# Medchel Chemicals And Pharmaceuticals ... vs Dr. D.C. Mallik And Ors. on 1 April, 1998

## Equivalent citations: [1998]94COMPCAS259(MAD)

JUDGMENT

Rengasamy, J.

1. All these revisions arise from the orders of the VIIth Metropolitan Magistrate, George Town, Chennai, in Crl. M. P. No. 1770 of 1996, in C. C. No. 5232 of 1995, and Crl. M. P. Nos. 2377 to 2380 of 1996, in C. C. Nos. 3491 to 3494 of 1995.

2. To understand the facts relating to these private complaints before the Vllth Metropolitan Magistrate, George Town, Chennai, and the miscellaneous petitions from these complaints the background of these cases has to be narrated in detail.

3. The complainant in C. C. Nos. 3491 to 3494 of 1995, Minerals and Metals Trading Corporation of India Limited (hereinafter to be referred to as "the MMTC"), is a company owned by the Government of India. The complainant in C. C. No. 5232 of 1995, Medchel Chemicals and Pharma-ceuticals Private Limited (hereinafter to be referred to as "the MCPL"), is a company engaged in the manufacture and export of certain drugs. For importing the raw materials, MCPL entered into an agreement with the MMTC and a memorandum of understanding was drawn up between them on June 1, 1994, which was later on altered to some extent by addendum to the memorandum of understanding on September 17, 1994. The important conditions under the memorandum of understanding are that the MCPL should export the required raw materials through MMTC and after the manufacture of the drugs, the export orders should be made in the name of MMTC or MCPL, that the respondent-MCPL should open the letters of credit in the name of MMTC and also execute the pronote to the value of the materials towards the security at the value of the raw materials imported by the MMTC and that the letters of credit and the promissory notes will get discharged automatically if MCPL exports the manufactured drugs within the prescribed time, otherwise the MMTC will be entitled to encash the cheques. With this understanding, MCPL issued two cheques, one dated October 31, 1994, to the value of Rs. 20,26,975 and another dated November 10, 1994, to the value of Rs. 22,17,156. Subsequently also, during the course of the transaction, MCPL executed four other cheques dated December 23, 1994, November 21, 1994, and January 16, 1995, for certain value. It is the allegation of the MMTC that the MCPL did not abide by the contract by exporting the drugs within the prescribed period on account of which, they could not realise the value of the raw materials which they imported and, therefore, when they presented these six cheques, they were dishonoured as the MCPL had asked the bank to stop payments and, therefore, the MMTC filed the complaints, C. C. Nos. 3324, 3325 and 3491 to 3494 of 1995, under Section 138 of the Negotiable Instruments Act before the VIIth Metropolitan Magistrate, George

