IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.03.2019

CORAM:

THE HON'BLE MR.JUSTICE G.K.ILANTHIRAIYAN

Crl.O.P.No.8961 of 2014
and
M.P.No.1 of 2014

M.Iqbal ....Petitioner

Vs

M.Sargunan ...Respondent

Prayer: Criminal Original Petition filed Under Section 482 of the Code of Criminal Procedure 1973 to call for the records in C.C.No.195 of 2013 on the file of Judicial Magistrate, Fast Track Court, Vellore and quash the same.

For Petitioner : M/s.S.Sivakumar

For Respondent : No Appearance

O R D E R

The petitioner is the accused in C.C.No.195 of 2013 pending on the file of the learned Judicial Magistrate, Fast Track Court, Vellore.

2. The respondent/complainant had filed a complaint against the petitioner/accused for an alleged offence punishable under Section 138 of the Negotiable Instruments Act, 1881 [hereinafter referred to as 'NI Act'] 1881.

3. The case of the complainant is that the petitioner is doing business in steel rolling materials in the name and style of "IVEE STEEL ROLLING MILL". On the basis of his acquaintance with the complainant through his brother, on 16.03.2013, the petitioner approached the respondent and had borrowed a loan of Rs.70,00,000/- from the respondent to meet out his business and executed a Demand Promissory note, dated 16.03.2013 in favour of the respondent at Vellore and agreeing to repay the loan amount together with interest at the rate of 12% p.a. on demand. However, even after a lapse of considerable time, the petitioner

did not pay any amount. Moreover, repeated demands to repay the loan amount made by the respondent, on 29.03.2013 the petitioner was issued a cheque bearing No.205988, dated 30.03.2013 for the said amount of Rs.70,00,000/- drawn on M/s.Syndicate Bank, Vellore Branch to the respondent. When the cheque was presented for an encashment/realization by the respondent through his bankers viz., M/s.Indian Bank, Odugathur Branch, on 30.03.2013 and the same was returned for the reason “insufficient funds”. Therefore, the respondent issued a statutory notice to the petitioner on 23.07.2013 and thereafter, the petitioner failed to repay the loan amount. Hence, the complaint.

4. The learned counsel for the petitioner submitted that the cheque was issued in the name of M/s. IVEE STEEL ROLLING MILL in the capacity as managing partner, but the respondent did not issue any notice to the M/s "IVEE STEEL ROLLING MILL" or other partners of the company. When the respondent failed to implead the company as an accused, the complaint itself is not maintainable. Further, the learned counsel submits that the cheque was again represented by the respondent on 07.06.2013 and the same was returned by return memo dated 02.05.2013 and 24.06.2013 for the reason that "insufficient funds". The respondent had issued a legal notice dated 23.07.2013, for which the respondent stated that when he was presented the cheque for collection and the same was returned on 17.06.2013. Also the said notice was received only on 26.07.2013. It was sent after 39 days which is beyond the limitation of NI Act. Therefore, he prayed for quashing the entire proceedings.

5. Heard the learned counsel appearing for the petitioner and none appeared behalf of the respondent and perused all the materials available on record.

6. It is seen that the petitioner is the sole accused. The respondent has initiated the proceedings under Section 138 of the NI Act, as against the petitioner and alleging that the petitioner had borrowed a sum of Rs.70,00,000/- as loan to meet out his business and executed a Demand Promissory Note in favour of the respondent and agreeing to repay the said loan amount. However, even after a lapse of considerable time, the petitioner did not pay any amount. Thereafter, the petitioner was issued a cheque in respect of loan amount of Rs.70,00,000/- and the said cheque was presented for collection and was returned as dishonoured for the reason "insufficient funds". Thereafter, the respondent stated in his notice that the proceedings were initiated under Section 138 of the NI Act as against the petitioner.

7. It is also seen that the cheque was issued by the petitioner in the capacity of managing partner of M/s.IVEE STEEL ROLLING MILL. Whereas, the complaint filed in the personal capacity by the respondent herein under Section 138 of the NI Act. When the cheque was issued on behalf of the partnership firm, the respondent ought to have impleaded the company as an accused. The relevant portion is extracted hereunder under Section 141 of the NI Act.

> (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Provided that nothing contained in this sub section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence. (Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter).
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> (2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

8. The provision of section 141 of the NI Act, postulate that if the person committing an offence under section 138 of the NI Act, is the company, every person, who at the time when the offence was committed was in charge of or was responsible to the company for the conduct of the business of the company as

well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished. In the absence of the company being arraigned as an accused, a complaint cannot be sustained as against the individual persons.

