

## **Medchl Chemicals And Pharmaceuticals ... vs Minerals And Metals Trading ... on 18 December, 1998**

**Equivalent citations: [2002]108COMPCAS24(MAD)**

### **JUDGMENT**

A. Raman, J.

1. Criminal Original Petition No. 17210 of 1997--The petitioners are accused Nos. 1 to 3 in the complaint filed under Section 138 read with Section 142 of the Negotiable Instruments Act, 1881. The complainants' case is as follows :

The first complainant is a Government of India undertaking company, incorporated under the Companies Act, 1956, and the second complainant is the regional office of the first complainant. The first accused is also a company, which is represented by the managing director Thiru Chandramouli, who is also the second accused and Thiru Srinivasan, the director is the third accused. Pursuant to the memorandum of understanding dated June 1, 1994, and September 19, 1994, a cheque was issued by the accused for a sum of Rs. 22,10,156 in connection with export of certain items of chemicals through the complainants. The cheque was dated November 10, 1994, and it was drawn on Punjab National Bank, Mylapore, Chennai 600 004. The first complainant instructed the second complainant to present the cheque for collection through their regional office at Madras. The cheque which was presented for collection on May 8, 1995, was returned on May 10, 1995, with the endorsement "payment stopped by drawer". A notice was issued by fax and telex and a copy of the notice was also sent by registered post, which was received by the accused on May 22, 1995. The accused gave evasive answers with the intention of prolonging the payment. Accused Nos. 1 to 3 are jointly and severally liable to be punished under the Negotiable Instruments Act. Hence, the complaint.

2. The complaint presented on June 15, 1995, was taken on file by the 7th Metropolitan Magistrate, after recording the sworn statements of Lakshman Goel, the manager of the complainant on June 16, 1995. The case was taken on file in C. C. No. 3325 of 1995. It is to quash the said proceeding, this Criminal Original Petition No. 17210 of 1998 is filed by the accused.

Criminal Original Petition No. 17211 of 1998:

3. The petitioners are accused Nos. 1 to 3 in the complaint filed under Section 138 read with Section 142 of the Negotiable Instruments Act. The complainants' case, is as follows :

The first complainant is a company incorporated under the provisions of the Companies Act, 1956. The second complainant is the regional office of the first complainant. The first accused is also a company, which is represented by the managing director, Thiru Chandramouli, who is also the second accused and Thiru Srinivasan, the director is the third accused. Pursuant to the memorandum of understanding dated June 1, 1994, and September 19, 1994, a cheque was issued by the accused for a sum of Rs. 20,26,995 in connection with export of certain items of chemicals through the complainants. The cheque was dated October 31, 1994, and it was drawn on Punjab National Bank, Mylapore, Chennai-4. The first complainant instructed the second complainant to present the cheque for collection through their regional office at Madras. The cheque which was presented for collection on April 28, 1995, was returned on May 2, 1995, with the endorsement "payment stopped by drawer". A notice was issued by way of fax and telex and a copy of the notice was also sent by registered post which was received by the accused on May 22, 1995. The accused gave evasive answers with the intention of prolonging the payment. Accused Nos. 1 to 3 are jointly and severally liable to be punished under the Negotiable Instruments Act. The complaint was presented on June 15, 1995. The above complaint was taken on file by the 7th Metropolitan Magistrate, George Town, Chennai, on June 16, 1995, after recording the sworn statement of Lakshman Goel, the manager, in C. C. No. 3324 of 1995. To quash the above proceedings, this Crl. O. P. No. 17211 of 1997 is filed by the accused.

4. The above two criminal original petitions were taken up together as the parties are the same and the points for determination are the same. Therefore, the above two criminal original petitions are thus disposed of hereunder by a common order.

5. Learned counsel for the petitioners, raised the following contentions. Firstly, he contended that the complaint is not maintainable because it has been filed by a person, who is not competent to file the complaint under the provisions of the Negotiable Instruments Act. Secondly, he contended that there is no debt much less a legally enforceable debt or other liability, on the date when the cheque was issued and, therefore, the provisions of Section 138 of the Negotiable Instruments Act, are not thus attracted. The other ground raised by learned counsel for the petitioners is that it is not alleged in the complaint that the third accused, viz., the third petitioner was in charge of and was responsible to the company for its conduct of the business as well, and therefore, the complaint as against the third accused will not lie.

6. The complainant and the accused entered into a memorandum of understanding on June 1, 1994, which was somewhat altered by an addendum to the memorandum of understanding, on September 19, 1994. They are identical in both the cases. The memorandum of understanding was entered into, to enable the import of DL 2 amino butanol for the purpose of manufacture of drugs. It was agreed that one consignment of 78 drums consisting of 15,210 kgs. each month should be imported and MMTC agreed to arrange the imports to the account of MCPL. MMTC is the Minerals and Metals Trading Corporation, viz., the complainant and MCPL is M/s. Medchl Chemicals and Pharmaceuticals Private Limited, the accused/petitioner. Under the memorandum of

understanding, MMTC has to arrange for the import of materials of requisite specifications and would give the price indication on a 180 days deferred payment basis to MCPL of such import before opening of L/C for import. There are about nine conditions incorporated in the memorandum of understanding. But, these conditions found in the memorandum of understanding dated June 1, 1994, did not make mention of any payment of advance or refer to any condition that any post-dated cheque should be given by MCPL to MMTC. In that context, perhaps, addendum I to the memorandum of understanding was arrived at on January 19, 1994. The said addendum is in the nature of clarification of some of the clauses. The indemnity concerned in C. C. No. 3324 of 1995 (Crl. O. P. No. 17211 of 1998) was executed on October 31, 1994, by Medchl Chemicals in favour of MMTC. The relevant portion of the indemnity, which is found in para. 4 of the indemnity runs as follows : "We, Medchl Chemicals and Pharmaceuticals Private Limited, hereby agree and undertake that we shall supply the export product 2,500 kgs. Ethambutol HCL to M/s. MMTC Ltd. by November 20, 1994, and if, for any reason, the export of this quantity 2,500 kgs. Ethambutol HCL is not made by November 28, 1994, the enclosed cheque for Rs. 20,26,925 which is the value of DL 2 Amino Butanol as provided for in the addendum to memorandum of understanding, the cheque may be encashed by you. We shall keep M/s. MMTC Limited indemnified against any loss or damage that may arise on account of this release of twenty-five (25) drums DL 2 Amino Butanol to us."