Town, Chennai. The accused in these complaints, viz., MCPL, who has to be referred to as the respondent alleged that for the two cheques concerned in C. C. Nos. 3324 and 3325 of 1995, the exports of the drugs were made within time and the MMTC, to be referred to as the revision petitioner also got realised the value of the imported raw materials and in spite of that, they made attempts to encash the cheques to enrich themselves at their cost, which will amount to cheating, defrauding and criminal breach of trust. Therefore, the respondent- MCPL filed a private complaint, C. C. No. 5232 of 1995, against the revision petitioner the MMTC, and its ten employees, including the director, the general manager, deputy general managers, senior managers, etc., alleging that though the revision petitioner has realised the value of the drugs imported, it had unlawfully attempted to encash the cheques, which were given as securities and they intended to cause wrongful loss to them and they have attempted to commit cheating and criminal breach of trust and, therefore, they are liable to be punished under Sections 120B, 209, 211, 406, 420 and 511 read with Section 34 of the Indian Penal Code, 1860. Therefore, there were two sets of complaints, one set by the revision petitioner-MMTC under Section 138 of the Negotiable Instruments Act, 1881, for the dishonour of the cheques and the other complaint by the respondent-MCPL against the revision petitioner alleging criminal breach of trust, cheating, etc. The director of the revision petitioner, who is arrayed as the eleventh accused, and the senior manager of the revision petitioner, arrayed as the fifth accused, in C. C. Nos. 5232 of 1995, filed Crl. M. P. No. 1770 of 1996, contending that they are public servants as defined under the Indian Penal Code and without the sanction of the Government, they cannot be prosecuted and they should be discharged. A similar petition was filed by the other accused in C. C. No, 5232 of 1995, in Crl, M. P. No. 1056 of 1996, contending that as the MMTC is owned by the Union of India, in view of their employment in the MMTC, they are also public servants, that without the sanction of the Government, the complaint against them is not maintainable and they should be discharged, The learned Vllth Metropolitan Magistrate, who heard both the petitions filed by the employees of the MMTC has found that the director, who is arrayed as the eleventh accused in C. C. No. 5232 of 1995, was appointed by the President of India, whereas all others including the fifth accused were appointed by the office bearers of the MMTC who can be removed by them and Section 197 of the Criminal Procedure Code, 1973, is not attracted for sanction, and, therefore, he dismissed M. P. No. 1056 of 1996, totally and partly M. P. No. 1770 of 1996, relating to the prayer of the fifth accused. As the petitions of the employees of the revision petitioner have been dismissed holding that no sanction is required to prosecute them, the fifth accused and the other accused have filed Crl. R. C. Nos. 578 and 579 of 1996 separately before this court. As the contention of the eleventh accused, viz., the director, has been accepted by the learned Vllth Metropolitan Magistrate, holding that the sanction is required for prosecuting him under Section 197 of the Criminal Procedure Code, 1973, the respondent-MCPL has filed Crl. R. C. No. 450 of 1996. In the meanwhile, the development in the other four complaints, viz., C. C. Nos. 3491 to 3494 of 1995 have to be referred to. The complainant, viz., the revision petitioner, examined three witnesses on their side but the respondent-MCPL did not cross-examine those witnesses. Therefore, the complainant made an endorsement that they are closing the evidence on their side. A petition was filed under Section 311 of the Criminal Procedure Code, 1973, to recall a witness by the complainant and that was allowed. Though three witnesses were examined on the side of the complainant, revision petitioner, no cross-examination of these witnesses was made by the respondent-MCPL. But, after the examination of those witnesses, they filed separate petitions, viz., Crl. M. Ps. Nos. 2377 to 2380 of 1996, in each of the complaints under Section 258 of the Criminal

Procedure Code, 1973, to discharge them on various grounds. In these petitions, it is alleged that the complainant have failed to produce the memorandum of understanding and the addendum, that a single complaint has been filed by two complainants, which is hot valid in law, that the complainant, Lakshman Goyal, had no authorisation to file the complaint, that as the promissory notes were executed only as security along with the indemnity bond and there was also intimation to the complainant not to present the cheques, Section 138 of the Negotiable Instruments Act, 1881, is not attracted, and, therefore, they should be discharged under Section 258 of the Criminal Procedure Code, 1973. The learned Vllth Metropolitan Magistrate, in full agreement with the contention taken by the respondent, had stopped the proceedings under Section 258 of the Criminal Procedure Code, 1973, and discharged the respondent. Aggrieved by this order, the revision petitioner/complainant have filed Criminal Revision Cases Nos. 649 to 652 of 1996. It is thus, these revisions have come before this court.

4. I feel that the revision relating to the sanction to prosecute under Section 197 of the Criminal Procedure Code, 1973, Crl. R. C. Nos. 450, 578 and 579 of 1996, can be first taken up for consideration. As mentioned above, Crl. R. C. No. 450 of 1996 is against the order of discharge of the eleventh accused whereas Crl. R. C. Nos. 578 to 579 of 1996 are against the dismissal of the petitions to discharge the other employees of the MMTC, the revision petitioner.

5. It is not in dispute that the revision petitioner, MMTC, is a company owned by the Government of India. The employees of the company, relying upon the definition of "public servant" in Clause (b) of the twelfth category to Section 21 of the Indian Penal Code, 1860, which reads, "Every person--. . .

(b) in the service or pay of a local authority, a corporation, established by or under a Central, provincial or State Act or a Government company as defined in Section 617 of the Companies Act, 1956," is a public servant, filed the petitions before the learned magistrate that they cannot be prosecuted unless the sanction was obtained from the Government of India. Section 197 of the Criminal Procedure Code, 1973, reads that where any person, who is a public servant not removable from his office save by or with the sanction of the Government, is accused of any offence alleged to have been committed by him, while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction of the Central Government or the State Government, as the case may be. It is not denied that accused Nos. 2 to 10 can be removed from service by the managing director of the company. Therefore, it cannot be stated that those accused, though are treated as public servants as per the definition of the Indian Penal Code, cannot be said to be removable from office only with the sanction of the Government. Only on this ground, the learned metropolitan magistrate has rejected their prayer to discharge them. Mr. N. Natarajan, learned senior counsel, appearing for the revision petitioner, MMTC, also, is unable to say anything against this reasoning given by the learned VIIth Metropolitan Magistrate, George Town, Chennai.

