THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

Crl.R.C.No.1715 of 2017
AND
Crl.R.C.No.1740 of 2017

COMMON ORDER:

These two Criminal Revision Cases are filed under Sections 397 and 401 Cr.P.C. by V.Nookala Rajeshwari Devi, Accused No.2 in C.C.No.232 of 2016 (Old C.C.No.989 of 2016) and C.C.No.231 of 2016 (Old C.C.No.990 of 2016) on the file of XIX Special Magistrate, Hyderabad.

2. The petitioner filed Crl.M.P.No.190 of 2017 and Crl.M.P.No.3249 of 2017 in the above Calendar Cases under Section 251 read with 482 of Cr.P.C. to recall summons issued against her taking cognizance of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act') and against her husband, who is A1, on the sole ground that the petitioner is not the maker/drawer of the cheque, but her husband alone allegedly issued the said cheque, which was dishonoured for one reason or the other and thereupon the 2nd respondent filed a complaint for the offences punishable under Section 138 of the Act and during pendency of the calendar cases, petitions were filed with a request to recall summons issued against her.

3. Aggrieved by the impugned orders, the present revisions are filed on the sole ground that the proceedings cannot be continued against this petitioner by exercising power under Section 251 of Cr.P.C. as the petitioner is not the drawer of the cheque allegedly issued by the husband of the petitioner and placed judgments of the Apex Court in **Bhushan Kumar and another v State (NCT of Delhi) and another**[1] and **Aparna A.shah v Sheth Developers Private Limited and another**[2] and

[1] 2010(2) Supreme 600
[2] (2013) 8 SCC 71

Arvind Kejriwal and others v Amit Sibal and another (Crl.M.C.No.5245 of 2013 and Crl.M.A.Nos.18920-21/2013). On the strength of those principles, learned counsel for the petitioner sought to set aside the impugned orders and requested this Court to pass appropriate orders recalling the summons issued to the petitioner by exercising power under Section 204 of Cr.P.C.

4. During hearing, learned counsel for the petitioner reiterated the same contention and mostly stressed on the power of this Court to pass orders by exercising power under Sections 397 and 401 of Cr.P.C. based on the principles laid down in the above judgments of the Apex Court, Delhi High Court and requested this Court to pass appropriate orders setting aside the orders passed by the trial Court.

5. Learned counsel for respondents 2 and 3, Sri K.Durga Prasad, Advocate, supported the impugned orders passed by the trial Court while contending that the Magistrate has no power to recall summons issued under Section 204 of Cr.P.C. after taking cognizance of the offence against the petitioner, but the remedy is otherwise. Hence, the impugned orders passed by the trial Court are not erroneous and requested this Court to follow the same principle and pass appropriate orders.

6. The offence allegedly committed by the petitioner is punishable under Section 138 of the Act, subject to proof of the requirements to constitute an offence punishable under Section 138 of the Act.

7. The main contention of the petitioner is that she is not the drawer of the cheque as defined under Section 7 of the Act as she was not signatory to the cheque, but her husband alone allegedly signed on the cheque, which was dishonoured on its presentation for collection. When

she is not a party to the cheque or a drawer of the negotiable instrument, respondent is not entitled to prosecute the petitioner for the offence punishable under Section 138 of the Act. The Magistrate accepted the contention of the petitioner to some extent, but dismissed the petitions on the ground that the Magistrate has no power to recall the summons based on the principles laid down in **Adalat Prasad v Rooplal Juidal and others**[3], wherein, the Apex Court made it clear that the Magistrate has no power to recall the summons issued under Section 204 of Cr.P.C.

8. In the earlier judgment of the Apex Court in **P.J. Agro Tech Limited and others v. Water Base Limited**[4] the Apex Court is of the view 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 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 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 of the Act 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.

[3] (2004) 7 SCC 338
[4] 2011 (2) ALT (Crl.) 204 (SC)

9. In view of the principle laid down in the above judgment by the Apex Court, a person, who issued cheque, which was dishonored alone, can be proceeded for the offence, if the cheque was issued towards legally enforceable liability or debt. In view of the principle laid down by the Apex Court in the above two judgments, it is made clear that a drawer of a negotiable instrument alone is liable to be proceeded for the offence punishable under Section 138 of the Act subject to proof, as such the petitioner, who is not a drawer of the cheque, is not liable to be proceeded.

10. The main contention of the learned counsel for respondents 2 and 3 is that the cheque was drawn from joint account maintained by both wife and husband. In such a case, the wife also can be proceeded, but it is difficult to accept this contention for the reason that there is no implied agency between wife and husband. At best husband is competent to testify on behalf of his wife in civil proceedings under Section 120 of the Evidence Act. Time and again, the 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**[5] wherein it was held that 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 is 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

[5] 1989 [1] ALT 335

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.

