supreme Court has held as hereunder : "The section appears to our mind to be plain enough. If the contravention of the order made under section 3 is by a company, the persons who may be held guilty and punished are : (1) the company itself, (2) every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company whom for short we shall describe as the person in charge of the company, (3) any director, manager, secretary or other officer of the company with whose consent or connivance or because of neglect attributable to whom the offence has been committed, whom for short, we shall describe as an officer of the company. Any one or more or all of them may be prosecuted and punished. The company alone may be prosecuted. The person-in-charge only may be prosecuted. The conniving officer may individu-

ally be prosecuted. One, some or all may be prosecuted. There is no statutory compulsion that the person-in-charge or an officer of the company may not be prosecuted unless he be ranged alongside the company itself. Section 10 indicates the person who may be prosecuted where the contravention is made by the company. It does not lay down any condition that the person-in-charge or an officer of the company may not be separately prosecuted if the company itself is not prosecuted. Each or any of them may be separately prosecuted or along with the company. Section 10 lists the person who may be held guilty and punished when it is a company that contravenes an order made under section 3 of the Essential Commodities Act. Naturally, before the persons-in-charge or an officer of the company is held guilty in that capacity it must be established that there has been a contravention of the order by the company." 13. In view of the above authoritative pronouncement of the Supreme Court, it cannot be contended that the persons who were in charge of and were responsible to the company for the conduct of the business cannot be prosecuted for the offence committed by the company without the company itself being prosecuted. As such, the contention of learned counsel for the petitioner that as the offence is committed by the firm, the petitioner cannot be prosecuted without the firm being arraigned as an accused, cannot be accepted. Another contention that was urged by learned counsel for the petitioner was that under section 138, notice giving 15 days' time for payment ought to have been issued and that as in this case the complainant had issued a notice demanding the amount within a week, the notice is invalid and consequently no offence under section 138 is made out. He relied on the judgment of the Punjab and Haryana High Court in Embee Textiles Ltd. v. Sadhu Ram and Co. [1993] 1 BC 68. He has only produced the gist of the judgment. In the headnote, it is stated that under section 138, the notice of demand should give 15 days to pay, whereas in the notice under reference 30 days' time had been given and that as such, it was not a proper notice and that the notice did not conform to the specifications of the statute. The facts of that case and the actual reasoning given are not available. However, if that decision purports to lay down that the notice should give 15 days time for payment and that if the time given is either less or more, the notice would be invalid, I, respectfully disagree with that view. The proviso to section 138 reads as hereunder : "Provided that nothing contained in this section shall apply unless - (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier; (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice. Explanation. - For the purposes of this section 'debt or other liability' means a legally enforceable debt or other liability." 14. A plain reading of the above proviso would indicate that all that the statute requires is that the payee or the

holder in due course of the cheque should make a demand for the payment of the amount covered by the cheque by giving a notice in writing to the drawer of the cheque and that such notice should be issued within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. Clause (b) of the proviso does not stipulate that the payee or the holder in due course who issues the notice should give any specific time for the drawer to pay the amount. Sub-clause (c) of the proviso only stipulates that if the drawer of the cheque fails to make the payment of the amount to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice, then the offence would be committed. The cause of action for filing the complaint would arise after the completion of 15 days from the date, the drawer receives the notice and fails to pay the amount within that period. The payee cannot lodge a complaint after the completion of one month from the date the cause of action arose as there is a bar under section 142(b). To comply with clause (b) of the proviso to section 138, it is not at all necessary for the payee to specify any time in the notice for making payment. Even if he specifies a time lesser than 15 days, the statute gives the drawer time of 15 days for making payment and if he pays that amount within 15 days of the receipt of the notice, the offence would not be committed. For the purpose of this case, it is not necessary to consider the question as to what would be the consequence if the payee voluntarily gives more than 15 days for payment while issuing the notice. In the case referred to above, the notice had given 30 days time for payment and possibly that may be the reason why that notice was held invalid. But in the present case, the fact that the notice gives 7 days time for payment does not render it invalid. After considering all questions raised in this petition, I do not find any good ground to quash the proceeding. This petition is rejected. 15. However, it is made clear that any observations made by this court on the factual aspects of the case may not be taken into consideration at the time of appreciation of the evidence by the trial court after conclusion of the trial.