

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.09.2020

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

CrI.O.P.No.9503 of 2015 and
CrI.M.P.Nos.1 & 2 of 2015

Nithya,
Director,
M/s.Nitsun Garments Pvt. Ltd.,
No.141 A, Thanneer Pandal Colony West,
15, Velampalayam,
Thiruppur-641 652. ...Petitioner/3rd Accused

Vs.

M/s.MIQ Logistics India Pvt Ltd.,
Represented by its Authorized Agent,
Mr.P.S.Sriram,
S/o.P.R.Saranath,
No.8/25, IInd Floor, Kambar Street,
Alandur, Chennai-600 016. ...Respondent/Complainant

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the records in respect of the complaint filed by the respondent herein in C.C.No.254 of 2015 Judicial Magistrate No.I, Thiruppur and quash the same as far as petitioner is concerned.

For Petitioner : Mr.R.Nalliyappan
For Respondent : Mr.A.Ashwin Kumar,
Legal Aid Counsel

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ORDER

The petitioner/A2 who is facing trial in C.C.No.254 of 2015 for offence under Sections 138 r/w 141 and 142 of the Negotiable Instruments Act, 1881, pending on the file of the Judicial Magistrate Court No.I, Tiruppur, has filed this quash petition.

2.Despite serving of notice to the respondent and his name

being printed in the cause list, no representation for him. Hence, this Court by order dated 31.08.2020, appointed Mr.A.Ashwin Kumar as Legal Aid Counsel for the respondent.

3.The gist of the case is that A1 company viz., M/s.Nitsun Garments Private Limited, Tirupur was indulging in the business of manufacturing garments and exporting and A2 and A3/petitioner are the Managing Director and Director respectively of the 1st accused company. A1 company had engaged the respondent company viz., M/s.MIQ Logistics India Private Limited to transport garments packed in cartoons boxes to Newyork via air and towards Air Freight Charges for two shipments. A2 on behalf of the A1 company had issued two posted cheques bearing Nos.468445 & 468444, dated 18.10.2014 for Rs.7,43,683/- and Rs.10,40,763/- respectively drawn on Axis Bank Limited, Tirupur in favour of the respondent company.

4.On 05.11.2014, when the respondent presented the cheques for collection in its Bank viz., HSBC Bank, Rajaji Salai, Chennai, the cheques were returned as 'Payment Stopped by Drawer'. The respondent was informed of the return of cheques through Return Memos dated 07.11.2014. Thereafter, the respondent sent a legal notice to the accused on 05.12.2014 within 15 days. All the accused received the notice on 13.12.2014, failed to repay the cheque amount, but sent a reply dated 09.01.2015 to the respondent. On receipt of the same, the respondent sent a rejoinder dated 27.01.2015, by refuting the allegations of the accused dated 09.01.2015.

5.The accused not paid the cheque amounts within 15 days from the date of receipt of the notice and thereby, committed the offence under Section 138 r/w 141, 142 of the Negotiable Instruments Act, 1881.

6.The learned counsel for the petitioner submitted that the petitioner is A3, since being a Director of A1 company and wife of A2, she is roped in this case as accused and she is not incharge of the management and affairs of A1 company. The learned counsel for the petitioner further submitted that since the petitioner is neither the signatory nor having any specific role as alleged by the respondent, the learned Magistrate ought not to have taken cognizance of the complaint against the petitioner. It is on the part of the respondent to make specific allegations for making a Director vicariously liable for the acts of the company, but in this case, the complaint of the respondent does not whisper any such allegation against the petitioner.

7.The learned counsel for the petitioner further submitted that mere bald statement that the petitioner is incharge of

responsible to A1 company, is not sufficient to maintain prosecution. Further, the necessary requirements of the complaint which need to be indicated in the complaint are how, in what manner, the role, description and specific allegation as to the part played by a person before she could be made as accused. In this case, there is no description as to how the petitioner acted on behalf of A1 company.