7. This is the indemnity dated October 31, 1994, executed by the petitioners herein and concerned in Crl. O. P. No. 17211 of 1998 (C. C. No. 3324 of 1995).

8. As regards Crl. O. P. No. 17210 of 1998 (C. C. No. 3325 of 1998) the memorandum of understanding is followed by addendum No. 1, dated September 19, 1994. The indemnity is dated November 10, 1994. It contains the same conditions and clauses. This indemnity makes mention of the cheque enclosed for Rs. 22,70,156 and provides that if the export is not made by November 28, 1994, the said cheque may be encashed by MMTC and that MCPL will indemnify MMTC against any loss or damage that may arise on release of 28 drums of DL 2 amino butanol to MCPL.

9. Based on these two cheques, the two complaints have been laid against the petitioners herein by MMTC. Besides these two cheques, in the course of the transaction, MCPL issued four other cheques dated December 23, 1994, November 21, 1994, and January 16, 1995, with reference to which four other complaints were laid by MMTC and those complaints were taken on file in C C. Nos. 3491 to 3494 of 1995. With regard to C. C. Nos. 3491 to 3494 of 1995, relating to the four cheques as mentioned above, on the side of the complainant three witnesses were examined. The accused in those cases, thereafter filed separate applications for their discharge. The Judicial Magistrate accepted the petitions filed by the accused in Crl. M. P. Nos. 2377 to 2380 of 1996. Aggrieved by the same, the complainant, viz., MMTC preferred revisions to the High Court in Criminal Revision Cases Nos. 649 to 652 of 1996. With regard to the two cheques, which are the subject-matters of Crl. O. P. Nos. 17210 and 17211 of 1998, the MCPL filed a complaint stating that exports of the drugs were made within time and the amount was also realised, and in spite of that MMTC made attempts to encash the cheques and hence the action of the MMTC will amount to cheating and criminal breach of trust. Hence, MCPL filed a private complaint in C. C. No. 5232 of 1995 against MMTC and its ten employees, including the managing director, the general manager, deputy general managers,

senior managers, etc., stating that they are liable to be punished under Sections 120B, 209, 211, 406, 420 and 511 read with Section 34 of the Indian Penal Code. One of the accused in the said complaint had filed a petition, contending that MMTC is owned by the Union of India and in view of the fact that they being public servants, without sanction of the Government, the complaint against them is not maintainable. The application filed by the 11th accused in C. C. No. 5232 of 1995 was dismissed in part by the 7th Metropolitan Magistrate, who held that the 11th accused was appointed by the President of India and he could be removed only by the Union of India, whereas all the accused including the fifth accused, who were appointed by the office-bearers of MMTC can be removed by them and, therefore, as far as Crl. M. P. No. 1770 of 1996 is concerned, Section 197 of the Criminal Procedure Code is not attracted and thus, he dismissed M. P. No. 1056 of 1996 totally and partly the M. P. No. 1770 of 1996. Therefore, against the same, revisions were preferred in Crl. R. C. Nos. 450, 578 and 579 of 1996. The revisions preferred by MMTC against the order of the magistrate under Section 258 of the Criminal Procedure Code in Crl. R. C. Nos. 649 to 652 of 1996 and the revisions in Crl. R. C. Nos. 450, 578 and 579 of 1996 were taken up together and disposed of by this court, on April 1, 1998 (since reported in *Medchel Chemicals and Pharmaceutical Pvt. Ltd. v. Dr. D. C Mallik* [1998] 94 Comp Cas 259). In those revisions, the points that are now canvassed by counsel for the petitioners herein, were urged before a single judge of this court. The single judge of this court, while disposing of the revisions, held that the magistrate has erred in holding that the complaints filed by Lakshman Goel were not maintainable. He further, held that as there is no material on the side of the accused to hold that the accused had exported the finished products within the prescribed time to enable the complainant to realise the value of the raw materials imported, there is evidence for non-compliance with conditions, by the accused party. Hence, it would entitle the complainants to present the cheque for encashment. Therefore, the learned single judge of this court, set aside the order of discharge passed in C. C. Nos. 3491 to 3495 of 1995 and directed the magistrate to restore the complaint to the file and proceed with the trial in accordance with law. Then, the accused in the said four C. Cs., viz., C. C. Nos. 3491 to 3494 of 1995 took the matter to the apex court, by preferring special leave petitions against the order of the single judge. The Supreme Court dismissed the same, and the Supreme Court did not pass any considered order or speaking order, as the order reads "special leave petitions are dismissed".

10. Learned counsel for the respondents contended that inasmuch as the points that are canvassed for consideration in these two criminal original petitions were urged as grounds in the special leave petitions filed before the Supreme Court, and inasmuch as the special leave petitions are dismissed, it must be held that the Supreme Court has negatived the contention of the petitioners and, therefore, it is not open to them to canvass those points again for consideration. But, I cannot accept this contention put forward by the learned senior counsel Mr. N. Natarajan, appearing on behalf of the respondents.

11. Dismissal of special leave petitions at the admission stage, without giving any reasons, does not constitute *res judicata*. No inference can be drawn either by implication or otherwise that the contentions raised in the special leave petitions, on merits, were rejected by the Supreme Court. It simply reads that the special leave petitions are dismissed.

12. The apex court had an occasion to consider such a proposition in the ruling reported in Indian Oil Corporation Ltd. v. State of Bihar, AIR 1986 SC 1780 ; [1987] 167 ITR 897, where it has been observed as follows (headnote of ITR):

"The dismissal of a special leave petition in limine by a non-speaking order does not, therefore, justify any inference that by necessary implication the contentions raised in the special leave petition on the merits of the case have been rejected by the court ... Neither on the principle of res judicata nor on any principle of public policy analogous thereto, would the order of the Supreme Court dismissing the special leave petition operate to bar the trial of identical issues in a separate proceeding namely, the writ proceeding before the High Court merely on the basis of an uncertain assumption that the issues must have been decided by the court at least by implication."

