Kirshna Texport & Capital Markets Ltd vs Ila A Agrawal & Ors on 6 May, 2015

Equivalent citations: 2015 AIR SCW 2951, 2015 (8) SCC 28, 2015 CRI. L. J. 2847, AIR 2015 SC (CRIMINAL) 1170, 2015 ACD 660 (SC), 2015 (2) ABR (CRI) 501, (2015) 2 KER LJ 534, (2015) 4 RECCIVR 341, (2015) 6 SCALE 95, (2015) 3 ALLCRILR 855, (2015) 3 PAT LJR 253, (2016) 1 MH LJ (CRI) 426, 2015 CRILR(SC&MP) 560, (2015) 3 RAJ LW 2200, (2015) 2 ALD(CRL) 253, (2016) 1 MPLJ 270, (2015) 2 CURCRIR 380, (2015) 150 ALLINDCAS 18 (SC), (2015) 2 CAL LJ 209, (2016) 2 MH LJ (CRI) 68, (2015) 3 CIVILCOURTC 248, (2015) 2 ORISSA LR 642, (2015) 3 PUN LR 307, (2015) 2 RECCRIR 949, 2015 ALLMR(CRI) 2414, (2015) 3 JLJR 62, (2015) 2 BOMCR(CRI) 593, (2015) 3 DLT(CRL) 685, (2015) 89 ALLCRIC 949, (2016) 1 CIVLJ 1, (2015) 2 MADLW(CRI) 730, (2015) 2 MAD LJ(CRI) 708, (2016) 1 MAH LJ 582, (2015) 5 MAD LW 810, (2015) 2 UC 1085, 2016 CALCRILR 1 332, (2015) 4 JCR 64 (SC), (2015) 61 OCR 444, (2015) 2 KER LT 543, (2015) 2 CRILR(RAJ) 560, 2015 CRILR(SC MAH GUJ) 560, (2015) 1 NIJ 578, (2015) 3 CRIMES 28, 2015 (3) SCC (CRI) 423, 2015 (3) KCCR SN 328 (SC), (2015) 3 BOM CR 544, AIR 2015 SUPREME COURT 2091

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Bench: Uday Umesh Lalit, Pinaki Chandra Ghose

Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1220 of 2009

KIRSHNA TEXPORT &
CAPITAL MARKETS LTD. …. Appellant

Versus

ILA A. AGRAWAL & ORS. …. Respondents

J U D G M E N T

Uday Umesh Lalit, J.

1. This appeal by Special Leave is directed against the order dated 6.5.2008 passed by the High Court of Judicature at Bombay rejecting Criminal Application No. 2174 of 2007 preferred by the appellant for leave to appeal.

2. On 14.09.1996 a notice under Section 138 of the 'Negotiable Instruments Act, 1881'(hereinafter referred to as "the Act") was issued on behalf of the appellant to M/S Indo French Bio Tech Enterprises Ltd ('the Company' for short). The notice stated that a cheque bearing No. 364776 dated 8.9.1996 drawn by the Company on Dena Bank, New Marine Lines, Mumbai in favour of the appellant was returned on 10.9.1996 with endorsement "funds insufficient". The notice therefore called upon the addressee to make the payment of the cheque amount within 15 days of the receipt of such notice. No reply was sent to the aforesaid notice dated 14.9.1996.

3. The appellant thereafter filed Complaint Case No. 243/S/1996 before the Additional Chief Metropolitan Magistrate, 5th Court at Dadar, Mumbai against the Company, Mr. K.J. Bodiwala, the Chairman and Managing Director of the Company and 11 other directors including respondents 1 and 2. In so far as the directors are concerned, it was averred that they were in-charge of the business of the Company and its day to day affairs and were liable. During the pendency of said complaint case, the process issued against Accused Nos. 3 to 5, 7, 9 to 13 was recalled and due to the death of Mr. Bodiwala the proceedings as against him also abated, which left the Company and the present respondents 1 and 2 namely Ms. Ila A. Agrawal and Mr. Prafulla Ranadive, Accused Nos. 6 and 8 respectively in the array of accused.

