IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.12.2018

PRONOUNCED ON : 28.02.2019

CORAM:

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

Crl.O.P.No.19283 of 2010
and
M.P.No.1 of 2010

J.Vaidhyanathan ... Petitioner/Accused

Vs

K.Jagannathan ... Respondent/Complainant

PRAYER: Petition filed under Section 482 of the Code of Criminal Procedure, to call for the records in C.C.No.11188 of 2009 on the file of the learned IX Metropolitan Magistrate, Saidapet, Chennai and quash the same.

For Petitioner : Mr.Abudukumar Rajarathinam
for M/s.S.Ashok Kumar

For Respondent : No appearance

ORDER

This Criminal Original Petition has been filed challenging the proceedings in C.C.No.11188 of 2009, on the file of the 9th Metropolitan Magistrate, Saidapet, Chennai, which arose out of a complaint preferred by the respondent / defacto complainant against the petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act.

2. When the matter came up for hearing in the earlier occasion, there was no representation for the respondent. Perusal of record shows that notice sent to the respondent was returned with an endorsement 'Door locked' and the learned Counsel for the petitioner has also filed a proof affidavit to that effect. The learned Counsel for the petitioner further submitted that the respondent is regularly appearing before the 11th Assistant City Civil Court, Chennai, in O.S.Nos.6390 of 2008 & 6399 of 2009, in which the same address as mentioned in the present complaint is shown. Therefore, he submitted that the respondent is willfully evading to appear before this Court and

since service of notice has been attempted and returned as 'Door locked', notice shall be deemed to be served on the respondent under Section 27 of the General Clauses Act, 1897. In support of his contention, the decisions of the Hon'ble Supreme Court reported in (1996) 7 SCC 523 & (2004) 8 SCC 774 were relied upon.

3. In the decision reported in (1996) 7 SCC 523 (cited supra), the Hon'ble Supreme Court has held as follows:

> "In view of the office report, it would be clear that the respondents obviously managed to have the notice returned with postal remarks 'not available in the house', 'house locked' and 'shop closed' respectively. In that view, it must be deemed that the notices have been served on the respondents."

4. In the another decision referred to by the learned Counsel for the petitioner, ie., in (2004) 8 SCC 774, it has been held as follows:

> "No doubt Section 138 of the Act does not require that the notice should be given only by 'post'. Nonetheless the principle incorporated in Section 27 can profitably be imported in a case where the sender has dispatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would report to the strategy of subterfuge by successfully avoiding the notice."

5. Keeping in mind the aforesaid decisions of the Hon'ble Supreme Court, this Court directed the Registry to print the name of the respondent in the cause title and adjourned the matter. Even today, none appeared on behalf of the respondent, despite his name is printed in the cause list. Therefore, this Court proceeded with hearing the Counsel for the petitioner and reserved the matter for orders, after perusing the entire records.

6. The case of the complainant / respondent, as stated in the complaint, reads thus:

6.1. According to the complainant, he is in the field of the share market, having vast experience in promoting companies, buying and selling of shares, managing share portfolios, handling investments for High Networth Individuals, Investment Advisories as well as expertise in the field of raising market capitals and funds. The petitioner had approached the complainant on behalf of M/s.Dhanush Technologies Ltd., for better utilization of the shares of the Company and to raise the market capitalization of that Company. At the instance of the petitioner, the complainant had also met the Directors of M/s.Dhanush Technologies Ltd., on various occasions and they have informed him that they are planning to take over a company in Turkey, for which, they require Rs.100 Crore funds and therefore, they are intending to raise the market capital of their Company.

6.2. The Company had decided to raise the share value by buying the shares of the Company through various brokers all over India. Using the complainant's clout and influence, the parties have also purchased the shares and the accused gave a sum of Rs.2 Crore to be deployed for procuring the shares from various brokers all over the country. In view of that, the share prices, which was Rs.140/- per share at that point of time, raised to Rs.300/- per share.

6.3. The intention of the accused as well as the Management of M/s.Dhanush Technologies Ltd., was to raise market price of the shares and then to unload the accused personal stock holding, by selling the same during the course of these price rise and to make huge profits out of that transaction. The complainant had started procuring their shares initially with the Two Crore advanced by the accused as well as by the Company and thereafter, slowly started to purchase the shares on credit basis after being promised of the sale consideration. When the price had risen upto Rs.297/- per share, the major stock holders / share holders of the Company off loaded huge amount of stocks.

