

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.08.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

CrI.O.P.No.1065 of 2020 and
CrI.MP.Nos.645 & 646 of 2020

Anandhanarayanan

... Petitioner

.Vs.

K.Harish

.... Respondent

Prayer: Criminal Original Petition filed under Section 482 Cr.P.C., praying to call for the records and quash the complaint in STC.No.437 of 2019 on the file of the Judicial Magistrate Fast Track Court, Magisterial Level, Poonamallee for an offence under Section 138 Negotiable Instruments Act, 1881.

For Petitioner : Mr.Adithya Varadarajan

For Respondent : No Appearance

O R D E R

This petition has been filed to quash the proceedings in STC.No.437 of 2019 on the file of the Judicial Magistrate Fast Track Court, Magisterial Level, Poonamallee, having been taken cognizance for the offences under Section 138 of Negotiable Instruments Act, 1881.

2. The learned counsel for the petitioner would submit that the petitioner is the accused in the complaint lodged by the respondent for the offences punishable under Section 138 of Negotiable Instruments Act. The impugned complaint is lodged by the power of attorney on behalf of the Managing Director of Amsak Cranes Private Limited. The alleged cheque was issued by the partner on behalf of Sanjey Heavy Engineering partnership firm. Admittedly, the respondent did not issue any statutory notice to the partnership firm and also failed to include the partnership firm as an accused in the complaint. When it being so, the complaint itself is not maintainable without impleading the partnership firm as an accused. The Hon'ble Supreme Court of India as well as this Court repeatedly held in a catena of judgments that the complaint is not maintainable without

partnership firm being made as an accused. In this regard, the learned counsel for the petitioner relied upon the following judgments:

- (i) Aneeta Hada Vs. Godfather Travels and Tours Private Limited reported in (2012) 5 SCC 661
- (ii) Himanshu Vs. B.Shivamurthy and another reported in (2019) 3 SCC 797 and
- (iii) Rangabashyam Vs. Ramesh reported in 2019 (6) CTC 392

3. Heard, Mr.Adithya Varadarajan, learned counsel for the petitioner. Though notice was served on the respondent and printed the name in the cause list, no one appeared on behalf of the respondent in person or through pleader.

4. The petitioner is the accused on the complaint lodged by the respondent herein for the offences punishable under Section 138 of NI Act. The crux of the complaint is that the respondent is a company engaged in manufacturing and supplying cranes. The accused is a partnership firm that is engaged in the business of manufacture of forklift, ace forklift and forklift truck and their partnership firm had purchased cranes and other ancillary parts from the respondent for a total sum of Rs.28,32,000/-. The partnership firm paid a sum of Rs.20,40,000/-and issued cheque towards part of balance payment for a sum of Rs.5,08,800/-. The said cheque was presented for collection and the same was returned dishonoured with an endorsement that "payment stopped by drawer". Again on the request of the petitioner, the cheque was re-presented and once again the said cheque was returned dishonoured for the very same reason, namely "payment stopped by drawer". After causing statutory notice to the accused initiated proceedings for the offences punishable under Section 138 of NI Act.

5. On perusal of records, the cheque was issued on behalf of partnership firm, namely Sanjey Heavy Engineering partnership firm. Whereas, the respondent caused statutory notice only to the partner who signed the cheque, namely the petitioner herein. Admittedly, the respondent did not issue any notice to the partnership firm and also did not implead the partnership firm as an accused in the complaint lodged for the offences under Section 138 of NI Act. Even according to the respondent, the partnership firm purchased materials and issued cheque towards part payment of the balance amount. Therefore, the complaint impugned is not at all maintainable as against the partner without impleading the partnership firm as an accused. In support of the contention, the learned counsel for the petitioner relied upon the judgment in the case Aneeta Hada Vs. Godfather Travels and Tours Private Limited reported in (2012) 5 SCC 661, wherein the Hon'ble Supreme Court of India has held as follows:

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.

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 dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh (supra) which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal (supra) does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada (supra) is overruled with the qualifier as stated in paragraph 51. The decision in Modi Distilleries (supra) has to be treated to be restricted to its own facts as has been explained by us hereinabove.

