

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.07.2020

CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

CRL.O.P.No.1157 of 2020

and

Crl.MP.Nos.728 & 738 of 2020

Ilakkia Raja,
S/o.Sathiah,
Dr.No.5, Devendrar Nagar,
1st Street, Otteri Extension,
Vandalur, Chennai - 48.

... Petitioner/Accused

Vs.

T.Umamaheswaran
S/o.Thangaraj,
No.114, Madurai Veeran Koil,
Vada Nemili Village,
Thiruporur Taluk,
Kancheepuram District.

... Respondent/Complainant

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C. praying to call for the records in C.C.No.670 of 2019, on the file of the Judicial Magistrate No.1, Chengalpet and to quash the same against the petitioner.

For Petitioner : Mr.A.Edwin Prabakar

For Respondent : Mr.R.Krishnakumar

सत्यमेव जयते
O R D E R

This petition has been filed to quash the proceeding in C.C.No.670 of 2019 on the file of the learned Judicial Magistrate, Chengalpattu, thereby taken cognizance for the offences punishable under Section 138 of Negotiable Instruments Act, as against the petitioner.

2. The learned counsel appearing for the petitioner would submit that the petitioner is a sole accused in the complaint lodged by the respondent herein for the offences punishable under Section 138 of Negotiable Instruments Act. He further submitted that the respondent is an Advocate, who appeared on behalf of the petitioner in so many matters. While being so, the

respondent and his brother cheated the petitioner to the tune of Rs.7 lakhs and also misused the cheque issued by the petitioner herein and filed false case as against him with concocted stories. The alleged cheque was presented for collection before the Indian Bank, Madras High Court Branch, whereas the complaint has been lodged before the learned Judicial Magistrate I, Chengalpattu, without any jurisdiction. Therefore the complaint is liable to be quashed for lack of jurisdiction. He also relied upon the judgment reported in (2016) 2 SCC 75 in the case of Bridgestone India Private Limited Vs. Inderpal Singh in this regard. He further submitted that the statutory notice issued by the respondent did not fulfil the procedures laid down under Section 138 of Negotiable Instruments Act. The notice is a defective one and the seven days time has been given for the repayment, instead of 15 days as contemplated under the Act.

2.1. He further submitted that the respondent is an Advocate and misused the fiduciary relationship with his client and the continuation of the above complaint is harassment to the petitioner for choosing such a person for defending his case. He further submitted that the alleged cheque was issued as security for the loan borrowed by the petitioner herein. More over, the petitioner and the respondent are having relationship only as Advocate and client. Whereas as per Rule 49(1) C of the Advocates Act, the Advocate is barred from having any business transaction or loan transaction with his client. Therefore the entire complaint is liable to be quashed. He also relied upon the judgement reported in (2018) 1 SCC 638 in the case of B.Sunitha Vs. State of Telangana in support of his contention. Therefore he sought for quashment of the entire proceedings.

3. Per contra, the learned counsel appearing for the respondent would submit that though the respondent is being an Advocate for the petitioner herein, on behalf of the petitioner, the respondent paid fine amount for the offence committed by the petitioner under vehicle theft case. Further the petitioner involved other two cheque cases in S.T.C.No.1293 of 2016 and S.T.C.No.106 of 2018. In those cases, the respondent appeared and also he spent so much of money on behalf of the petitioner herein. While being so, for his business development and also for his personal expenditure, the petitioner borrowed a sum of Rs.24 lakhs from the respondent and also assured that he will pay interest to the said amount. He also executed pronote to that effect on 31.03.2017. Towards the repayment of the said amount, the petitioner issued a cheque for a sum of Rs.9,45,000/- on 28.07.2019 and the same was presented for collection and the same was returned dishonour for the reason the "Exceeds Arrangements". After issuing statutory notice, he lodged the present complaint for the offence under Section 138 of Negotiable Instruments Act. He further submitted that all the

points raised by the petitioner cannot be considered under Section 482 of Cr.P.C., and all are mixed question of fact. Therefore, he sought for dismissal of the quash petition.

4. Heard Mr.A.Edwin Prabakar, learned counsel appearing for the petitioner and Mr.R.Krishnakumar, learned counsel appearing for the respondent.

