Crl.O.P.No.1051 of 2020 and
Crl.MP.Nos.641 & 643 of 2020

G.K.ILANTHIRAIYAN, J.

At the instance of the learned counsel for the petitioner, today this matter has been posted under the caption "for being mentioned" for correcting the facts of the case.

2. Heard, the learned counsel for the petitioner.

3. It is ordered that the entire order made in Crl.OP.No.1051 of 2020 dated 29.07.2020 shall read as follows:

"This petition has been filed to quash the proceeding in C.C.No.3560 of 2019 on the file of the learned Metropolitan Magistrate (Fast Tract Court-II), Egmore, Chennai, thereby taken cognizance for the offence under Section 138 of Negotiable Instruments Act, as against the petitioner.

2. The learned counsel appearing for the petitioner would submit that the respondent lodged complaint for the offence under Section 138 of Negotiable Instruments Act, in which the petitioner is arrayed as accused. He further submitted that the respondent who is practicing Advocate had friendship with the petitioner during the year 2002, when he was came to purchase audio speaker. Thereafter, they become friends and they had financial transactions. During the year 2015, the respondent borrowed a sum of Rs.2 lakhs from the petitioner herein. In order to discharge the same, he issued cheque for the said sum and when it was presented for collection, the same was returned dishonored. Therefore the petitioner insisted the respondent to settle the amount, for which he threatened the petitioner with dire consequences. Thereafter to escape from the clutches of law, the respondent misused the cheque, which was given by the petitioner as security, while borrowing loan from the respondent and initiated proceedings for the offences under Section 138 of Negotiable Act. Therefore, there is no legally enforceable debt

to the respondent as such the entire proceedings is nothing but clear abuse of process of law. He further submitted that the respondent is being an Advocate, he clearly barred by the Indian Bar Council Rules as well as the Advocates Act from indulging money lending business. Therefore the entire proceedings is liable to be quashed.

3. Per contra, the learned counsel appearing for the respondent would submit that the petitioner is a known friend of the respondent and for his urgent needs, the petitioner borrowed a sum of Rs.3 lakhs from the respondent and towards the repayment of the said amount, the petitioner issued a cheque for a sum of Rs.3,00,000/- on 31.05.2016 and the same was presented for collection. The said cheque was returned dishonour for the reason that “Funds Insufficient". After issuing statutory notice, the respondent lodged the present complaint for the offence under Section 138 of Negotiable Instruments Act as against the petitioner. 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.R.Thirumoorthy, learned counsel appearing for the petitioner and Mr.W.Camyles Gandhi, learned counsel appearing for the respondent.

5. The petitioner is an accused in the complaint lodged by the respondent herein for the offence punishable under Section 138 of NI Act in C.C.No.3560 of 2019 on the file of the learned Metropolitan Magistrate, Fast Tract Court-II, Egmore, Chennai. The case of the complainant is that the petitioner borrowed a sum of Rs.3,00,000/- for his urgent needs. Thereafter in order to repay the said amount, he issued a cheque for a sum of Rs.3,00,000/- and the same was presented for collection in the Bank of India Ltd, Egmore Branch, Chennai and it was returned for the reason that "Funds Insufficient". Hence the complaint.

6. The only point raised by the learned counsel appearing for the petitioner is that the respondent is being an Advocate, he ought not to have do the business of money lending. In this regard, it is relevant to rely 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) Crl.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 became 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."

7. In the above judgment the Hon'ble Supreme Court of India held that the action of Advocate is against public policy and an act of professional misconduct. Further in the absence of independent proof, issuance of cheque could not furnish cause of action under Section 138 of NI Act. 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 the penal

consequences. In the case on hand, admittedly the petitioner is an advocate represented by his colleague. The complainant has acquaintance with the respondent from the year 2002 and they had money transactions. In fact, the respondent borrowed money from the petitioner and to discharge the said liability, he issued cheque No.005972 dated 20.05.2015, which was returned dishonoured. When the petitioner insisted the respondent for the said amount, the respondent lodged the impugned complaint as against the petitioner herein. It proves that they had money transaction. When there is a specific bar for doing money lending business, the act of the respondent is amount to professional misconduct. Also in the absence of any proof to show that the petitioner issued the alleged cheque in discharge of any legally enforceable debt, the impugned complaint is nothing but clear abuse of process of law and it is liable to be quashed.

8. In view of the above discussion, this Criminal Original Petition is allowed and the proceeding in C.C.No.3560 of

2019 on the file of the learned Metropolitan Magistrate, Fast Track Court-II, Egmore at Chennai, is hereby quashed. Consequently, connected miscellaneous petitions are closed."

4. The Registry is directed to issue a fresh order copy in Crl.O.P.No.1051 of 2020 dated 29.07.2020 after making necessary corrections.