6. Then coming to the discharge of the eleventh accused, the director of the company, the director is being appointed only by the President of India. Mr. N. Natarajan, learned senior counsel, also would contend that as the President himself is the appointing authority of the eleventh accused, he can be removed only by the sanction of the Union Government, and, therefore, the order of the learned

magistrate in discharging the eleventh accused is perfectly correct. But Mr. K. V. Sridharan, learned counsel appearing for the MCPL, respondent, has cited Article 287 of the articles of association of the revision petitioner and Clauses (4) and (5) of the abovesaid Article read as follows :

> "(4) The President shall have the power to remove any director including the chairman and managing director from office at any time in his absolute discretion. . .
>
> (6) The office of a director shall be vacated if :
>
> (a) he is found to be of unsound mind by a court of competent jurisdiction ;
>
> (b) he has applied to be adjudicated an insolvent ;
>
> (c) he is adjudged an insolvent ;
>
> (d) he is convicted by a court of any offence and is sentenced in respect thereof to imprisonment for not less than six months ;
>
> (e) he absents himself from three consecutive meetings of the board of directors or from all meetings of the board for a continuous period of three months, whichever is longer, without obtaining leave of absence from the board ;
>
> (f) he fails to disclose the nature of his concern or interest in any contract or arrangement, or proposed contract or arrangement, entered into or to be entered into by or on behalf of the company as required under Section 299 of the Act ;
>
> (g) he becomes disqualified by an order of court under Section 203 of the Act ;
>
> (h) he is removed in pursuance of Section 284 of the Act . . .
>
> " Section 284 of the Companies Act is relating to the removal of the directors and it reads :
>
> "284. Removal of directors.--(1) A company may by ordinary resolu tion, remove a director (not being a director appointed by the Central Government in pursuance of Section 408) before the expiry of his period of office :"

7. So, the director of the company can be removed by ordinary resolution. It is these powers that are referred to in Article 87(6)(b) of the articles of association of the revision petitioner. No doubt, there is an exception in Section 284 of the Companies Act itself that the director appointed by the Central Government cannot be removed before the expiry of his period of office. In this case, an attempt was made to argue that as the President of India himself has appointed the eleventh accused director, the exception of Section 284 of the Act is applicable. But Mr. K. V. Sridharan has referred to a decision in Ranjit Kumar Chatterjee v. Union of India, , wherein it has been held that when the

President appoints a person as a director of the company, such appointment is only in exercise of the powers conferred by the articles of association of the company and not by virtue of any powers under the Constitution of India and, therefore, a person appointed by the President does not become a servant of the Government. It cannot be stated that the President of India derives the powers under the Constitution of India for the appointment of the directors or the chairman of the companies owned by the Union Government. As the articles of association provide the method of appointment of office bearers of the company by virtue of such powers under the articles of association, the President of India, as head of the Union Government, appoints any director. Therefore, as held by the Calcutta High Court, the director of the company cannot become a Government servant. The appointment of the director, though by the President of India, as the appointment is by virtue of the articles of association, it cannot be stated that he was appointed by the Central Government. Therefore, the exception to Section 284 of the Companies Act is not available to the eleventh accused. Mr. K. V. Sridharan, learned counsel, has cited a catena of decisions, viz., Government of India v. Sukhlal Singareni Collieries Co. Ltd. [1994] MLJ (Crl.) 709, State v. B. L. Ohri, , Praga Tools Corpn. v. C. V. Imanual , S. L Agarwal v. Hindustan Steel Ltd., , Pyare Lal Sharma v. Jammu and Kashmir Industries Ltd. [1990] 67 Comp Cas 195 (SC), State of Punjab v. Raja Ram , A. P. State Road Transport Corporation v. Income-tax Officer [1964] 34 Comp Cas 473 ; AIR 1964 SC 1846, and Tata Engineering and Locomotive Co. Ltd. v. State of Bihar , wherein it is held that a company is a separate legal entity of its own like any statutory corporation and the employees of such a company or corporation are not Government servants. Even though as per the definition under Section 21 of the Indian Penal Code, such persons can be public servants, they cannot be Government servants for the purpose of obtaining sanction under Section 197 of the Criminal Procedure Code.