13. Again, this proposition was reiterated by the Supreme Court in the decision in Supreme Court Employees Welfare Association v. Union of India, , where it has been held as follows (headnote) :

"When no reason is given, but a special leave petition is dismissed simpliciter, it cannot be said that there has been a declaration of law by the Supreme Court under Article 141."

14. Again, the Supreme Court has held in the decision in State of Manipur v. Thingujam Brojen Meetei, , that the dismissal of a special leave petition by a non-speaking order which does not contain the reasons for dismissal does not amount to acceptance of the correctness of the decision sought to be appealed against. The effect of such a non-speaking order of dismissal without anything more only means that the Supreme Court has decided only that it is not a fit case where the special leave should be granted. Such an order does not constitute law as laid down by the Supreme Court for the purpose of Article 141 of the Constitution.

15. Emphasising the same, the apex court has held in the ruling reported in Sun Export Corporation v. Collector of Customs, , that dismissal of special leave petition at the stage of admission, does not constitute binding precedent. Therefore, in view of the position of law, as consistently held by the apex court, the contention of learned counsel for the respondent that these two petitions have to be rejected merely because of the dismissal of the special leave petitions in a connected matter, where similar points were raised, is not worthy of acceptance.

16. Now, let us consider as to whether on the date when the cheque was issued, there was any liability subsisting and enforceable in payment of which, the cheque was issued. The cheque relating to C. C. No. 3325 of 1995 (Crl. O. P. No. 17210 of 1997) is for a sum of Rs. 22,70,156, which was handed over on November 10, 1994. It was drawn on Punjab National Bank, Mylapore Branch, Chennai, and the same was issued in favour of MMTC Limited. The cheque concerned in C. C. No. 3324 of 1995 (Crl. O. P. No. 17211 of 1997) was issued for a sum of Rs. 20,26,925, on October 31, 1994. It was drawn on Punjab National Bank, Mylapore, Chennai, and was issued in the name of MMTC. The complaint in C. C. No. 3325 of 1995 (Crl. O. P. No. 17210 of 1997) is that the cheque was

presented for collection on May 8, 1995, and the same was returned on May 10, 1995, with an endorsement "payment stopped by drawer". The complaint in C. C. No. 3324 of 1995 (Crl. O. P. No. 17211 of 1997) is that the cheque was presented for collection on April 28, 1995, and the same was returned on May 2, 1995, with an endorsement "payment stopped by the drawer".

17. It is not necessary to discuss the question of subsisting liability with regard to these two cheques separately, as these two cheques can be taken up for discussion together under this head. The two cheques were not issued on the date of either the drawing of memorandum of understanding or on the date of execution of addendum to the memorandum of understanding. The memorandum of understanding is dated June 1, 1994, and the addendum is dated September 19, 1994. Neither the memorandum of understanding nor the addendum refer to the mode of payment specifically. The cheques were handed over only pursuant to the indemnity dated October 31, 1994, and November 10, 1994, the indemnity dated November 10, 1994, only read that Medchl Chemicals and Pharmaceuticals Private Limited agrees and undertakes to supply the export product, viz., 2,800 kgs. of Ethambutol HCL to MMTC by November 20, 1994, and if, for any reason, the export of this quantity is not made by November 28, 1994, the cheque handed over for Rs. 22,70,156 and representing the value of DL 2 amino butanol may be encashed. It further provides that MCPL shall indemnify MMTC against any loss or damage that may arise on account of the release of 28 drums of DL 2 amino butanol to MMTC. Likewise, the indemnity dated October 31, 1994, is also to the effect that they undertake to supply by November 20, 1994, and if 2,500 kgs. of Ethambutol HCL is not supplied by November 28, 1994, the enclosed cheque for Rs. 20,26,925 may be encashed by MMTC and that MCPL shall indemnify MMTC against any loss or damage that may arise on account of the release of 25 drums of DL 2 amino butanol.

18. A plain reading of the indemnity gives an option to MMTC to encash the cheques, if the supply is not made before the prescribed date. Whether such an undertaking, in the circumstances will give room to spell out a subsisting liability, is the question to be considered. It is to be stated that it is not at all alleged in the complaint that the supply was not made within time and, therefore, the cheques had become payable immediately on such default. The complaint reads as though that the cheque was issued on October 31, 1994, towards an existing or subsisting liability or in part payment of subsisting liability. In fact, along with the complaint, even the memorandum of understanding or the addendum were not produced. The mere allegation is that the cheque dated October 31, 1994, and the cheque dated November 10, 1994, when presented for collection, were returned. It is also to be pointed out that it was not alleged in the complaint that any notice was issued to the accused stating that as the accused have failed to make the supply of the items within the stipulated time, the cheques handed over by them have become payable immediately and, therefore, they had presented the cheques for collection. Such a notice was also not issued by the complainant. It is to be pointed out that the accused have filed a private complaint against MMTC and its officers, alleging that they have realised the value of the drugs imported, but have unlawfully attempted to encash the cheques which were given as securities and thereby they have not only caused wrongful loss to the accused but also guilty of cheating and criminal breach of trust. It is also to be pointed out that a reading of the indemnity would only show that the cheques were handed over as a security for the due performance of the obligations arising under the memorandum of understanding. It was definitely not handed over with an intention to make payment of money due to the complainant under the

agreement as on that day or discharge any existing liability. It was not issued in part payment or in part satisfaction or in full satisfaction. It is not alleged that on the date of execution of the indemnity, already supply has been made. It is not stated that amino butanol was delivered to the accused even before the date when the cheque was issued or the date when the indemnity was executed. In other words, it is neither alleged in the complaint nor in the notice that delivery of the material was already effected or at any rate before the date of handing over of the cheque. Therefore, for compliance with the terms and conditions of an agreement, to show their bona fides, a cheque has been handed over by the accused to the complainant. It was handed over as an expression of the honest intention to fulfil the commitments under the agreement. Legally, it can be termed as a security given by the accused, to show that they would fulfil the obligations arising under the contract. It is not the case that on the date when the cheques were issued, any amount was due by the accused to the complainant. It is not the allegation that on the date when the cheques were handed over, supply of amino butanol had been effected and that the accused being a party to the contract had received some benefits in pursuance of the terms and conditions of the contract.

