



[2000] 38 CLA (Mag.) 199

Competence of power of attorney holder to file a complaint under section 138 of the Negotiable Instruments Act

In the article below, Mr Ayaz Bilawala points out that while a power of attorney holder can file a criminal case under section 138 of the Negotiable Instruments Act, 1881, it is essential to get a proper authorisation from the Board of directors of the complainant company, if the complainant is a company and the officer who is to lodge the complaint on its behalf does not happen to be its managing director.

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Scope of a power of attorney

1. A person can act either by himself or through a person whom he nominates or authorises to do any act, matter or thing on his behalf or in his name which is lawful. The person authorised to do any lawful act in the stead of another is called the attorney or the donee of the power of attorney. The authority in writing is the power of attorney. The power of attorney not only enables the attorney only to do lawful things on behalf of the principal so as to bind the latter but also to use the latter's name in the instruments executed by him as the attorney. In the instrument, thus, executed, the principal himself figures as a party to the transaction. His name is written or seal used by the person authorised not only to act on behalf of or in the name of the principal but also to use the latter's name in all the transactions effected by him in the capacity of the attorney. This is the effect of the power of attorney.

Definition of 'power of attorney'

2. Before determining whether or not the constituted attorney under a power of attorney, or an officer or person duly authorised by a company can file a criminal complaint under the provisions of section 138 of the Negotiable Instrument Act, 1881 (as amended) and before analysing the views taken by various High Courts in our country on this issue, it would be appropriate to examine the definitions of the 'power of attorney', 'complaint' and 'officer' as defined under the Powers of Attorney Act, 1882 (as amended), the Negotiable Instrument Act, the Code of Criminal Procedure, 1973 and the Companies Act, 1956. Section 1A of the Powers of Attorney Act, 1882 defines the 'power of attorney' "to include any instrument empowering a specified person to act for and in the name of the person executing it". The Law Commission in its 68th Report examined the provisions of the Powers of Attorney Act, which had till then worked smoothly for a century. The Powers of Attorney Act, though dealing with the power of attorney, does not contain the definition of 'power of attorney'.

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In order to remove this defect, the Power of Attorney (Amendment) Act, 1982 was introduced and the definition was suitably amended. In *Stroud's Dictionary*, a 'power of attorney' is defined as "an authority whereby one is set in lieu, instead or place of another to act for him". The definition of the 'power of attorney' in the *Law Lexicon* is as follows :

"Includes any instrument (not chargeable with a fee under law relating to court fees for the time being in force) empowering a specific person to act for and in the name of the person executing it."

Hence, in colloquial terms a power of attorney is an authority given by a formal instrument whereby one person who is called a donor or principal authorises another person who is called donee, attorney, or agent to act on his behalf or as his nominee. In the case of agency, the agent himself executes the instrument, though the transaction is binding on the principal. Chapter X of the Contract Act, 1872 deals with 'agency' wherein the entire gamut of the provisions of agency has been explicitly laid down.

Definitions of 'complaint' and 'officer'

3. Under the provisions of Negotiable Instruments Act, with effect from 1st April, 1989, Chapter XVII has been inserted by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988, which comprises sections 138 to 142. The new provisions were inserted with a view to enhance the acceptability of cheques for settlement of liability by making the drawer liable for penalties in case of bouncing of cheques, due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangement made by the drawer, with adequate safeguards to prevent harassment of honest drawers. Section 141 defines the offences by companies. Section 142 deals with cognisance of offences. It provides as follows :

"Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974),

- (a) no court shall take cognisance of any offence punishable under section 138 except upon a complaint in writing made by the payee or, as the case may be, the holder in due course of the cheque,"

Keeping in view the provisions clause (a) of section 142, it will be useful to see also the clause (d) of section 2 of the Code of Criminal Procedure which defines a 'complaint' to be "any allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence but does not include a police report". Under clause (30) of section 2 of the Companies Act, an 'officer' has been defined to include -

"any director, managing agent, secretary, treasurer, manager or any other person in accordance with whose directions or instructions the Board of directors or any one or more of the directors is or are accustomed to act, and includes

- (a) where the managing agent or the secretary and treasurer is or

- are a firm, any partner in the firm ;
- (b) where the managing agent or the secretary and treasurer is or are a body corporate, any director or manager of the body corporate..."

Madras High Court rulings on who can represent company in criminal proceedings initiated by it.