8. Learned senior counsel, Mr. Natarajan, citing two decisions, viz., Dr. A. S. Rao, Managing Director, E. C. I. L. v. C. N. N. Kutty [1977] 2 APLJ 219 and N.N. Pillai v. P.V.R. Kutty Menon [1979] APLJ 269, contended that accused No. 11 having been appointed as director by the President of India, sanction under Section 197 of the Criminal Procedure Code, is required. In the first case, the managing director of Electronics Corporation of India, which is a Central Government owned company, was found to be a public servant and sanction was required to prosecute him. No doubt, the managing director of the company was also appointed by the President of India. The judgment reads that the President appoints the chairman, managing director and the other directors of the corporation and he alone removes them. So the appointment and removal were in the hands of the President of India alone. But as referred to above, in this case, though the President appoints the director, under Article 87(2) of the memorandum and articles of association, the board of directors also can remove him by resolution. So, when the board of directors also have that power of removal, Section 197 of the Criminal Procedure Code, is not attracted. In the latter decision, the accused was an employee of the Government of India, being a senior officer in the Central Government service, which is a public service of the Government of India. He was sent on deputation by the Government of India to the Food Corporation of India, a corporation constituted under the Food Corporation of India Act. As the accused was a senior officer of the Central Government, which was his parent department, though temporarily he served as a manager in the Food Corporation of India, taking into consideration the fact that he was a permanent employee of the Government of India, it was held that for the prosecution of the said officer, sanction under Section 197 of the Criminal

Procedure Code was imperative. So, those two cases are not applicable for this case. As Section 197 reads that the sanction for prosecution of a public servant is required only if he can be removed from his office with the sanction of the Government, whereas the eleventh accused director, can be removed not only by the President of India, but also by an ordinary resolution of the board of directors of the company, Section 197 of the Criminal Procedure Code is not attracted to the eleventh accused also. Therefore, the order of discharge of the eleventh accused passed by the learned magistrate is clearly an error.

9. As I have already observed that all the other employees of the MMTC do not require sanction for removal their revisions, Crl. R. C. Nos. 578 and 579 of 1996, are to be dismissed whereas Crl. R. C. No. 150 of 1996, has to be allowed setting aside the order of discharge of the eleventh accused.

10. Now, let us consider Crl. R. C. No. 649 of 1996, and 642 of 1996, filed against the order of discharge of the respondents, who are the accused in C. C. Nos. 3491 to 3494 of 1995.

11. The accused/respondent in these revisions filed the petitions Crl. M. P. Nos. 2377 to 2380 of 1996, under Section 258 of the Criminal Procedure Code, to discharge them for the reasons mentioned in the petitions, to which I would refer later. Mr. N. Natarajan, learned senior counsel, would contend that Section 258 of the Criminal Procedure Code is attracted only to the summons case instituted otherwise than upon a complaint, that is cases filed by the police, but in this case though the offence under Section 138 of the Negotiable Instruments Act will be tried as a summons case, as it is a private complaint, Section 258 of the Criminal Procedure Code is not attracted and, therefore, the learned magistrate stopping the proceedings and discharging the accused under Section 258 of the Criminal Procedure Code is a manifest illegality. It is not as if the learned magistrate was not aware that Section 258 of the Criminal Procedure Code cannot be invoked in the private complaint. Being fully conscious of this position; the learned magistrate has taken support from the decision of this court in Jameel Khan, Proprietor, Oriental Leather Export v. Thomas Cook India Ltd. [1995] 1 LW (Crl.) 277, wherein this court has expressed the view that the accused is entitled to plead for discharge, even of the complaints filed under Section 138 of the Negotiable Instruments Act. But, unfortunately, the learned magistrate has not understood the purport of that decision. In that decision relying upon the view of the apex court in K.M. Mathew v. State of Kerala , it was held that when the accused had contended that there was no prima facie case made against him and when the allegations in the complaint do not constitute an offence, the accused is certainly entitled to contend that the magistrate has no jurisdiction to summon him and try the case and he is entitled to plead to discharge him. In the decision cited above, without considering the contention that no materials were available to constitute an offence, the learned magistrate straightaway dismissed the petition as it was a private complaint. Therefore, this court has observed that even if it is a private complaint, when the allegations in the complaint do not make out an offence, the accused was entitled to plead for discharge. But in this case, the learned VIIth Metropolitan Magistrate has not applied this ratio, while considering the petitions under Section 258 of the Criminal Procedure Code. He has not found that the allegations in the complaint do not constitute the offence under Section 138 of the Negotiable Instruments Act. Specific averments have been made in the complaints that the accused had executed four promissory notes and they were presented for encashment but they were dishonoured and, therefore, after issuing notice to the