5. The petitioner is an accused in the complaint lodged by the respondent herein for the offences punishable under Section 138 of Negotiable Instruments Act in C.C.No.670 of 2019 on the file of the learned Judicial Magistrate No.1, Chengalpattu. The case of the complainant is that the petitioner borrowed a sum of Rs.24 lakhs for his development of his business and for personal expenditure on 31.03.2017 and he also assured that he will pay interest for the borrowed amount. Thereafter in order to repay the part of the amount, he issued a cheque for a sum of Rs.9,45,000/- and the same was presented for collection before the Indian Bank, High Court branch, Chennai, and it was returned for the reason that "Exceeds Arrangements". Hence the complaint.

6. On perusal of the notice issued by the respondent/defacto complainant dated 27.08.2019, the respondent stated that the petitioner borrowed a sum of Rs.24 lakhs with interest of 24% per annum. Further the respondent demanded the petitioner to pay the cheque amount within the period of seven days from the date of receipt of the notice. It is relevant to extract the provision under Section 138(c) of Negotiable Instruments Act as follows :-

"138(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.

Accordingly, the respondent ought to have asked for payment of the cheque amount within a period of 15 days. Whereas the respondent issued notice asking the petitioner to repay the cheque amount within a period of seven days. Therefore, the statutory notice did not fulfill the requirements made under Section 138(c) of Negotiable Instruments Act.

7. Admittedly, the respondent is a practicing Advocate and he appeared on behalf of the petitioner in S.T.C.No.1293 of 2016 on the file of the learned Judicial Magistrate No.4, Salem and also in S.T.C.No.106 of 2018 on the file of the learned Judicial Magistrate No.1, Salem. While being so, he is barred from having any business transactions or loan transactions with his client viz., the petitioner herein.

8. In this regard, the learned counsel appearing for the petitioner relied upon the judgement reported in (2018) 1 SCC 638 in the case of B.Sunitha Vs. State of Telengana, in which the Hon'ble Supreme Court of India held as follows :-

"12. One of the issues was dealt with by a single Bench Judgment of the Madras High Court in C. Manohar versus B.R. Poornima. R. Banumathi, J (as her Lordship then was) held that no presumption could arise merely by issuance of a cheque that amount stipulated in the cheque was payable towards fee. In absence of independent proof, issuance of cheque could not furnish cause of action under Section 138 of the Act in the context 4 J.S. Vasu versus State of Punjab (1994) 1 SCC 184, para 20 5 (2004) Cr1.L.J 443 of an advocate or client. The observations relevant in the context are as follows :

".....The case in hand is an example of the present day trend of the legal profession. Legal profession is essentially service oriental. Ancestor of today's lawyers was no more than a spokesperson, who rendered his services to the needy members of the society, by putting forth their case before the authorities. Their services were rendered without regard to remuneration received or to be received. With the growth of litigation, legal profession became a full time occupation. The trend of the legal profession has changed ... profession has almost become a trade. There is no more service orientation.

12. The relationship between the lawyer and the client is one of trust and confidence. The client engages a lawyer for personal reasons and is at liberty to leave him for the same reasons. Considering the relationship between the lawyer and the client and the present day trend in the profession, it has to be carefully seen whether the complainant has proved that the amount due of Rs. 43.600/- is being payable towards him.

13. To attract the penal provisions under

Section 138 N. I. Act, a cheque must have been drawn by the accused 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 due. That means, the cheque must have been issued in discharge of debt or other liability wholly or in part. The cheque given for any other reasons not for the satisfaction of any debt or other liability, even if it is returned unpaid-, will not meet with penal consequences.

