

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.07.2015

DELIVERED ON : 27.07.2015

CORAM:

THE HONOURABLE MR.JUSTICE P.N.PRAKASH

CrI.O.P. Nos.26813 to 26816 of 2013

and

M.P. Nos.1 to 1 of 2014

and

M.P.No.1 of 2013

1.KGS Developers Ltd.
63, Kamaraj Avenue, I Street
Adyar, Chennai 600 020.

2.Gigi George ... Petitioners in CrI.O.Ps.26813
and 26815/2013

1.Pichaiya Velayutham Sanmugam
2.Kumaran Kandasamy ... Petitioners in CrI.O.Ps.26814
and 26816/2013

Vs

Rakesh P.Sheth ... Respondent in all CrI.O.Ps.

Prayer:- Criminal Original Petitions filed under Section 482 Cr.P.C. to call for the records in C.C.No.4382 of 2013 and C.C.No.4383 of 2013 pending on the file of the Fast Track Court [Magisterial level] Saidapet, Chennai 15 and quash the proceedings as against the petitioners.

For Petitioners : Mr.A.Ramesh,
Senior Counsel
for M/s S.Chitra, C.Arun Kumar,
For Respondent : Mr.ARL.Sundaresan,
Senior Counsel
for M/s Nithyaesh Vaibhav

C O M M O N O R D E R

These petitions have been filed to call for the records in C.C.No.4382 of 2013 pending on the file of the Fast Track Court [Magisterial level] Saidapet, Chennai 15 and quash the same.

2. For the sake of convenience, the first accused in this case will be referred to as M/s Developers Limited and its sister concern, namely M/s KGS Constructions Limited will be referred to as Constructions Limited.

3. Shorn of immaterial frills, the dispute between the accused and the complainant stems from a memorandum of understanding dated 29.11.2012. It appears that Gigi George [A2] was the Managing Director of M/s Developers Limited and Rakesh Sheth [complainant] was the Managing Director of Constructions Limited. They seem to have had some differences of opinion and after protracted negotiations, they entered into a Memorandum of Understanding on 29.11.2012, wherein Developers Limited has been shown as first party, Construction Limited as the second party, Rakesh Sheth [complainant] as third party and one M/s Clover Design Studio represented by Rakesh Sheth has been shown as fourth party. The clauses in the Memorandum of Understanding relevant for the adjudication in this petition are extracted hereunder:

"This Memorandum of Understanding has been signed between the above constituents and it has been agreed among other things that 21,25,000 equity shares standing in the name of the THIRD PARTY of KGS Constructions Limited shall be sold to the FIRST PARTY at a cost of Rs.2,12,50,000/- (Rupees two crores twelve lacs fifty thousand only)

The FIRST PARTY has entrusted and appointed The FOURTH PARTY as the Architect for their upcoming projects at Karsangal, Siruseri, Talambur, Pallikaranai and Taramani all the suburbs of Chennai. The FOURTH PARTY has already prepared all the necessary drawings for the said projects and has submitted the same to the undertaking persons both in hard and soft copies and Professional fees of Rs.2,50,00,000/- should be paid to the FOURTH PARTY by the FIRST PARTY as per the time scheduled in this Memorandum of Understanding.

The SECOND PARTY has agreed to pay a one time settlement of Rs.3,87,50,000/- (Three crore eighty seven lac fifty thousand only) for relinquishing the position of Managing Director, service rendered in the company and

handing over the management of the company to Gigi George of the SECOND PARTY and on subsequent meeting on 29.11.2012 the SECOND PARTY has requested for a waiver of Rs.37,50,000/- and the THIRD PARTY as accepted the waiver of Rs.37,50,000/- subject to FIRST and Second party pays all their dues as per this agreement. If the FIRST and Second Party fails to pay the amounts mentioned in this agreement the waiver of Rs.37,50,000/- will be cancelled and the same amount of Rs.37,50,000/- shall be paid on or before 31st March 2013. The net amount payable by the SECOND PARTY as one time settlement will be Rs.3,50,00,000/- (Three crore fifty lac only) subject to the conditions above.

.....