6. He also relied upon the judgment in the case of Himanshu Vs. B.Shivamurthy and another reported in (2019) 3 SCC 797, wherein the Hon'ble Supreme Court of India has held as follows:

8. The judgment of the three Judge Bench has 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.

9. 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.

10. 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, 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....

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

12. The provisions of Section 141 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 the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.

13. 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, the High Court was in error in holding that the company could now be arraigned as an Accused.

14. We, accordingly, are of the view that the High Court was in error in rejecting the petition Under Section 482 of the Code of Criminal Procedure. We hence allow the appeal and set aside the judgment of the High Court. In consequence, the complaint, being C.R.P. No. 27/2004 shall stand quashed.

In the above judgments, the Hon'ble Supreme Court of India has settled the law to the effect that complaint under Section 138 of NI Act cannot be maintained without issuing statutory notice to the company and without adding the company as accused, only as against the Director of the company.

7. In the case on hand, admittedly the alleged cheque was issued by the partnership firm and the respondent did not issue any statutory notice to the partnership firm and also did not

implead the partnership firm as an accused. There are two partners in the firm, in which the petitioner is being one of the partners only impleaded as an accused.

8. In view of the above discussion, this Criminal Original Petition is allowed and the proceedings in STC.No.437 of 2019 on the file of the Judicial Magistrate Fast Track Court, Magisterial Level, Poonamallee is quashed. Consequently, connected miscellaneous petitions are closed.

Sd/-

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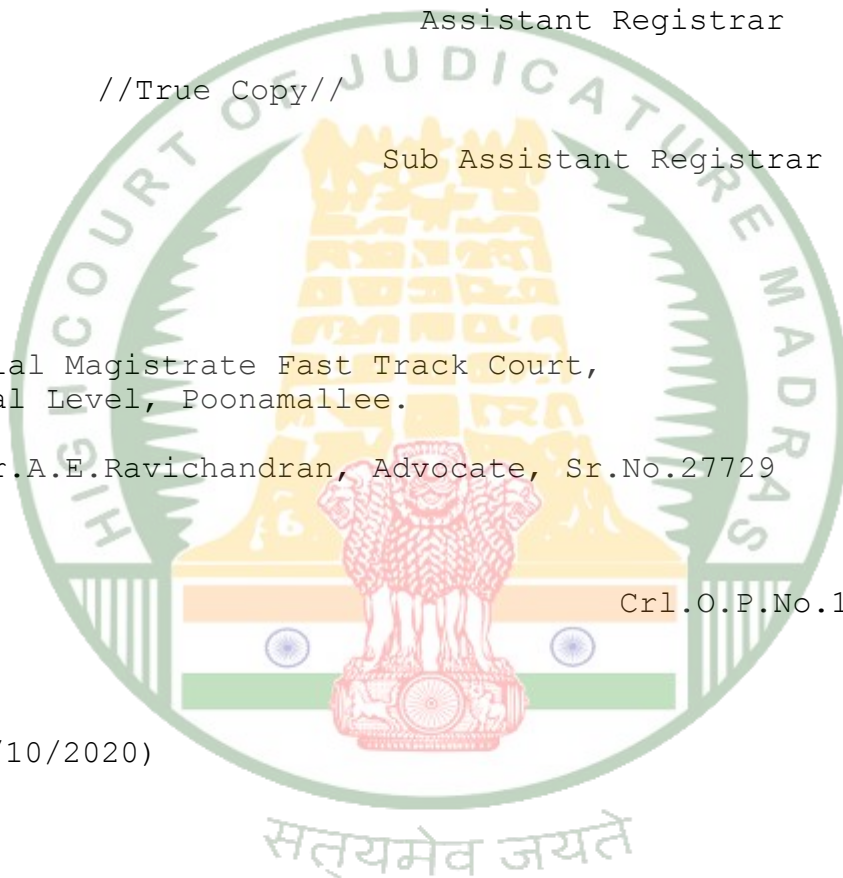
The Judicial Magistrate Fast Track Court,
Magisterial Level, Poonamallee.

+1cc to Mr.A.E.Ravichandran, Advocate, Sr.No.27729

Cr1.O.P.No.1065 of 2020

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