6.4. Since all these shares were purchased at the instance of the accused and the management of the Company, the complainant had approached the accused as well as Directors and Chairman of the Company and they have also promised to compensate the loss of Rs.20 Crore and they have parted with the share to the value of Rs.7,50,000/-, being the value of 5,00,000/- shares valued at Rs.150/-, out of which, 2,00,000 shares stand in the name of one of the Directors Mr.D.N.Srinivasan and the remaining 3,00,000/- shares in the name of Mr.Sudhindra, the Chairman of M/s.Dhanush Technologies Ltd. Having parted with these shares, the said D.N.Srinivasan and Sudhindra had filed two suits before the 12th Assistant City Civil Court, Chennai in O.S.Nos.6390 of 2008 and 6399 of 2009, regarding the share certificates given to the complainant and had also obtained an ex-parte injunction restraining the complainant and his wife from in any manner alienating / selling the suit schedule shares, as if the suit shares were given only as security to raise funds.

6.5. In the month of October, 2008, at the instance of the accused, a settlement was arrived at between all of them to return the share certificates to the plaintiffs and in turn, they would compensate the loss suffered by the complainant. A sum of Rs.25,00,000/- was also paid in cash during this settlement and the accused stood guarantee for the remaining amount suffered by the complainant due to the purchase of shares on the instructions of the Management of the Company. Towards that settlement, a post dated Cheque bearing number 821729, dated 22.10.2008, for a sum of Rs.1 Crore was given by the accused. However, on 22.10.2008, the accused and the other Directors requested the complainant to hold the cheque and present it later, as the funds have not yet been transferred to the account. Thereafter, the complainant presented the said cheque on 10.03.2009, but it was returned by the Bank for the reason 'funds insufficient'. The complainant, thereafter, issued a statutory notice under Section 138 of the Negotiable Instruments Act on 10.04.2009, which was received by the accused on 13.04.2009 and a reply notice dated 02.05.2009 was also sent by the accused. Aggrieved over the same, the respondent / complainant has preferred the present complaint stating that the accused had utilised his services for the purpose of raising the market capital of the shares by purchase / sale of shares of M/s.Dhanush Technologies Ltd., and issued the cheque to clear their payment, however, the same got dishonoured.

7. Learned Counsel for the petitioner, at the outset, submitted that even assuming that the complaint is true, the cheque in question was issued in discharge of a liability to raise the market value of the shares of one M/s.Dhanush Technologies Ltd. This transaction itself is a illegal one and the liability, if any, arising out of that transaction cannot be construed as a legally enforceable debt, as contemplated under the Negotiable Instruments Act. In this regard, the learned Counsel relied upon Section 138 of the Negotiable Instruments Act as well as Sections 3 & 4 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003. In fact, the act of the complainant would squarely fall under the prohibition as contemplated under Sub Sections (a), (b), (c) & (d) of Section 4(2) of the said regulations. As the entire transaction is illegal, the transaction itself is void ab initio and therefore, relying upon the decision of the Andhra Pradesh High Court reported in MANU/AP/0294/2006, learned Counsel for the petitioner prayed for allowing the present criminal original petition.

8. Heard the learned Counsel appearing for the petitioner and perused the documents placed on record. There is no representation on behalf of the respondent.

9. For better understanding, Section 138 of the Negotiable Instruments Act is extracted thus:

> "138. Dishonour of cheque for insufficiency, etc., of funds in the account. Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid. either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice. to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:
>
> Provided that nothing contained in this section shall apply unless-
>
> (a) the cheque has been, presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
>
> (b) the payee or the holder in due course. of the cheque as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
>
> (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.
>
> Explanation.-For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

10. Sections 3 & 4 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003, as relied upon by the learned Counsel for the petitioner are extracted thus:

> "3. Prohibition of certain dealings in securities:
>
> No person shall directly or indirectly-
>
> (a) buy, sell or otherwise deal in securities in a fraudulent manner;
>
> (b) use or employ, in connection with issue,

purchase or sale of any security listed or proposed to be listed in a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of the Act or the rules or the regulations made there under;

(c) employ any device, scheme or artifice to defraud in connection with dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange;

(d) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange in contravention of the provisions of the Act or the rules and the regulations made there under.

4. Prohibition of manipulative, fraudulent and unfair trade practices:

(1) Without prejudice to the provisions of regulation 3, no person shall indulge in a fraudulent or an unfair trade practice in securities.