12. One time Settlement fees of Rs.3,50,00,000/- (Three crore fifty lacs only) as compensation for relinquishment of Managing Directorship of M/s KGS Constructions Limited shall be paid to Mr.Rakesh P. Sheth by the Second Party after adjusting an amount of Rs.25,00,000/- (Twenty five lacs) received on 09.11.2012 by way of RTGS (UTR CNRBH12314723311) from Canara Bank, Kasturba Nagar Branch, Adyar, Chennai. The Net amount of Rs.3,25,00,000/- (Rupees Three Crore Twenty Five Lacs Only) shall be paid as per the Schedule mentioned below:

Date	Rakesh P.Sheth	Cheque No	Drawn On	Branch
Net Amount	3,25,00,000.00			
20.02.2013	1,62,50,000.00	408922	Canara Bank	Chennai-20
30.03.2013	1,62,50,000.00	408925	Canara Bank	Chennai-20

4. The two impugned cheques in these two cases are referred to in clause 12 extracted above. These two cheques were issued by M/s Developers Ltd. [A1] and signed by Gigi George [A2] for the debt of M/s Constructions Ltd. When Rakesh Sheth presented those cheques, they were dishonoured and after issuing the statutory notice under Section 138 of the Negotiable Instruments Act, he filed two complaints under the NI Act, which were taken on file as C.C.No.4382/2013 [for Cheque No.408925 dated 30.03.2013 for Rs.1,62,50,000/-] and C.C.No.4383 of 2013 [for cheque no.408922 dated 20.02.2013 for Rs.1,62,50,000/-] by the IX Metropolitan Magistrate, Saidapet and after recording of sworn statement,

process was issued to Developers Limited [A1], GigiGeorge [A2], Pichaiya Velayutham Sanmugam [A3]/whole time Director and Kumaran Kandasamy [A4]/whole time Director, challenging which these petitions are filed.

5. Before advertng to the rival submissions, it may also be necessary to extract verbatim the relevant averments in the complaint:

"6. The complainant states that the shares held by him in the company KGS Constructions Limited in and by a Memorandum of Understanding was agreed to be sold to the first accused for consideration. The Memorandum of Understanding stipulates and spells out the consideration. Since there was a default on the part of the accused a fresh Memorandum of Understanding was entered into on 29.11.2012 and in furtherance of the same, the cheque subject matter of this complaint was issued in part liquidation of the liability with an assurance and promise to honour the cheque on due presentation. Copy of the Memorandum of Understanding dated 29.11.2012 is annexed as document along with the complaint and the complainant craves leave of this Hon'ble Court to treat the same as part and parcel of the complaint. Apart from the above, another cheque bearing No.408922 for a like sum was issued in liquidation of the liability which was on presentation returned and a separate complaint is being preferred."

6. Mr.A.Ramesh, learned Senior Counsel appearing for the accused made the following submissions:

[a] In paragraph 6 of the complaint and the sworn statement, the transactions mentioned therein relate to sale of shares, whereas, the impugned cheques were issued, according to the Memorandum of Understanding, as consideration for the complainant to resign from M/s Constructions Limited, and hence there is a patent contradiction.

[b] Admittedly, the Complainant was the Managing Director in M/s Constructions Limited, from which he has to quit after receiving Rs.3.5 crores and for that debt, M/s Developers Limited [A1] has given the impugned cheques about which there is no averment either in the complaint or in the sworn statement.

[c] The entire Memorandum of Understanding is void in the light of Sections 23 and 24 of the Contract Act, inasmuch as the

transactions in the Memorandum of Understanding is violative of Sections 318 and 77 of the Companies Act, 1956. To further expatiate, if one portion of a contract is void, the entire contract is vitiated and any debt on a void contract is unenforceable.

[d] That by virtue of Sections 91, 92 and 93 of the Evidence Act, no oral evidence can be permitted to expand the scope of the Memorandum of Understanding dated 29.11.2012.

[e] Lastly, Pichaiya Velayutham [A3] and Kumaran Kandasamy [A4] cannot be made vicariously liable under Section 141 of the Negotiable Instruments Act, in the absence of the averments that they were incharge of, and responsible to the affairs of the Company when the impugned cheques were issued.