4. It was submitted by the appellant that separate notices to the directors were additionally issued but at the stage of evidence it turned out that such individual notices to the directors were with respect to dishonour of a different cheque. The facts as found therefore were that no individual notices were given to the directors. The Metropolitan Magistrate by his judgment and order dated 30.4.2007 convicted the Company but acquitted respondents 1 and 2 of the offence punishable under Section 138 of the Act. Relying on the judgment of the Division Bench of Madras High Court in B. Raman & Ors. Vs. M/s. Shasun Chemicals and Drugs Ltd. reported in 2006 Cril. L.J. Page 4552, it was observed that statutory notice under Section 138 of the Act was required to be issued to every Director and for non- compliance of such mandatory requirement respondents 1 and 2 could not be proceeded against. .

5. The appellant being aggrieved filed Criminal Application No. 2174 of 2007 in the High Court seeking leave to prefer appeal against the judgment acquitting respondents 1 and 2. It was submitted that it was not necessary to serve individual notice upon the directors and it was sufficient if the notice was served on the Company. Reliance was placed on the decision of a Single Judge of the Calcutta High Court in the case of Girish Chandra Pandey Vs. Kanhaiyalal Chandak and Ors. reported in 1999 ALL MR (CRI) JOURNAL 3, wherein it was held that if the partnership firm failed to give the amount within the stipulated time after receipt of notice, each partner need not be served with a separate notice individually. So also reliance was placed on the decision of a Single Judge of Delhi High Court in the case of Jain Associates and Ors. Vs. Deepak Chawdhary & Co. reported in

80 (1999) DLT 654, wherein it was laid down that Section 141 of the Act does not require that each and every partner of the firm is required to be issued notice.

Similar view was taken by High Court of Andhra Pradesh in K. Pannir Selvan vs. MMTC and another reported in (2000) Cr. L.J. 1002 and by Delhi High Court in Ranjit Tiwari vs. Narender Nayyar reported in 191 (2012) DLT

318.

6. The High Court, relying on the judgment of the Division Bench of Madras High Court B. Raman & Ors. (supra) observed that it was mandatory to have issued separate notices to the directors. The High Court concluded thus:-

> "If the legal fiction is created by Section 141 to make directors who are responsible for day to day affairs of the Company, punishable under Section 138, then it is necessary that they get an opportunity to rectify, the mistake or clarify matters after service of notice. So before making the complaint against the directors, notice necessarily must be served on them. In my opinion without service of notice to accused Nos. 6 & 8, vicarious liability of the offence under Section 138 cannot be fixed upon them."

7. At this stage the decision of the Division Bench of Madras High Court in B. Raman & others (Supra) may also be referred to. Para 2 of said decision sets out that the matter was referred to the Division Bench as a result of divergent views taken by Single Judges of the Court. Paras 25 and 26 of the decision are as under:-

> "25. Under Section 141 (1), the persons in charge of and responsible to the Company shall be deemed to have committed the offence. Under sub section (2), even the persons, who are not stated to be in charge of and responsible to the Company, can be prosecuted, if it is alleged and proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any of those persons prosecuted. So, these Sections would provide that when there are Directors, who are responsible for the conduct of the business of the Company, and when there are other officers, with whose consent the offence has been committed, the complainant shall make averments to the said effect. In that context, the complainant has to start the process of getting back the cheque amount from those persons, who represent the Company, in order to avoid the filing of the Complaint against them. In the said process, he has to necessarily make a demand from those persons, who are part and parcel of the drawer. Only when the process fails, the cause of action, as envisaged in Section 138, would arise against them, to enable the complainant to approach the Court, within the stipulated time. So, the starting of the process is, the service of notice on the persons, who represent the Company, the drawer of the cheque.

