THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NO.11859 OF 2015

ORDER:

This criminal petition under Section 482 Cr.P.C is filed by the petitioners/Accused 1 & 2 to quash the proceedings in C.C.No.816 of 2014 passed by the IX Additional Chief Metropolitan Magistrate at Hyderabad. The petitioners are the accused no.1 & 2 in the private complaint filed by the first respondent/complainant for the offences punishable under Sections 138 & 142 of Negotiable Instruments Act (for short 'Act').

A suit bearing O.S.No.123 of 2003 was filed by K.V.R. Rangachary, brother of the complainant against the respondents therein for specific performance alleging that there is an oral agreement for sale of the suit schedule property. The petitioners have filed suit for recovery of possession of the suit schedule property having purchased the same from the owners of the said suit schedule property. O.S.No.123 of 2003 filed for specific performance was dismissed and suit filed by the petitioner no.1 for recovery of possession of the suit schedule property is decreed against Sri K.V.R. Rangachary, plaintiff in O.S.No.123 of 2003. Against the said judgment and decree of dismissal in O.S.No.123 of 2003, an appeal in CCCA No.141 of 2009 was filed and another CCCA No.37 of 2009 was filed against the judgment and decree passed in CCCA No.147 of 2006 filed for recovery of possession by the petitioners.

It is the case that there was a civil litigation pending between the accused and the complainant in CCCA No. 37 of 2009 and C.C.C.A.No.141 of 2009 before this Court. Appeal in CCCA No.141 of 2009 was filed against the suit for specific performance filed by late elder brother of the complainant herein and the appeal in CCCA No.37 of 2009 was filed against the suit for recovery of possession filed by the accused no.1 against the complainant and his late elder brother and the same were pending.

During pendency of two appeals, the appellant in both the appeals i.e. Sri K.V.R. Narasimha Chary died issueless and the complainant was brought on record as legal heir to prosecute the appeals. When both the appeals were listed before this Court on 04.03.2014, due to intervention of elders, the appeals were compromised and a compromise memo dated 04.03.2014 was filed and this Court passed a compromise decree in both the appeals. As per the terms of compromise, the complainant delivered the symbolic possession of the property to the accused no.1 Smt. K. Lalitha and accused no.1 had agreed to pay an amount of Rs.18,00,000/- to the complainant towards full and final settlement. In order to comply with the condition of payment of Rs.18,00,000/-, accused no.2, being the husband of accused no.1 had issued a cheque bearing No.001802 dated 30.04.2014 drawn on Axis Bank Ltd., Towli Chowki Branch, Hyderabad and the complainant was permitted to take away his belongings by the end of April, 2014 from the house and thus the complainant was permitted to be in possession till 30.04.2014 as per the said compromise memo dated 04.03.2014. The petitioners have inspected the suit schedule premises bearing Municipal Nos.1-2-365/9, 1-2-360/9/A, 1-2-365/9/B and 1-2-365/8/A of an extent of 425 sq.yds as per the schedule of the suit in O.S.No.123 of 2003. Since the first respondent did not take away his belongings immediately, the second respondent issued instructions to stop payment of Rs.18,00,000/- covered by the cheque, which was scheduled to be encashed on the date of taking away the belongings of the first respondent, since the first respondent contravened the terms of the compromise and also the judgment and decree passed in CCCA No.141 of 2009 and CCCA No.37 of 2009.

It is stated that the first respondent had been given sufficient time to take away the belongings in the entire suit schedule property from 04.03.2014 to 30.04.2014 and the first respondent without removing belongings from the said suit schedule property of the part of the house bearing Nos. 1-2-365/9/A, and 1-2-365/8/A, presented the cheque which is obviously returned on instructions to stop payment were given by the drawee/second petitioner, since the first respondent is not entitled to encash the cheque issued by the second petitioner towards payment of amount, as it is in violation of the terms of compromise.

It is submitted that on the date of stoppage of payment of the cheque, the second petitioner, who is the drawee of the cheque is having balance amount in his account of Rs.72,79,531-63 ps as per the bank memo issue. Thus, the cheque was not dishonored because of insufficiency of funds. The cheque was issued in terms of compromise, subject to removing the belongings of the first respondent from the suit schedule premises annexed to suit O.S.No.123 of 2003. The first respondent having violated the terms of compromise, presented the cheque for encashment without removing his belongings from the suit schedule property and dishonour of the cheque on the ground of stop payment instructions by the second respondent would not constitute an offence punishable under Section 138 of the Act and therefore, the complaint itself is not maintainable, since the cheque was not issued by the second petitioner towards discharge of legally enforceable liability or debt.

