

SMT JUSTICE T. RAJANI

CRIMINAL PETITION No.5826 of 2011

ORDER:

This criminal petition is filed by the petitioner/A2, seeking for quash of the proceedings in CRLMP.No.262 of 2010, in CC.No.136 of 2009 dated 03.08.2010, on the file of the Judicial Magistrate of First Class, Ichapuram.

2. The petitioner was added as A2 in pursuance of the orders passed in a petition, filed under Section 319 of the Code of Criminal Procedure, 1973, by the Judicial Magistrate of First Class, Ichapuram in CRLMP.No.262 of 2010 in CC.No.136 of 2009 dated 03.08.2010. It is the said order, which is impugned in this petition.

3. Heard learned counsel for the petitioner and learned Public Prosecutor, who takes notice for second respondent. The first respondent did not appear in spite of notice.

4. The very tricky question that is involved in this petition is, whether a company on behalf of whom, allegedly, a cheque was issued by A1 can be added as an accused under Section 319 Cr.P.C.

5. Briefly the facts of the case, to the extent necessary for deciding the petition, are that a notice was issued by R1 to A1, by addressing as follows:

To
Sri Sanjeev Kumar,
V.B. Home Care Industries,
514, 5th Floor,
Swapnalok Complex,
S.D. Road,
Secunderabad.

The contents of the notice, to the extent relevant, are that A1 is doing wholesale business in selling mosquito coils and other products. The complainant is also manufacturing mosquito coils. There was an agreement between the complainant and A1 on 10.05.2008 for business transaction and in compliance of the terms of the agreement, a cheque was issued by A1 and the same was dishonoured when presented in the bank for encashment. Hence, the notice.

6. The complaint was filed against A1 and the same was taken on file by the concerned Magistrate. The cause title in the complaint is also as under:

Sri Sanjeev Kumar, Managing Partner, V.B. Home Care Industries,
514, 5th Floor, Swapnalok Complex, S.D. Road, Secunderabad.

It is nowhere mentioned, either in the legal notice issued to A1 or in the complaint, that the cheque was issued on behalf of the company, for which A1 was managing partner. But, however, the counsel for the petitioner submits that the cheque bears the stamp of the company over which the signature of A1 is made. There is no denial of the said fact by the respondents. In the course of the proceedings, a petition was filed under Section 319 Cr.P.C. seeking to add the petitioner herein as A2. In the petition it is averred that it is the company which entered into the agreement with the complainant, contrary to the contents of the original complaint, wherein it is stated that the accused therein is the person who entered into agreement.

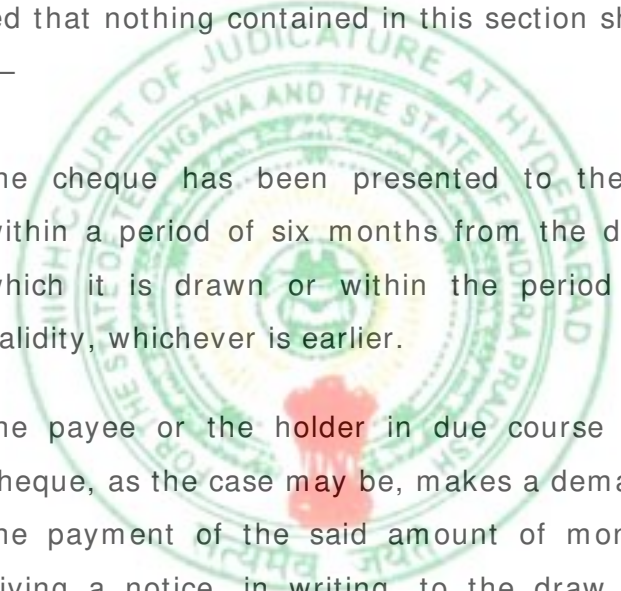
7. The Court below by virtue of a very cryptic order, permitted impleadment of the respondent in the said petition as A2. In the case filed for the offence other than for the offence under Section 138 of

the Negotiable Instruments Act, 1881 (for short 'the Act'), Section 319 Cr.P.C permits addition of additional accused, if during enquiry or during trial it comes to light that there are some other accused also involved in the offence. But this is a case filed for the offence under Section 138 Act. Section 138 of the Act lays down some pre-conditions, to be fulfilled before initiating prosecution against the accused. The proviso to Section 138 of the Act lays down the said conditions, which are as under:

138. Dishonour of cheque for insufficiency, etc., of funds in the account. –

...

Provided that nothing contained in this section shall apply unless –

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- 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 draw 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.

