

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.11.2019

PRONOUNCED ON : 29.11.2019

CORAM

THE HON'BLE MR.JUSTICE M. NIRMAL KUMAR

CRL.O.P.NO.11916 of 2014

AND

M.P.No.1 of 2014

S.Saravanan ... Petitioner/Accused No.2

Vs.

S.Murugesan ... Respondent/complainant

PRAYER: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to call for the records relating to C.C.No.236 of 2013 on the file of the Judicial Magistrate, Avinashi and quash the same.

For Petitioner : Mr.A.Thiyagarajan for
Mr.T.Balaji

For Respondent : Mr.A.V.Raja

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O R D E R

This Criminal Original Petition is filed to call for the records relating to C.C.No.236 of 2013 on the file of the Judicial Magistrate, Avinashi and quash the same.

2.The petitioner is the accused No.2 in C.C.No.236 of 2013, which is pending on the file of the Judicial Magistrate, Avinashi. A private complaint has been filed by the respondent/complainant for the offence under Section 138 of Negotiable Instruments Act against the petitioner/A2 and M/s. Sri Pavatharani Exports/A1, represented by its authorised signatory S.Saravanan, the petitioner herein.

3.The petitioner's submission is that the respondent/complainant filed a private complaint in which the petitioner has been arrayed as A2. The first accused is M/s.Sri.Pavatharani Exports, represented by its authorised signatory. The petitioner being authorised signatory is authorised only to sign the cheques and he cannot be the representative for A1, which is a proprietary concern and the Proprietrix is S.Kavitha.

4. Further authorised person cannot be held liable in the absence of the proprietrix. Further, the cheque in issue was not drawn by the petitioner on an account maintained by him. The proprietary concern is not a legal entity distinct from its proprietor. The proprietary concern is nothing but an individual trading under a trade name. A person may carry on business in the name of a business concern. The proprietor is the only person who would be solely responsible for conduct of the affairs. Further normal rule in cases involving criminal liability is against vicarious liability. No one is to be held criminally liable for an act of another.

5. Further he submitted that in the case of companies and body corporate, section 141 of the N.I. Act extends such criminal liability to every person who at the time of the offence, was in charge of and was responsible for the conduct of the business of the company or the body corporate. By a deeming provision contained in Section 141, such a person is vicariously liable to be held guilty for the offence under Section 138 of the N.I. Act and punished accordingly. The word "deemed" used in Section 141 of the Act applies to the company and the persons responsible for the acts of the company.

6. In support of the contention to buttress the fact that S.Kavitha was the proprietor of Sri Pavatharani Exports, the Certificate of Registration issued by the Commercial Tax Officer, Permanent Registration Certificate issued by the Directorate of Industries and the certificate issued from the Apparel Export Promotion Council were produced. Further the learned counsel appearing for the petitioner also relied upon the decision of Kerala High Court in the case of B.S.Bhasi / Versus/ K.M.Purushotham Das reported in 2017 (4) KLT 705 : 2018(1) CivCC 111 : 2018(1) Cri.CC 285 : 2018 ACD 12 : 2018(1) AICLR 921 : 2018 ALL MR(Cri) 225 : 2018(3) BC 291 : 2018(3) DCR 125 : 2018(1) JCC 97. In view of the legal embargo, he prayed to quash the complaint case filed by the respondent/complainant.

7. The learned counsel appearing for the respondent/complainant admitted that the proprietrix of M/s.Sri.Pavatharani Exports have not been arrayed as an accused. Further submitted that Mr.S.Saravanan, who is the authorised signatory of M/s.Sri.Pavatharani Exports is none other than the husband of the proprietrix, who was carrying on the banian company business and he was the friend of the respondent/complainant and for the development of M/s.Sri.Pavatharani Exports he had borrowed a sum of Rs.5,00,000/- (Rupees Five Lakh Only) as hand loan from the respondent/complainant and in discharge of the said hand loan he had issued a cheque dated 15.06.2013 bearing No.709880 drawn on Catholic Syrian Bank Ltd., Avinashi branch and the same was signed by him as authorised signatory of M/s.Sri.Pavatharani Exports. Further statutory notice was

received by the petitioner/A2 and he had sent a reply. The first accused company failed to receive the statutory notice. Thereafter, the complaint came to be filed within the stipulated time. The points raised by the petitioner are factual and to be raised only during the trial.