8.It is further submitted that it is necessary to specifically aver in a complaint under Section 141 of the Negotiable Instruments Act that at the time the offence, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement to attract Section 141 of the Negotiable Instruments Act. Without any such averment in the complaint, the requirements of Section 141 of the Negotiable Instruments Act cannot be said to be satisfied.

9.It is further submitted that for prosecuting the Director of the company under Section 141 of the Negotiable Instruments Act, an authoritative pronouncement in the case of "S.M.S Pharmaceuticals Limited reported in (2005) 8 SCC 89" was rendered by the Hon'ble Apex Court that "essential averment to be made in the complaint and it is necessary to aver that at the time the offence was committed the present accused was incharge of, and responsible for the conduct of business of the company.". Further, the provision under Section 141 of the Negotiable Instruments Act is an exception to normal rule that no one is to be held criminally liable for an act of another. Further, in the case of dishonour of cheque and offence made by company, vicarious liability on the part of the accused, must be pleaded and proved and not inferred. Hence, he prayed to quash the proceedings against the petitioner/A3.

10.The learned counsel for the respondent submitted that the 1st accused company viz., M/s.Nitsun Garments Private Limited, Tirupur, representing by its Managing Director/A1 and Director/A2/petitioner, in order to discharge liability, issued two cheques bearing numbers 468445 & 468444, dated 18.10.2014 for Rs.7,43,683/- and Rs.10,40,763/- respectively drawn on Axis Bank Limited, Tirupur.

11.On 05.11.2014, when the respondent presented the cheques for collection in its Bank viz., HSBC Bank, Rajaji Salai, Chennai, the cheques were returned as 'Payment Stopped by Drawer'. Hence, the respondent sent a legal notice to the accused on 05.12.2014 within 15 days. On receipt of the notice, the accused sent a reply dated 09.01.2015, stating that the cheques were issued as security. Annoyed over the same, the respondent filed a private complaint before the learned Judicial

Magistrate No.I, Thirupur, for offence under Section 138 r/w 141, 142 of the Negotiable Instruments Act, 1881.

12.The learned counsel for the respondent further submitted that the petitioner is the Director of A1 company. Hence, she cannot now claim that he was was not incharge of the affairs of A1 company. The petitioner along with A2 fraudulently with a dishonest intention to defraud the respondent issued 'Stop Payment' instruction to the bank, to get the cheques bounced for the reason of 'Payment Stopped by Drawer'. The act of the accused not only attracts the offence under Section 138 of the Negotiable Instruments Act, but also the criminal breach of trust and cheating, for which they are held liable for prosecution. He further submitted that it is settled law that a specific averment in the complaint that a person is incharge of and is responsible to the company for the conduct of the business of the company is sufficient to maintain the complaint under Section 138 of the Negotiable Instruments Act. Further, it is not necessary upon the respondent to elaborate in the complaint the role played by each of the Directors in the transaction forming the subject matter of the complaint. In the present case, the petitioner/A3 and A2 were the Director and Managing Director respectively of A1 company at the time when the offence committed and were in charge and responsible for the conduct and day to day business of A1 company. Hence, the learned Judicial Magistrate No.I, Tirupur has rightly taken cognizance of the complaint, which cannot be quashed by invoking Section 482 Cr.P.C by this Court and it is a matter for trial. Thus, the points agitated by the petitioner are to be decided only during the trial.

13.In support of his contention, reliance was placed on the Judgment of the Hon'ble Supreme Court in the case of "Gunmala Sales Private Limited Versus Anu Mehta and Ors. reported in 2015 1 SCC 103".

14.This Court considered the rival submissions and perused the materials available on record.

15.It is not in dispute that the petitioner/A3 is the Director of A1 company. In order to discharge the liability, the said two cheques were issued to the respondent, which were returned in the Bank viz., HSBC Bank, Rajaji Salai, Chennai and the same were returned as 'Payment Stopped by Drawer'.