4. Keeping in view the provisions of all the above mentioned Acts, various High Courts in India in recent times have extensively dealt with and pronounced judgments on the question whether in case of a juristic person or a legal entity, any special authorisation is required even if legal proceedings are initiated by principal officers in-charge of management or by persons who under law are recognised to represent such a body. The Madras High Court, in the case of *Sudesh Kumar Sharma v. K S Selvamani* [1994] 4 Cur. Cri. R 2374, held that a complainant under section 138 of the Negotiable Instruments Act must necessarily be a payee or holder in due course and if the complaint is filed by the manager in his personal capacity, then authorisation is required. In that case, the complaint was not filed in the name of a legal entity but in the name of a manager representing the interest of the legal entity and since the manager who filed the complaint was not a payee or holder in due course the court held that authorisation was necessary. In the case of *Ruby Leather Exports v. V K Venu* [1993] Mad.WN 249, the Madras High Court held that as the transaction was initiated by the complainant in his personal name for and on behalf of a corporate body and not in the name of the company, authorisation was required and as no such authorisation was produced before taking cognisance, the complaint was barred under section 142 of the Negotiable Instruments Act and hence liable to be quashed. The Madras High Court in the case of *Shakti Concrete Industries Ltd. v. Valuable Steels (India) Ltd.* [1998] Banker Journal 370 held that the person connected with the affairs of a company could represent the company in legal matters and that any other view would defeat the very purpose of the enactment.

Gujarat High Court's view

5. The Gujarat High Court in the case of *Geekay Exim Ltd. v. State of Gujarat* [1998] 28 CLA 438 held that it is only if the complaint is filed by any one in his personal name for and on behalf of the company that the question of authorisation could arise. The court held on the facts of the case that the criminal complaint filed in the name of the company by its administrative officer against another company on the bouncing of two cheques issued by the latter company was maintainable. The Gujarat High Court again in the case of *Anil G Shah v. Chittaranjan Co.* [1998] XXIX(1) GLR 303 held that the complaint under sections 138 and 142 of the Negotiable Instruments Act can be filed by the power of attorney holder of the payee. The reason adopted was that when section 142 did not specifically say that the complaint must be filed by the payee, personally,

lodging of the complaint by the power of attorney holder of the payee could not be said to be illegal or invalid. In another decision of Gujarat High Court in the case of *Ajay Ramniklal Modi v. State of Gujarat* [1998] Bankers' Journal 801, the Gujarat High Court held that as a general rule criminal law can be set in motion by anyone except where provided otherwise and that the law as to negotiable instruments emanates from principles of common law and codified to an extent under the Negotiable Instruments Act or the Contract Act. The court, therefore, accepted the contention that a duly constituted attorney can act on behalf of the payee or holder in due course, as the criteria under clause (a) of section 142 stands fulfilled when it is disclosed that the complaint is filed through the attorney and this fact should be clearly stated in the cause title itself.

Bombay High Court rulings

6. In the case of *Suresh Srinivasan Iyengar v. State of Maharashtra* [1998] 4 BCR 589, the validity of the criminal complaint was challenged before the Bombay High Court on the ground that the constituted attorney had not mentioned in the title of the complaint that he was the attorney holder of the complainant. The Bombay High Court, after referring to a catena of decisions, dismissed the writ petition and held that such grounds are untenable and that such technical defects cannot be permitted to defeat the provisions of sections 138 and 142 of the Negotiable Instruments Act. In another, *Credential Finances Ltd. v. State of Maharashtra* [1998] 3 MHLJ 805, the Bombay High Court has held that neither Negotiable Instruments Act nor the Companies Act imposes a pre-condition that there has to be an authorisation as per any statutory provision. A manager or managing director, ordinarily by the very nomenclature, can be taken to be the person incharge of the affairs of the company for its day-to-day management. In the said case, the complaint was already registered and cognisance had been taken by the magistrate and hence the Bombay High Court held all that could be insisted upon was the existence of authorisation and no special express authorisation was necessary for initiating proceedings by the administrative manager, though on behalf of the company. The Bombay High Court relied upon its earlier decision reported in *Bratindranath Banerjee v. Hiten B Dalal* [1995] 18 CLA 86 where it was held that the complaint filed by the director and/or officer of the bank not having been filed in its individual capacity is to be understood as a complaint by the bank. Accordingly, the complaint was restored and was ordered to be proceeded with in accordance with law.