14. Case of the complainant is that on behalf of the accused, he has filed claim petitions in M. C. O. P. Nos. 2339 of 1992 and 246 of 1993. Two civil cases were also filed. There is nothing to show that the complainant/Advocate himself has paid the stamp duty and bore the legal fees. The complainant has not produced any agreement showing as to what was the arrangement between him and the accused, as to how much is the fee payable and whether the accused agreed for payment of stamp duty by her counsel itself. In the absence of any agreement, Ex. P-1 cheque cannot be said to have been issued for the purpose of discharge of any substantial debt or liability. Urging the Court to raise the presumption under Section 139 N. I. Act, the learned counsel for the appellant has relied upon M/s. Modi Cements Ltd. versus Kuchil Kumar Nandi [(1998) 3 SCC 249] wherein the Supreme Court has held that once the cheque is issued by the drawer a presumption under Section 139 N. I. Act must follow and merely because the drawer issues a notice to the drawee (Payee) or to the Bank for stoppage of the payment it will not preclude an action under Section 138 of the Act by the drawee (Payee) or the holder of a cheque in due course. Of course, under Section 139 N. I. Act, there is a presumption that unless the contrary is proved, the holder of the cheque received the cheque for the discharge in whole or in part of any debt or other liability. But even in Section 139 N.I.

Act, the legal presumption is created only for the cheque so received for the discharge in whole or in part of any debt or other liability. In the case on hand, the complainant being a practising advocate, has not proved the debt amount payable towards him by the accused, who has engaged him as his lawyer to conduct the case. The finding of the trial Court that there is no debt or legally enforceable liability' does not suffer from any infirmity warranting interference."

13. The Bombay High Court in Re: KL Gauba⁶ held that fees conditional on the success of a case and which gives the lawyer 6 AIR 1954 Bom 478 an interest in the subject matter tends to undermine the status of the profession. The same has always been condemned as unworthy of the legal profession. If an advocate has interest in success of litigation, he may tend to depart from ethics.

14. In the matter of G. Senior Advocate of the Supreme Court, this Court held that the claim of an advocate based on a share in the subject matter is a professional misconduct. In VC Rangadurai versus D. Gopalan, it was observed that relation between a lawyer and his client is highly fiduciary in nature. The advocate is in the position of trust.

15. Rule 20 of Part VI, Chapter II, Section II of the Standard of Professional Conduct and Etiquette reads as follows :

"An advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof."

16. Thus, mere issuance of cheque by the client may not debar him from contesting the liability. If liability is disputed, the advocate has to independently prove the contract. Claim based on percentage of subject matter in litigation cannot be the basis of a complaint under Section 138 of the Act.

17. In view of the above, the claim of the respondent advocate being against public policy and being an act of professional misconduct, proceedings in the complaint filed by him have to be held to be abuse of the process of law and have to be quashed."

In the above judgment the Hon'ble Supreme Court of India held that the action of the Advocate is against public policy and an act of professional misconduct. The proceedings under his complaint is felt to be abuse of process of law and have to be quashed. In the case on hand, when there is a specific bar for doing money lending business that too with his own client, the act of the respondent is amount to professional misconduct. Therefore, the entire proceedings initiated as against the petitioner is nothing but clear abuse of process of law and the complaint itself is liable to be quashed.

9. That apart, the alleged cheque was presented before the Indian Bank, High Court branch at Chennai, whereas the complaint lodged by the respondent before the learned Judicial Magistrate No.1, Chengalpattu. In this regard, the learned counsel appearing for the petitioner relied upon the judgment reported in (2016) 2 SCC 75 in the case of Bridgestone India Private Limited Vs. Inderpal Singh, which reads as follows :-

"11. In order to overcome the legal position declared by this Court in Dashrath Rupsingh Rathod case [Dashrath Rupsingh Rathod v. State of Maharashtra, (2014) 9 SCC 129 : (2014) 4 SCC (Civ) 676 : (2014) 3 SCC (Cri) 673], the learned counsel for the appellant has drawn our attention to the Negotiable Instruments (Amendment) Second Ordinance, 2015 (hereinafter referred to as "the Ordinance"). A perusal of Section 1(2) thereof reveals that the Ordinance would be deemed to have come into force with effect from 15-6-2015. It is, therefore, pointed out to us that the Negotiable Instruments (Amendment) Second Ordinance, 2015 is in force. Our attention was then invited to Section 3 thereof, whereby, the original Section 142 of the Negotiable Instruments Act, 1881, came to be amended, and also, Section 4 thereof, whereby, Section 142-A was inserted into the Negotiable Instruments Act.

