IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.10.2018

CORAM

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

Crl.O.P.No.9754 of 2013
and M.P.Nos.1 and 2 of 2013
and M.P.No.1 of 2015

1.Hassan Shah ...1st Petitioner/ 1st Accused

2.Sunshine Enterprises
Represented by its
Sole Proprietor
Mr.Hassan Shah,
No.18, Feroz Sahib Street,
Royapettah,
Chennai - 600 014. ...2nd Petitioner/ 2nd Accused

Vs.

Nabishah ...Respondent / Complainant

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the records in C.C.No.408 of 2013 pending on the file of the learned VII Metropolitan Magistrate, George Town, Chennai and quash the same.

For Petitioners: Mr.Samir S.Shah
for Shah and Shah

For Respondent : Mr.M.Sunil Kumar

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O R D E R

This petition has been filed by the accused Nos.1 and 2 to quash the proceedings against them in C.C.No.408 of 2013 on the file of the VII Metropolitan Magistrate, George Town, Chennai.

2. The brief facts are as follows:-

The respondent herein has filed a private complaint under Sections 138 and 142 of the Negotiable Instruments Act, stating that the first petitioner is the proprietor of the second petitioner. He further stated that the first petitioner till the year 2010 has borrowed amount totalling to Rs.20,00,000/- on various occasions and in order to discharge the said debt, the first petitioner has issued a cheque for Rs.20,00,000/- dated 31.10.2012 in the capacity of proprietor of the second petitioner. He further stated that when the said cheque was presented in the bank, it was returned for the reasons ''in sufficient funds'' and hence, he issued a statutory notice to the petitioners herein and they have received the said notice and sent a reply notice with false averments. However, they did not come forward to pay the amount mentioned in the cheque. Hence, the respondent has filed a private complaint to punish the petitioners herein under Section 138 of the Negotiable Instruments Act. Based on the said complaint, the VII Metropolitan Magistrate, George Town, Chennai, has taken the case on file in C.C.No.408 of 2013 and issued summons to the petitioners herein. The petitioners herein, after receipt of the said summons, have filed the present petition under Section 482 of Cr.P.C. to quash the proceedings in C.C.No.408 of 2013 on the file of the VII Metropolitan Magistrate, George Town, Chennai.

3. Heard Mr.Samir S.Shah for M/s.Shah and Shah, learned counsel for the petitioners and Mr.M.Sunil Kumar, learned counsel appearing for the respondent.

4. The learned counsel for the petitioners has submitted that the first petitioner and the respondent herein are brothers and there was a family dispute between them and hence, the first petitioner has lodged complaints before the police on various dates and based on the said complaints FIRs in Crime Nos.825 of 2012, 1132 of 2012 and 1515 of 2012 were registered in D4 Jam Bazaar Police Station and subsequently, the said FIRs were transferred to D1 North Beach police station and they are pending for investigation. He further submitted that the petitioner herein has also filed a suit in C.S.No.564 of 2012 on the file of this Court for partition and the said suit is also pending. He further submitted that the respondent has filed two cases by forging the signature of the first petitioner in the cheques. He further submitted that in the complaint, the respondent has not subsequently averred that on which date the first petitioner has borrowed the amount. He further submitted that the respondent has not specifically averred in the complaint that the cheque was issued by the first petitioner to discharge the legally enforceable debt. He further submitted that since no such averments made in the complaint, it cannot be presumed that the cheque was issued to discharge legally enforceable debt and hence, he prayed to quash the proceedings against the petitioners.

5. In support of the aforesaid contentions, he relied upon the following decisions:-

1.Sam Daniel Vs. John 2004, LawSuit (Mad) 214.
2.Ramachandran Vs. Dinesan, 2004 LawSuit (Ker) 438.

3.Sanjay Mishra Vs. Kanishka Kapoor @ Nikki, 2009 LawSuit (Bom) 603.

4.Shiva Murthy Vs. Amruthraj, 2008 LawSuit (Kar)264.

5.Krishna Janardhan Bhat Vs. Dattatraya G Hegde, 2008 LawSuit (SC) 55.

6.Rangappa Vs. Mohan, 2010 LawSuit (SC)277.

6. Per contra the learned counsel for the respondent has submitted that the amounts were paid to the first petitioner through cheques and hence, the respondent is having documentary evidence to prove his case and he will produce the same before the trial Court. He further submitted that the disputed facts cannot be decided by this Court in the petition which has been filed under Section 482 Cr.P.C. He further submitted that in Rangappa Vs. Mohan (supra), the Hon'ble Supreme Court has over ruled the earlier decision in Krishna Janardhan Bhat Vs. Dattatraya G Hegde (supra) and held that the presumption mandated by Section 139 of Negotiable Instruments Act, does indeed include the existence of a legally enforceable debt or liability and therefore, the contention of the learned counsel for the petitioners that the presumption under Section 139 of the Act does not include the existence of legally enforceable debt is not acceptable. Therefore, he prayed to dismiss the petition.

7. According to the petitioners, the impugned cheque was not issued by the first petitioner and the signature found in the cheque is not that of the first petitioner and it was forged by the respondent. The said fact cannot be decided by this Court under Section 482 of Cr.P.C. The said fact is a matter for appreciation of evidence.

8. In Sam Daniel Vs. John (supra), Ramachandran Vs. Dinesan (supra), Sanjay Mishra Vs. Kanishka Kapoor (supra), Shiva Murthy Vs. Amruthraj (supra) and Krishna Janardhan Bhat Vs. Dattatraya G.Hegde (supra) it was held that it is only if the complainant establishes the existence of legally enforceable debt or liability, then presumption under Section 139 of the Negotiable Instruments Act to the effect that the cheque issued was for discharge of such legally enforceable debt or liability could be drawn. But the aforesaid decisions were over ruled by the three judges Bench of the Hon'ble Supreme Court in Rangappa Vs Mohan (supra), wherein it has been held that the presumption mandated by Section 139 of the Act, does indeed include the existence of a legally enforceable debt or liability. Therefore, the presumption under Section 139 of the Act, indeed include the existence of a legally enforceable debt or liability. Further, in the aforesaid decision, the Hon'ble Supreme Court has held that the presumption is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally

enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. Further it was held that it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, it is open to the petitioners to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability before the trial Court.

9. For the aforesaid reasons, this Court is of the view that this petition is not maintainable and the same is liable to be dismissed. In the result, this Criminal Original Petition is dismissed. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

1.The VII Metropolitan Magistrate,
George Town, Chennai.

2.The Public Prosecutor,
High Court, Madras.

+2cc to Mr.M.Sunil Kumar, Advocate sr.no.69073

Crl.O.P.No.9754 of 2013
and M.P.Nos.1 and 2 of 2013
and M.P.No.1 of 2015

pvs(co)
nr 24/10/2018