IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.09.2017

CORAM

THE HON`BLE MR.JUSTICE **A.D. JAGADISH CHANDIRA**

Crl.O.P.No.10517 of 2012 and M.P.Nos.1 and 2 of 2012

1. M.Srinivasan
2. P.Sridevi. ... Petitioners/Accused

Vs

V.P.Krishnamurthy ... Respondent/Complainant

Criminal Original Petition filed under Section 482 Cr.P.C, to call for the records and quash the proceedings in C.C.No.24 of 2012, on the file of the Judicial Magistrate, Fast Track Court, Vellore.

For Petitioner : Mr.S.Haroon-AL-Rasheed for M/s.T.S.Gopalan and Co.

For Respondent : Mr.E.Kannadasan

ORDER

This quash petition has been filed by the Petitioners/Accused to quash the proceedings in C.C.No.24 of 2012, on the file of the Judicial Magistrate, Fast Track Court, Vellore.

2. The complaint has been filed against the first petitioner who is the husband of the second petitioner and the second petitioner who is

the proprietorix of Sree Suba Sree Pharma. The averments in the complaint is that the first accused being a close friend of the complainant had on 1.10.2010 for his urgent business need borrowed Rs.4.00 lakhs from the complainant and for the security of the said borrowing he had executed a promissory note on the same day in favour of the complainant for a sum of Rs.4.00 lakhs, promising to repay the same on demand with interest at 24% per annum for good valid consideration and that second loan transaction also very well known to the second accused. Since the loan has been borrowed by the first accused for the development of the Sree Suba Sree Pharma, of them had been jointly and severally liable to pay the loan amount with interest to the complainant.

3. The further allegation of the complainant is that after borrowal of the said loan amount only 6 months interest has been paid to the complainant and after repeated demands made by the complainant on 5.6.2011 both the accused have come to the complainant's house and that the second accused had accepted her joint and several liability of the aforesaid loan borrowed by the first accused for Sree Suba Sree Pharma and the second accused in the presence of and consent of the first accused towards partial discharge of the said loan amount as authorised signatory of Sree Suba Sree Pharma had issued a post

dated cheque drawn on Indusind Bank, Vellore Branch in favour of the complainant for a sum of Rs.2.00 lakhs in cheque No.494101 dated 08.10.2011.

4. It is further averred in the complaint that at the time of issuing the said cheque to the complainant both the accused assured that the cheque will be duly honoured if it is presented for collection on the said date and trusting the words of both the accused herein the complainant had received the cheque. Thereafter, the complainant was shocked to receive a lawyer notice dated 29.6.2011 from the second accused alleging that she is nowhere connected to M/s. Sree Suba Sree Pharma nor obtained any loan or issued any cheque to the complainant and also alleged that the account Sree Suba Sree Pharma in Indusind Bank, Vellore has been closed on 23.12.2010. Thereafter the first accused has also issued a lawyer's notice dated 2.7.2011 to the complainant stating that he undertakes to settle the entire principal amount within two years by part payments. After that both the accused personally requested the complainant that they will discharge the entire due amount under the aforesaid promissory note dated 1.10.2010 and meanwhile not to take any legal steps against the accused for recovery of the loan amount. Hence the complainant neither issued any reply notice in respect of the lawyer's notice nor

taken any immediate legal action against both of them. As per the request made by the accused they failed to discharge the loan amount and keep up their words and thereby the complainant on 12.10.2011, through his bankers namely State Bank of India, Siruthozhil Branch, Vellore, had presented the cheque for collection and the same was returned with Indusind bank memo dated 12.10.2011 stating reason that 'account closed'.

5. It is further averred that both the accused to defraud the complainant in payment of the due amount under the promissory note dated 1.10.2010, and to escape from the liability with mala fide intention without having sufficient funds in the second accused bank account to honour the aforesaid cheque, have closed the bank account in Indusind Bank, Vellore Brnach. The said act done by both the accused by issuing a cheque after closing the bank account is an offence pubishable under Section 138 of the Negotiable Instruments Act and Section 420 of IPC. The complainant submits that on 31.10.2011 the complainant issued a lawyer's notice to both the accused to pay the aforesaid cheque amount of Rs.2.00 lakhs within 15 days from the date of receipt of the notice by Registered Post and courier. The notice served to the accused on 1.11.2011. On 14.11.2011 the second accused issued a reply lawyer's notice with

false and frivolous allegations instead of discharging the aforesaid cheque amount. Both the accused have failed to pay the amount till date. The complainant after completing the formalities under Section 138 of the Negotiable Instruments Act, had filed a complaint before the learned Judicial Magistrate, Vellore and it had been taken on file in C.C.No.24 of 2012.