18.09.2020

lok

G.K.ILANTHIRAIYAN, J.

lok

Crl.O.P.No.1051 of 2020 and
Crl.MP.Nos.641 & 643 of 2020

18.09.2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.07.2020

CORAM:

THE HONOURABLE MR.JUSTICE **G.K.ILANTHIRAIYAN**

CRL.O.P.No.1051 of 2020
and Crl.MP.Nos.641 & 643 of 2020

Rajasekaran,
S/o. Ramu,
Proprietor of M/s.Silicon Radio House,
Harini Building, 1st Floor,
No.72, Nelson Manickam Road,
Aminjikarai,
Chennai - 600 029. ... Petitioner

Vs.

Amul Prakash,
Rep by its POA
S.Ravindrakumar,
No.51, Ritherdon Road,
Vepery,
Chennai - 600 007. ... Respondents

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C. praying to call for the records pending on the file of the Fast Track Court-II, Metropolitan Magistrate, Egmore at Chennai in C.C.No.3560 of 2019 and to quash the same.

For Petitioner : Mr.R.Thirumoorthy

For Respondent : Mr.W.Camyles Gandhi

O R D E R

This petition has been filed to quash the proceeding in C.C.No.3560 of 2019 on the file of the learned Metropolitan Magistrate (Fast Tract Court-II), Egmore, Chennai, thereby taken cognizance for the offence under Section 138 of Negotiable Instruments Act, as against the petitioner.

2. The learned counsel appearing for the petitioner would submit that the respondent lodged complaint for the offence under Section 138 of Negotiable Instruments Act, in which the petitioner is arrayed as accused. He further submitted that the respondent who is practicing Advocate had friendship with the petitioner during the year 2002, when he was came to purchase audio speaker. Thereafter, they become friends and they had financial transactions. During the year 2015, the respondent borrowed a sum of Rs.2 lakhs from the petitioner herein. In order to discharge the same, he issued cheque for the said

sum and when it was presented for collection, the same was returned dishonored. Therefore the petitioner insisted the respondent to settle the amount, for which he threatened the petitioner with dire consequences. Thereafter to escape from the clutches of law, the respondent misused the cheque, which was given by the petitioner as security, while borrowing loan from the respondent and initiated proceedings for the offences under Section 138 of Negotiable Act. Therefore, there is no legally enforceable debt to the respondent as such the entire proceedings is nothing but clear abuse of process of law. He further submitted that the respondent is being an Advocate, he clearly barred by the Indian Bar Council Rules as well as the Advocates Act from indulging money lending business for interest. Therefore the entire proceedings is liable to be quashed.

3. Per contra, the learned counsel appearing for the respondent would submit that the petitioner is a known friend of the respondent and for his business development and also for his personal expenditure, the petitioner borrowed a sum of Rs.3 lakhs from the respondent and also assured

that he will pay interest to the said amount. Towards the repayment of the said amount, the petitioner issued a cheque for a sum of Rs.3,00,000/- on 31.05.2016 and the same was presented for collection. The said cheque was returned dishonour for the reason that "Funds Insufficient". After issuing statutory notice, the respondent lodged the present complaint for the offence under Section 138 of Negotiable Instruments Act as against the petitioner. 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.R.Thirumoorthy, learned counsel appearing for the petitioner and Mr.W.Camyles Gandhi, learned counsel appearing for the respondent.

5. The petitioner is an accused in the complaint lodged by the respondent herein for the offence punishable under Section 138 of NI Act in C.C.No.3560 of 2019 on the file of the learned Metropolitan Magistrate, Fast

Tract Court-II, Egmore, Chennai. The case of the complainant is that the petitioner borrowed a sum of Rs.3,00,000/- for his urgent needs and he also assured that he will pay interest for the borrowed amount. Thereafter in order to repay the said amount, he issued a cheque for a sum of Rs.3,00,000/- and the same was presented for collection in the Bank of India Ltd, Egmore Branch, Chennai and it was returned for the reason that “Funds Insufficient”. Hence the complaint.

6. The only point raised by the learned counsel appearing for the petitioner is that the respondent is being an Advocate, he ought not to have do the business of money lending. In this regard, it is relevant to rely 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) Crl.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 became 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.

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> *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."*

7. In the above judgment the Hon'ble Supreme Court of India held that the action of 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.

8. In view of the above discussion, this Criminal Original Petition is allowed and the proceeding in C.C.No.3560 of 2019 on the file of the learned Metropolitan Magistrate, Fast Track Court-II, Egmore at Chennai, is hereby quashed. Consequently, connected miscellaneous petitions are closed.

29.07.2020

Internet : Yes / No
Index : Yes / No
Speaking / Non Speaking order
rts

To

The Metropolitan Magistrate,
Fast Track Court-II,
Egmore at Chennai

G.K.ILANTHIRAIYAN, J.
rts

CRL.O.P.No.1051 of 2020 and
Crl.MP.Nos.641 & 643 of 2020

29.07.2020