19. The Explanation to Section 138 of the Negotiable Instruments Act specifies that "for the purposes of this section, 'debt or other liability' means a legally enforceable debt or other liability". Whether in the circumstances, it can be stated that the cheques were handed over by the accused for the discharge of any whole or part of any debt or other liability that subsisting or was existing on the date when the cheque was issued. What is debt, has been discussed by the apex court in *Kesoram Industries and Cotton Mills Ltd. v. Commissioner of Wealth-tax*. The apex court held as follows (page 784) :

"A debt is a present obligation to pay an ascertainable sum of money, whether the amount is payable in praesenti or in future : Debitum in prae-senti, solvendum in future. But a sum payable upon a contingency does not become a debt until the said contingency has happened."

20. Therefore, till the happening of the contingency, there is no debt at all.

21. Here, there is an obligation under the contract to make supply on or before a particular day. With regard to C. C. No. 3325 of 1995 (Crl. O. P. No. 17210 of 1997), the supply has to be made by November 28, 1994, whereas the cheque was issued on November 10, 1994. Therefore, as on the date, when the cheque was issued, it was only a contingency. It would become a debt only after November 28, 1994, if the supply is not effected. There may also arise a situation where only a part of the contract was fulfilled, viz., suppose the accused having undertaken to supply the export product of 2,800 kgs. of Ethambutol HCL, could supply, before the agreed date, only a part of it, can it then be said that the cheque issued for a sum of Rs. 22,70,156 will become a debt and payable immediately ?

22. Similarly in C. C No. 3324 of 1995 (Crl. O. P. No. 17211 of 1997), the cheque was handed over on October 31, 1994, and the supply was to be made on November 28, 1994. Therefore, the contingency arises only after November 28, 1994. As on the date of handing over of the cheque, there was only obligation to fulfil a condition of the contract. There was no obligation to pay any amount.

Moreover, I have already pointed out that it is not alleged in the complaint at all that contingency had happened and, therefore, immediately the cheque had become payable and thus it was presented for collection. This is a special provision incorporated in the Negotiable Instruments Act. It is necessary to allege specifically in the complaint that there was a subsisting liability and an enforceable debt and to discharge the same, the cheques were issued. But, we do not find any such allegation at all. The absence of such vital allegation considerably impairs the maintainability.

23. The word "security" according to Law Lexicon, compiled and edited by P. Ramanatha Aiyer, 1997 edition, speaking generally is anything that makes the money more assured in its payment or more readily recoverable as distinguished from, e.g., a mere "I.O.U." which is only evidence of debt and the word is not confined to a document which gives a charge on specific property, but includes personal securities for money. The term security signifies that which makes secure or certain. In its proper use, it relates to pecuniary matter, and often consists of a promise or right with or without possession of the thing upon which it rests. It implies in its common acceptation that which prevents loss or makes safe. Dr. Johnson defines it as anything given as a pledge of caution. Dean Swift uses it as synonymous with "safety" or "certainty". Webster defines it as anything given or deposited to secure the payment of a debt or the performance of a contract. Thus, in this case, we can safely conclude that the cheques that were handed over, only to assure the performance of the conditions of the contract and to assure due performance of the obligations and to leave the other party concerned more assured in its commitment. An expression of honest intention to honour the commitment under the contract and its performance a certainty or to assure performance.

24. There is yet another point to be projected in this regard. It is the definite case of the petitioner that supplies were made within the stipulated period and certain amounts were realised by the complainant. It is also not disputed that a civil suit is pending between the parties before the High Court of Judicature at Bombay. The accused had specifically stated that they made export shipment of 200 kgs. of the finished product Ethambutol HCL under the orders of and in the name of MMTC, valued at Rs. 19,71,900 on October 31, 1994, and made another shipment of 2,000 kgs. of the same finished product valued at Rs. 19,71,900 on November 10, 1994, under the orders of and in the name of MMTC and the export obligation thus stood discharged. It is also stated that another shipment was made on November 19, 1994, to the value of Rs. 19,71,900 and, therefore, the liability stood discharged on November 10, 1994, and November 19, 1994, and hence the cheque dated October 31, 1994, for Rs. 20,26,925 and the cheque dated November 10, 1994, for Rs. 22,70,156 issued in favour of MMTC and drawn on Punjab National Bank had to be returned to the complainant and they cannot be encashed or presented for collection by MMTC. Thus performance of the contract is pleaded when the petitioners herein filed a complaint which was taken on file in C. C. No. 5878 of 1997, such specific allegations are made. To quash the said proceedings, the sixth and the eighth accused, who were the manager of the MMTC Limited have filed applications in Crl. O. P. No. 6334 of 1998 and 15218 of 1997. The allegation made with regard to the effecting of supplies as per the memorandum of understanding is not disputed there. But, on the other hand the stand taken by them there is that the entire transaction is purely a matter civil in nature involving supply of chemicals and thus the criminal complaint has been filed with an ulterior motive, and it is nothing but a gross abuse of the judicial process. It is a dispute civil in nature when it suits them to say so. But yet have rushed to court to file a complaint under Section 138 of the Negotiable Instruments



Act. At that time it did not strike them as a matter of civil nature. Therefore, the stand taken by the officers of the MMTC is only indicative of the nature of the complaint filed by MMTC. Therefore, considering all these aspects, I am clearly of the view that the cheques were issued and handed over by the accused, viz., the petitioners herein only as security for the due performance of the obligations under the contract and they were not handed over in discharge of any subsisting debt and that there was no subsisting debt on the date of issuance of cheques and, therefore, the cheques issued in this case will not come within the purview of Section 138 of the Negotiable Instruments Act as they were issued only as security and as an expression of their desire to fulfil the purpose and terms of the contract and that contingency also did not arise.