> 26. The object of the notice is to give a chance to the drawer of the cheque to rectify his omission and also to protect an honest drawer.

Service of notice of demand in Clause (b) of the proviso to Section 138 is a condition precedent for filing a complaint under Section 138. By sending a notice to the Company as well as the persons in charge of and responsible fore the conduct of the business of the company, he can make a demand, asking them to pay the amount. Some may reply that they are not in charge of and responsible for the conduct of the business of the Company. Some may reply that they are not connected with the Company in any way and some may rectify the omission, by making efforts to pay the amount to the payee, in the name of the Company, in that event, the complainant may either drop the action of filing the Complainant or, in the event of non- payment of the cheque amount, he may choose the persons, who are really responsible fore the commission of offence and, then, initiate prosecution against them."

8. It was submitted by Mr. Ajit Anekar, learned Advocate for the appellant that Section 138 does not contemplate issuance of separate notices to the directors and that no such requirement ought to be read into said Section. Mr. Shree Prakash Sinha and Mr. Ashok Bhatia, learned Advocates appearing for respondents relied upon the decision of the Division Bench of Madras High Court in B. Raman & others (Supra). It was submitted that though the issue whether such separate notices are mandatorily required to be given to the Directors had not squarely arisen, paras 10 & 11 of the decision of this Court in N.K. Wahi v Shekhar Singh[1] did speak of such notices. We quote said paras 10 & 11:-

> "10. In order to bring application of Section 138 the complaint must show:
>
> 1 That Cheque was issued;
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> 2. The same was presented;
>
> 3. It was dishonored on presentation;
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> 4. A notice in terms of the provisions was served on the person sought to be made liable;
>
> 5. Despite service of notice, neither any payment was made nor other obligations, if any, were complied with within fifteen days from the date of receipt of the notice.
>
> 11. Section 141 of the Act in terms postulates constructive liability of the Directors of the company or other persons responsible for its conduct or the business of the company."

9. The question, therefore, is whether notice under Section 138 of the Act is mandatorily required to be sent to the directors of a Company before a complaint could be filed against such directors along with the Company. At the outset we must consider whether the decision of this Court in N.K. Wahi

(supra) had considered and concluded that it is obligatory to issue separate notices to the Directors in addition to the Company, before initiating any proceedings against them. We have perused the decision and find that no such issue had arisen for consideration in that case. We, therefore, proceed to consider the question. Before we deal with the matter, Sections 138 and 141 of the Act may be quoted:-

> "138. Dishonour of cheque for insufficiency, etc., of funds in the accounts Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for "a term which may extend to two year", or with fine which may extend to twice the amount of the cheque, or with both:
>
> 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.
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> (b) The payee or the holder induce 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 thirty days" of the receipt of information by him from the bank regarding the return of the cheques 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 purpose of this section, "debt or other liability" means a legally enforceable debt or other liability.

141. Offences by companies- (1) 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 proceeded against and punished accordingly;

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

"Provided further that where a person is nominated as a Director of a Company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a Company and it is proved that the offence has been committed with the consent or connivance of, or is attribute to, any neglect on the part of, any director, Manager, secretary, or other office of the Company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation: For the purpose of this section. –

(a) "Company" means any body corporate and includes a firm or other association of individuals; and

(b) "Director", in relating to a firm, means a partner in the firm." The expression "drawer" used in Section 138 has to be understood in the light of the definition in Section 7 of the Act which is to the following effect :-