accused party, the complaints were filed under Section 138 of the Negotiable Instruments Act. The dishonoured promissory notes also have been filed before the court. From the materials alleged in the complaints, no one can say that the allegations in the complaints do not constitute an offence. On the other hand, the learned metropolitan magistrate has gone into the allegations made in the petitions, viz., Crl. M. P. Nos. 2377 to 2380 of 1996, which require the proof to accept the case of the accused, but has discharged them under Section 258 of the Criminal Procedure Code, Mr. K. V. Sridharan, learned counsel for the respondent MCPL, would concede that Section 258 of the Criminal Procedure Code, cannot be invoked in this case to stop the proceedings as this is a private complaint under Section 138 of the Negotiable Instruments Act and the decision, viz., Jameel Khan, Proprietor, Oriental Leather Export v. Thomas Cook India Ltd. [1995] 1 LW (Crl.) 277 (Mad) is not applicable as the materials in the four complaints of the revision petitioner definitely make out the offence. But Mr. K. V, Sridharan, learned counsel, would submit that in this case, three witnesses on the side of the prosecution have been examined, that though the learned magistrate has used the word "discharge", it has to be treated as acquittal after full trial of the case and, therefore, the order of acquittal by the learned magistrate is perfectly valid. Learned counsel has cited a series of decisions in support of his argument that the order of discharge can be treated as an order of acquittal.

12. He relied upon the decision in Palchami v. Paramasiva Gounder, AIR 1958 Mad 197, wherein this court has held that when the trial court cannot pass an order of discharge in a summons case, but it has discharged the accused, it is an acquittal. In Public Prosecutor v. Hindustan Motors, , also, the Andhra Pradesh High Court has held that when the trial magistrate had wrongly followed the summons procedure, though there cannot be any discharge in this case, the order of discharge is actually an acquittal of the case, In Amritsar Municipality v. Labbu Ram [1970] Cr. L. J. 553, the accused were tried and an order of discharge was passed, though no such order of discharge could be passed in that case yet the Punjab and Haryana High Court treated it as an order of acquittal and refused to set aside the order of the magistrate. Learned counsel, Mr. K. V. Sridharan, further contended that it is the duty of the prosecution to prove the case beyond all reasonable doubt and it is not for the accused to let in evidence on his side and even if he did not cross-examine the witnesses, it will not be a defect on the part of the accused and in this case, as three witnesses have been examined on the side of the prosecution and the learned magistrate, from the contentions raised by the accused party, has found that the prosecution was not fair in filing the complaints when especially the cheques were issued only as security, the order of acquittal passed by the learned magistrate is proper and valid. Learned counsel also refers to Raja Ram v. Principal, Sudarshan Singh, M. K. H. S. School [1981] Cr. LJ 1469, wherein the Punjab and Haryana High Court has held that the magistrate has to consider the evidence of the prosecution as it is the duty of the prosecution to produce all the evidence in support of their case and if the accused has not rebutted the allegations, the accused cannot be punished when the magistrate finds that no case has been made out against the accused. He would further contend that for the reasons that the accused had not cross-examined the prosecution witnesses, the complainant is not prejudiced and the accused cannot be blamed that he has not placed the material before the court by cross-examining all the witnesses.

13. It is true that though the order of discharge passed by a magistrate happened to be an error, instead of the acquittal to be passed by him, and such order of discharge can be treated as acquittal, but there must be materials to hold that the evidence placed before the court is not reliable and acceptable or even the evidence of the witnesses does not establish the offence to arrive at the conclusion for the acquittal of the accused.