Contrary views expressed by the Andhra Pradesh High Court

7. However, the Andhra Pradesh High Court has taken a different view in the case of *Satish & Co. v. S R Traders* [1997] 4 All MR 58 that the High Court has held that the complaint was not maintainable where the complaint was filed by the company represented by its manager when he was not authorised to file the complaint, and after a full-fledged trial the complaint was quashed on the ground that the manager was not

specifically authorised by the company at the time of filing of the complaint. The court observed that the designation manager does not clothe a person with all the powers to file a suit and defend a suit or file a complaint for and on behalf of the company and that unless there was a specific authorisation from the company a complaint filed by such manager was incompetent. The same High Court in the case of *L Raja Krishna Reddy v. Satwik Drugs Ltd.* [1998] All MR 1 held that the question as to whether the manager of the company is competent to file the complaint is one of the facts to be decided at the trial of the case and that the complaint cannot be quashed on that ground under section 482 of the Code of Criminal Procedure.

Calcutta High Court points out that a company has necessarily to act through its authorised officers

8. In *Mohanlal Khemchand v. Pawarkar Mahonkar* [1997] Bankers Journal 40, the Calcutta High Court held that a company being a juristic person could only act through its officers. In that case the complaint was filed by an authorised officer of Albert David Ltd., a company which was the holder in due course of a dishonoured cheque. Necessary averments were made in the complaint that the officer had been duly authorised by the company and the letter of authorisation was also annexed to the complaint. Accordingly, an application for discharge filed by the accused in that case contending that the complaint was not maintainable, was dismissed.

Section 291 of the Companies Act empowers a company's Board to authorise its officers to initiate criminal action

9. It has to be borne in mind, in this connection that the provisions of section 291 of the Companies Act, 1956 authorise the Board of directors of the company to exercise such powers to do all such acts, matters and things as the company is authorised to exercise and do. A resolution of the Board is the only evidence of a decision by the Board. It is not free from doubt whether any director, including the managing director, can file a criminal complaint against a third party on behalf of the company, unless there is evidence demonstrating in the form of minutes of an earlier Board meeting of application of mind to the case resulting in the institution of the complaint. Whether the administrative officer or secretary or anybody else who is not a director, can presume to act or has authority to act on behalf of the company without the Board's sanction is even more controversial.

A duly constituted attorney of a company is competent to start legal action on its behalf

10. Ordinarily, a person who can act in a particular manner can also do so through his agent. There should be no difficulty in accepting the idea that a duly constituted attorney can act on behalf of the payee or holder in due course under clause (a) of section 142 of the Negotiable Instruments Act. It is pertinent to note that for recovery of a debt, a suit can be filed by an

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the beginning of the financial year and funds required for retaining/rehabilitation of employees availing VRS would be placed with Department of Public Enterprises. In pursuance of this decision, the Government of India hereby abolishes National Renewal Fund (NRF) set up *vide* Resolution published in the Gazette of India, Extraordinary Part-I, section 1 dated 3rd February, 1992.

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LEGAL BRIEF – INDIAN

Beverages 'Frooti' and 'Appy' are not 'fruits' attracting market fee under the Bihar Agricultural Produce Market Act, 1960.

In *Edward Keventer (P.) Ltd. v. Bihar State Agricultural Marketing Board* [Civil Appeal No. 2503 of 1998 decided on 11th August, 2000], Division Bench of the Supreme Court comprising Mr. Justice V N Khare and Mr. Justice Doraiswami Raju held that the products 'Frooti' and 'Appy' not being specified in the Schedule to the Bihar Agricultural Produce Market Act, 1960, the Bihar State Agricultural Marketing Board has no authority to demand any fee from the company manufacturing the said products. The Apex Court also observed that though 'Frooti' and 'Appy' are manufactured out of mango pulp and apple concentrate, but after the mango pulps and apple concentrate are processed and beverages are manufactured, the products become entirely different items, and the fruits mango and apple lose their identity.

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agent. Order 3 of the Code of Civil Procedure, 1908 recognises the concept of a recognised agent. Thus, in the context of the recent decisions of the various High Courts as cited above, it can fairly be concluded that where the criminal complaints are filed in the name of a legal entity, *viz.*, a company, there is no legal bar and the complaints are maintainable. However, in the event of a complaint not being filed in the name of a legal entity, but in the name of a manager of the organisation, prior authorisation is a necessity and appropriate averments will have to be incorporated in the complaint and proof of authorisation must be produced or annexed with the complaint.

EDITOR'S POST SCRIPT

It is necessary for every company to have resolutions passed by its Board of directors authorising designated officers to initiate and conduct legal action, where necessary. The law requires the Board to apply its mind to individual cases. There can hardly be any excuse for any Board not applying its mind to all criminal cases and also all arbitration and non-civil cases, involving large sums of money. Authenticated copies of the resolutions should be made available to the authorised officers for production in the courts, when required.