16.On an overall reading of the complaint, it is seen from the complaint that except the bald averments that the the petitioner/A3 was in charge of and responsible to A1 company at the relevant point of time, nothing has been stated as to what part was played and how she was responsible regarding the

issuance of cheque.

17.The Hon'ble Apex Court laid the guidelines in "S.M.S Pharmaceuticals" (cited supra) in the case of prosecution of Director for vicarious liability under Section 141 of the Negotiable Instruments Act, is as follows:-

"17.K.P.G. Nair v. Jindal Menthol India Ltd. [(2001) 10 SCC 218 : 2002 SCC (Cri) 1038] was a case under the Negotiable Instruments Act. It was found that the allegations in the complaint did not in express words or with reference to the allegations contained therein make out a case that at the time of commission of the offence, the appellant was in charge of and was responsible to the company for the conduct of its business. It was held that the requirement of Section 141 was not met and the complaint against the accused was quashed. Similar was the position in Katta Sujatha v. Fertilizers & Chemicals Travancore Ltd. [(2002) 7 SCC 655 : 2003 SCC (Cri) 151] This was a case of a partnership. It was found that no allegations were contained in the complaint regarding the fact that the accused was a partner in charge of and was responsible to the firm for the conduct of business of the firm nor was there any allegation that the offence was made with the consent and connivance or that it was attributable to any neglect on the part of the accused. It was held that no case was made out against the accused who was a partner and the complaint was quashed. The latest in the line is the judgment of this Court in Monaben Ketanbhai Shah v. State of Gujarat [(2004) 7 SCC 15 : 2004 SCC (Cri) 1857] . It was observed as under: (SCC p. 17, para 4)

"4. It is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole. If the substance of the allegations made in the complaint fulfil the requirements of Section 141, the complaint has to proceed and is required to be tried with. It is also true that in construing a complaint a hypertechnical approach should not be adopted so as to quash the same. The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind. These provisions create a statutory presumption of dishonesty, exposing a person to criminal liability if payment is not made within the statutory period even after issue

of notice. It is also true that the power of quashing is required to be exercised very sparingly and where, read as a whole, factual foundation for the offence has been laid in the complaint, it should not be quashed. All the same, it is also to be remembered that it is the duty of the court to discharge the accused if taking everything stated in the complaint as correct and construing the allegations made therein liberally in favour of the complainant, the ingredients of the offence are altogether lacking. The present case falls in this category as would be evident from the facts noticed hereinafter."

It was further observed: (SCC pp. 18-19, para 6)

"6. ... The criminal liability has been fastened on those who, at the time of the commission of the offence, were in charge of and were responsible to the firm for the conduct of the business of the firm. These may be sleeping partners who are not required to take any part in the business of the firm; they may be ladies and others who may not know anything about the business of the firm. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and establishes that fact. The present case is of total absence of requisite averments in the complaint."

18. This legal principle and position is applicable to the facts of the present case on hand. Hence, this Court finds that there is no factual averments to show how the petitioner is responsible for the business and conduct of A1 company to invoke provision under Section 141 of the Negotiable Instruments Act. Admittedly, the petitioner is not a signatory to the cheque in issue.

19.For the aforesaid reason, this Criminal Original Petition is allowed and the proceedings in C.C.No.254 of 2015, on the file of the Judicial Magistrate Court No.I, Thirupur is, hereby, quashed, as against the petitioner/A3 alone.

20.Considering the case is of the year 2015, this Court directs the learned Judicial Magistrate No.I, Tirupur to complete the trial within a period of three months from the date of lifting of lock down and normal functioning of Court below. The connected Criminal Miscellaneous Petitions are closed.

21.This Court places appreciation to Mr.A.Ashwin Kumar, Legal Aid Counsel for the respondent for preparation and effective arguments made in this case.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Judicial Magistrate Court No.I, Thirupur.
2. -Do- Through The Chief Judicial Magistrate, Thiruppur.

Copy to

The Secretary,
Legal Aid Service Authority,
Chennai - 109.

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Cr1.O.P.No.9503 of 2015

CO (NMI)
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