14. As Mr. K. V. Sridharan, learned counsel, has conceded that the order of discharge under Section 258 of the Criminal Procedure Code in this case is a mistake and this has to be treated as judgment of acquittal, now, the question is whether the learned metropolitan magistrate was justified in passing this order of acquittal. It is to kept in mind that the prosecution has examined three witnesses and marked fourteen exhibits to substantiate the offence under Section 138 of the Negotiable Instruments Act. No cross-examination of the witnesses was made to discredit the testimony of these witnesses or the documents placed before the court. The learned magistrate also has not observed in his order that the witnesses are not reliable or the documents are fabricated and the offences against the respondent/accused are not proved. On the other hand, he has gone into the question of maintainability of the complaints from the allegations made in Crl. M. Ps. Nos. 2377 to 2380 of 1996. He has found that a single complaint has been filed in each of the cases by two complainants and such complaints are not contemplated under the Code of Criminal Procedure, and, therefore, the accused party cannot be prosecuted. He has given another reason that the senior manager, Mr. Lakshman Goyal, has filed the complaints as though he was authorised to file the complaints but in Crl. M. P. Nos. 1058 to 1062, 1057 and 1059 of 1996, one Sampath Kumar had filed the complaints stating that he was authorised to continue the prosecution and, therefore, Lakshman Goyal was not competent to file the complaints against the accused party. The third ground, which he has considered is that the indemnity bonds were executed and the cheques were issued by the accused only as securities but the presentation of the cheques for encashment were contrary to the agreement and, therefore, Section 138 of the Negotiable Instruments Act was not attracted. Another ground for acquittal of the accused is that the complainants had not chosen to produce the vital documents relating to the transaction between them under the memorandum of understanding and the withholding of the memorandum of understanding was unfair, which would make one to suspect the prosecution case.

15. Mr. N. Natarajan, learned senior counsel, contended that all these points considered by the learned magistrate could not be considered without suggesting anything to the witnesses examined on the side of the complainants and the learned magistrate should have completed the trial for giving a finding in the manner stated above, but without the materials, he has given such a finding treating it as a proceedings under Section 258 of the Criminal Procedure Code, and, therefore, the order of the learned magistrate, even if it is treated as acquittal, is illegal. Learned senior counsel has answered the points raised by the learned magistrate for the acquittal of the accused party.

16. The first point taken by the learned magistrate is with regard to the two complainants in each of the four complaints. The learned magistrate has relied upon the decisions of this court in Mani v. Saleem [1989] L. W. (Crl.) 187 and the decision of the Calcutta High Court in Sashadar v. Sir Charles Tegart, AIR 1931 Cal 646, wherein it is held that a joint complaint is not contemplated under the Criminal Procedure Code, and, therefore, cognizance of the offence on the complaint will be difficult

as the complainant has to be examined on oath and in such cases, the complaint could be withdrawn and a separate complaint could be filed. These decisions are on joint complaints given by two different parties. But, in this case, it cannot be treated as a joint complaint by two different parties. All the four complaints, no doubt, mention two parties as complainants, but both of them are the same parties, viz., MMTC Ltd., represented by its senior manager, Mr. Lakshman Goyal. The company is the complainant and the human agency, viz., its senior manager, has represented this company. Even though different addresses are given, one a Bombay address and the other a Madras address, the complainant, viz., the company, and the person who represents the company, are repeated twice in the complaint. Therefore, it cannot be treated that it is a joint complaint by two persons. In view of the fact that the company presented the cheques for encashment at Madras, the complainant's name is repeated twice in the complaints. There is no dispute with regard to the identity of the two names given in the complaint describing them as complainants, The learned magistrate has not found that those two names, refer to two different companies or different legal entities unconnected with each other. As mentioned above, the name of the company as well as the person representing the company is the same though repeated twice for the reason that the cheques were presented by the Madras office. Suppose a complainant's name is repeated twice in the complaint, when admittedly it refers to the same person, can that be said that it is a joint complaint by two persons ? Similarly, this petition cannot be treated as a joint complaint by two separate bodies or persons. It has to be treated as a repetition of the name of the same body. Therefore, certainly, this will not affect the prosecution of the accused party.