25. The other contention raised by learned counsel for the petitioners is that the complaints are not maintainable at all since it is not filed by a person competent to file the complaint. As regards, Crl. O. P. No. 17210 of 1998, it relates to C. C. No. 3325 of 1995. There are two complainants, viz., the first complainant is M/s. MMTC Limited, the Regional Office at Nariman Point, Mum-bai, represented by its senior manager Mr. Laxman Goyal and the second complainant is M/s. MMTC Ltd., having its Regional Office at Chennai House No. 7, Esplanade, Chennai-108, represented by its senior manager, Mr. Laxman Goyal. On June 16, 1995, the sworn statement of Laxman Goyal was recorded. He had stated that he was the senior manager in MMTC Limited and that according to the rules, he has the authority to file the complaint. Along with the complaint, no authorisation was filed. Only copies of the returned cheques, bank's advice, copies of the notice and replies were filed.

On November 14, 1997, one Sampath Kumar was examined as P. W.-1. He has stated that he is the Deputy General Manager of MMTC Limited and that he is working in the Bombay branch of MMTC. He has further stated that Mr. Lax-man Goyal is unwell and, therefore, he has filed that application. It is the same story in C. C. No. 3324 of 1995 (Crl. O. P. No. 17211 of 1997). The complaint was signed by Laxman Goyal, whose statement was recorded and the complaint was taken on file, on June 16, 1995. In that complaint also the documents, viz., copies of the returned cheques, bank's advice, copies of the notice and replies alone were filed. On July 25, 1997, Sampath Kumar was examined as P. W.-1. He has stated that he has filed an application to bring him on record in the place of Laxman Goyal. Along with the typed set of papers, the petitioners herein have produced a xerox copy of a document styled delegation of power. From the said document we find that it is only the executive director, who has full powers to institute legal proceedings. The chief general manager, general manager, and deputy general manager have powers only up to the money value of Rs. 15 lakhs, Rs. 10 lakhs and Rs. 5 lakhs respectively. Here, in this case, admittedly, the value of the cheques exceed Rs. 20 lakhs in each case. The said document does not authorise the senior manager either to sign or prefer the complaint. It is only the executive director, who is empowered to sign the same. Originally, the complaints were laid by Laxman Goyal, the senior manager of MMTC Limited. Then it is stated that an application was filed by Sampath Kumar, the deputy general manager of MMTC Limited to permit him to come in the place of Laxman Goyal and that it was allowed. Now, in the above context of the case, we have to see whether the complaint in the circumstances has been laid by a competent person. In other words, whether the complaint as laid, is maintainable.

26. It will be appropriate to refer to some of the rulings on this point, so that in the background of law enunciated in those rulings, a better appreciation of the case on hand can be made to see

whether the magistrate was justified in taking cognizance of the complaint. The Andhra Pradesh High Court has held in the decision in [1997] 1 ALT (Crl.) 696 (AP) that a complaint is to be filed on behalf of a company by a person, who is in charge of or was responsible to the company. He must be a person whose action would be binding on the company and the said person must be empowered by law so as to bind the company. It was a case, where the authorisation was not filed on the date when the complaint was filed, but it was filed one year later. It was further held that the subsequent authorisation does not validate the complaint, and since on the date of the complaint there was no valid authorisation in favour of the complainant, there was no valid complaint and hence the accused were acquitted.

27. Referring to a complaint laid by the Sanitary Inspector of Calcutta Corporation, their Lordships of the Supreme Court held in the decision in Ballabhdas Agarwala v. Chakravarthy (J. C.) [1960] MLJ (Crl.) 677 that the absence of com-

plaint by the Commissioner or the chairman or a duly delegated authority cannot be said to be a mere defect or irregularity which could be cured under Section 537 of the Criminal Procedure Code and it affected jurisdiction and initiation of proceedings.

28. Justice Thangamani, has held in the decision in K.N. Sankaranarayanan v. Shree Consultations and Services Pvt. Ltd. [1994] 80 Comp Cas 558 (Mad) that when a director institutes petition on behalf of company without proof of authorisation, the invalidity cannot be cured by later ratification and, therefore, such a petition is not maintainable. The Andhra Pradesh High Court again held in the decision in Satish and Co. v. S. R. Traders [1997] 4 All MR (Journal) 58 ; [1999] 95 Comp Cas 836 that complaint filed by the company represented by its manager, who is not authorised to file the complaint, is not maintainable. Subsequent authorisation in favour of the manager will not revive the prosecution. The case reported in Ruby Leather Exports v. K. Venn [1994] 1 LW (Crl.) 34 ; [1995] 82 Comp Cas 776 (Mad) related to a complaint filed by a manager. As the records did not disclose any authorisation, it was held that taking cognizance of the impugned complaint was barred under Section 142(a) of the Negotiable Instruments Act.

29. The Supreme Court has held in the ruling reported in Vishwa Mitter v. O. P. Poddar, , that it is thus crystal clear that anyone can set the criminal law in motion by filing a complaint of facts constituting an offence before a magistrate entitled to take cognizance under Section 190 and unless any statutory provision prescribes any special qualification or eligibility criteria for putting the criminal law in motion, no court shall take cognizance of the sole ground that the complainant was not competent to file the complaint. The Patna High Court has held in the decision in BOC India Ltd. v. Zinc Products and Co. Pvt. Ltd. [1996] 86 Comp Cas 358 that since the board of directors of the petitioner-company had not passed a resolution authorising the area sales manager to institute a petition for winding up the respondent-company, the petition filed by him is not maintainable.

30. The Delhi High Court has held in the decision in Nibro Ltd. v. National Insurance Co. Ltd. [1991] 70 Comp Cas 388 (headnote): " . . . that the powers of a company in respect of a particular matter are to be exercised by the company in general meeting, in all other cases the board of directors are entitled to exercise all its powers ... It is true that ordinarily the court will not nonsuit a person on

account of technicalities. However, the question of authority to institute a suit on behalf of a company is not a technical matter. It has far-reaching effects. Order 29, Rule 1 of the Code of Civil Procedure, 1908, does not authorise persons mentioned therein to institute suits on behalf of a corporation. It only authorises them to sign and verify the pleadings on behalf of the corporation. Thus, unless a power to institute a suit is specifically conferred on a particular director, he has no authority to institute a suit on behalf of the company. Such power can be conferred by the board directors only by passing a resolution in that regard."