So the issuance of notice to the drawer of the cheque within 30 days of the receipt of information from the bank, regarding the return of cheque as unpaid, is mandatory and after issuing such notice, as prescribed under clause (b), 15 days time has to be given to the drawer of the cheque for making payment of the said amount under the cheque. Unless these two conditions are fulfilled, there cannot be any prosecution launched against the drawer of the cheque. In this case, the notice, as already observed, is issued only to A1, he is not described as a representative of the company, which is sought to be brought as A1. Hence, the question that has to be decided is whether the order of the Court below, impleading A2 as a party, is sustainable.

8. The counsel for the petitioner relied upon several decisions touching upon various aspects. Two decisions, which, apparently, run counter to one another, can be looked into at the outset.

ANEETA HADA v. GODFATHER TRAVELS AND TOURS (P) LTD.¹ is a decision to the effect that a complaint under Section 138 of the Act against the accused director is maintainable without joining the company as accused. The reasoning for such principle is that the company, which is a juristic person, owns primary responsibility for dishonour of cheque under Sections 138 and 141(1) of the Act and the other persons mentioned in Section 141(1) are responsible along with the company, which has to be held responsible in the first instance. It is, observed that, however, it is a different matter that company is impleaded as accused but complaint against it cannot proceed on

¹ (2008) 12 SCC 703

account of some legal bar and therefore, other persons are proceeded against under the doctrine *lex non cogit ad impossibilia*. It was observed that taking note of the factual situation, that the trial Court was yet to decide whether dishonoured cheque was issued to discharge accused director's personal liability or company's liability and evidence was yet to be lead on that aspect and as Section 138 refers to any debt/liability and it can be director's personal debt or liability, Section 138 was therefore attracted, at least against the accused director irrespective of company's liability.

In *ANEETA HADA v. GODFATHER TRAVELS & TOURS (P) LTD.*² which is rendered by three Judges of the Supreme Court in a batch of appeals, the Supreme Court ruled contrary to the above decision by holding that the prosecution against the officers of a company, without arraigning the company as accused is not maintainable.

9. But, however, a careful reading of the above decisions would resolve the apparent inconsistency. The reasons for permitting prosecution against the directors when the company being shown as accused are stated in the decision first cited and it has to be understood when such is the case, the directors can individually be prosecuted without the company being arraigned as accused.

10. The Supreme Court in *KRISHNA TEXPORT AND CAPITAL MARKETS LIMITED v. ILA A. AGARWAL*³ held that Section 138 does not admit any necessity or scope for reading into it, the

² (2012) 5 SCC 661

³ (2015) 8 SCC 28

requirement that the Directors of the Company in question must also be issued individual notices under Section 138; such Directors, who are in charge of the affairs of the company and responsible for the affairs of the company would be aware of the receipt of notice by the company under Section 138. But here is a converse situation. Managing director is added and company is added. Can the same principle be borrowed in this case? The answer would be in the negative. Since directors are part of the company, notice to company may serve as notice to the directors. But notice to one of its partners, which may be in individual capacity, cannot serve as notice to the company. Any notice coming to the directors cannot be treated as notice to the company, as the transactions constituting the notice may not bear any nexus to the company affairs.

The decision in *SUNIL BHARTI MITTAL v. CENTRAL BUREAU OF INVESTIGATION*⁴ is relied upon by the counsel for the petitioner to support his plea that the matter needs to be remanded to the Court below for making a reasoned order for allowing the petition filed under Section 319 Cr.P.C. to implead the petitioner herein as an accused.

11. However, the technical hurdle for adding this petitioner as A2 lies in the language of Section 138 of the Act. As already observed the pre-conditions for initiating prosecution against the accused are not fulfilled in this case. Hence, unless the company is put on notice about the liability under the alleged cheque and unless the company fails to make the payment under the said cheque, no prosecution can be initiated against the company, by resorting to Section 319 Cr.P.C.

⁴

(2015) 4 SCC 609

The complainant cannot be permitted to subvert the process of law that is to follow a particular course under a special enactment, by resorting to a general provision. Hence, with the above, it can be concluded that the order of the Court below, permitting the impleadment of A2 as additional accused cannot be sustained and hence, is set aside and the proceedings against the petitioner as A2 in CC.No.136 of 2009 on the file of the Judicial Magistrate of First Class are hereby quashed.

With the above observation, the criminal petition is allowed. As a sequel, the miscellaneous applications, if any pending, shall stand closed.

November 13, 2017
DSK



T. RAJANI, J