

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.03.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**Crl.O.P No.10031 of 2011
and
M.P.No.1 of 2011**

N.Vasantha

... Petitioner

vs.

R.Srinivasan

... Respondent

Prayer: Criminal Original Petition filed under section 482 of Criminal Procedure Code, to quash all further proceedings as against her in C.C.No.7971 of 2010, on the file of the learned IX Metropolitan Magistrate, Saidapet, Chennai.

For Petitioner : Mr.R.Baskar

For Respondent : Mr.V.Sairam

ORDER

The petitioner has come up with the present quash petition to quash the proceedings in C.C.No.7971 of 2010 pending on the file of the on the file of the learned IX Metropolitan Magistrate at Saidhapet, Chennai.

2.The factual matrix of the petitioner's case is that the respondent herein has filed the above complaint in C.C.No.7971 of 2010 against the petitioner/1st accused and her son, on the file of the learned IX Metropolitan Magistrate at Saidhapet, Chennai for an offence under Section 138 of The Negotiable Instruments Act. According to the respondent /complainant the accused borrowed a hand loan of Rs.9,08,000/- but failed to repay the same in time. Thereafter the 2nd accused issued the cheque bearing No.575885 dated 20.07.2009 drawn on ICICI Bank Ltd., Vellacherry Branch, Chennai. But when the same was presented for collection on 21.08.2009 it was returned dishonored for want of sufficient funds. Therefore the respondent herein filed the above complaint against the petitioner herein and her son.

3.The allegations leveled against the petitioner herein/1st accused is untrue, however the above criminal complaint came to be filed under Section 138 of the NI Act by the respondent. The said complaint filed against the petitioner is a sheer abuse of process of Court and Law, besides hit by Limitation. Despite that the petitioner being not the drawer of the cheque, above complaint came to be filed beyond the Scope of Negotiable Instruments Act. Therefore the petitioner is before this Court invoking the inherent power of this Court under Section 482 of Cr.P.C to

quash the above private complaint.

4.I heard Mr.R.Baskar, learned counsel appearing for the petitioner and Mr.V.Sairam, learned counsel appearing for the respondent and perused the entire records.

5.The learned counsel for the petitioner would submit that the petitioner cannot be roped in the above case merely because she is the mother of the 2nd accused. Furthermore the petitioner is not the drawer of the cheque and the cheque involved in the case was not drawn on an account maintained by the petitioner. Further the petitioner is not a party to the above transaction of dishonor of the cheque and the same can be ascertained from the pleadings of the complaint filed by the respondent stating that the 2nd accused alone is the drawer of the cheque and the subject cheque was drawn on an account maintained by the 2nd accused. Therefore the above Criminal Complaint lodged by the respondent is an abuse of process of Law and the same is liable to be quashed.

6.The learned counsel for the petitioner relies on the following judgments of the Hon'ble Apex Court to substantiate his claim that the proceeding under Section 138 of the Negotiable Instruments Act is

maintainable only as against the drawer of the cheque and not against anybody else.

1. **2010-2-LW (Cri) 1279 (SC)** in a case between **P.J.Agro Tech Limited & Ors. v. Water Base Limited**
2. **(2009) 14 SCC 683** in a case between **Jugesh Sehugal v. Shamsher Singh Gogi**
3. **1998 SCC (Cri.) 1400** in a case between **Pepsi Foods Ltd. and Anr. v. Special Judicial Magistrate and ors.**
4. **2011-1 L.W.(Cri.) 330** in case between **Kannukiniyal v. Sri Santhossimatha**

7.Per contra, the learned counsel for the respondent would submit that both the accused have borrowed the hand loan of Rs.9,08,000/-, but have failed to repay the same in time. Thereafter the accused issued check bearing No.575885 dated 20.07.2009 drawn on ICICI Bank Ltd., Vellacherry Branch, Chennai. But when the same was presented for collection on 21.08.2009 it was returned dishonored for want of sufficient funds. Only thereafter the above Criminal Complaint came to be lodged against the petitioner/1st accused and her son, the 2nd accused, since they failed to repay the loan in furtherance of the demand notice issued by the respondent stating the dishonor of cheque issued by the accused.

8.On careful perusal of the records it is noticed by this Court that

the petitioner herein is neither drawer of the cheque, nor was drawn on an account maintained by the petitioner, whereas it stands drawn on the account of the 2nd accused. Further it is noteworthy that it is not the case of the respondent that the petitioner and the 2nd accused constitute association of persons and that the said association is the drawer of the cheque.

