IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.10.2018

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THE HONOURABLE MR.JUSTICE M.DHANDAPANI

Crl.R.C.No.1139 of 2018

Shanavazz Mohamed ... Petitioner

Vs.

1.Parveen Jaleela
2.A.Noordeen
3.NJF Agencies
Rep. by No.1 and 2 ... Respondents

Prayer:
Criminal Revision Case filed under Section 397 r/w 401 of the Criminal Procedure Code seeking to set aside the order passed in M.P.No.3335 of 2018 in the unnumbered case on the file of Metropolitan Magistrate (FTC-II) Egmore @ Allikulam, Chennai - 3, dated 01.09.2018 and direct the learned Magistrate, to take cognizance of the case and issue process to the accused.

For Petitioner : Mr.R.Ramanlaal

O R D E R

The petitioner is the complainant in M.P.No.3335 of 2018 in the unnumbered case on the file of the learned Metropolitan Magistrate (FTC-II) Egmore @ Allikulam, Chennai. He initiated proceedings under Section 138 of the Negotiable Instruments Act as against the respondents alleging that during the course of business transaction, the petitioner advanced some amount in favour of the third respondent firm. Thereafter, he received cheque from the third respondent firm duly signed by the first respondent, however, the cheque was not honoured.

2.The said petition was dismissed by the learned Metropolitan Magistrate (FTC-II) Egmore @ Allikulam, Chennai, on the ground that the materials and evidences did not disclose any prima facie case against the accused. Aggrieved by the same, the petitioner has preferred this revision.

3.To arrive at the conclusion, the learned Magistrate has relied upon several decisions of the Hon'ble Apex Court, one of such decision is the decision of the Hon'ble Apex Court reported in 2014 (16) SCC 1 (Pooja Ravinder Devidasani Vs. State of Maharastra), wherein it is held that to fasten vicarious liability under Section 141 of the Act on a person, at the material time that person should have been at the helm of affairs of the Company, one who actively looks after the day to day activities of the Company and particularly responsible for the conduct of its business and it is further held that simply because a person is a Director of a Company, it does not make him liable under the Negotiable Instruments Act.

4.The issue involved in the present case is whether the learned Magistrate can dismiss the complaint by invoking the proviso to Section 203 of Cr.P.C. at the initial stage before issuing the process.

5.Since the complaint was dismissed at the preliminary stage, this Court has to answer only about the maintainability of the complaint and hence notice to the respondents/ accused is dispensed with.

6.The learned counsel appearing for the petitioner would submit that the third respondent is not a Company registered under the Companies Act and it is only a proprietary firm owned by the respondents 1 and 2 and would further submit that there is no article of association available in respect of the third respondent. It is only for name sake and hence the decisions relied upon by the lower Court is not applicable to the present case on hand and hence dismissing the complaint under Section 203 of Cr.P.C. is un-warranted.

7.The learned counsel appearing for the petitioner would further submit that the requirement under Section 203 of Cr.P.C., is that after considering the statements of the complainant and of the witnesses and the result of the inquiry or investigation, if any, under section 202 of Cr.P.C., the learned Magistrate is of opinion that there is no sufficient ground for proceeding, the learned Magistrate shall dismiss the complaint, and in every such case the learned Magistrate shall briefly record the reasons for doing so.

8.The un-disputed facts disclosed in the materials available on record are that there was business transaction inbetween the petitioner and the third respondent firm owned by respondents 1 and 2. During the business transaction, the petitioner/ complainant transferred a sum of Rs.1,65,000/- to the accounts of respondents 1 and 3. After receipt of the said sum, for the due discharge of the above said sum, the accused 1 and 2 issued cheque bearing No.000192 dated 16.11.2017 drawn on Karur Vysya Bank, Whites Road Branch for a sum of Rs.1,50,000/-. The above said cheque was issued in lieu of the money borrowed from the complainant. Accused 1 and 2 are the Proprietrix and Proprietor.

9.When the complainant wanted to present the cheque for collection, the first accused asked the complainant to present the cheque for collection on 09.01.2018. Accordingly, the complainant presented the cheque for collection on 09.01.2018, however, the same was returned with the endorsement 'insufficient funds'. Thereafter, the complainant issued legal notice to the accused on 31.01.2018 and the same was received by the accused on 01.02.2018. Thereafter, the first accused sent reply through her counsel with false allegations. Hence, the complainant has preferred the complaint initiating proceedings under Section 138 of the Negotiable Instruments Act.

10.The said complaint was dismissed by the lower Court by relying upon several decisions of the Hon'ble Apex Court on the ground that the complaint averments are confusing and not useful to conclude that A3 is either a proprietory concern or a firm/ company and that there is no clear averment as to who is the Proprietor / Proprietrix and hence there is no prima facie case made out as against the accused.

11.Perusal of the decisions relied upon by the lower Court discloses that the complainant therein has not established the day to day affairs and the involvement of the Company. In that background, the accused therein was acquitted from the offence. However, in the present case on hand, the lower Court at the initial stage itself, without even issuing notice to the respondents has dismissed the complaint at the stage of Section 203 of Cr.P.C.

12.The issue involved in the present case is whether the lower Court can dismiss the complaint at the preliminary stage with the above said grounds.

