

HONOURABLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.5556 OF 2016

ORDER:

This petition is filed under Section 482 Cr.P.C. to quash the proceedings in C.C.No. 1 of 2016 for the offence under Section 138 of Negotiable Instruments Act (for short 'the Act') mainly on three grounds:

2. The first ground is that the first respondent is G.M.Enterprises and is not a Company and filing such a complaint against a juristic person is not in accordance with Section 141 of N.I.Act; the second ground is that the cheque was not returned for insufficiency of funds but payment was stopped by drawer and it would not fall under Section 138 of the Act; and the third ground is that filing such a complaint is only an abuse of process of court and therefore, prayed to quash the proceedings.

3. During hearing, Sri CMR Velu, the learned counsel appearing for the petitioner-Srinivasa Educational Academy placed reliance on two judgments viz. MRAMIT DESAI AND ANOTHER v. M/S. SHINE ENTERPRISES AND ANOTHER¹ and another judgment of Kerala High Court in BALAKRISHNA PILLAI v. VABDULLAKUTTY².

4. Whereas, Sri M.Shiva Shekar, learned counsel appearing for the respondent while supporting the maintainability of the complaint, drew the attention of this Court on two judgments of Apex Court in LAXMI DYEHEM v. STATE OF GUJARAT AND OTHERS³ and PULSIVE TECHNOLOGIES PRIVATE LIMITED v. STATE OF GUJARAT AND OTHERS⁴.

¹ 2000 CrI.LJ.2386

² LAWS (KER)-1994-32

³ (2012) 13 SCC 375

⁴ (2014) 13 SCC 18

5. During the course of hearing, the learned counsel appearing for the respondent raised a different ground regarding limitation by contending that filing of the complaint is premature.

6. The first and foremost ground raised by the learned counsel appearing for the petitioner is that the first respondent is not a registered firm and not a juristic person. The first respondent is not a firm and it is a sole proprietary concern represented by its proprietor G.Madan Kumar and the complaint was filed by M/s. G.M.Enterprises represented by Proprietor G.Madan Kumar and notice under Section 138 of the Negotiable Instrument Act (for short 'the Act') was also issued by M/s G.M.Enterprises represented by its Proprietor G.Madan Kumarj. Similarly, the cheque was issued in favour of M/s. G.M.Enterprises, a proprietary concern. Therefore, filing of complaint by M/s G.M.Enterprises against the petitioner would not fall within the Section 141 of the Act. The learned counsel for the petitioner though relied on judgment of this Court reported in 2000 CrI.LJ.2386 ^{1st} cited supra which relates to a firm which is not registered under Partnership Act as required under Section 69 of Partnership Act. The principle laid down by this Court has no application, since, the first respondent complainant is a sole proprietary concern.

7. The second ground urged by the learned counsel for the petitioner is that 'payment stopped by drawer' as per the return memo issued by the bank dated 21.09.2015 could not fall within the ambit of Section 138 of the Act. In support of his contention he placed reliance on the judgment of Kerala High Court in BHAGEEPATHY v. BEENA AND ANOTHER⁵ at end of para 3, it is held that when a cheque was dishonoured on the ground of instructions to stop payment would not fall within the ambit of Section 138 of N.I.Act since it was cheque not returned due to insufficient funds. But,

⁵ 1992 CrI.LJ. 3946(1)

in the later judgment, in LAXMI DYECHEM case 3rd cited supra the Apex Court took a contrary view and held that:

“the two contingencies envisaged under Section 138 of the Act must be interpreted strictly or literally. We find ourselves in respectful agreement with the decision in Magma case – *PEPC MICON LTD. V. MAGMA LEASING LTD.* (1999) 4 SCC 253 that the expression “amount of money.....is insufficient” appearing in Section 138 of the Act is a genus and dishonor for reasons such “as account closed”, “payment stopped”, “referred to the drawer” are only species of that genus. Just as dishonor of a cheque on the ground that the account has been closed is a dishonor falling in the first contingency referred to in Section 138, so also dishonor on the ground that the “signatures do not match” or that the “image is not found”, which too implies that the specimen signatures do not match the signatures on the cheque would constitute a dishonor within the meaning of Section 138 of the Act.

In *PULSIVE TECHNOLOGIES PRIVATE LIMITED* reported in (2014) SCC 18, the Apex Court in para 10, it is held as follows:

“10. We find that the High Court has relied on MMTC Ltd. And Modi Cements and yet drawn a wrong conclusion that inasmuch as cheque was dishonoured because of “stop payment” instructions, the offence punishable under Section 138 of the NI Act is not made out. The High Court observed that “stop payment” instructions were given because the complainant had failed to discharge its obligations as per agreement by not repairing/replacing the damaged UPS system. Whether the complainant had failed to discharge its obligations or not could not have been decided by the High Court conclusively at this stage. The High Court was

dealing with a petition filed under Section 482 of the Code for quashing the complaint. On factual issue, as to whether the complainant had discharged its obligations or not, the High Court could not have given its final verdict at this stage. It is a matter of evidence. This is exactly what this court did in MMTC Ltd. Though the High Court referred to MMTC Ltd, it failed to note the most vital caution sounded therein.”

8. By applying the principles laid down in the aforesaid decisions, it is difficult to exercise inherent powers under Section 482 Cr.P.C. pending on the file of the II Special Magistrate, Malkajgiri, Cyberabad under Section 138 of N.I. Act. To exercise powers under Section 138 of the Act this Court has to look into the allegations made in the complaint and the defence raised by the accused cannot be considered while deciding the application. Therefore, basing on the allegations made in the complaint, it is difficult to quash the proceedings at this stage.

9. The third ground is that the complaint was filed as an abuse of process of court, but there is no substance in this contention in view of my discussion in earlier paras. During the hearing the learned counsel for the petitioner contended that the complaint is premature since the notice was issued on 07.11.2015 and receipt of the same was acknowledged on 20.11.2015 but filed the complaint on 10.12.2015 thereby it is premature since the complaint was filed without waiting for 15 days. But, this contention was not raised in the present petition filed under Section 482 Cr.P.C. and in the absence of any such contention, it cannot be looked into and it is not a ground to quash the proceedings.

Consequently, the criminal petition is liable to be dismissed at the stage of admission.

10. Accordingly, this Criminal Petition is dismissed at the stage of admission. However, the parties are at liberty to raise all the contentions during the trial and the learned Magistrate concerned is directed to decide the matter uninfluenced by any of the observations made by this Court.

As a sequel to the disposal of this petition, the Miscellaneous Petitions, if any, pending, shall stand dismissed.

JUSTICE M.SATYANARAYANA MURTHY

Date:04.01.2017
ccm



HONOURABLE SRI JUSTICE M.SATYANARAYANA MURTHY



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