9. In the above circumstance, for appreciation of the question as to whether a criminal complaint under section 138 of Negotiable Instruments Act would lie as against any person other than the drawer, it would be relevant to look into Section 138 of Negotiable Instruments Act, which is extracted hereunder:

Section-138: Dishonour of cheque for insufficiency, etc., of funds in the account. — **Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid,** either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such

person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two year, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation— For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.

10.From the above, it is clear that only a drawer of the cheque can be prosecuted and punished for an offence under Section 138 of N.I.Act. It is needless to say for this Court that unlike civil liability, the Criminal Liability has to be gathered from the specific statutes and it should fall within the purview of the Section charged with. Therefore this Court is of the opinion that the criminal liability cannot be fastened against the petitioner and the continuance of such criminal prosecution will be an abuse of process of Court and Law.

11.In this context this Court likes to emphasis a decision of this Court made in the matter of **Seetha Lakshmi v. Suresh Bafna**, reported in **2006 (131) Company Cases 205 Mad**, holding as follows:

“3.When the above criminal original petition was taken up for consideration, no representation has been made on the part of the respondent. On the other hand the learned counsel for the petitioner besides reiterating the facts and circumstances pleaded in the above criminal original petition, would also cite two decisions, the first one rendered by the Andhra Pradesh High Court in G.Surya Prabhavathi v. Nekkanti Subramanyeswara Rao and Anr. (1998 (3) Crimes 543) and the second one rendered by this Court in the case

of Gummadi Industries Ltd., and Anr. v. Khushroo F. Engineer reported in (2000 (1) Crimes 1) both rendered by the learned single Judges respectively.

4. So far as the first judgment cited above is concerned in a proceeding under Section 138 of the Negotiable Instruments Act, 1881, on a criminal petition filed before the said High Court, wherein among the three accused who are the members of the joint Hindu family, first accused as the Manager of the joint Hindu family, third accused is his wife and all the three accused joining hands with each other, have approached the complainant and obtained the financial assistance for a sum of Rs. 1,50,000/- for the purchase of the car and in the said transaction, the first accused had issued a cheque dated 1.2.1995 for a sum of Rs. 2,56,300/- and on presentment since for want of sufficient funds in the accounts the cheque got dishonoured, criminal proceedings were initiated under Section 138 of the said Act against all the three accused and the learned single Judge of the Andhra Pradesh High Court having assessed the facts and circumstances of the case and analysing the import of Section 138 of the said Act and remarking that 'where the cheque has been drawn by a person on an account maintained by him with a banker for payment of money to another person from

out of that account, for the discharge, in whole or in part, of any debt or other liability, was returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid, only such person shall be deemed guilty of the commission of the offence subject to the other conditions mentioned in proviso to the said Section and if the person committing the offence under Section 138 of the Act is a company, then the person incharge of the company etc., as well as the company shall be deemed guilty of the offence as provided under Section 141 of the Act.

5. The learned Judge would further find that the emphasis is on the words "such person" and it is manifest from the expression of the words used in Section 138 of the Act. "Such person shall be deemed to have committed the offence" relate to the person who has drawn the cheque in favour of the payee and if the cheque is returned unpaid ... such person alone is liable but not the other except the contingencies mentioned under Section 141 of the Act.' With the above remarks, the proceeding initiated against the other two accused in the said case has been quashed by the learned single Judge.

6. In the second judgment cited above, the learned single Judge of this Court on the same subject would hold that " it is noticed that the second petitioner alone is the drawer as he has signed the cheque in his individual capacity and not as a Promoter of the first accused company.

1. Though the cheques were issued by the second petitioner towards the discharge of the liability of the first petitioner, the first petitioner company cannot be prosecuted as it is not the drawer. Therefore the proceedings as against the first petitioner are liable to be quashed and accordingly the same are quashed."

7. Since no appearance has been made on the part of the respondent, this Court is left with no choice but to decide the matter, after hearing the learned counsel for the petitioner and having regard to the materials placed on record in which event, what this Court is able to assess is that the complainant in the above case has initiated the proceeding under Section 138 of the Act on account of the returned cheque issued by the husband of the petitioner for the debt or liability alleged to have incurred by him by obtaining a loan of Rs. 10 lakhs to which the petitioner stood as guarantor and in addition to the guarantee obtained from

the petitioner he had also obtained a cheque dated 2.6.2001 for the said sum from the husband of the petitioner, who obtained the loan and on account of the said cheque having been dishonoured for the reason that the petitioner stood the guarantor which instead of approaching the civil Court to enforce the guarantee, the complainant made the petitioner also an accused in the case registered in C.C.No. 4099 of 2001 on the file of the VIII Metropolitan Magistrate, George Town, Chennai for the commission of an offence under Section 138 of the Act and only seeking to quash the said proceedings as against the petitioner, she has come forward to file the above Criminal Original Petition on averments extracted supra.