31. In this case on hand, the senior manager is said to have been authorised to lodge the complaint. Subsequently, another person claiming to be a deputy general manager is alleged to have filed an application to come in the place of the said senior manager to prosecute the complaint. Admittedly, the complainant is governed by the provisions of the Companies Act. It has board of directors. No resolution from the board of directors is produced authorising either Laxman Goyal or Sampath Kumar to sign and file the complaint on behalf of the company, or to prosecute the same. Now, in such context, it has to be seen, what is the effect of the complaint so filed.

32. Section 142 of the Negotiable Instruments Act provides that a complaint can be given only in writing made by the payee or the holder in due course. The payee in this case is MMTC. Therefore, under Section 142 of the Act, it is the payee, viz., MMTC Ltd., who alone can initiate action under Section 138 of the Negotiable Instruments Act, and only a complaint laid by the payee or holder in due course can be taken cognizance of by the magistrate. Here, the complaint is admittedly signed by Laxman Goyal and presented by him into court. It may be that Laxman Goyal is an employee of the MMTC. He is not the company secretary or power of attorney agent of the company. He is neither the general manager nor the managing director of the company. He is not a director. But, on the date when the complaint was filed, he was only a paid employee of the company, in the position of a senior sales manager. The other person Sampath Kumar is also neither director nor power of attorney agent of the company. He is also not the company secretary. He is neither the chairman of the board nor the managing director. Along with the complaint, document of authorisation, was not produced. It has been produced only subsequently.

33. In Crl. O. P. No 17210 of 1997, the sworn statement of Laxman Goyal was recorded on June 14, 1995. Even on that day, when the sworn statement was recorded, the document of authorisation was not produced into court. On November 14, 1997, Sampath Kumar was examined. His sworn statement was recorded on November 14, 1997, and it was through him the document of authority marked as exhibit P-15. The complaint was laid in the year 1995. As regards Crl. O. P. No. 17211 of 1997 which relates to C. C. No. 3324 of 1995, the sworn statement of Laxman Goyal was recorded on June 16, 1997. On July 25, 1997, Sampath Kumar was examined. The authorisation was marked through him as exhibit P-12.

34. When the sworn statement of Laxman Goyal was recorded, he had simply stated that he has been authorised to file the complaint. Sampath Kumar was examined as P. W.-1. In his testimony, he has stated that Laxman Goyal has filed the complaint on behalf of MMTC, and as he is unwell, he has filed an application to come in the place of Laxman Goyal. The alleged authorisation in favour of Laxman Goyal was neither produced nor marked. Though this witness has stated that he has filed an

application, I do not find any such application on record to show that the witness Sampath Kumar had filed an application, seeking permission of the court to represent the complainant. He has also referred to the document that has been produced and marked as exhibits P-15 and P-12 to say that it is the authorisation given to him. Exhibits P-12 and P-15 do not bear any signatures. They are not authenticated. They appear to be xerox copies. It is not known whether this document was taken out from any other book. There is nothing to show that this document which is marked as exhibit P-15 in C C. No. 3325 of 1995 and exhibit P-12 in C C No. 3324 of 1995, is a document, conferring special authorisation. It is not known whether it is a part of the book containing the board's resolutions nor we do not know whether it forms part of any standing order. Even otherwise, the document contains three columns. The first column mentions the authority, the second column mentions the extent of powers and the third column is headed remarks. Item No. 19 in the said document relates to power as regards legal proceedings, viz., to institute and to defend. The executive director is described as having full power. The chairman and general manager has power up to the money value of Rs. 15 lakhs, the general manager has power up to the money value of Rs. 10 lakhs and the deputy manager has power up to the money value of Rs. 5 lakhs. The column also makes reference to "compound or abandon legal proceedings", which also specifies that executive director has full powers, while chairman and general manager have power up to Rs. 1.50 lakhs, the general manager up to Rs. 1 lakh and the deputy general manager up to a money value of Rs. 0.50 lakh, and in the column "remarks" with reference to compound or abandon legal proceedings, while referring to the powers of chairman and general manager, general manager, deputy general manager, it is stated that a statement showing such cases would be submitted to the executive director. Therefore, this document which is relied upon by P.W.-1 makes it clear that when a legal proceeding is to be instituted, it is only the executive director, who has the full power and otherwise the chairman and general manager, general manager and deputy general manager have only powers up to certain limits. Here, admittedly, in these two cases, the amount involved is more than Rs. 20 lakhs in each case. Therefore, even according to the document produced by the complainant, it is only the executive director, who has the full powers to sign, present and institute the complaint. The other persons mentioned, viz., chairman and general manager, general manager and deputy general manager have powers only up to a limit. There is no other document produced, viz., either the resolution of the board or any specific authorisation by the chairman and general manager or by the board as the case may be, authorising either Thiru Laxman Goyal or Sampath Kumar to lay the complaint. On the date, when the complaint was laid, Laxman Goyal was only a senior manager of MMTC, and he was not a person specified under item 19 as one of the persons competent to institute or defend legal proceedings. As regards Sampath Kumar, he has stated that he was the deputy general manager. The deputy general manager has power to institute legal proceedings, where money value is only Rs. 5 lakhs and less. There is no other document that was produced to show that either Laxman Goyal or Sam-path Kumar was competent to lay the complaint. Being an artificial person, the company viz., MMTC, has to have a human agency to represent it in a court of law in a proceeding. A company can be sued and can sue being a legal entity. If a company is to be sued or is to sue it can be done only in a manner known to law. Anybody and everybody cannot come forward and say that they have the authority to lawfully represent a company.

35. In this connection, it is worthwhile to note that Section 305 of the Criminal Procedure Code, 1973, specifically lays down the procedure, where a corporation or registered society is an accused.

Under this section, a corporation or a registered society, if it is an accused, may appoint a representative for the purpose of inquiry or trial and such appointment need not be under the seal of the corporation. A corporation, being an artificial person, can be punished for an offence by fine. The old Code did not make any provision as to how a corporation could be represented before the court, necessitating thereby, the introduction of Section 305 of the Criminal Procedure Code, 1973. The new provision came to be enacted in the year 1973. Thus, when a corporation or a registered society is an accused, a particular procedure has to be followed. Similarly, when a corporation or a registered society is the complainant, such a complaint can be laid only in accordance with law and in an accepted form of procedure.