The second petitioner is not liable to pay any amount, as he was not a party to the compromise and therefore, the second respondent cannot be proceeded for the offence punishable under Section 138 of the Act, since it was not issued towards discharge of legally enforceable debt or liability, as held by the Apex Court in **M/s Indus Airways Pvt. Ltd and others v. M/s. Magnum Aviation Pvt. Ltd and another**[1].

It is also contended that the dispute is purely civil in nature, as the cheque was issued in compliance of the terms and conditions and therefore, the petitioners cannot be proceeded for the offence punishable under Section 138 of the Act.

Finally, it is contended that the first petitioner was a party to the said compromise who agreed to pay the said amount and

[1] 2014 (2) ALT (Crl.) 395 (SC)

whereas the second petitioner is the husband of the first petitioner was not a party to the earlier suits and compromise. Therefore, issue of cheque by second petitioner who is not a party and not legally liable to pay any debt or liability, the first respondent cannot proceed against him for the offence punishable under Section 138 of the Act. Similarly, when the first petitioner did not issue cheque, which was allegedly dishonoured and returned by the bank with cheque return memo, she cannot be prosecuted for the offence punishable under Section 138 of the Act and finally prayed to quash the proceedings in C.C.No.816 of 2014.

Learned counsel for the petitioner while reiterating the contentions urged in the petition, placed reliance on the judgment of the Apex Court in **M/s Indus Airways Pvt. Ltd**[1] case, **P.J. Agro Techn limited and others v. Water Base Limited**[2], **Anita Mishra v. Arun Kumar and others**[3]. Relying on these principles, learned counsel would contend that when the first petitioner did not issue any cheque which was allegedly dishonored, she cannot be proceeded for the offence punishable under Section 138 of the Act. Similarly, the second petitioner is not legally liable to discharge any debt, the respondent prayed to quash the proceedings in C.C.No.816 of 2014.

Per contra, learned counsel for the first respondent contended that, when the first petitioner/wife agreed to pay Rs.18,00,000/- to the complainant, issue of cheque by the second petitioner/husband binds both the wife and husband, as husband

[2] 2011 (2) ALT (Crl.) 204 (SC)
[3] 2016 (1) ALT (Crl.) 10 (NRC)

issued cheque representing his wife. Therefore, the proceedings cannot be quashed, since the cheque was issued towards discharge of legally enforceable debt or liability and when the cheque was presented for collection, the same was dishonored and subsequently, instructions for stoppage of payment were given.

Undisputedly, the civil litigation was pending between the first petitioner and the first respondent with regard to movable properties. The said fact is admitted in various paragraphs of the complaint at page no.2 and in the last paragraph of page no.2, a compromise memo dated 04.03.2014 was referred and the terms of the compromise are extracted below, for better appreciation of the case:

> "1. In view of the compromise the respondent herein has agreed to pay an amount of Rs.18,00,000/- (Rupees eighteen lakhs only) to the appellant in full and final settlement and thus issued cheque bearing No.001802 dated 30.04.2014 drawn on AXIS Bank. The cheque should be presented by the appellant on the date of taking away his belongings under intimation to respondent.
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> 2. The appellant has delivered the possession of the suits schedule property to the respondent in C.C.C.A.No.37 of 2009 and respondent No.4 in C.C.C.A.No.141 of 2009. However, the appellant is permitted to take away his belongings by end of April, 2014."

The two paragraphs extracted above made it clear that the first petitioner/A-1 alone agreed to pay Rs.18,00,000/- towards full and final settlement in C.C.C.A.No.141 of 2009 and

C.C.C.A.No.37 of 2009 before this Court, subject to delivery of possession of the property and at the same time, in the third paragraph, it is admitted that the second petitioner/accused no.2 i.e. husband of first petitioner issued cheque for Rs.18,00,000/- drawn on AXIS Bank, Towlichowki Branch on 30.04.2014. The undisputed fact is that the first petitioner agreed to pay Rs.18,00,000/- subject to compliance of terms and conditions contained in the compromise decree passed by this Court in C.C.C.A.No.37 of 2009. Therefore, the liability to pay Rs.18,00,000/- was on the first petitioner, but not on the second petitioner i.e. husband of the first petitioner. When, the first petitioner wife did not issue the cheque towards legally enforceable debt, dishonor of the cheque issued by the third party i.e, a third party to the compromise who is not under legal obligation to discharge the debt or liability of the first petitioner, she cannot be proceeded for the offence punishable under Section 138 of the Act.