8. Not only from the construction of the provision of law under Section 138 of the Act, but also from the propositions held by the Upper Forums, two of which were cited above, particularly the first case cited above wherein the learned single Judge of the Andhra Pradesh High Court has clearly held that "under any pretext, no person other than one who has issued the cheque can be made an accused for the commission of the offence under Section 138 of the said Act, thereby quashing the proceedings against the petitioner therein and since in the case in hand also similar facts and

circumstances prevail, the same decision could be arrived at in the present case also.

9. For the cheque issued by the husband for the loan obtained by him, just for the reason that in the borrowing of the loan a guarantee has been given by the wife, the petitioner herein, which could only be enforced in a Civil Forum for the liability and since the petitioner is not a party to the issuance of the cheque, she cannot be made a party or an accused for the prosecution of the bounced cheque under Section 138 of the Act"

12. In view of the above legal proposition and in the light of the decision referred above, this Court reiterates the settled law that only a drawer of the cheque can be prosecuted and punished for an offence under Section 138 of N.I. Act.

13. However, this Court is not inclined to go into the plea of limitation put forth by the petitioner and hence the same is hereby negatived.

14. It is astonishing to note here that how the learned Magistrate

has numbered the above case and taken cognizance as against the petitioner herein / 1st accused when she is not a drawer of the cheque. In future no Court shall take cognizance of offence under Section 142 of Negotiable Instrument Act as against the person who is not the drawer of the cheque. The registry is directed to circulate this Judgment to all the lower Courts through the respective District Courts and all the Courts are hereby strictly directed to follow the principle of law laid down in this order.

15. In the result, the Criminal Original Petition is allowed and all the further proceedings in C.C.No.7971 of 2010 on the file of the learned IX Metropolitan Magistrate at Saidapet, Chennai stands quashed in so far as this petitioner/1st accused is concerned. Consequently, connected miscellaneous petition is closed.

सत्यमेव जयते

17.03.2017

Note: Registry is directed to circulate this Order to all the lower Courts through respective District Courts in Tamilnadu.

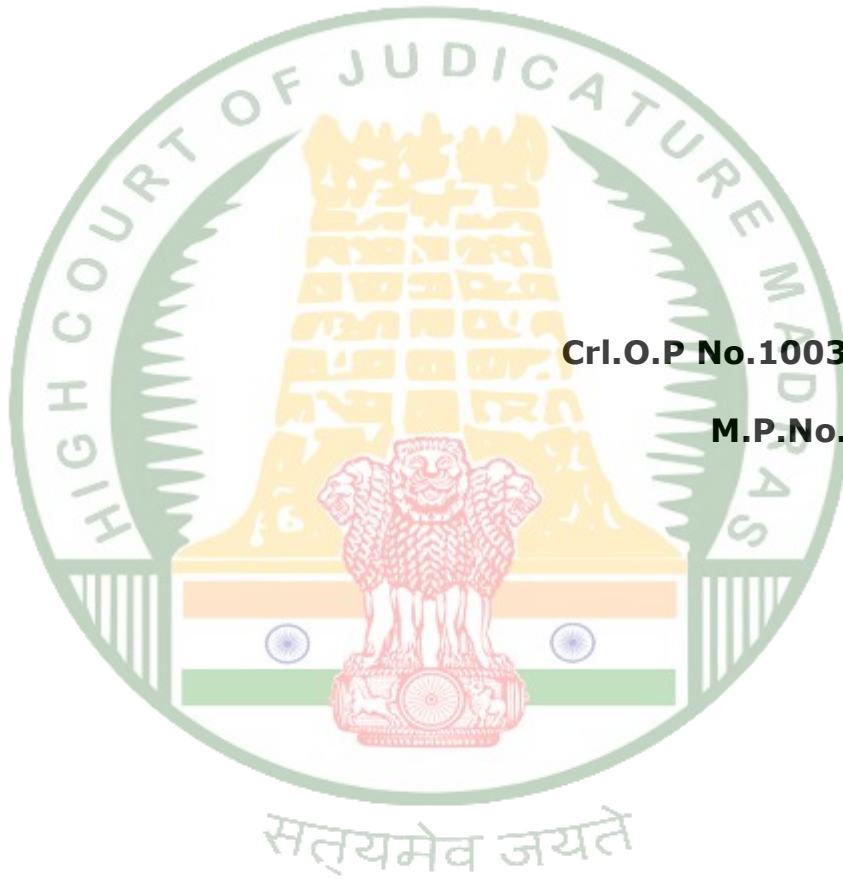
Index : Yes
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vs

To
The IX Metropolitan Magistrate,
Saidapet, Chennai.

M.V.MURALIDARAN,J.

VS



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