> "..The maker of a bill of exchange or cheque is called the "drawer"; the person thereby directed to pay is called the 'drawee."
>
> 10. Since the High Court has read into Section 138 of the Act the requirement that separate notices ought to be given to the directors, without which they cannot be made vicariously liable, the principles concerning interpretative function of the Court may be adverted to. In Kanai Lal Sur v. Paramnidhi Sadhukhan[2] it was observed, "In support of his argument Mr. Chatterjee has naturally relied on the observations made by Barons of the Exchequer in Heydon's case. Indeed these observations have been so frequently cited with approval by courts administering provisions of welfare enactments that they have now attained the status of a classic on the subject and their validity cannot be challenged. However, in applying these observations to the provisions of any statute, it must always be borne in mind that the first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself. If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The words used in the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise. When the material words are capable of two constructions, one of which is likely to defeat or impair the policy of the Act whilst the other construction is likely to assist the achievement of the said policy, then the courts would prefer to adopt the latter construction. It is only in such cases that it becomes relevant to consider the mischief

and defect which the, Act purports to remedy and correct."

11. In Nasiruddin and others v. Sita Ram Agarwal[3] this Court stated the law in the following terms:

"37. The court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. It cannot rewrite or recast legislation. It is also necessary to determine that there exists a presumption that the legislature has not used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used....."

12. In Nathi Devi v. Radha Devi Gupta[4] a Constitution Bench of this Court was called upon to consider, inter alia, whether the expression, "where the landlord is a widow and the premises let out by her, or by her husband, are required by her for her own residence" appearing in Section 14-

D of the Delhi Rent Control Act would include every widow so as to entitle her to obtain immediate possession of the premises owned by her. While holding that the benefit under Section 14-D is available only to a widow, where premises are let out by her or by her husband, this Court repelled the contention that a widow who had acquired tenanted premises by sale or transfer could also invoke the provisions of Section 14-D. During the course of its decision this Court observed:

"The interpretative function of the court is to discover the true legislative intent. It is trite that in interpreting a statute the court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense. When the language is plain and unambiguous and admits of only one meaning, no question of construction of statute arises, for the Act speaks for itself. Courts are not concerned with the policy involved or that the results are injurious or otherwise, which may follow from giving effect to the language used. If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In considering whether there is ambiguity, the court must look at the statute as a whole and consider the appropriateness of the meaning in a [pic]particular context avoiding absurdity and inconsistencies or unreasonableness which may render the statute unconstitutional."

13. With these principles in mind, we now consider the provisions in question. According to Section 138, where any cheque drawn by a person on an account

maintained by him is returned by the Bank unpaid for reasons mentioned in said Section such person shall be deemed to have committed an offence. The proviso to the Section stipulates three conditions on the satisfaction of which the offence is said to be completed. The proviso inter alia obliges the payee to make a demand for the payment of said amount of money by giving a notice in writing to "the drawer of the cheque" and if "the drawer of the cheque" fails to make the payment of the said amount within 15 days of the receipt of said notice, the stages stipulated in the proviso stand fulfilled. The notice under Section 138 is required to be given to "the drawer" of the cheque so as to give the drawer an opportunity to make the payment and escape the penal consequences. No other person is contemplated by Section 138 as being entitled to be issued such notice. The plain language of Section 138 is very clear and leaves no room for any doubt or ambiguity. There is nothing in Section 138 which may even remotely suggest issuance of notice to anyone other than the drawer.

14. Section 141 states that if the person committing an offence under Section 138 is a Company, every director of such Company who was in charge of and responsible to that Company for conduct of its business shall also be deemed to be guilty. The reason for creating vicarious liability is plainly that a juristic entity i.e. a Company would be run by living persons who are in charge of its affairs and who guide the actions of that Company and that if such juristic entity is guilty, those who were so responsible for its affairs and who guided actions of such juristic entity must be held responsible and ought to be proceeded against. Section 141 again does not lay down any requirement that in such eventuality the directors must individually be issued separate notices under Section 138.

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. The opportunity to the 'drawer' Company is considered good enough for those who are in charge of the affairs of such Company. If it is their case that the offence was committed without their knowledge or that they had exercised due diligence to prevent such commission, it would be a matter of defence to be considered at the appropriate stage in the trial and certainly not at the stage of notice under Section 138.