In **P.J. Agro Techn limited and others**[2] case, the Supreme Court held that in order to attract the provisions thereof a cheque which is dishonored will have to be drawn by a person on an account maintained by him with the 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. It is only such a cheque which is dishonored which would attract the provisions of Section 138 of the above Act against the drawer of the cheque. In the facts of the above judgment, dishonored cheque may have been issued by respondent no.11 for discharging dues of appellant no.1 company and its Directors to respondent no.1 company and respondent company may have a good case against appellant no.1 company and respondent company may have a good case against appellant no.1 company for recovery of its dues before other fora, but it would not be sufficient to attract provisions of Section 138 of the Act and the appellant company and its Directors cannot be made liable under Section 138 for a default committed by respondent no.11 and proceedings in such matters are in personam and cannot be used to foist an offence on some other person, who under the statute was not liable for the commission of such offence.

In view of the principle laid down in the above judgment by the Apex Court, a person who issued cheque which was dishonored alone be proceeded for the offence, if the cheque was issued towards legally enforceable liability or debt. In the present case, the first petitioner was legally liable to pay or discharge the liability in terms of the compromise to the complaint. But, cheque was not issued by the first petitioner and instead, the second respondent, who is the husband of the first petitioner, issued the cheque in dispute, which was dishonored. Since the offence is in personam and for the acts of the husband, wife cannot be prosecuted for the offence punishable under Section 138 of the Act. Therefore, on this ground alone, the proceedings against the first petitioner/wife are liable to be quashed.

The other contention raised before this Court is that the second respondent though issued cheque, he was not under legal obligation to discharge the liability of the first petitioner as per the terms of compromise. Admittedly, the second petitioner was not a party to the compromise referred supra and his wife/first petitioner alone is liable to pay Rs.18,00,000/- in terms of the compromise referred above, subject to the other terms and conditions by the complainant. Though, it is contended that both the parties disputed about compliance of terms and conditions, the said question cannot be gone into in the present criminal proceedings, since the question of liability of the second respondent is alone to be considered in the present facts of the case. Admittedly, when the cheque was issued and it was dishonoured due to stoppage of payment instructions issued by the second petitioner, who is not under legal obligation to discharge the liability of his wife/first petitioner and it would not constitute an offence, since criminal offence is an act in personam. Therefore, the second respondent cannot be proceeded for the offence punishable under Section 138 of the Act.

Learned counsel for the petitioner further drawn attention of this Court to another judgment of the Supreme Court in **M/s Indus Airways Pvt. Ltd and others**[1] case, wherein, the Apex Court held that if a cheque is issued as an advance payment for purchase of goods and, for any reason, purchase order is not carried to its logical conclusion, either because of its cancellation or otherwise, and material or goods, for which purchase order was placed, is not supplied, held that the cheque cannot be held to have been drawn for an existing debt or liability.

Here also, the alleged cheque was issued by the second petitioner for compliance of the terms and conditions of the compromise referred supra. But, the terms were not complied with by the first respondent strictly. Therefore, the cheque is not deemed to have been issued towards legally enforceable liability. But, whether the first respondent complied with the terms and conditions of the compromise is a question of fact which has to be decided based on the evidence adduced before the Court. But, on such ground, the proceedings cannot be quashed even if the principle laid down in the above judgment is applied.

As discussed above, the second petitioner who is not under the legal obligation to pay the debt, admittedly issued cheque and the same was dishonored on its presentation due to instructions issued to stop payment. But, he was not under legal obligation to discharge the liability or debt as per the compromise. When a third party issued a cheque and it was dishonoured and returned testified on its presentation for collection by the payee bank and returned, the drawee cannot be saddled with any criminal liability.

Learned counsel for the respondent mainly contended that the petitioners 1 & 2 are wife and husband respectively and both are liable when husband issued the cheque for discharge of legally enforceable liability of the wife. But, this contention cannot be accepted for the reason that the criminal act is an act in personam and the person who committed such act alone is liable for punishment, but not the other person. The question of implied agency between wife and husband cannot be applied in the criminal acts to rope the husband or wife with the offence and even in civil cases, the implied agency between wife and husband cannot be inferred.