17. Then, the learned magistrate, has found that as exhibit P-14 has been filed to show that one Sampath Kumar has been authorised to continue the prosecution and there is nothing to show that Lakshman Goya! was authorised to prosecute the accused, the complaints were not maintainable. PW-1, Sampath Kumar, in his evidence, has specifically stated that Lakshman Goyal has filed the complaints on behalf of the company as senior manager, that he became deputy general manager on the legal side, that Lakshman Goyal was empowered to file complaints under serial No. 21 in the delegation of powers, marked as exhibit P-13, and, therefore, he filed the complaints at that time. He also further stated that later the company has separately given the authorisation, exhibit P-14, to him. When so much evidence has been let in by PW-1, even without any material to discredit the testimony of PW-1, the learned magistrate would observe that exhibit P-14, authorisation, has been given to Sampath Kumar and there is nothing to show that Lakshman Goyal was authorised to file the complaints in these four cases-exhibit P-14, authorisation, Was given on March 18, 1996, whereas the complaints were filed even in the year 1995. As the company has given the authorisation to Mr. Sam-path Kumar in the year 1996 to proceed against the accused party, it cannot be stated that the complaints filed by Lakshman Goyal in the year 1995, were not with the permission of the company. When PW-1 himself would say that Mr. Lakshman Goyal was empowered to file the complaints and there is also no contra evidence, it is not for the learned magistrate to reject the testimony of PW-1, that too when there is no cross examination of these witnesses. This court in Gopalakrishna Trading Co. v. D. Baskaran [1992] 3 Crimes 1094 ; [1994] 80 Comp Cas 53 (Mad), has held that to enable the company to present a complaint, some person connected with the affairs of the company has a right to file the complaint. There is no contra evidence on the side of the accused to hold that some other person alone was competent to file the complaint and these complaints were filed by Lakshman Goyal detrimentally to the interest of the company. In Ruby

Leather Exports v. K. Venu [1994] I LW (Crl.) 34 ; [1995] 82 Comp Cas 776 (Mad) also this court has held that the power of attorney of a company or as the case may be, the holder in due course of the cheque, can file the complaint unless any statutory provision prescribes any special qualification or eligibility criteria for setting the criminal law in motion. It is also the view of this court in that decision that no court can decline to take cognizance of a complaint on the sole ground that the complainant was not competent to file the complaint. In the complaints itself, it is mentioned that Lakshman Goyal was the senior manager authorised to give the complaints and it cannot be disputed that he is one connected with the affairs of the company. Under those circumstances, the learned magistrate was not right in holding that the complaints by Mr. Lakshman Goyal were not maintainable.

18. The other ground considered by the learned magistrate is that all the four cheques mentioned in the four complaints were issued as security along with indemnity bonds and only in the event of certain contingency happening, the cheques could be presented but in this case, even though the accused sent an intimation not to present the cheques, the presentation of the cheques was contrary to the agreement and the object of presenting the cheques was only to get an endorsement on the cheques to prosecute the accused. He has further observed that when the cheques were presented in spite of the intimation by the accused not to present the cheques and the accused had sent an intimation to the banker to stop the payment, it will not constitute an offence under Section 138 of the Negotiable Instruments Act. There is no material before the court to hold that the respondent accused had complied with the conditions to accuse the complainant that they had presented the cheques contrary to the agreement. No doubt, it is the case of the accused also, though not mentioned in the complaint, that the cheques were issued as security towards the value of the raw materials imported by the revision petitioner and the accused should export the finished products within a prescribed time to enable the complainant to realise the value of the materials imported by them and if the accused failed to export the finished products within the prescribed time, they have got a right to present the cheques for encashment. The issuance of the cheques is not disputed by the accused party. Therefore, in the complaints, the revision petitioner has stated that the cheques were dishonoured, and, therefore, it has filed the complaints under Section 138 of the Negotiable Instruments Act. 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. When PW-1 has narrated this aspect in the evidence, specifically mentioning that the accused party had not exported the drugs and this evidence of PW-1 has not been discredited, either by producing any document on the side of the accused or by cross examination of the witnesses, to show that the goods were exported, it is strange to see how the learned magistrate has found that the complainant had contravened the agreement. He also would observed that in spite of the intimation by the accused party to the complainant not to present the cheques, they were presented for the purpose of getting the endorsement. No doubt, PW-1 in his evidence has stated that they intimated to the accused about their intention to present the cheques for encashment and the accused party over the phone requested some time for payment of the amount. Mr. K. V. Sridharan, learned counsel, contended that the Supreme Court in Electronics Trade and Technology Development Corporation Ltd. v. Indian Technologists and Engineers (Electronics) Pvt. Ltd. [1996] 86 Comp Cas 30 ; [1996] 1 LW (Crl.) 325, has observed that after the cheque is issued to the payee, or to the holder in due course and before it is presented for

encashment, if notice is issued to him not to present the same for encashment and yet the payee or holder in due course presented the cheque to the bank for payment and when it is returned on instructions, Section 138 of the Negotiable Instruments Act does not get attracted. But this view of the two honourable judge-Bench has been differed by a larger Bench of the apex court in Modi Cements Ltd. v. Kuchil Kumar Nandi [1998] 92 Comp Cas 88 (SC). In this decision, the larger Bench has observed as follows (page 93} :