8. Considering the rival submission and on perusing the materials, it is admitted that the proprietrix namely S.Kavitha of M/s.Sri.Pavatharani Exports has not been arrayed as an accused in the complaint. On plain reading of the Section 138 of N.I. Act, it is seen that 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 of the loan, the cheque has to be drawn by a person on an account maintained by him. In this case, the cheque in issue is that of M/s.Sri.Pavatharani Exports, a Proprietary concern which is not a legal entity distinct from its proprietor S. Kavitha. The deeming clause under Section 141 of the N.I. Act would apply only to a company, if a company is a firm or association of individuals.

9. The distinction between partnership firm and proprietary concern is well illustrated in the case of Ashok Transport Agency V. Awadhesh Kumar, reported in 1998 (5) SCC 567 and the relevant paragraph No.6 is extracted as under:

"6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person but Order XXX Rule 1 CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 of Order XXX which make applicable the provisions of Order XXX to a proprietary concern, enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order XXX have no application to such a suit as by virtue of

Order XXX Rule 10 the other provisions of Order XXX are applicable to a suit against the proprietor of proprietary business "insofar as the nature of such case permits". This means that only those provisions of Order XXX can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case."

10.The concept of vicarious liability was introduced in penal statutes like the Negotiable Instruments Act to make the Directors, partners or other persons, in charge of and control of the business of the company or otherwise responsible for its affairs; the company itself being a juristic person.

11.Section 138 of the N.I. Act is a penal provision, the commission of which offence entails a conviction and sentence on proof of the guilt in a duly conducted criminal proceedings. The penal provision, needless to say, must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. In this case, Section 138 of the N.I. Act creates a penal liability and as a natural corollary, the same should also receive a strict interpretation. The culpability attached to dishonour of the cheque can in no case "except in the case of Section 141 of the N.I. Act" be extended to those on whose behalf the cheque has been issued. No person could be held liable if the cheque was not issued from the bank account of the issuer. In this case, admittedly, the account is not maintained by the authorised signatory. Further the principle of agency is a concept of civil liability which cannot be extended to fix penal liability when the penal provision does not allow the Court to do so. In the case of proprietary concern prosecution can be initiated against the individual or the proprietor.

12.No stretch of imagination can a non drawer be held liable for a cheque on the sole ground that the cheque was issued for and on his behalf. In this case, the authorised signatory alone could not be prosecuted and the authorised signatory does not maintain the account with the bank and it is only the proprietor who maintains the account. In this case proprietrix of M/s.Sri.Pavatharani Exports, S.Kavitha is not an accused. Hence, the petitioner cannot be prosecuted.

13.In view of not arraying the proprietrix of M/s.Sri.Pavatharani Export as accused, which is a legal requirement. The respondent/complainant cannot further proceed against the petitioner, who is only an authorised signatory, representative of the first accused M/s.Sri.Pavatharani Exports, a Proprietorship concern.

14.In view of the legal bar to proceed against the petitioner allowing proceedings to continue would be an abuse

of process of Court.

15. In view of the legal embargo, this Court finds that no prosecution could be proceeded further in C.C.No.236 of 2013. Hence, the proceedings in C.C.No.236 of 2013, pending on the file of the Judicial Magistrate, Avinashi stands quashed. The case against the first accused is also on the same footing. The first accused have not filed any quash petition. The benefit of this order shall flow to the other accused also namely Proprietorship firm/A1 i.e. M/s. Sri.Pavatharani Exports.

16. Accordingly, this Criminal Original Petition stands allowed. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To

1. The Judicial Magistrate,
Avinashi.

2. The Public Prosecutor,
High Court, Madras.

+1cc to Mr.A.Thiyagarajan , Advocate SR.No. 99892

+1cc to Mr.A.V.Raja , Advocate SR.No. 99668

CRL.O.P.NO.11916 of 2014
AND

M.P.No.1 of 2014

A.SK(08/01/2020)