11. Similarly in **Kalipatnapu Atchutamma Vs. Kommana Sambamurthy [died] per L.Rs. and others**[6] 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."*

12. In view of the principles laid down in the above two decisions, husband is not entitled to issue a cheque though it is required to be drawn on a specific bank where the wife and husband are maintaining joint accounts, merely because the cheque was issued to be withdrawn from the joint account maintained in a bank, the wife cannot be made liable for the offence punishable under Section 138 of the act, since she was not a drawer of the cheque.

13. Section 138 of the Act made it clear that 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

[6] 2003 [3] ALT 82

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.

14. The proviso to Section 138 of the Act requires a notice to be given to the drawer of the cheque. Drawer means a person, who made the cheque is called the drawer as defined under Section 7 of the N.I. Act. Therefore, the cheque allegedly issued by the 3rd respondent, who is the husband of the petitioner alone is the drawer of the cheque and merely because notice was issued to both wife and husband, the petitioner cannot be proceeded for the offence punishable under Section 138 of the Act, though the amount is unpaid even after compliance of Clause (b) of proviso to Section 138 of the Act. Thus, the law is clear that the person, who made a cheque i.e., drawer of the negotiable instrument as defined under Section 7 of the Act, alone is to be proceeded for the offence punishable under Section 138 of the Act. Therefore, the petitioner, who is not the drawer of negotiable instrument as defined under Section 7 of the Act read along with Clause (b) of proviso to Section 138 of the Act, she cannot be proceeded for the offence, but the trial Court basing on the implied authority issued process after taking cognizance of the offence against the petitioner.

15. Curiously, in the present petition, the relief claimed by the petitioner is <u>to recall summons</u> issued against this petitioner/A2 by exercising power under Section 251 of Cr.P.C. based on various grounds discussed in the earlier paras Section 251 of Cr.P.C. deals with the power of the Magistrate to stop all further proceedings. In a summons case when the accused appears before the Magistrate, the particulars of the offence, which accused shall be stated to him whether he pleaded guilty

or not in defence to made it shall not necessary to frame a formal charge. Section 254 of Cr.P.C. if the Magistrate does not convict the accused under section 252 or section 253, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence, the Magistrate may, if he thinks fit, on the application of the prosecution or the accused, issue a summons to any witness directing him to attend or to produce any document or other thing and the Magistrate may, before summoning any witness on such application require that the reasonable expenses of the witness incurred in attending for the purposes of the trial be deposited in Court.

16. Section 258 of Cr.P.C. conferred power on the Magistrate to stop all further proceedings in certain cases, but this case would not fall within Section 258 of Cr.P.C. At best it would attract Section 251 of Cr.P.C.. But the duty of the Magistrate is specifically provided under Section 251 of Cr.P.C. and if the Magistrate finds no material against the petitioner to proceed, the Magistrate need not examine the petitioner explaining the gist of accusation made against the petitioner in summons case.

17. Here, the petitioner sought recall of the summons, which is not contemplated under Section 251 of Cr.P.C. and in the similar circumstances in **Adalath Prasad's** case referred supra, the Apex Court made it clear that the Magistrate has no power to recall summons issued when cognizance of offence was taken against the petitioner. Therefore, the power that can be exercised under Section 251 of Cr.P.C. is limited and the Magistrate has no power to grant the relief claimed by the petitioner herein and in **Aparna A Shah's case** referred supra, the Apex

Court at para 18 discussed about the power of this Court and held as follows:

> *"In the case on hand, we are concerned with criminal liability on account of dishonour of a cheque. It primarily falls on the drawer, if it is a Company, then Drawer Company and is extended to the officers of the company. The normal rule in the cases involving criminal liability is against vicarious liability. To put it clear, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in statutes extending liability to others. For example, Section 141 of the N.I. Act is an instance of specific provision that in case an offence under Section 138 is committed by a Company, the criminal liability for dishonour of a cheque will extend to the officers of the company".*

18. The judgment did not deal with the power of the Magistrate to recall summons,, but can stop further proceedings, when no material is found by the Magistrate at the time of examination of the accused under Section 251 of Cr.P.C.

19. The present petitions are filed to recall summons issued against the petitioner is not maintainable even by applying the principle laid down by the Apex Court. However, the petitioner is at liberty to file appropriate application under relevant provisions of Cr.P.C. to stop all further proceedings against this petitioner. Consequently, I find no grounds to interfere with the impugned orders passed by the trial Court.

20. Accordingly, the criminal revision cases are disposed of directing the petitioner to file appropriate application under relevant provisions of Cr.P.C.

Miscellaneous petitions, if any, pending in the criminal revision case, shall stand closed.

M. SATYANARAYANA MURTHY J

Date: 27.10.2017
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