

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 06.01.2020
CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

Crl.O.P.No.10356 of 2011
and
M.P.Nos.1 and 2 of 2011

Balasubba Naidu

... Petitioner

Vs.

Balakrishna Naicker (Deceased)
1.Gnnaprakasam
2.Saraswathi

[Legal heirs of the sole
respondent/ respondents 1 and 2
are impleaded as per the order of
this court dated 03.12.2018 made
in Crl.M.P.No.16373 of 2018 in
Crl.O.P.No.10356 of 2011.]

... Respondents

PRAYER: Petition filed under Section 482 of Cr.P.C., seeking to
call for the records and quash the complaint in CC.No.25 of 2005
on the file of the learned District Munsif cum Judicial
Magistrate, Thirukallukundram as against the petitioner herein.

For Petitioner : Mr.R.Ganesh Kumar

For Respondents : Mrs.C.R.Rukmani

O R D E R

This Criminal Original Petition has been filed to call for
the records and quash the complaint in CC.No.25 of 2005 on the
file of the learned District Munsif cum Judicial Magistrate,
Thirukallukundram as against the petitioner herein.

2. The case of the prosecution is that the respondent had
filed a complaint under Section 138 of Negotiable Instruments
Act before the learned District Munsif cum Judicial Magistrate,
Thirukallukundram in C.C.No.25 of 2005 against the accused 1 and
2 viz., Tirupathiah and Chennappa Naidu in respect of dishonour
of a cheque dated 31.10.1997 bearing No.423515 for a sum of
Rs.3,00,000/-. The above said cheque was alleged to have been
issued by accused 1 and 2 to discharge the liability arising out

of a sale transaction, where the respondent/ complainant had sold a land to the company in which the accused 1 and 2 are concerned. The cheque was presented for collection by the respondent was returned by the 1st accused bankers on 18.04.1998 as "Funds insufficient". Thereafter, the respondent/ complainant is alleged to have issued statutory notice dated 23.04.1998 to the accused 1 and 2 to pay the cheque amount. The said notice was received by the 1st accused and the notice sent to the 2nd accused was returned as "Not found". The respondent/ complainant had filed a case before the learned District Munsif cum Judicial Magistrate, Thirukallukundram in CC.No.134 of 1998 which was re-numbered as CC.No.25 of 2005. The 1st accused had entered appearance in the said case before the trial court and as against the 2nd accused NBW is pending.

3. While such being the case, after the lapse of several years the respondent/ complainant had taken out an application in CrI.M.P.No.1419 of 2009 before the learned District Munsif cum Judicial Magistrate, Thirukallukundram under Section 319(1) and (4), 156 Cr.P.C r/w.138A of the Negotiable Instruments Act for impleading the petitioner herein as 3rd accused in C.C.No.25 of 2005. Without issuing notice and without assigning any reason the impleading petition filed by the respondent was allowed on 17.08.2009 and thereafter, the trial court issued notice to the petitioner. Challenging the said complaint, the present petition has been filed.

4. The learned counsel appearing for the petitioner would submit that though the petitioner was not originally arrayed as an accused in the said complaint filed by the respondent, after a lapse of several years, the respondent had filed a petition under Section 319 Cr.P.C to implead the petitioner herein as 3rd accused. The trial court without issuing notice and without following the procedure under Section 142 of Negotiable Instruments Act allowed the said petition. Filing a complaint without issuing statutory notice, itself is bad in law. Further, though the complaint was filed in the year 2005 and the statutory period of 30 days was over in the year 2005 itself, after a lapse of 4 years, the respondent filing a petition u/s.319 Cr.P.C for impleading the petitioner as an accused is unsustainable.

5. The learned counsel for the petitioner in support of his contention had relied upon the judgment of the Hon'ble Apex Court in N.Harihara Krishnan vs. J.Thomas reported in 2017 SCC OnLine SC 1017, wherein, it has been clearly held in paragraph No.33 that in the offence under Section 138 of the Negotiable Instruments Act, the first ingredient constituting the offence is the fact that a person drew a cheque. The identity of the drawer of the cheque is necessarily required to be known to the

complainant (payee) and needs investigation and would not normally be in dispute unless the person who is alleged to have drawn a cheque dispute that very fact. The other facts required to be proved for securing the punishment of the person who drew a cheque that eventually got dishonoured is that the payee of the cheque did in fact comply with each one of the steps contemplated under Section 138 of the Negotiable Instruments Act before initiating prosecution. In the absence of any authority of law to investigate the offence u/s.138, there would be no person against whom a court can proceed. There cannot be a prosecution without an accused. The offence under Section 138 is person specific. Therefore, the parliament declared under Section 142 that the provisions dealing with taking cognizance contained in the Cr.P.C should give way to the procedure prescribed under Section 142. Therefore, the impleading petition filed under Section 319 Cr.P.C is bad in law, accordingly, he prayed to allow this petition.