> "... once the cheque is issued by the drawer, a presumption under Section 139 must follow and merely because the drawer issues a notice to the payee or to the bank for stoppage of the payment, it will not preclude an action under Section 138 of the Act by the payee or the holder of a cheque in due course ... It is for this reason we are of the considered view that the observations of this court in Electronics Trade and Technology Development Corporation Ltd. v. Indian Technologists and Engineers (Electronics) Pvt. Ltd. [1996] 86 Comp Cas 30, 34 ; [1996] 1 LW (Crl.) 325, in paragraph 6 to the effect 'suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque for payment and when it is returned on instructions, Section 138 does not get attracted, does not fit in with the object and purpose for which the above chapter has been brought on the statute book."

19. So, the decision relied upon for the accused is not the law. Hence, the finding of the learned magistrate that Section 138 of the Negotiable Instruments Act is not attracted, is not correct.

20. Section 47 of the Negotiable Instruments Act has been referred to by the learned magistrate and it reads as follows :

> "Negotiation by delivery.--Subject to the provisions of Section 58, a promissory note, bill of exchange or cheque payable to bearer is negotiable by delivery thereof.
>
> Exception : A promissory note, bill of exchange or cheque delivered on condition that it is not to take effect except in a certain event is not negotiable (except in the hands of a holder for value without notice of the condition) unless such event happens."

21. As mentioned above, PW-1 himself has narrated that the accused party failed to export the finished products within the prescribed time and the records also were not handed over to them. Therefore, there is evidence for the non-compliance with the conditions by the accused party for which the complainant party was entitled to present the cheques for encashment.

22. The learned magistrate has commented upon the non-production of the memorandum of understanding and its addendum in the proceedings to show that the cheques were not in the nature of security. PW-1 himself in his evidence has spoken that these cheques were issued as security but as the conditions were not complied with, they had the right to present the cheques. It is not as if the memorandum of understanding is exclusively in the custody of the complainant. On the other hand,

both parties are having copies of memorandum of understanding and if the evidence of PW-1 is not correct, the accused, who are having copies of the memorandum of understanding were entitled to bring it to the notice of PW-1 as to how he did not give the correct particulars of the transaction. Therefore, the criticism levelled against the complainant for not producing the memorandum of understanding is quite uncharitable.

23. So, the reasons given by the learned metropolitan magistrate, though for discharge of the accused, even if treated as reasons for acquittal, there are no materials sufficient to hold that the complaints made by the revision petitioner are not maintainable, so as to acquit the accused party, even without giving an opportunity to the accused to cross-examine the witnesses. Having examined the three witnesses, the learned magistrate could have completed the trial by allowing the accused to cross examine the witnesses. But with undue haste, giving importance to the criminal miscellaneous petitions, filed under Section 258 of the Criminal Procedure Code, he has wrongly invoked the said provision, though such petitions were not maintainable in the private complaints when especially sufficient allegations are available in the complaints for the offence under Section 138 of the Negotiable Instruments Act. The learned magistrate was thoroughly misled by non-application of mind to the decisions he has relied upon to give importance to the averments made by the accused in their petitions to pass the illegal order of discharge. Therefore, on a thorough consideration of the entire materials available before the court, I find that the learned metropolitan magistrate has grossly erred in passing the impugned order, which is liable to be set aside.

24. The order of discharge passed by the learned VIIth Metropolitan Magistrate, George Town, Chennai, in Crl. M. Ps. Nos. 2377 to 2380 in C.C. No. 3491 to 3494 of 1995, on his file is set aside. The learned magistrate is directed to restore the complaints to file, proceed with the trial in accordance with the provisions of the Code of Criminal Procedure, and dispose of the cases on the merits. The trial court shall not be influenced by the observations above for the disposal of the cases on the merits. If the learned metropolitan magistrate, who passed the impugned order, is still in the same court, the complainant is at liberty to move before the Chief Metropolitan Magistrate, Chennai, to transfer the cases to some other court.

25. In the result, Crl. R. C. Nos. 578 and 579 of 1996 are dismissed, Crl.R.C. No. 450 of 1996 is allowed setting aside the order of discharge of the eleventh accused, and Crl. R. C. No. 649 of 1996, to 652 of 1996, are allowed with the direction to restore C. C. No. 3391 of 1995 to 3394 of 1995, to file for disposal on the merits. The parties are directed to appear before the trial court on June 8, 1998.