36. I have already pointed out that no document was produced to show that the complaint has been signed and laid by a person competent to lay a complaint for and on behalf of the corporation. There is no specific authority as such produced, nor is there any resolution of the board of directors. The xerox or printed copy of the general authority alone is produced. It is not known whether it forms part of the resolution of the board or any standing orders of the company. It is neither attested nor signed by any of the parties. Further, even the general authority produced is only to the effect that it is only the executive director, who is competent to initiate legal proceedings, where the amount involved is more than Rs. 5 lakhs. Here, the amount involved is more than Rs. 20 lakhs. It is not the executive director, who had signed the complaint. The complaint is neither signed nor presented by the executive director, who alone will be competent, as per exhibits P-15 and P-12.

37. The Andhra Pradesh High Court has held in the decision in Swastik Coalers Pvt. Ltd. v. Deepak Brothers [1997] 89 Comp Cas 564; [1997] 1 ALT CrL 371 as follows :

"Complaint, as filed by the director is not maintainable. Director is not the holder in due course, the drawee is the company. Director requires proper authorisation to file the complaint. In the instant case, there is no authorisation in favour of the complainant under the memorandum of understanding or Articles of association. No such authorisation is proved. Therefore, the court below is correct in negating the contention of the complainant."

38. As J have already pointed out, in this case, there is no authorisation produced either in the shape of resolution of the board or otherwise to show that Thiru Laxman Goyal or Sampath Kumar, as the case may be, are competent to represent the company and to file a complaint.

39. Section 142 of the Negotiable Instruments Act makes it clear that a complaint can be made only by a payee or the holder in due course. Therefore, it is only the payee, who is competent to lay the complaint. A complaint, on behalf of the corporation, has to be laid, only according to law. A director or the managing director, or secretary of the company can normally represent a company in a proceeding either when they sue or when they are sued. But, here the complaint is not filed by any of them. But, the complaint is sought to be filed by one senior manager, who had signed the complaint. The senior manager is only a paid employee of the company. A paid employee of the company is normally, not competent to represent the company, unless there is any specific authorisation by the board or there must be standing order to that effect. At least, the Articles of

association must arm them with such powers. It is not so in this case. On the other hand, the first complainant is shown as MMTC Limited, Nariman Point, Mumbai, represented by its senior manager Laxman Goyal and the second complainant is shown as MMTC Ltd. having its Regional Office at Chennai House, No. 7 Esplanade, Chennai-108, represented by its senior manager Laxman Goyal. In para. 1 of the complaint, it is stated that MMTC Ltd., represented by its senior manager Laxman Goyal is authorised to lodge this complaint. I have already referred to the fact that no such authorisation has been produced along with the complaint, nor in the sworn statement recorded of Lakshman Goyal, anything is mentioned by him about the same. He has simply stated that according to the rules or the Articles of association, he is authorised to initiate proceedings. But the said rule or Articles are not produced, but what is produced does not show that Lakshman Goyal is competent to represent MMTC or sign any complaint or present any complaint for and on behalf of MMTC Limited.

40. The Supreme Court has held in the decision in *Associated Cement Co. Ltd. v. Keshvanand* , "... the complainant must be a corporeal person, who is capable of making physical presence in the court. Its corollary is that even if a complaint is made in the name of an incorporeal person, (like a company or corporation) it is necessary that a natural person represent such juristic person in the court and it is that natural person who is looked upon, for all practical purposes to be the complainant in the case. In other words, when the complainant is a body corporate it is the de jure complainant, and it must necessarily associate a human being as de facto complainant to represent the former in court proceedings."

41. Thus, when the complainant is not a natural person as in this case, and when the law permits that a complaint can be in the name of a juristic person, who is a person competent in the eye of law, then such a complaint must be made only by a person, who is competent and who is held out by the juristic person as the competent person to represent the same. Therefore, it is not possible to accept the contention that anyone can file the complaint for and on behalf of a juristic person such as a corporation or a registered body. Therefore, a person, who represents a company or a corporation must be a person competent to represent it by reason of authorisation to that effect.

42. Section 141 of the Negotiable Instruments Act makes it clear that if an offence is committed by a firm or company, all those persons, who were responsible for the conduct of the business of the company, must be deemed to have committed the offence under Section 138 of the Negotiable Instruments Act. Similarly, when a complaint is to be filed under Section 138 of the Negotiable Instruments Act by a company, it must be only by a person, who is competent to represent the company and thus by a person who is responsible for the conduct of the company or its business. The action of such person must be binding upon the company. It cannot be said so of Laxman Goyal. Therefore, Section 141 of the Negotiable Instruments Act gives an indication as to who will be the competent person to represent the company, when the company wants to initiate proceedings under Section 138 of the Negotiable Instruments Act.

43. Of course, if the memorandum of Articles mention that a senior manager is competent to institute or initiate proceedings on behalf of the company, such a senior manager will become a person empowered to represent the company and bind the company by his action. It is also open to

the company to authorise a person, who becomes a duly authorised agent to initiate action. But, it is not shown by producing any records that Laxman Goyal or Sampath Kumar is the authorised agent to initiate proceedings. Therefore, when an artificial person is the complainant, it must follow that the action for and on behalf of such inanimate body can be only through persons, who are authorised either under the Articles of association or by a special resolution of the board or by means of a special authority as an authorisation or by way of power of attorney. Then such person can sign such complaint, initiate proceedings for and on behalf of the company. A reference to Section 29 of the Civil Procedure Code will be also apt. It provides that pleadings in a suit, by or against a Corporation can be signed and verified on behalf of the company by its secretary, director or other principal officer of the corporation.

44. This court has held in the decision in *Ruby Leather Exports v. K. Venu* [1994] 1 Crimes 820 ; [1995] 82 Comp Cas 776, 794 as follows :

"Whenever the statute, required a particular act to be done personally, it stood so mentioned. The law laid down by *Paripoornan J.* is one more indication, that when the statute, does not insist, that the complaint should be filed personally by the payee or the holder in due course, such a meaning cannot be read into it. There cannot be any dispute, that when the law specifies, that an act should be done in that way, and not in any other way.

Then after referring to Sections 141 and 142 of the Negotiable Instruments Act, it was held that a power of attorney agent of the payee or the holder in due course of the cheque will be competent to make a complaint in writing under Section 142(a) of the Negotiable Instruments Act, to facilitate valid cognizance being taken by the magistrate."