6. Per contra, the learned counsel for the respondent would submit that in the earlier occasion one of the co-accused filed petitions before this court challenging the very same complaint and the said petitions were dismissed and thereafter, the 3rd accused filing the very similar type of petition is unsustainable. In support of her contention, she would rely upon the judgment of the Kerala High Court in M/s.Plywood House Vs. M/s.Wood Craft Products Ltd. and others reported in 1194 CRI.L.J.543, wherein it has been held that the 319 Cr.P.C empowers the court to proceed against any other person who appears to have committed any offence for which such person could be tried together with the accused already arraigned in the criminal case. Once the court decide to proceed against such other person then sub Section 4 says that the case may proceed as if such person had been an accused person when the court took cognizance of the offence upon which the inquiry or trial was commenced. In the present case as regards the other accused already the trial court had taken cognizance. Further the petitioner is the Executive Director of the said Company, therefore, the impleading of the petitioner and issuing summons for his appearance is not bad in law. Hence, she prays for dismissal of this petition.

7. On a perusal of the records it reveals that the petitioner was not originally arraigned as an accused, he was implicated in the said offence only on the petition, filed under Section 319(1) and (4), 156 Cr.P.C r/w.138A of the Negotiable Instruments Act, being allowed on 17.08.2009. Further on a perusal of the alleged cheque reveals that it was signed by the Director and the Executive Director for Dhana Teja Investments Ltd., on 31.10.1997 bearing cheque No.423515. However, this court perused the 138 complaint, on a perusal of the compliant,

it reveals that Tirupathiah and Chennappa Naidu were initially implicated as accused. However, the company viz., Dhana Teja Investments Ltd., was not implicated as accused in the said complaint. The Balasubba Naidu, who is the present petitioner was not originally arraigned as an accused and he was subsequently implicated under 319 Cr.P.C vide order dated 17.08.2009.

8. This court had also perused the decision of the Kerala High Court in M/s.Plywood House Vs. M/s.Wood Craft Products Ltd. and others reported in 1194 CRI.L.J.543, wherein the Kerala High Court held that the court have power to proceed against any other person who appears to have committed any offence for which such person could be tried together with the accused already arraigned in the case. Once the court decides to proceed against such other person then sub-sec (4) will save the earlier act of taking cognizance of the offence. Sub-sec (4) says that the case may proceed as if such person had been an accused person when the court took cognizance of the offence upon which the inquiry or trial was commenced. Subsequently, the Hon'ble Apex Court in N.Harihara Krishnan vs. J.Thomas reported in 2017 SCC OnLine SC 1017, had elaborately discussed about the impleading petition filed to initiate prosecution against the drawer beyond the period of limitation stipulated under the Act after the enactment of Section 142 of Negotiable Instruments Act. The relevant portion of the judgment is extracted hereunder:-

The scheme of the prosecution in punishing under Section 138 of THE ACT is different from the scheme of the CrPC. Section 138 creates an offence and prescribes punishment. No procedure for the investigation of the offence is contemplated. The prosecution is initiated on the basis of a written complaint made by the payee of a cheque. 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. It is obvious from the scheme of Section 138 that each one of the ingredients flows from a document which evidences the existence of such an ingredient. The only other ingredient which is required to be proved to establish the commission of an offence under Section 138 is that in spite of the demand notice referred to above, the drawer of the cheque failed to make the payment within a period of 15 days from the date of the receipt of the demand. A fact which the complainant can only assert but not prove, the burden would essentially be on the drawer of the cheque to prove that he had in fact made the payment pursuant to the demand.

By the nature of the offence under Section 138 of THE ACT, the first ingredient constituting the offence is the fact that a person drew a cheque. The identity of the drawer of the cheque is necessarily required to be known to the complainant (payee) and needs investigation and would not normally be in dispute unless the person who is alleged to have drawn a cheque disputes that very fact. The other facts required to be proved for securing the punishment of the person who drew a cheque that eventually got dishonoured is that the payee of the cheque did in fact comply with each one of the steps contemplated under Section 138 of THE ACT before initiating prosecution. Because it is already held by this Court that failure to comply with any one of the steps contemplated under Section 138 would not provide "cause of action for prosecution". Therefore, in the context of a prosecution under Section 138, the concept of taking cognizance of the offence but not the offender is not appropriate. Unless the complaint contains all the necessary factual allegations constituting each of the ingredients of the offence under Section 138, the Court cannot take cognizance of the offence. Disclosure of the name of the person drawing the cheque is one of the factual allegations which a