6. It is seen from the records that though the quash petition had been filed by both the accused, on 11.6.2012, an endorsement had been made by the counsel stating that the Criminal Original Petition was not pressed in respect of A2, since she being the signatory of the cheque and also proprietorix of Sree Suba Sree Pharma, who had issued the cheque. Therefore, the petition was admitted only in respect of the first petitioner.

7. The contention raised by Mr.S.Haroon-AL-Rasheed learned counsel for the petitioner is that the cheque of the proprietary concern had been issued by the second accused who is the proprietorix of the concern and that the complaint can be filed only against the person who has issued the cheque, as drawer of the cheque and the proprietrix of the firm which has issued the cheque and that since the proceedings have been initiated only under Section 138 of the Negotiable Instruments Act, vicarious liability cannot be fastened on

the petitioner who is the husband and not the drawer of the cheque.

8. Now, let us draw our attention to Section 138 of the Negotiable Instruments Act.

> *"Section 138 : Dishonour of cheque for insufficiency, etc., of funds in the account Where any cheque drawn by a persons on an account maintained by him with a banker for payment of any amount of money to another persons 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 years, 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 us 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 account 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.

9. This Court and the Hon'ble Apex Court in number of decisions have held that any proprietary concern the proprietor/proprietorix as the case may be liable to be held responsible for the cheque drawn and issued by him/her. Criminal liability on account of dishonour of cheque primarily falls on the drawer and no one is held criminally liable for any act of another. This normal rule is, however, subject to exception on account of specific provisions made under Section 141 of the Negotiable Instruments Act/statute extending liability on others in the event of a drawer is a company or a partnership firm thereby fixing liability on the person who is incharge of and responsible for the conduct of the business of the company and the company. As a matter

of fact, Section 138 of the Negotiable Instruments Act contains conditions which have to be satisfied before the liability can be extended. Admittedly, no one can be fastened with criminal liability for the acts of others except as expressly provided under law and there is no vicarious liability in criminal law unless the statute specifically provided for fastening of liability. In order to constitute the offence under Section 138 of the Negotiable Instruments Act, the following ingredients which are required to be fulfilled:

> *"(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account;*
> *(ii) the cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;*
> *(iii) that 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; 8 Page 9*
> *(iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the 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 the bank;*
> *(v) the payee or the holder in due course of the*

cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice. Being cumulative, it is only when all the aforementioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have committed an offence under Section 138 of the Act."

10. In the decision reported in *(2007) 5 SCC 103*, ***(Raghu Lakshminarayanan vs. Fine Tubes)*** the Apex Court has held in para 11 to 17 as follows:-

"11. Appellant herein categorically contended that accused No. 1 was a proprietary concern of the accused No. 2 and he was merely an employee thereof.

12. If accused No. 1 was not a Company within the meaning of Section 141 of the Negotiable Instruments Act, the question of an employee being preceded against in terms thereof would not arise. Respondent was aware of the difference between a 'partnership firm' and a 'business concern' as would be evident from the fact that it described itself as a *partnership firm and the accused No. 1, as a business concern. Significantly, Respondent deliberately or otherwise did not state as to in which capacity the appellant had been serving the said business concern. It, as noticed hereinbefore, described him as in charge, Manager and Director of the accused No. 1. A person ordinarily cannot serve both in the capacity of a Manager and a Director of a Company.*

13. The distinction between partnership firm and a proprietary concern is well known. It is evident from Order XXX Rule 1 and Order XXX Rule 10 of the Code of Civil Procedure. The question came up for consideration also before this Court in M/s. Ashok Transport Agency v. Awadhesh Kumar and another [(1998) 5 SCC 567] wherein this Court stated the law in the following terms:-

"6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person but Order XXX, Rule 1, CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the

proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 of Order XXX, which make applicable the provisions of Order XXX to a proprietary concern enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order XXX have no application to such a suit as by virtue of Order XXX, Rule 10 the other provisions of Order XXX are applicable to a suit against the proprietor of proprietary business "in sofar as the nature of such case permits." This means that only those provisions of Order XXX can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case."