12. Sections 3 and 4 of the Negotiable

Instruments (Amendment) Second Ordinance, 2015 are being extracted hereunder:

'3.Amendment of Section 142.—In the principal Act, Section 142 shall be numbered as sub-section (1) thereof and after sub-section (1) as so numbered, the following sub-section shall be inserted, namely—

'142.(2) The offence under Section 138 shall be inquired into and tried only by a court within whose local jurisdiction—

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.—For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.'

4.Insertion of new section.—In the principal Act, after Section 142, the following section shall be inserted, namely —

'142-A.Validation for transfer of pending cases.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or any judgment, decree, order or directions of any court, all cases transferred to the court having jurisdiction under sub-section (2) of Section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015 (6 of 2015), shall be deemed to have been transferred under this Ordinance, as if that sub-section had been in force at all material times.

(2) Notwithstanding anything contained in sub-section (2) of Section 142 or sub-section (1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the court having jurisdiction under sub-section (2) of Section 142 or the case has been transferred to that court under sub-section (1), and such complaint is pending in that court, all subsequent complaints arising out of Section 138 against the same drawer shall be filed before the same court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.

(3) If, on the date of the commencement of this Ordinance, more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under sub-section (2) of Section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, before which the first case was filed and is pending, as if that sub-section had been in force at all material times."

13. A perusal of the amended Section 142(2), extracted above, leaves no room for any doubt, specially in view of the Explanation thereunder, that with reference to an offence under Section 138 of the Negotiable Instruments Act, 1881, the place where a cheque is delivered for collection i.e. the branch of the bank of the payee or holder in due course, where the drawee maintains an account, would be determinative of the place of territorial jurisdiction.

14. It is, however, imperative for the present controversy, that the appellant overcomes the legal position declared by

this Court, as well as, the provisions of the Code of Criminal Procedure. Insofar as the instant aspect of the matter is concerned, a reference may be made to Section 4 of the Negotiable Instruments (Amendment) Second Ordinance, 2015, whereby Section 142-A was inserted into the Negotiable Instruments Act. A perusal of sub-section (1) thereof leaves no room for any doubt, that insofar as the offence under Section 138 of the Negotiable Instruments Act is concerned, on the issue of jurisdiction, the provisions of the Code of Criminal Procedure, 1973, would have to give way to the provisions of the instant enactment on account of the non obstante clause in sub-section (1) of Section 142-A. Likewise, any judgment, decree, order or direction issued by a court would have no effect insofar as the territorial jurisdiction for initiating proceedings under Section 138 of the Negotiable Instruments Act is concerned. In the above view of the matter, we are satisfied that the judgment rendered by this Court in Dashrath Rupsingh Rathod case [Dashrath Rupsingh Rathod v. State of Maharashtra, (2014) 9 SCC 129 : (2014) 4 SCC (Civ) 676 : (2014) 3 SCC (Cri) 673] would also not non-suit the appellant for the relief claimed.

15. We are in complete agreement with the contention advanced at the hands of the learned counsel for the appellant. We are satisfied, that Section 142(2)(a), amended through the Negotiable Instruments (Amendment) Second Ordinance, 2015, vests jurisdiction for initiating proceedings for the offence under Section 138 of the Negotiable Instruments Act, inter alia, in the territorial jurisdiction of the court, where the cheque is delivered for collection (through an account of the branch of the bank where the payee or holder in due course maintains an account). We are also satisfied, based on Section 142-A(1) to the effect, that the judgment rendered by this Court in Dashrath Rupsingh Rathod case [Dashrath Rupsingh Rathod v. State of Maharashtra, (2014) 9 SCC 129 :

(2014) 4 SCC (Civ) 676 : (2014) 3 SCC (Cri) 673] , would not stand in the way of the appellant, insofar as the territorial jurisdiction for initiating proceedings emerging from the dishonour of the cheque in the present case arises.

16. Since Cheque No. 1950, in the sum of Rs 26,958, drawn on Union Bank of India, Chandigarh, dated 2-5-2006, was presented for encashment at IDBI Bank, Indore, which intimated its dishonour to the appellant on 4-8-2006, we are of the view that the Judicial Magistrate, First Class, Indore, would have the territorial jurisdiction to take cognizance of the proceedings initiated by the appellant under Section 138 of the Negotiable Instruments Act, 1881, after the promulgation of the Negotiable Instruments (Amendment) Second Ordinance, 2015. The words "... as if that sub-section had been in force at all material times..." used with reference to Section 142(2), in Section 142-A(1) gives retrospectivity to the provision.