complaint is required to contain. Otherwise in the absence of any authority of law to investigate the offence under Section 138, there would be no person against whom a Court can proceed. There cannot be a prosecution without an accused. The offence under Section 138 is person specific. Therefore, the Parliament declared under Section 142 that the provisions dealing with taking cognizance contained in the CrPC should give way to the procedure prescribed under Section 142. Hence the opening of non-obstante clause under Section 142. It must also be remembered that Section 142 does not either contemplate a report to the police or authorise the Court taking cognizance to direct the police to investigate into the complaint.

9. A perusal of the above decision makes it clear that Section 138 creates an offence and prescribes punishment. No procedure for the investigation of the offence is contemplated. The prosecution is initiated on the basis of a written complaint made by the payee of a cheque. Obviously such complaints must contain the factual allegations constituting each of the ingredients of the offence under Section 138. In the present case though the instrument was issued by the Director and Executive Director of the Company, the Company was not arraigned as a party and only the individuals are arraigned as party and the said cheque was issued for non-payment of sale consideration. Admittedly, no statutory notice was issued as against the petitioner and he was implicated by filing a petition under Section 319 of Cr.P.C and the same was ordered on 17.08.2009 without following necessary procedures required under section 138 and 142 of Negotiable Instruments Act. Applying the ratio laid down by the Hon'ble Apex Court, this petition is allowed.

10. Accordingly, this criminal original petition is allowed. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CS-)

// True Copy//

Sub Assistant Registrar

dsa

To

1.The District Munsif cum Judicial Magistrate,
Thirukalukundram.

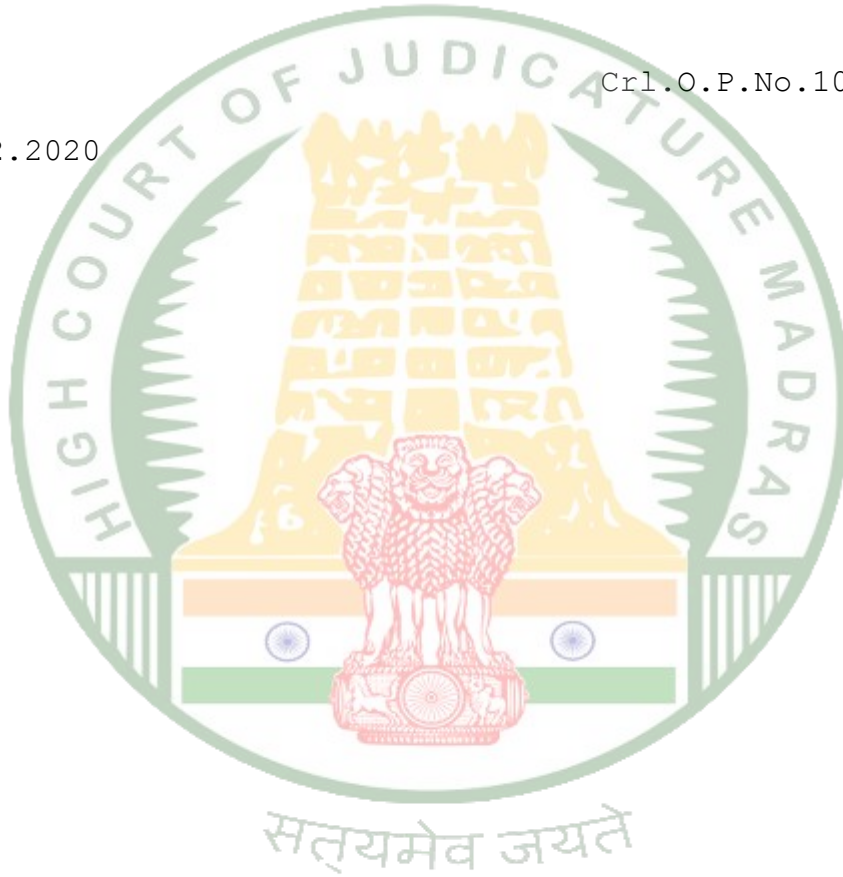
2.The Chief Judicial Magistrate,
Kancheepuram.

+lcc to Mr.R.Ganesh Kumar, Advocate, SR.No.750.

+lcc to Ms.C.R.Rukmani, Advocate, SR.No.706.

Crl.O.P.No.10356 of 2011

SJ(CO)
CSR: 18.02.2020



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