14. We, keeping in view the allegations made in the complaint petition, need not dilate in regard to the definition of a 'Company' or a 'Partnership Firm' as envisaged under Section 34 of the Companies Act, 1956 and Section 4 of the Indian Partnership Act, 1932 respectively, but, we may only note that it is trite that a proprietary concern would not answer the description of either a Company incorporated under *the Indian Companies Act or a firm within the meaning of the provisions of the Section 4 of the Indian Partnership Act.*

15. A Constitution Bench of this Court in S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla [A.I.R. 2005 SC 3512] furthermore categorically stated that the complaint petition must contain the requisite averments to bring about a case within the purview of Section 141 of the Act so as to make some persons other than company vicariously liable therefor. [See also Sabitha Ramamurthy & Anr. v. R.B.S. Channabasavaradhya [A.I.R. 2006 SC 3086] and S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla [2007 (3) SCALE 245].

16. For the reasons aforementioned, we are unable to agree with the High Court that no case had been made out for exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure.

17. The impugned judgment is set aside. Appeal is allowed. The complaint case against the appellant is quashed."

11. In the decision rendered by this Court *in* ***Devendra Pundir vs. Rajendra Prasad Maurya, Proprietor, Satyamev Exports S/o. Sri Rama Shankar Maurya****, reported in* ***2008 Criminal Law Journal 777***, this Court, has concluded thus:

"7. This Court is of the considered view that the

above proposition of law laid down by the Hon'ble Apex Court in the decision cited supra is squarely applicable to the facts of the instant case. Even in this case, as already pointed out, the first accused is admittedly the sole proprietrix of the concern namely, "Kamakshi Enterprises" and as such,the question of the second accused to be vicariously held liable for the offence said to have been committed by the first accused under Section 138 of the Negotiable Instruments Act not at all arise."

12. Thereafter in the case reported in ***2013 (8) SCC 71 (Aparna A.Shah vs. Sheth Developers Pvt. Ltd., and another****, the Hon'ble Apex Court while making reference to the above decision of our High Court in 2008 Criminal Law Journal 777 has held in paras 22 & 23 as follows:-*

"22.In addition to our conclusion, it is useful to refer some of the decisions rendered by various High Courts on this issue.

23. The Learned Single Judge of the Madras High Court in Devendra Pundir vs. Rajendra Prasad Maurya, Proprietor, Satyamev Exports S/o. Sri Rama Shankar Maurya, 2008 Criminal Law Journal 777, following decisions of this Court, has concluded thus:

"7. This Court is of the considered view that the above proposition of law laid down by the Hon'ble Apex Court in the decision cited supra is squarely applicable to the facts of the instant case. Even in this

case, as already pointed out, the first accused is admittedly the sole proprietrix of the concern namely, "Kamakshi Enterprises" and as such, the question of the second accused to be vicariously held liable for the offence said to have been committed by the first accused under Section 138 of the Negotiable Instruments Act not at all arise."

After saying so, learned Single Judge, quashed the proceedings initiated against the petitioner therein and permitted the Judicial Magistrate to proceed and expedite the trial in respect of others."

13. In this case, the cheque has been issued by the 2nd accused as the proprietrix of Sree Suba Sree Pharma and thereby the case of invoking Section 141 of the Act will not be applicable against the petitioner and in this case the complaint has been filed only under Section 138 of the Negotiable Instruments Act and as such Section 141 of the Act has no application in the case on hand and hence vicarious liability cannot be fastened upon the husband of the proprietrix and he cannot be implicated as accused in this case.

14. Taking into consideration the ratio decidendi that since the

accused No.2 being the proprietrix of the firm and having issued the cheque can only be liable for prosecution and thereby the proceedings against the husband for the offence under Section 138 of the Negotiable Instruments Act is an abuse of process of law and is liable to be quashed and is accordingly quashed. However since the matter is pending from 2012, the Magistrate is directed to proceed with the trial in respect of the other accused and complete the trial within a period of four months from the date of receipt of a copy of this order. Consequently, M.P.Nos.1 and 2 of 2012 are closed.

20.09.2017

gr.
Index : Yes
Internet: Yes

To

1.The Judicial Magistrate, Fast Track Court, Vellore
2.The Public Prosecutor, High Court, Chennai.

A.D.JAGADISH CHANDIRA, J

gr.

Crl.O.P.No.10517 of 2012

20.09.2017