BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 02.11.2017

CORAM

THE HON'BLE MR.JUSTICE M.DHANDAPANI

Crl.O.P.(MD)No.6895 of 2011
and
M.P.(MD).Nos.1 & 2 2011

1.M/s.Sunvision Impex (Partnership Firm)
408/14A, Madurai Road,
Ambathurai,
Dindigul-624 302.

2.S.Kavitha (Partner)
3.N.Dhanakodi (Partner) .. Petitioners/Accused Nos.2 to 4

-Vs-

A.Harihara Subramanian,
Manager and Authorized Officer,
Oriental Bank of Commerce,
16 & 17, A.R.Plaza,
North Veli Street,
Madurai-625 001. .. Respondent/Complainant

Prayer : This Criminal Original Petition is filed under Section 482 of Cr.P.C, to call for the records relating to the proceedings in S.T.C.No.107 of 2011, on the file of the learned Judicial Magistrate No.II, Madurai and quash the same in so far as the petitioners herein/Accused No.2 to 4 are concerned.

For Petitioners : Mr.M.Thirunavukkarasu
For Respondent : Mr.S.Devaraj

O R D E R

The petitioners filed this petition under Section 482 of Cr.P.C, to quash the case in S.T.C.No.107 of 2011, on the file of the learned Judicial Magistrate No.II, Madurai and quash the same.

2. The brief facts of the case is as follows:

The accused are the partners of the firm, namely, M/s.Sunvision Impex/the first petitioner herein. Admittedly, the second petitioner is a partner of the firm and the wife of A1 and the third petitioner is a partner of the firm. The petitioners borrowed a sum of Rs.50,00,000/- on 07.04.2009. The first accused in this case issued two cheques bearing Nos.078557 and 078558, dated 05.06.2010, each for a sum of Rs.10,00,000/-, totally a sum of Rs.20,00,000/- towards the part payment of the outstanding loan amount of the accused Nos.2, 3 and 4. When the cheques were presented for encashment, they were returned with an endorsement 'insufficient funds'. Thereafter, the respondent Bank issued a registered notice, dated 23.06.2010 and the same was received by the accused persons on 29.06.2010. Even, after receipt of the notice, the accused have failed to pay the amount. Hence, the respondent Bank filed the complaint under the amended provisions of the Negotiable Instruments Act before the competent Court. Thereafter, notice was issued to the Company and other partners/accused persons of the Firm. Challenging the complaint filed by the respondent Bank, the Firm and the partners filed this petition under Section 482 of Cr.P.C. before this Court.

3. The learned counsel for the petitioners would further submit that the cheques were issued by one Saravanan, who is no way connected with the Company and he further submitted that in the individual capacity, he issued the cheques to the respondent Bank. Hence, implicating the Company and other partners of the firm under Section 138 of Negotiable Instruments Act is not sustainable. In support of his argument, he relied upon the decisions of the Hon'ble Supreme Court as follows:

(a) In ***S.M.S.Pharmaceuticals Ltd., vs. Neeta Bhalla and another***, reported in ***2005 STPL(LE) 35053 SC*** *at paragraph No.19 which reads as follows:*

> *"19.In view of the above discussion, our answers to the questions posed in the Reference are as under:*
>
> *(a) It is necessary to specifically aver in a compliant under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied."*

(b) In **Monaben Ketanbhai Shah and another** ***Vs. State of Gujarat and others***, reported in ***2004 STPL(LE) 33424 SC*** *at paragraph* 6, which reads as follows:

> *"6. From the above, it is evident that in the complaint there are no averments against the appellants except stating in thee title that they are partners of the firm. Learned counsel for the respondents/complainant contended that a copy of the partnership deed was also filed which would show that he appellants were active in the business. No such document was filed with the complaint or made part thereof. The filing of the partnership deed later is of*

no consequence for determining the point in issue. Section 141 does not make all partners liable for the offence. The Criminal liability has been fastened on those who, at the time of the commission of the offences, was in-charge of and was responsible to the firm for the conduct of the business of the firm. These may be sleeping partners who are not required to take any part in the business of the firm. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in-charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and establishes that fact. The present case is of total absence of requisite averments in the complaint."

4. The learned counsel appearing for the respondent would submit that the first petitioner Company borrowed a loan from the Bank. In order to settle the loan, the guarantor/A1 issued two cheques on behalf of the partners of the company to the Bank. When the cheques were presented for encashment, they were returned with an endorsement 'insufficient fund'. It is the responsibility of the guarantor as well as the company to clear the amount. Hence, Section 138 of Negotiable Instruments Act, clearly attracted against the accused persons, who default the payment and issued cheques with insufficient funds. Therefore, they committed the offence punishable under Section 138 of Negotiable Instruments Act.

5. I have heard the learned counsel for the petitioners as well as the learned counsel for the respondent and perused the materials available on record.

6. On perusal of the complaint, it is averred in para No.6 of the affidavit that A3 and A4 borrowed a loan from the respondent Bank and A1 stood as guarantor. The loan agreement was executed in the branch office of the Bank at Madurai. In order to settle the loan, A1 issued two cheques drawn on Karur Vysya Bank Ltd., Chinnalapatti Branch on behalf of the Company/Firm. It is further cleared that A1 is none other than the husband of the second petitioner/A2. It is not the case of the personal loan transaction in between the said Saravanan/A1 and the Bank. Admittedly, the cheques were issued on behalf of the Company to the respondent Bank. Hence, the decision cited on the part of the learned counsel for the petitioner is not applicable to the case on hand. In the decision reported in ***2005 STPL(LE) 35053 SC*** relates to the complaint in which the accused/director of the company was in-charge of, and responsible to, the Company for conduct of the business of the

Company. The present case is completely different. This petitioners borrowed a loan and in order to settle the loan, the second petitioner's husband issued cheques on behalf of the Company to the Bank. Hence, the judgment relied upon by the learned counsel for the petitioner is not applicable to the present case.

7. In view of the above, since there is disputed question of facts involved in this case and it has to be decided only at the time of trial, I do not find any merits to exercise the power under Section 482 of Cr.P.C. However, it is made clear that this Court has not expressed any opinion on the merits of the case.

8. In the result, without going into the merits of the case, this Criminal Original Petition is dismissed. Consequently, connected miscellaneous petitions are also dismissed. However, it is made clear that the learned Judicial Magistrate No.II, Madurai is directed to conduct the trial and decide the case in S.T.C.No.107 of 2011 independently without influencing any of the observations made in this petition.

Sd/-
Assistant Registrar

/True Copy/

Sub Assistant Registrar

To

The Judicial Magistrate No.II,
Madurai.

+ 1 CC TO Mr.S.BALASUBRAMANIAN, ADVOCATE IN SR No. 84982
+ 1 CC TO Mr.M.THIRUNAVUKKARASU, ADVOCATE IN SR No. 85144

PJL
TE/JC/SAR-1 : 30/11/2017 : 4P/4C

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