

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.11.2018

CORAM

THE HONOURABLE MR.JUSTICE N. ANAND VENKATESH

CrI.O.P.No.13484 of 2017

and

CrI.M.P.Nos.8700 and 8701 of 2017

1.M/s.Angalamman Agency,
S.F.No.461, Vallalar Nagar,
Angalamman Avenue,
Press Colony (Post),
No.4, Veerapandi,
P.N.Palayam,
Coimbatore- 641 019.

2.V.Govindaraj

3.G.Jayasudha

... Petitioners

Vs.

M.Ganesh Kuthampulli,
Represented by its,
Power of Attorney Holder,
D.Shanmugasundaram

... Respondent

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the entire records in C.C. No.456 of 2016 on the file of the Judicial Magistrate-VI, Coimbatore and quash the same.

For Petitioners: Mr.I.Mouli

For Respondent : Mr.K.Balakrishnan

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O R D E R

This petition has been filed seeking to quash the proceedings in C.C. No.456 of 2016, pending on the file of Judicial Magistrate-VI, Coimbatore.

2.The learned counsel for the petitioner raised two grounds for the consideration of this Court, in order to justify for quashing of the complaint filed by the respondent under Section

138 of Negotiable Instruments Act. The first ground that has been raised by the learned counsel for the petitioner is that the third petitioner who has been added as third accused was not even the drawer of the cheque. The third petitioner has been added as an accused person only on the ground that the loan was given jointly to the second and third petitioners and the cheque was also issued in the name of first accused which is a proprietorship concern. It was signed by the second accused, who is the proprietor of the first accused proprietorship concern. Therefore, the learned counsel for the petitioner would submit that the third petitioner who was admittedly not even the drawer of the cheque cannot be added as an accused and therefore the complaint has to be quashed insofar as the third petitioner is concerned. For this purpose, the learned counsel for the petitioner relied upon the Judgement of the Honourable Supreme Court of India in the case of P.J.Agro Tech Limited & Ors vs Water Base Limited reported in (2010) 4 MLJ (Crl) 701.

3. The next ground that has been raised by the learned counsel for the petitioner is that in this case, the complaint has been admittedly filed through a Power of Attorney/agent. Before, the Court below, there is no averment in the complaint that the Power of Attorney/agent had personal knowledge regarding the transaction between the complainant and the accused persons. The Court below has taken the sworn statement of the Power of Attorney/agent and thereafter, it has taken cognizance of the offence. Even in the sworn statement, Power of Attorney/agent does not speak about his personal knowledge with regard to the transactions. Therefore, the learned counsel for the petitioner would submit that the Court below went wrong in taking cognizance of the complaint. In order to substantiate his arguments, the learned counsel for the petitioner relied upon the Judgment of the Honourable Supreme Court of India in the case of Venture Softech India Pvt. Ltd vs. Startup Xperts reported in 2016 (6) CTC 719.

4. This Court has carefully considered the submissions made on either side. The first ground raised by the learned counsel for the petitioner is squarely covered by the judgement of the Honourable Supreme Court of India in the case of Raghu Lakshminarayanan vs. Fine Tubes reported in 2007 5 SCC 103. The Honourable Supreme Court of India in the said judgement has categorically held that only the drawer of the cheque is liable to be proceeded against for an offence under Section 138 of the Negotiable Instruments Act and the theory of vicarious liability will not arise, since, it involves a sole proprietorship concern. This Court also had an occasion to deal with the similar issue in the case of D.Prabhu vs. R.Manikandan reported in 2016 1 MWN (Crl) DCC 162 (MAD). Therefore, the point raised by the learned counsel for the petitioner is covered by the Judgment referred supra. The third petitioner cannot be made an

accused in this case, since the second petitioner was the signatory of the cheque and the cheque has been signed for and on behalf of the sole proprietorship concern. Therefore, the proceedings will have to be necessarily quashed insofar as the third petitioner is concerned.

5. This Court now will go into the second issue raised by the learned counsel for the petitioners. The learned counsel for the petitioners had submitted that the Power of Attorney/agent has not stated either in the complaint or in the sworn statement, that he has personal knowledge about the transaction. Therefore, Court below cannot take cognizance of the complaint, based on the sworn statement given by the Power of Attorney/agent.

6. In order to substantiate his submissions, the learned counsel for the petitioner relied upon the judgement of the Honourable Supreme Court in the case of A.C. Narayanan vs State of Maharashtra & Anr. reported in (2014) 11 SCC 790. The relevant portion of the judgement is extracted hereunder:-

"33. While holding that there is no serious conflict between the decisions in MMTC (supra) and Janki Vashdeo Bhojwani (supra), we clarify the position and answer the questions in the following manner:

33.1 Filing of complaint petition under Section 138 of N.I Act through Power of Attorney is perfectly legal and competent.

33.2 The Power of Attorney holder can depose and verify on oath before the Court in order to prove the contents of the complaint. However, the Power of Attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.

33.3 It is required by the complainant to make specific assertion as to the knowledge of the Power of Attorney holder in the said transaction explicitly in the complaint and the Power of Attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

33.4 In the light of section 145 of N.I Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the N.I Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant or his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the N.I. Act.

33.5 The functions under the general Power of Attorney cannot be delegated to another person without specific clause permitting the same in the Power of Attorney. Nevertheless, the general Power of Attorney itself can be cancelled and be given to another person."

7. This judgement has been relied upon by this Court in the case of Venture Softech India Pvt. Ltd vs. Startup Xperts reported in 2016 (6) CTC 719, the relevant portion of the judgement is extracted hereunder:-

"17 The complaint does not contain any averment that Shyam Sekar, the Power of Attorney holder, has knowledge of the said transaction. Even in the proof affidavit dated 25.11.2015 sworn to by Shyam Sekar, this averment is absent. This, in the considered opinion of this Court, is very vital for the very institution of the prosecution by the power agent on behalf of the principal. Though Shyam Sekar may be the husband of Poornima, nevertheless, that, by itself, cannot be a qualification for the Courts to infer that he has the knowledge of the transaction in question. Therefore, only on this short ground, the prosecution is liable to be quashed, with liberty to the complainant to once again file a fresh complaint with appropriate application for condonation of delay, if so advised and it is ordered accordingly."

It is clear from the above judgement that where the complaint does not contain any averment that the Power of Attorney holder had knowledge about the transaction and there is no whisper about it in the proof affidavit or in the sworn statement taken before the Court below, the Court below ought not to have been taken cognizance of the complaint without examining the complainant.

8. As a natural consequence, the cognizance taken by the Court below is liable to be quashed. The Court below is directed to take the sworn statement of the complainant and thereafter proceed with the complaint in accordance with law.

9. With the above direction, this Criminal Original Petition is allowed. Consequently, Connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(J)

//True Copy//

Sub Assistant Registrar

gsp/lpp

To

The Judicial Magistrate No.VI,
Coimbatore.

+1cc to Mr.I.Mouli, Advocate sr.no.79339

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and

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nr 20/12/2018



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