45. The manager being an employee of the company, cannot, under law, be regarded or deemed by reason of his post to represent the company. He does not become an authorised person or a power of attorney agent. A director or managing director may derive such power from Articles of association. But, a manger cannot be held to derive such powers. As to the duties of the senior manager, there is no reference in the evidence of P. W.-I nor any document was produced. The sworn statement recorded of Laxman Goyal also does not give any indication to hold that the filing of the complaint forms part of the duties. Therefore, the mere position held by Laxman Goyal as the senior manager cannot lead to any inference that he by virtue of the office held by him, would become a competent person to represent the company or that any authorisation should be inferred. Therefore, one cannot presume that a senior manager has all the powers inclusive of power to initiate action. Hence, in my opinion, the legal position that would emerge from these facts is that if any legal proceeding especially a complaint under Section 138 of the Negotiable Instruments Act is to be instituted by the company, it can be only done through the persons, who are authorised so as to bind the corporation. Otherwise, there will not be a legal and proper complaint before the court. Unless there is a complaint by the person concerned, viz., by the payee or the holder in due course, the magistrate cannot take cognizance of the same.

46. In the decision in *K.N. Sankaranarayanan v. Shree Consultations and Services Pvt. Ltd.* [1994] 80 Comp Cas 558, this court has held that any cause instituted without authority makes it invalid from its inception and cannot be validated by a later ratification, and, therefore, the proceeding initiated by one of the directors without the resolution of the board was not maintainable under law. In this case, though it is stated that subsequently an authorisation has been given I do not find anything on record to prove the same, nor I find any order of the magistrate concerned to that effect. Even assuming that there is any such record, that cannot save the situation as far this complaint is concerned.

47. It was held by me in the decision in [1998] 42 MLJ 138 that a complaint filed by a manager of the limited company without the resolution of the board and in the absence of proof that the person mentioned in the complaint is the authorised person, such complaint cannot be maintained at all.

48. The Patna High Court has held in the decision in *BOC India Ltd. v. Zinc Products and Co. Pvt. Ltd.* [1996] 86 Comp Cas 358 as follows (headnote) : "Except where otherwise expressly provided it is the board of directors which is entitled to exercise all the powers of the company ; individual directors have only such powers as are vested in them by the memorandum and Articles of association. The question of authority to institute a suit on behalf of a company is not a technical matter. Unless a power to institute a suit is specifically conferred on a particular director, he has no authority to institute a suit on behalf of the company. Such a power can be conferred by the board of directors only by passing a resolution in that regard. . . . Since the board of directors of the petitioner-company had not passed a resolution authorising the area sales manager to institute a petition for winding the respondent-company, the petition filed by him was not maintainable."

49. In this case on hand, we find that the defect is not curable and it goes to the very root of the matter. Therefore, the very taking of cognizance of the case is vitiated by reason of absence of power in the person making the complaint, it will lead to the only conclusion that the proceeding is ab initio void and cannot be enlivened by any subsequent ratification or authorisation. The Andhra Pradesh High Court has held in the decision in *Satish and Co. v. S. R. Traders* [1997] 4 All MR (Journal) 58 ; [1999] 95 Comp Cas 836 that any legal proceedings whether criminal or civil shall be instituted by the company through its authorised officers, so as to bind the company and if the complaint, as filed, was not maintainable as on the date of its filing, it was liable to be dismissed and subsequent ratification cannot revive it.

50. Here, Section 142 of the Negotiable Instruments Act makes a departure from the provisions of the Criminal Procedure Code. It clearly sets down a specific and different period of limitation. It further provides that it is only the payee or the holder in due course can file a complaint under Section 138 of the Negotiable Instruments Act. It further prescribes that only First Class Magistrates shall be competent to try such offences. Section 138 of the Negotiable Instruments Act was introduced with a view to enforce some sort of discipline and credibility in the commercial transactions, the life-line of which is the issuance of cheques. Therefore, with that object, Section 138 of the Act has been introduced. Sections 138 and 142 of the Negotiable Instruments Act read together would show that only a holder in due course or payee will be competent to initiate action, provided the conditions set out in proviso to Section 138 of the Act are satisfied. Thus, it is a specific



enactment prescribing certain offences and providing the conditions for taking cognizance of the said offences. Here, the cheques have been issued in the name of MMTC Limited, a corporate body which has no natural existence, but an artificial legal existence. It is a body governed by the memorandum and Articles of association. Therefore, persons empowered under the memorandum and Articles of association and persons, who are specifically authorised alone can represent such artificial body and can bind the artificial body by such representation. But, in this case on hand, the petitioners have failed to produce before the court anything to suggest or support that the person, who has signed the complaint and presented the same in the court, is a person authorised either under the Articles of association or by any resolution of the board of directors to initiate the said action. On the other hand, the document produced to only empower the executive director to initiate such action.

51. Therefore, it is clear that the legal position as crystallised by the rulings is to the effect that a complaint under Section 138 of the Negotiable Instruments Act can be filed for and on behalf of a body such as corporation, who has only artificial existence through a particular mode and when that mode is not followed, any proceeding initiated or any complaint filed will be vitiated from its very inception. In my opinion, here, the complaint is signed and presented by a person, who is neither an authorised agent nor a person empowered under the Articles of association or by any resolution of the board to do so. Hence, the complaint is not maintainable. The taking cognizance of such a complaint is legally not acceptable. Hence, these two complaints filed for and on behalf of MMTC Limited against the petitioners herein, which were taken on file in C. C. Nos. 3324 and 3325 of 1995 are not maintainable at all and that cognizance of the said complaints ought not to have been taken by the magistrate. In such circumstances, the entire proceedings are liable to be set aside. Hence it is not necessary to consider the submission made by counsel for the petitioner as regards maintainability of the complaints as against the third accused.

52. In the result, these two applications are allowed, quashing the proceedings initiated against the petitioners in C. C. Nos. 3324 and 3325 of 1995, on the file of Seventh Metropolitan Magistrate, Chennai. In view of the order passed in the main criminal original petitions, CrI. M. P. Nos. 6999 and 7000 of 1998 shall stand closed.