17. In the above view of the matter, the instant appeal is allowed, and the impugned order passed by the High Court of Madhya Pradesh, by its Indore Bench, dated 5-5-2011 [Inderpal Singh v. Bridgestone India (P) Ltd. Misc. Criminal Case No. 2677 of 2010, order dated 5-5-2011 (MP)] , is set aside. The parties are directed to appear before the Judicial Magistrate, First Class, Indore, on 15-1-2016. In case the complaint filed by the appellant has been returned, it shall be re-presented before the Judicial Magistrate, First Class, Indore, Madhya Pradesh, on the date of appearance indicated herein above."

In the above judgment the Hon'ble Supreme Court of India held that the place where the cheque is delivered for collection i.e., the branch of the payee or holder in due course, where the drawee maintains an account, would be determinative of the place of territorial jurisdiction. Accordingly, the respondent ought to have filed the complaint within the jurisdiction of Indian Bank, High Court branch. Therefore, on this ground also the complaint cannot be sustained as against the petitioner.

10. In view of the above discussion, this Criminal Original Petition stands allowed and the proceeding in C.C.No.670 of 2019 on the file of the learned Judicial Magistrate No.I, Chengalpattu, is hereby quashed. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

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Sub Assistant Registrar

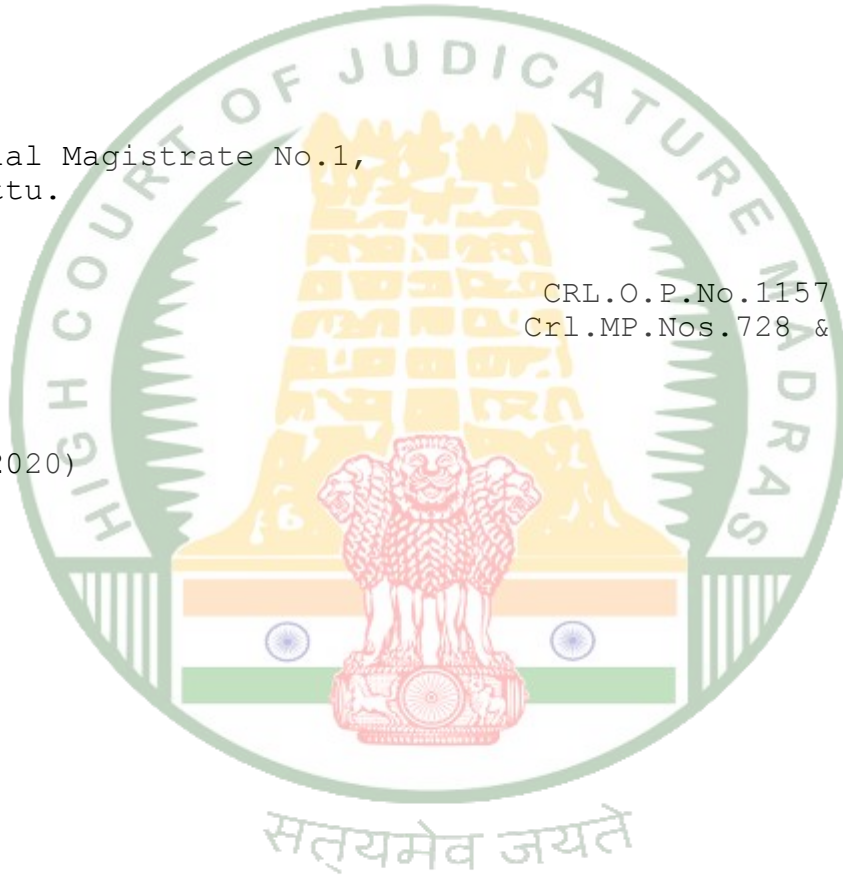
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To

The Judicial Magistrate No.1,
Chengalpattu.

CRL.O.P.No.1157 of 2020 and
Crl.MP.Nos.728 & 738 of 2020

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