7. In support of his contention, Mr.A.Ramesh, learned Senior Counsel relied upon the following judgments:

S.No	Citation	Title
1	MANU/AP/0294/2006	Spring Fields Financial Services Ltd. Vs State of A.P. & Another
2	MANU/BH/1310/2010	Vijay Sharma & another Vs State of Bihar
3	MANU/DE/9709/2006	Virender Singh Vs Laxmi Narain & another
4	(2009) 10 SCC 48	K.K.Ahuja Vs V.K.Vora and another
5	(2010) 3 SCC 330	National Small Industries Corporation Limited V Harmeet Singh Paintal and another
6	(2013) 4 SCC 505	GHCL Employees Stock Option Trust Vs India Infoline Ltd. & others
7	(2008) 5 SCC 668	Maksud Saiyed vs. State of Gujarat
8	2005 (3) KLJ 29	J.Daniel vs State of Kerala

8. In reply Mr.ARL Sundaresan, learned Senior Counsel submitted that, the complaint cannot be read in isolation, as the complaint itself states in para 6 [extracted above] that the Memorandum of Understanding should be read as part and parcel of it. He further submitted that, in view of the existence of Arbitration Clause in the Memorandum of Understanding, the matter was taken for arbitration before Mr.Justice Vinod Kumar Sharma, a retired Judge of this Court who in his arbitral award has considered all these aspects and negated them.

9. It is the contention of Mr.ARL Sundaresan, learned Senior Counsel that, though the arbitral award is not binding on the criminal Court nor on this Court, yet, the aforesaid points were raised before the learned arbitrator, who has given cogent reasons for negating it and therefore, the complainant should also be given an opportunity to convince the Magistrate after adducing evidence about the frailty in the aforesaid submission of the accused and without such an opportunity, the prosecution cannot be stifled under Section 482 Cr.P.C. by this Court by interpreting the Memorandum of Understanding in the manner in which the accused wants this Court to read.

10. The first judgment relied upon by Mr.A.Ramesh, learned Senior Counsel in Spring Field's case relates to the purchase of shares by the complainant in violation of Section 77 of the Companies Act and in that context, after a full fledged trial in an appeal against conviction, the Andhra Pradesh High Court had set aside the conviction and sentence.

11. The judgment in Vijay Sharma relates to a case where, the accused promised to get a job for the complainant in the Police Force and took money and returned the money by cheque, which bounced. In those circumstances, the Court said that the contract itself is a void contract and therefore, Section 138 of the Negotiable Instrument Act cannot apply. Similar is the finding in Virender Singh's case. Here, the complainant has clearly stated in para 6 of the complaint, extracted above, that the Memorandum of Understanding dated 29.11.2012 should be read as part and parcel of the complaint and he has also enclosed the Memorandum of Understanding as document, along with the private complaint. It must be remembered that the amount of Rs.3.5 crores was agreed to be paid not for the mere resignation of the complainant from M/s Constructions Limited as contended by Mr.A.Ramesh, learned Senior Counsel. In fact, the impugned cheques were not paid by M/s Constructions Limited, but by M/s Developers Limited [A1], in which Gigi George is the Managing Director.

12. The argument of Mr.A.Ramesh, learned Senior Counsel that, the cheques were given for getting resignation simpliciter of the complainant as Managing Director of M/s Constructions Ltd., which is violative of Section 318 of the Companies Act, has to be stated only to be rejected. The Memorandum of Understanding clearly states that the sum of Rs.3,87,50,000/- has to be paid to the complainant for relinquishing the position of Managing Director, service rendered in the Company and handing over of the management of the Company to GigiGeorge. This aspect was gone into in detail by Mr.Justice Vinod Kumar Sharma in the arbitral award and the relevant portion is extracted hereunder:

"115. In my view, on proper construction of the MOU, the one-time settlement amount of Rs.3,87,50,000/- (Rupees three crore eighty seven lakh fifty thousand only) was agreed to be paid for relinquishing the position of Managing Director, service rendered in the company and for handing over the management of the company. This is because the initial part of the MOU records what has been agreed between the parties. Clause 12 does not intend to dilute the scope of that agreement. It records how the one-time settlement amount is being paid. Therefore, in my view, clause 12 cannot dilute the agreement regarding payment of the one-time settlement as recorded in the initial part of the MOU dated 29.11.2012.

119. The first question to be answered is whether the one-time settlement for relinquishing the position of Managing Director, service rendered in the company and handing over management of the company" as contemplated by the MOU dated 29.11.2012 amounts to "compensation for loss of office or consideration for retirement from office" and therefore attracts the rigour of Section 318.

128. In view of the above, I am of the view that one-time settlement amount contemplated by the MOU dated 29.11.2012 is not a payment in terms of sub-clause (1) of Section 318. Accordingly, the question of exceptions laid down in sub-clause (3) or limits laid down in sub-clause (4) applying to such payment does not arise."