There is no implied agency between wife and husband. At best husband is competent to testify on behalf of his wife in Civil proceedings u/sec.120 of Evidence Act. Time and again High court of Andhra Pradesh consistently held that there is no implied agency between wife and husband in **M/s Jawaharlal Daima and Co., Vs. Ch. Chittemma and another**[4] the High Court of Andhra Pradesh held as follows;

> "If the wife has her own property the presumption is that she acts on her own authority. The ancient doctrine that the husband and wife are one person is not true in modern times. The wife cannot be reduced to a subordinated position in respect of her property matters by the application of the doctrine of implied agency. The obligation on the part of the husband to meet the requirement of his wife stems from the fact of cohabitation in a domestic establishment. By implied authority the wife acts as the agent of the husband making the latter liable for the expenditure incurred by her in respect of necessaries of life. There cannot be any such implied authority in a case where the wife owns separate properties. Marriage will not make the husband an agent of the wife to deal with her property matters without her authority. By virtue of marriage a husband has no authority to contract on behalf of his wife "

In **KalipatnapuAtchuta**[5]**mma Vs. Kommana Sambamurthy [died] per L.Rs. and others** this Court, while reiterating the principle laid down in **M/s Jawaharlal Daima and Co.,**[4], held in para 17 as follows:

> "The legal position is thus obvious that there is no implied authority in favour of the husband in respect of the separate properties of the wife, having regard to the clear legal position, the theory propounded that there has been implied authority, cannot be countenanced."

[4] 1989 [1] ALT 335
[5] 2003 [3] ALT 82

In view of the principles laid down in the above two decisions, husband is not entitled to issue cheque, even if cheque was issued and dishonoured, no criminal liability be saddled to him.

If the principle laid down in the above judgments is applied to the present facts of the case, no implied agency between the wife and husband be inferred and issue of cheque by second petitioner, who is not a party to the compromise cannot be said to be issued towards discharge of legally enforceable debt or liability. Therefore, I find no ground *prima facie* against the present petitioners to proceed further for the offence punishable under Section 138 of the Act, since the prosecution is groundless on the face value of the allegations if accepted as it is, the proceedings are liable to be quashed.

In ***State of Haryana*** v. ***Bhajan Lal***[6] this Court considered in detail the provisions of Section 482 and the power of the High Court to quash criminal proceedings or FIR. The Apex Court summarized the legal position by laying down the following guidelines to be followed by High Courts in exercise of their inherent powers to quash a criminal complaint:

> "(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence o make out a case against the accused.
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> (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except

[6] 1992 Supp. (1) SCC 335

> under an order of a Magistrate within the purview of Section 155(2) of the Code.
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> (3) Where the allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
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> (4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non- cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.
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> (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
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> (6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
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> (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

In view of guidelines 1, 6 & 7, criminal proceedings cannot be allowed to be continued, as the proceedings are initiated by abuse of process of the law.

In **R.P. Kapur v. State of Punjab**[7], the Apex Court held as follows:

> (i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;
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> (ii) where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;

[7] AIR 1960 SC 866

> (iii) where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and (iv) where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.

In view of the guidelines laid down by the Apex Court in the judgments referred supra, if the facts on its face value are taken into consideration, it constitutes an offence, *prima facie* if proved. The Court cannot interfere, except when the Court comes to a conclusion that it is an out come of abuse of process of law.

In ***State of Karnataka*** v. ***L. Muniswamy and Ors.***[8], the Supreme Court while considering scope and jurisdiction of the High Courts under Section 482 Cr.P.C, has held as under:

> "In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects it would be impossible to appreciate the width and contours of that salient jurisdiction."

By applying the principles in the above judgment, I find that both the petitioners 1 & 2 are not liable to be proceeded, accepting

[8] AIR 1977 SC 1489

the present facts of the case and the allegations made in the complaint as true, on its face value and therefore, the proceedings in C.C.No.816 of 2014 are liable to be quashed.

In the result, the criminal petition is allowed and the proceedings in C.C.No.816 of 2014 are hereby quashed.

Consequently, the miscellaneous petitions pending, if any, shall also stand closed.

JUSTICE M. SATYANARAYANA MURTHY

Dated: 22-09-2017

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