

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

Crl.P.No.8622 of 2017

ORDER

This petition under Section 482 Cr.P.C., is filed to quash the proceedings in C.C.No.87 of 2017 pending on the file of V Additional Judicial Magistrate of First Class, Nellore District, registered for the offences punishable under Sections 138 and 142(b) of Negotiable Instruments Act, 1881 (for short 'the Act') against the petitioner/A1.

2. The second respondent filed complaint against the petitioner/A1 and another, alleging that on 26.10.2014, the petitioner borrowed an amount of Rs.15,00,000/- from her for his necessities and executed a promissory note on the even date, agreeing to repay the same with interest at 24% per annum to her or her order on demand. Subsequently, on 02.11.2014 also, the petitioner borrowed an amount of Rs.15,00,000/- from the complainant for his necessities and executed another promissory note, agreeing to repay the same with interest at 24% per annum. In view of the demand made by the second respondent, A2, who is the father of A1, issued two cheques bearing Nos.320607 and 320608 on 11.03.2016 for a sum of Rs.5,00,000/- each, drawn on State Bank of India, Jubilee Hills, Hyderabad, in favour of the second respondent towards discharge of the debt due by the petitioner as part payment under two promissory notes.

3. On presentation of the cheques with the collecting Bank at Nellore, by the complainant, on 15.03.2016 and 21.03.2016, the cheques were returned unpaid vide cheque return memos. On

receipt of the same, she got issued notices to the accused on 06.04.2016, but the petitioner and other accused neither paid the amount nor issued any reply. Hence, she filed the complaint.

4. The main ground urged by petitioner before this Court is that he is not the drawer or maker of the cheques as defined under Section 7 of the Act and that when the cheque was not issued by petitioner towards discharge of legally enforceable debt, if any due, it would not constitute the offence punishable under Section 138 of the Act and therefore, sought for quashment of the proceedings against him.

5. During hearing, the main contention of the counsel for petitioner is that the petitioner is not liable to be proceeded for the offence punishable under Section 138 of the Act, since, he is not a drawer or maker of the cheques, which were dishonoured and returned unpaid by the payee Bank. While reiterating this contention, he placed reliance on the judgments of the Apex Court in **Mrs. Aparna A. Shah V. M/s.Sheth Developers Private Limited and another**¹ and in **Mohan Lal V. State of Rajasthan**² and on the strength of the principles laid down in the above judgments, he requested this Court to quash the proceedings.

6. Whereas the counsel for the second respondent while supporting the complaint contended that when the cheques were issued on her behalf by the father of petitioner and dishonoured on

¹ AIR 2013 SC 3210

² AIR 2015 SC 2098

their presentation, the complaint is maintainable and it cannot be quashed. He placed reliance on the judgment of the Apex Court on **Kirshna Texport & Capital Markets Ltd., V. Ila A. Agrawal and others³** .

7. In view of these rival contentions raised by both the parties, it is relevant to refer the allegations made in the complaint once again. The allegations made in paragraph Nos.6 and 7 of the complaint are extracted as under:

“It is submitted that in spite of several oral demands made by the complainant in respect of the debt due by the 1st accused, the 2nd accused, who is the father of the 1st accused, issued two cheques bearing Nos.320607 and 320608 dated 11.03.2016 for Rs.5,00,000/- each drawn on State Bank of India, Jubilee Hills, Hyderabad, in favour of complainant for the debt of the 1st accused as part payment in respect of said two promissory notes dated 26.10.2014 and 02.11.2014.

It is submitted that the complainant presented the cheque bearing No.320608 in ICICI Bank Ltd, Nellore on 15.03.2016 for collection but the State Bank of India, Jubilee Hills, Hyderabad, dishonoured the said cheque on 15.03.2016 on the ground that there are insufficient funds in account of the 2nd accused. The complainant also presented the cheque bearing No.320607 in ICICI Bank Ltd., Nellore on 21.03.2016 for collection but the same was also dishonoured by the State Bank of India, Jubilee Hills, Hyderabad, on the ground that there are insufficient funds in the account of the 2nd accused. The complainant received the said information of dishonour of said cheques from ICICI Bank Ltd., Nellore on 15.03.2016 and 21.03.2016 respectively”

As per the allegations made in the complaint, more particularly, in paragraph No.6, it is alleged that the alleged borrower of amount on two occasions and executor of two promissory notes on 26.10.2014 and 02.11.2014, was not issued cheques and not the drawer or

³ AIR 2015 SC 2091

maker of the cheques, but the cheques were issued by the father of petitioner, who is not the debtor of the second respondent.