9. In this regard, the learned counsel for the petitioner relied upon the decision of the judgment of the Hon'ble Supreme Court in the case of Himanshu v. B.Shivamurthy and Anr, reported in CTC 2019 (1) 689, wherein, it has been observed as follows.-

The first submission on behalf of the appellant is no longer res integra. A decision of a three Judge Bench of this Court in Aneeta Hada v. Godfather Travels and Tours Private Limited governs the area of dispute. The issue which fell for consideration was whether an authorized signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 without the company being arraigned as an accused. The three Judge Bench held thus:-

> " 58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted."

In similar terms, the Court further held:

> "59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself...."

The judgment of the three Judge Bench ha since been followed by a two Judge Bench of this Court in Charanjit Pal Jindal v. L.N.Metalics. There is merit in the second submission which has been urged on behalf of the appellant as well. The proviso to

Section 138 contains the pre-conditions which must be fulfilled before an offence under the provision is made out. These conditions are; (i) presentation of the cheque to the bank within six months from the date on which it is drawn or within the period of its validity, whichever is earlier; (ii) a demand being made in writing by the payee or holder in due course by the issuance of a notice in writing to the drawer of the cheque within thirty days of the receipt of information from the bank of the return of the cheques; and (iii) the failure of the drawer to make payment of the amount of money to the payee or the holder in due course within fifteen days of the receipt of the notice.

In MSR Leathers v. S. Palaniappan, this Court held thus:-

> "12. The proviso to Section 138, however, is all important and stipulates three distinct conditions precedent, which must be satisfied before the dishonour of a cheque can constitute an offence and become punishable. The first condition is that the cheque ought to have 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. The second condition is that the payee or the holder in due course of the cheque, as the case may be, ought to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. The third condition is that the drawer of such a cheque should have failed to make 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. It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to Section 138 as Clauses (a), (b) and (c) thereof that an offence under Section 138 can be said to have been committed by the person issuing the cheque."

The importance of fulfilling these conditions has been adverted to in a recent judgment of a two Judge Bench of this Court in N.Harihara Krishnan v. J.Thomas.

Adverting to the ingredients of Section 138 of the NI Act, the Court observed as follows:

> "26. ....Obviously such complaints must contain the factual allegations constituting

each of the ingredients of the offence under Section 138. Those ingredients are: (1) that a person drew a cheque on an account maintained by him with the banker; (2) that such a cheque when presented to the bank is returned by the bank unpaid; (3) that such a cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity whichever is earlier; (4) that the payee demanded in writing from the drawer of the cheque the payment of the amount of money due under the cheque to payee; and (5) such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid...."

In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Limited, as its Director. A notice of demand was served only on the appellant. The complaint was lodged only against the appellant without arraigning t he company as an accused.

The provision of under Section 141 of the Negotiable Instruments Act, 1881, postulate that if the person committing an offence under Section 138 is a company, every person who at the time when the offence was committed was in charge of or was responsible to the company for the conduct of the business of the company as well as t he company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.

In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to section 138 of the Negotiable Instruments Act, 1881, the High Court was in error in holding that the company could now be arraigned as an accused. The above judgments are squarely applies to the case on hand.

10. The alleged cheque was issued by the petitioner on behalf of M/s. "IVEE STEEL ROLLING MILL" signed by the managing partner. Admittedly, no other partners are impleaded as an accused in the complaint. Further, it is also seen that no notice was also issued to the other partners or the company. As such, the non-inclusion of the company or other partners of the

company are fatal to the case of the complainant. Therefore, the complaint cannot be sustained as against the petitioner and it is liable to be quashed.

11. In view of the above circumstances of the case and also keeping in mind the decisions of the Hon'ble Supreme Court, as extracted supra, this Court is inclined to allow the present quash petition. In fine, the proceedings pending against the petitioner in C.C.No.195 of 2013 on the file of the learned Judicial Magistrate, [Fast Track Court], Vellore, stands quashed and this Criminal Original Petition is accordingly, allowed. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

msm

To

1.The Judicial Magistrate,
Fast Track Court, Vellore.

2.The Public Prosecutor,
High Court, Madras.

+1cc to Mr.S.Sivakumar, Advocate Sr.27131

Crl.O.P.No.8961 of 2014

mv[co]
srg 25/04/2019