15. If the requirement that such individual notices to the directors must additionally be given is read into the concerned provisions, it will not only be against the plain meaning and construction of the provision but will make the remedy under Section 138 wholly cumbersome. In a given case the ordinary lapse or negligence on part of the Company could easily be rectified and amends could be made upon receipt of a notice under Section 138 by the Company. It would be unnecessary at that point to issue notices to all the directors, whose names the payee may not even be aware of at that stage. Under Second proviso to Section 138, the notice of demand has to be made within 30 days of the dishonour of cheque and the third proviso gives 15 days time to the drawer to make the payment of the amount and escape the penal consequences. Under clause (a) of Section 142, the complaint must be filed within one month of the date on which the cause of action arises under the third

proviso to Section 138. Thus a complaint can be filed within the aggregate period of seventy five days from the dishonour, by which time a complainant can gather requisite information as regards names and other details as to who were in charge of and how they were responsible for the affairs of the Company. But if we accept the logic that has weighed with the High Court in the present case, such period gets reduced to 30 days only. Furthermore, unlike proviso to clause (b) of Section 142 of the Act, such period is non-extendable. The summary remedy created for the benefit of a drawee of a dishonoured cheque will thus be rendered completely cumbersome and capable of getting frustrated.

16. In our view, Section 138 of the Act does not admit of any necessity or scope for reading into it the requirement that the directors of the Company in question must also be issued individual notices under Section 138 of the Act. Such directors who are in charge of affairs of the Company and responsible for the affairs of the Company would be aware of the receipt of notice by the Company under Section 138. Therefore neither on literal construction nor on the touch stone of purposive construction such requirement could or ought to be read into Section 138 of the Act. Consequently this appeal must succeed. The order passed by the High Court is set aside. Since the matter was at the stage of considering application for leave to appeal and the merits of the matter were not considered by the High Court, we remit the matter to the High Court for fresh consideration which may be decided as early as possible. Concluding so, we must record that the decision of the Division Bench of the Madras High Court in B. Raman & Ors. Vs. M/s. Shasun Chemicals and Drugs Ltd. (supra) was incorrect and it stands overruled. The appeal is allowed in these terms.

.....J (Pinaki Chandra Ghose) .....J (Uday Umesh Lalit) New Delhi, May 06, 2015 ITEM NO.1C COURT NO.11 SECTION IIA (for Judgment) S U P R E M E C O U R T O F I N D I A RECORD OF PROCEEDINGS Criminal Appeal No(s). 1220/2009 KIRSHNA TEXPORT & CAPITAL MARKETS LTD. Appellant(s) VERSUS ILA A AGRAWAL & ORS. Respondent(s) Date : 06/05/2015 This appeal was called on for pronouncement of judgment today.

For Appellant(s) Mr. Ajit Anekar, Adv.

Mr. Satyajit A. Desai, Adv.

Ms. Indu Sharma, Adv.

For Respondent(s) Mr. Shree Prakash Sinha, Adv.
Mr. Ashok Bhatia, Adv.
Mr. Shekhar Kumar, Adv.

Mr. Aniruddha P. Mayee, Adv.
Mr. Charudatta Mahindrakar, Adv.
Mr. Selvin Raja, Adv.

Mr. Mahaling Pandarge, Adv.
Mr. Nishant Katneswarkar, Adv.

Ms. Asha Gopalan Nair, Adv. (NP)

Hon'ble Mr. Justice Uday Umesh Lalit pronounced the reportable judgment of the Bench comprising Hon'ble Mr. Justice Pinaki Chandra Ghose and His Lordship.

The appeal is allowed in terms of the signed reportable judgment.

(R.NATARAJAN)
Court Master

(SNEH LATA SHARMA)
Court Master

(Signed reportable judgment is placed on the file)

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[1] (2007)9 SCC 481
[2] (1958) SCR 360
[3] (2003) 2 SCC 577
[4] (2003) 2 SCC 577