8. Therefore, the point that arises for consideration is, ***whether the petitioner/A1, who was not the drawer of the cheques, is liable to be proceeded for the offences punishable under Section 138 and 142(b) of the Act.***

9. **POINT:**

Section 7 of the Act defines the words 'Drawer' and 'Drawee', as under:

"The maker of a bill of exchange or cheque is called the 'drawer'; the person thereby directed to pay is called the 'drawee'

Here in this case, the petitioner is not a drawer or maker of the cheques. According to Section 138 of the Act, the drawer of the cheque fails to make the payment of the amount covered by the dishonoured cheque, as the case may be, to the holder in due course of the cheque or a holder of the cheque on receipt of the notice within the time stipulated therein, is liable to be proceeded with for the offence punishable under Section 138 of the Act. Even Clauses (b) and (c) of proviso to Section 138 of the Act make it clear that the payee or holder in due course of the cheque, as the case may be, makes a demand for payment of the said amount by giving notice in writing to the "**drawer**" of the cheque and similarly, the failure of the "**drawer**" to pay the cheque indicates that the drawer alone is liable to be proceeded with for the offence punishable under Section 138 of the Act. The third party, who is not a maker or drawer of the cheque, is not required to be called upon to pay the

amount as required under Clause (b) of proviso to Section 138 of the Act and failure to pay the amount by the drawer alone would constitute the offence punishable under Section 138 of the Act.

10. The counsel for petitioner placed reliance on the judgment of the Apex Court in **Mrs.Aparna A. Shah's** case, wherein it was held as follows:

“Under [Section 138](#) of the Act, it is only the drawer of the cheque who can be prosecuted. In the present case, the appellant is not a drawer of the cheque and she has not signed the same. A copy of the cheque brought to notice of Supreme Court though contains name of the appellant and her husband, the fact remains that her husband alone put his signature. In addition to the same, a bare reading of the complaint as also the affidavit of examination-in- chief of the complainant and a bare look at the cheque would show that the appellant has not signed the cheque. Under [Section 138](#) of the N.I. Act, in case of issuance of cheque from joint accounts, a joint account holder cannot be prosecuted unless the cheque has been signed by each and every person who is a joint account holder. The said principle is an exception to [Section 141](#) of the N.I. Act which would have no application in the case on hand. The proceedings filed under [Section 138](#) cannot be used as an arm twisting tactics to recover the amount allegedly due from the appellant. It cannot be said that the complainant has no remedy against the appellant but certainly not under [Section 138](#). The culpability attached to dishonour of a cheque can, in no case “except in case of [Section 141](#) of the N.I. Act” be extended to those on whose behalf the cheque is issued. This Court reiterates that it is only the drawer of the cheque who can be made an accused in any proceeding under [Section 138](#) of the Act. Thus, criminal proceedings against appellant quashed”.

11. Learned counsel for the second respondent/complainant, while supporting her contentions, placed reliance on the judgment of the Apex Court in **Krishna Texport's** case, referred supra, wherein the Apex Court discussed about the liability of the company and its directors. Even according to the principles laid down therein,

according to Section 141 of the Act, if a person committing an offence under Section 138 of the Act is a company, every director of such company who was in charge and responsible to that company for conduct of its business shall also be deemed to be guilty. The reason for creating vicarious liability is plainly that a juristic entity i.e. a company would be run by living persons who are in charge of its affairs and who guide the actions of that company.

12. The principles applied in the above case would not apply to the present facts of the case since the Apex Court discussed about the company's liability in respect of cheques issued by the company by its Managing Director and other Directors. Therefore, principle laid down in the judgment has no application to the present facts of the case. But the judgment of the Apex Court in **Mrs. Aparna A. Shah's** case, is directly applicable to the present facts of the case. The other judgment, which relied upon earlier, is directly applicable to the present facts of the case. Therefore, taking into consideration the facts, including the allegations, which are extracted in the earlier paragraphs, would clearly indicate that the petitioner was not the drawer or maker of the cheques and thereby, the proceeding against the petitioner/A1 is not liable to be proceeded for the offence punishable under Section 138 of the Act, even if the allegations made in the complaint on its face value would constitute no offence. The point is answered accordingly.

13. In the result, the Criminal Petition is allowed, quashing the proceedings in C.C.No.87 of 2017 on the file of V Additional Judicial Magistrate of First Class, Nellore, against the petitioner/A1.

14. Miscellaneous petitions, if any, pending in this criminal petition shall stand closed.

M. SATYANARAYANA MURTHY, J

15th December, 2017

sj