13. This Court is not relying upon the aforesaid finding in the arbitral award to conclude that the same is binding because, this Court is aware of the provisions of Sections 41, 42 and 43 of the Indian Evidence Act and the circumstances under which the finding of one Court will be binding on another. This Court has extracted the aforesaid paragraphs from the arbitral award only for the limited extent to show that, an opportunity should be given to the complainant to convince the Magistrate that the Memorandum of Understanding is not void in terms of Section 77 or in terms of Section 318 of the Companies Act.

14. In fact, the Hon'ble Supreme Court in S.Krishnamoorthy vs. Chellammal [(2015) 4 SCC 371] has stated that, this Court under Section 482 Cr.P.C. should not venture into disputed questions of fact and quash prosecutions under Section 138 of the Negotiable Instruments Act.

15. Now coming to the prosecution against Pichaiya Velayutham Sanmugam [A3] and Kumaran Kandasamy [A4], Mr.ARL Sundaresan, learned Senior Counsel appearing for the complainant submitted that, in the statutory notice issued under Section 138 of the Negotiable Instruments Act, it has been clearly averred as follows:

"3. That the second of you is the Managing Director and signatory to the cheque. That the third and fourth of you are the whole time Directors of the Company and are associated with the day to day affairs of the company, more particularly with this transaction. That you all are liable for the dishonour of the above cheque."

and that would be sufficient for the prosecution to proceed against him. He also contended that, in the cause title of the complaint, the two accused have been designated as whole time Directors. In support of his contention, he relied upon the judgment of the Supreme Court in K.K.Ahuja vs V.K.Vora and another [(2009) 10 SCC 48], wherein it is stated as follows in paras 21 and 27:

"21. A combined reading of Sections 5 and 291 of Companies Act, 1956 with the definitions in clauses (24), (26), (30), (31), (45) of section 2 of that Act would show that the following persons are considered to be the persons who are responsible to the company for the conduct of the business of the company : --

- (a) the managing director/s;
- (b) the whole-time director/s;
- (c) the manager;
- (d) the secretary;
- (e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act;
- (f) any person charged by the Board with the responsibility of complying with that provision (and who has given his consent in that behalf to the Board); and
- (g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so

specified, all the directors."

16. Relying upon, this he contended that, the averment that the accused are whole time Directors will be sufficient enough even in the absence of the averment that they were in-charge of and responsible to the affairs of the Company as required under Section 141 of the Negotiable Instruments Act. I am unable to persuade myself to agree with this proposition, because even in K.K.Ahuja's case, in paragraph 27(i), the Apex Court has stated as follows:

"27. The position under section 141 of the Act can be summarized thus :

(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix 'Managing' to the word 'Director' makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company."

Only for Managing Director and Joint Managing Director, there is exemption from making such an averment in the complaint and for the others, this fundamental averment is required.

17. Mr.ARL.Sundaresan, learned Senior Counsel appearing for the complainant made a valiant attempt to save the situation by relying upon the various provisions of the Companies Act, 2013 to drive home the point that, a whole-time Director is also equally liable to be prosecuted under Section 138 of the Negotiable Instruments Act. It is seen that the Companies Act, 2013 was not in force at the time when the impugned cheques were issued by the accused. May be for the purpose of the Companies Act, the whole-time Director could be considered as a key managerial person, but that principle cannot be telescoped into the provisions of the Negotiable Instruments Act, where a vicarious criminal liability is being fastened for which there should be necessary averments in the complaint.

18. In Pooja Ravinder Devidasani vs. State of Maharashtra and another [2014 (14) Scale 170], the Supreme Court has clearly stated as follows in para 30:

"30. Before a Magistrate taking cognizance of an offence under Section 138/141 of

the N.I. Act, making a person vicariously liable has to ensure strict compliance of the statutory requirements."

In the result, Crl.O.P.Nos.26813 and 26815 of 2013 are dismissed. Crl.O.P.Nos.26814 and 26816 of 2013 are allowed and the prosecution against Pichaiya Velayutham Sanmugam [A3] and Kumaran Kandasamy [A4] are quashed. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

gms

To

1.Fast Track Court [Magisterial level]
Saidapet, Chennai 15

2.The Public Prosecutor
High Court, Madras.

+3cc's to Mr.P.N.Vignesh, Advocate, S.R.No.37960

+1cc to M/s.Nithyaesh Vaibhav, Advocate, S.R.No.38176

Crl.O.P. Nos.26813 to 26816 of 2013

KM(CO)
CA(12/08/2015)

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