

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.06.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.S.RAMANATHAN

CrI.O.P. Nos.727 and 728 of 2010
and
M.P.Nos.1 and 2 of 2010 in CrI.O.P.No.727 of 2010
and
M.P.No.1 of 2010 in CrI.O.P.No.728 of 2010

S.Santhi Petitioner in the above OPs

Vs.

1. R.Chinnappa Chetty

2. M/s.Jai Ganesh Exports,
by partner, M.Kumaresan,
26, Thirugnanam Nagar,
Mariamman Koil New Street,
Dadagapatti, Salem - 6.

3. M.Kumaresan

4. K.Asha ... Respondents in the above OPs

PRAYER : Criminal Original Petition No.727 of 2010 filed under Section 482 of the Code of Criminal Procedure praying to call for the records in C.C.No.480 of 2002 on the file of the learned Judicial Magistrate Court No.4 at Salem and quash the same.

Criminal Original Petition No.728 of 2010 filed under Section 482 of the Code of Criminal Procedure praying to call for the records in C.C.No.479 of 2002 on the file of the learned Judicial Magistrate Court No.4 at Salem and quash the same.

For Petitioner in both
the Writ Petitions

: Mr.A.Thiagarajan

For 1st Respondent
in W.P.No.727 of 2010

: Ms.Zeenath Begam
for M/s.T.Murugamanickam

O R D E R

The first accused in C.C.No.480 of 2002 and C.C.No.479 of 2002 on the file of the Judicial Magistrate No.IV, Salem is the petitioner in these petitions. The respondent filed the above complaint against the petitioner and 3 others under section 138 of the N.I.Act and these petitions are filed to quash the same.

2. It is submitted by the learned counsel for the petitioner that even as per the averments made in the complaint filed by the respondent, the cheque was drawn on second accused partnership firm represented by partner in favour of the first accused and the first accused endorsed the cheque in favour of the complainant/respondent and therefore, the petitioner first accused was not the drawer of the cheque and she was only an endorsee of the cheque and as per section 138 of the N.I.Act only a drawer can be called upon to pay the amount and endorsee cannot be called upon to pay the amount and liability was fastened on the drawer of the cheque and therefore, the petitioner who was only an endorsee cannot be prosecuted and relied upon the judgment of this Court in 2010 (1) MWN (Cr.) DCC 103 in the matter of Motion Leathers rep.by its partner and another Vs. Moulana, Prop.of K.K.M. Leathers and two others and 2013 (2) MWN (Cr.) DCC 97 (SC) in the matter of Aparna A.Shah Vs. Sheth Developers Pvt.Ltd., and another.

3. The first respondent was served and his name was printed but there was no representation for the first respondent in CrI.O.P.No.728 of 2010. As the first respondent is one and the same person in both the cases, the learned counsel appearing for the first respondent in Criminal O.P.No.727 of 2010 was heard.

4. The learned counsel for the first respondent/complainant submitted that under section 8 of the N.I.Act, the "holder" of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. Under section 139 of the N.I.Act, a presumption can be drawn even in favour of the holder of a cheque and therefore, submitted even though the petitioner/first accused was not the drawer of the cheque, admittedly, she endorsed the cheque in favour of the respondent/complainant and the cheque was drawn only by the second accused/partnership firm and therefore, all of them were liable to be punished under section 138 of the N.I.Act and relied upon the judgment reported in 2000 (1) CTC 94 in the matter of Anil Hada Vs. Indian Acrylic Ltd.,.

5. I am unable to accept the contention of the respondent/complainant. It is admitted that the cheques were issued by the second accused/partnership firm represented by its partners and the payee was Shree Chendur Fabrics. It is seen from the reverse side of the cheque that the petitioner claiming to be the proprietrix of Shree Chendur Fabrics signed the cheque on the reverse side and thereafter, the cheque was presented by the respondent/complainant who claims to be the proprietor of M/s.Saravana Textiles. Therefore, the respondent/complainant filed the complaint as holder of the cheque drawn by the second accused. A reading of section 138 of the N.I.Act makes it clear that when the cheque was dishonoured, the payee or the holder of the cheque as the case may be should issue a notice in writing to the drawer within 30 days of the receipt of information by him from the Bank regarding the return of the cheque as unpaid and after receipt of the said notice from the holder in due course, the drawer should have failed to pay the cheque amount within 15 days of receipt of the said notice.

6. Admittedly, the second accused is the partnership firm. Accused Nos.3 and 4 are the partners of the firm/second accused. The first accused is only an endorsee of the cheque who endorsed the cheque. Even according to the complainant, the petitioner is not the drawer. Therefore, as per proviso to section 138, drawer alone is liable to make the payment within 15 days from the date of receipt of notice and no liability is fastened on the endorsee of the cheque.

7. In the judgment reported in 2010 (1) MWN (Cr.) DCC 103 supra, the learned Judge after relying upon the judgment reported in 1991 (2) MWN (Cr1) 237 (Mad) in the matter of S.Badhusha Bibi v. Anandkumar held as follows:-

"10. It is settled law that only the drawer of the cheque can be prosecuted for the offence under section 138 of the Negotiable Instruments Act but not the endorsee. Here, in these cases, admittedly, the petitioners herein are not drawers of the cheques, which were dishonoured, but they are only the endorsees of the cheques in question. Therefore, they cannot be prosecuted under section 138 of the Negotiable Instruments Act. The decision relied upon by the learned counsel for the petitioners squarely applies to the facts of this case."

8. In the judgment reported in 2013 (2) MWN (Cr.) DCC 97 (SC), it has been held as follows:-

"This Court reiterates that it is only the drawer of Cheque who can be made an accused in any proceeding under section 138 of the Act."

9. Therefore, from the above judgment, it is made clear that an endorsee cannot be prosecuted and only drawer of the cheque can be prosecuted and admittedly, the petitioner was not the drawer of the cheque. The judgment relied upon by the learned counsel reported in 2000 (1) CTC 94 supra cannot be applied to the facts of the case as that judgment deals with the presumption and we are not dealing with the presumption in this case.

10. Hence, the petitions are allowed and the proceedings in C.C.Nos.480 and 479 of 2002 on the file of the Judicial Magistrate No.IV, Salem is quashed insofar as the petitioner is concerned.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

asvm

To

The Judicial Magistrate Court No.4,
Salem.

+1cc to M/s.T.Muruga Manickam, Advocate, S.R.No.27555

+2cc's to M/s.A.Thiyagarajan, Advocate, S.R.No.27324 & 27325

CRL.O.P. Nos.727
and 728 of 2010

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Crl.O.P.No.727 of 2010

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