13.Chapter XVII was introduced in the Negotiable Instruments Act by the banking, public financial institution, under the Negotiable Instruments Law, Amendment Act, 1998 (66 of 1988 w.e.f. 1.4.1989) with the object of promoting banking operation and ensuring credible business transaction through banks. The said Chapter contains Sections 138 to 147.

14.Section 138 of the said Act deals with dishonour of cheques for insufficiency of funds in the accounts. Section 139 of the Act deals

with presumption in favour of holder. According to the provisions of Section 140 of the Act, it should not be a defence in prosecution for an offence under Section 138 that the drawer had reason to believe the cheque might be dishonoured on present for the reasons stated in the above Section. Section 141 deals with offences by the companies. Section 142 deals with procedure for taking cognizance of offences under the above Act notwithstanding anything contained in the Cr.P.C.

15.Chapter XVII has been inserted in the said Act, 1981 containing Sections 138 to 142 by the Legislature by enacting banking, financial institution under Negotiable Instruments Act with the object of promoting and inculcating faith in the efficiency of the banking system and its operation and giving credibility of its instrument in the business of transaction in our country where large number of commercial operation where sanctity and credibility of issuance of cheques were erroded to which expenditure resulting in inculcating loss in order to achieve object, the said Act was introduced.

16.The basic requirement under Section 138 of the Negotiable Instruments Act is that there must be business relationship inbetween the accused and the defacto complainant in the business transaction

and the Court has to consider whether the instrument was issued by the accused in favour of the complainant in the due course of business transaction. Thereafter, the complainant has to produce bankers memo with an endorsement and there must be legal notice to the accused for claiming the cheque amount from the accused. These three documents are very much relevant to present a complaint under Section 138 of the Negotiable Instruments Act.

17.In the present case, on perusal of the complaint, all the three documents are annexed along with the complaint and the list of witness are also annexed including the Manager of the Central Bank and it is relevant to mention Section 142 of the Act deals with cognizance of offence.

18.As per Section 142 of the Negotiable Instruments Act, notwithstanding anything contained in Cr.P.C., no Court shall take cognizance of any offence punishable under Section 138 except upon complaint in writing made by the payee or as the case may be, the holder in due course of the cheque; such complaint is made within one month of the date on which the cause of action arises and the offence under Section 138 shall be inquired into and tried only by a Court within whose local jurisdiction the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course as the case may be, maintains the account is situated or if the instrument is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account is situated.

19.Further, the involvement of the accused in the offence and other factual issues are trialable issue. However, the lower Court has arrived at the conclusion that two persons namely A1 and A2 cannot be the proprietors of the firm and it is not legally sustainable. If A3 is a proprietary concern, both A1 and A2 cannot be legally termed to be Proprietors/Proprietrix and they would not become to be accused jointly. The learned Magistrate has further held that the complainant has not specifically pleaded about the status of A1 and A2 in A3 firm and dismissed the complaint for lack of prima facie materials to proceed with the case.

20.As per Section 203 of Cr.P.C., the learned Magistrate can dismiss the complaint if there is no sufficient ground for proceeding

with the complaint. The word 'sufficient ground' means the satisfaction that a prima facie case is made out against the accused by evidence of witness and relevant materials. The lower Court is not required to access the evidence and consider the probabilities or the probabilities of the version of the complaint. The lower Court has to act like a reasonable and prudent person for satisfying himself prima facie if there is sufficient ground for proceeding further.

21.In the disputed instrument it is clearly stated 'for NJF Agencies' and signed by 'proprietor/ protrietrix/ authorised signatory'. Further, the complainant in paragraph no.6 of the complaint has specifically stated as follows:

> "The accused No.1 and 2 claimed that both the accused No.1 & 2 alone are in active business of NJF Agencies and the 1st Accused will be signing the cheque in the usual course of business and so all the accused are liable to discharge the cheque amount."

Hence, this Court is of the view that there are sufficient materials to proceed with the case.

22.In view of the above, without conducting any trial and foreclosing the issue at the preliminary stage is not sustainable. Hence, I am inclined to set aside the order dated 01.09.2018 passed in M.P.No.3335 of 2018 in the unnumbered case by the learned Metropolitan Magistrate (FTC-II) Egmore @ Allikulam, Chennai.

23.However, this order will not stand on the way of the respondents to defend their case at the time of trial. It is for the petitioner to establish the day to day affairs of the firm and other legal ingredients for implicating the accused in the above said offence at the time of trial.

24.The order dated 01.09.2018 passed in M.P.No.3335 of 2018 in the unnumbered case by the learned Metropolitan Magistrate (FTC-II) Egmore @ Allikulam, Chennai is hereby set aside. The learned Metropolitan Magistrate (FTC-II) Egmore @ Allikulam, Chennai, is directed to proceed with the case, in accordance with law and as per the procedure.

25.It is made clear that this Court has not expressed any opinion on the merits of the case. The learned Magistrate shall proceed with

the case, without being influenced by any of the observations made in this order and shall decide the matter independently, in accordance with law.

26.This criminal revision is accordingly allowed.

Sd/-
Assistant Registrar(CO)

//True copy//

Sub Assistant Registrar

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To

1.The Metropolitan Magistrate (FTC-II),
Egmore @ Allikulam, Chennai.

+1cc to Mr.R.Ramanlaal, Advocate SR.No.69051

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GJ II(CO)

GMY(02/11/2018)