(2) Dealing in securities shall be deemed to be a fraudulent or an unfair trade practice if it involves fraud and may include all or any of the following, namely:-

(a) indulging in an act which creates false or misleading appearance of trading in the securities market;

(b) dealing in a security not intended to effect transfer of beneficial ownership but intended to operate only as a device to inflate, depress or cause fluctuations in the price of such security for wrongful gain or avoidance of loss;

(c) advancing or agreeing to advance any money to any person thereby inducing any other person to offer to buy any security in any issue only with the intention of securing the minimum subscription to such issue;

(d) paying, offering or agreeing to pay or offer, directly or indirectly, to any person any money or moneys worth for inducing such person for dealing in any security with the object of inflating, depressing, maintaining or causing fluctuation in the price of such security;

(e) any act or omission amounting to manipulation of the price of a security;

(f) publishing or causing to publish or reporting or causing to report by a person dealing in securities any information which is not true or which he does not believe to be true prior to or in the course of dealing in securities;

(g) entering into a transaction in securities without intention of performing it or without intention of change of ownership of such security;

(h) selling, dealing or pledging of stolen or counterfeit security whether in physical or dematerialized form;

(i) an intermediary promising a certain price in respect of buying or selling of a security to a client and waiting till a discrepancy arises in the price of such security and retaining the difference in prices as profit for himself;

(j) an intermediary providing his clients with such information relating to a security as cannot be verified by the clients before their dealing in such security;

(k) an advertisement that is misleading or that contains information in a distorted manner and which may influence the decision of the investors;

(l) an intermediary reporting trading transactions to his clients entered into on their behalf in an inflated manner in order to increase his commission and brokerage;

(m) an intermediary not disclosing to his client transactions entered into on his behalf including taking an option position;

(n) circular transactions in respect of a security entered into between intermediaries in order to increase commission to provide a false appearance of trading in such security or to inflate, depress or cause fluctuations in the price of such security;

(o) encouraging the clients by an intermediary to deal in securities solely with the object of enhancing his brokerage or commission.

(p) an intermediary predating or otherwise falsifying records such as contract notes.

(q) an intermediary buying or selling securities in advance of a substantial client order or whereby a futures or option position is taken about an impending transaction in the same or related futures or options contract.

(r) planting false or misleading news which may induce sale or purchase of securities."

11. In the decision relied upon by the learned Counsel for the petitioner, ie., in MANU/AP/0294/2006 (decided on 20.02.2006), the High Court of Andhra Pradesh has held as follows:

"21. The words any debt or liability would undoubtedly include a cheque drawn by any person towards a legally enforceable debt or liability of another person. The explanation makes it very clear that the debt or liability towards which the cheque is issued should be a legally enforceable debt or liability. This would have reference to the nature of the debt or liability and not to the person against whom the debt or liability could be enforced.

22. As per the condition of MoU, Ex.P.10, the shares, which are allotted, should become locked in by SEBI and in the instant case SEBI has not locked in the shares. Consequently, the post-dated cheques issued by the accused are not enforceable under the law.

23. The agreement Ex.P.10 is itself void under Section 23 of the Indian Contract Act. The understanding between both the parties that repurchase of its own shares from the complainant by the accused failing which three post-dated cheques are liable to be encashed. This understanding popularly known as buck back shares in the transaction is against the provisions of Clause (2) of the Regulation No.20 of SEBI (Merchant Bankers) Regulations, 1992, because the admitted fact as per the evidence of P.Ws.1 & 2 is that the agreement to buy back shares is in respect of non-transferable shares, whereas the shares purchased by the complainant-company from the accused-company are transferable shares.

24. The purchase of shares of the accused-company by the complainant-company is in contravention of the above regulations and, therefore, they are hit by the provisions of Section 23 of the Indian Contract Act and, therefore, the entire transaction is void and the debt is unenforceable.

25. Section 77(1), Companies Act prohibits the purchase of its own shares unless certain conditions mentioned therein are complied with and its violations is made punishable under Sub-section (4) of Section 77 of the Companies Act and since there are no conditions mentioned, the said transaction is void under Section 23 of the Indian Contract Act.

26. So, I hold that a party to an illegal contract cannot invoke the aid of the Court to have such a contract carried into effect."

12. In this case, the complainant, in the complaint itself, has averred that the cheques were issued in discharge of the liability arising out of the transactions done in connection with purchase and sale of the shares of M/s.Dhanush Technologies Ltd., to raise the pseudo market price and to sell their

holdings to make huge profits. As per the regulations of SEBI, as referred to above, this transaction itself is a fraudulent transaction and it is void ab initio. Therefore, the cheque, if any, issued pursuant to the said void transaction cannot be treated as a legally enforceable one and as such, the complaint would not stand in the eye of law.

13. In such a view of the matter, the proceedings in C.C.No.11188 of 2009 on the file of the learned 9th Metropolitan Magistrate, Saidapet, Chennai, stands quashed and this criminal original petition is accordingly, allowed. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-IV)

//True copy//

Sub Assistant Registrar

gk

To

The 9th Metropolitan Magistrate,
Saidapet, Chennai.

+1cc to Mr.S.Ashok Kumar, Advocate SR.No.19416

Crl.O.P.No.19283 of 2010
and
M.P.No.1 of 2010

MR(CO)
GMY(12/04/2019)