

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 06.08.2020

DELIVERED ON: 14.08.2020

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

Crl.O.P. No.7322 of 2018 and Crl.M.P. Nos.3768 & 3769 of 2018

- 1 Venus Enterprises
represented by its Managing Partner
B.V. Ayyappan
No.47, II Floor
SIDCO Garment Complex
Guindy, Chennai 600 032
 - 2 B.V. Ayyappan
Managing Partner
Venus Enterprises
No.47, II Floor
SIDCO Garment Complex
Guindy, Chennai 600 032
 - 3 M. Priya
Partner
Venus Enterprises
No.47, II Floor
SIDCO Garment Complex
Guindy, Chennai 600 032
- Petitioners

vs.

Sri Moogambigai Constructions India Pvt. Ltd.
represented by its Managing Director
K.M. Velumanie
No.320, Srinivas Complex
N.S.R. Road
Saibaba Colony
Coimbatore 641 011

Respondent

Criminal Original Petition filed under Section 482 Cr.P.C. seeking to call for the records in C.C. No.655 of 2017 on the file of the Judicial Magistrate No.VI, Coimbatore and the summons issued by the Magistrate to the petitioner and quash the same.

For petitioner Mr.B.S. Gnanadesikan, Sr. Counsel
for M/s. Gnanadesikan Law Associates

For respondent Mr. A.E. Ravichandran

ORDER

This criminal original petition has been preferred seeking to call for the records in C.C. No.655 of 2017 on the file of the Judicial Magistrate Court No.VI, Coimbatore and

the summons issued by the said Magistrate to the petitioner and quash the same.

2 For the sake of convenience, the parties are referred to by their names.

3 Sri Moogambigai Constructions India Pvt. Ltd. (for brevity "Moogambigai") is a company incorporated under the Companies Act, 1956, and is represented by its Managing Director K.M. Velumanie. Moogambigai is into construction business and they were engaged by Rainbow Texcolour Processors Ltd. (for brevity "Rainbow") for constructing a factory and shed in SIPCOT, Perundurai vide appointment document dated 01.02.2008. Moogambigai began construction, but, midway, Rainbow asked them to stop the work for the reasons best known to the latter. Therefore, Moogambigai was demanding their dues for the construction made by them till then from Rainbow. In this connection, Moogambigai and Rainbow entered into an agreement dated 27.09.2008 in Tamil, wherein, all the payments that are due to Moogambigai have been catalogued. Rainbow did not honour its payment commitment and so, Moogambigai was putting pressure on Rainbow for payment. Ayyappan (A.2) was representing Rainbow in his capacity as its Director during the negotiations with Moogambigai. It was represented to Moogambigai that the shares of Rainbow have been sold to third parties. However, Venus Enterprises (A.1), a partnership firm, in which, Ayyappan (A.2) and his wife Priya (A.3) were partners, came forward to settle the amount that was due from Rainbow and issued the impugned cheque dated 23.01.2012 for Rs.32 lakhs to Moogambigai. Moogambigai presented the said cheque on 07.02.2012 and it returned with the endorsement "insufficient funds" on 08.02.2012. Moogambigai issued a legal notice dated 20.02.2012 to Venus Enterprises (A.1) and its partners, viz., Ayyappan (A.2) and Priya (A.3), which was received by them on 27.02.2012. However, they did not reply to the statutory notice.

4 It is specifically alleged in paragraph no.VII of the complaint that Velumanie was called to Hotel Vikram, Tiruppur, by Ayyappan (A.2) for negotiations and when Velumanie went there, he realised that Ayyappan (A.2) had got an FIR in Cr. No.267 of 2012 registered against him (Velumanie) in Tiruppur North Police Station for the offence under Sections 406, 420, 120-B and 379 IPC, alleging that the cheque for Rs.32 lakhs was stolen. It is further alleged in the complaint that the police forcibly obtained the original cheque for Rs.32 lakhs from Velumanie in the guise of conducting investigation. However, Velumanie escaped arrest by a whisker and obtained anticipatory bail in CrI.O.P. No.5015 of 2012 from this Court and thus, saved his skin.

5 With these allegations, Moogambigai represented by Velumanie, lodged a complaint in C.C. No.655 of 2017 before the Judicial Magistrate No.VI, Coimbatore against Venus Enterprises, (A.1), Ayyappan (A.2) and Priya (A.3) for the offence under Section 138 of the Negotiable Instruments Act,

1881 (for brevity "the NI Act"), for quashing which, all the three accused have filed the present application invoking Section 482 Cr.P.C.

6 Heard Mr. B.S. Gnanadesikan, learned Senior Counsel, representing M/s. Gnanadesikan Law Associates, learned counsel on record for Venus Enterprises (A.1), Ayyappan (A.2) and Priya (A.3) and Mr.A.E.Ravichandran, learned counsel for Moogambigai.

7 Mr. B.S. Gnanadesikan, learned Senior Counsel for the petitioners, formulated the following points:

There is no privity of contract between Venus Enterprises (A.1) and Moogambigai and therefore, the prosecution is not maintainable.

- (a) The agreement dated 27.09.2008 entered into by Moogambigai and Rainbow speaks of a total due of only around Rs.12 lakhs, but, the impugned cheque is for a sum of Rs.32 lakhs, for which, there is no explanation at all by the complainant in the complaint.
- (b) The construction contract was admittedly terminated by Rainbow in the year 2008, but, the cheque was issued only on 23.01.2012, which probabilises the defence of the accused that the said cheque was stolen.
- (c) Non impleadment of Rainbow as co-accused is fatal to the case of the complainant.
- (d) There are no sufficient averments in the complaint to include Priya (A.3) as accused, as required under Section 141 of the NI Act.

8 Mr.A.E. Ravichandran refuted the aforesaid contentions.

9 This Court gave its anxious consideration to the rival submissions.

10 Coming to the first submission of Mr. Gnanadesikan, learned Senior Counsel for the petitioners, with regard to lack of privity of contract between Venus Enterprises (A.1) and Moogambigai, it is an admitted fact that Ayyappan (A.2) was a Director in Rainbow and was a partner in Venus Enterprises (A.1) which had issued the impugned cheque. A reading of the complaint shows that after the parties had entered into the agreement dated 27.09.2008, the accused had represented to Moogambigai that they had sold Rainbow to third parties and hence, they came forward to give a cheque from the account of Venus Enterprises (A.1). Further, Section 138 of the NI Act uses the expression "any debt or other liability" which means that if a cheque has been issued for the discharge of the debt of another person other than the drawer, still, a prosecution under Section 138 of the NI Act can be maintained, in the event of dishonour of the said cheque. The plain text of the said provision militates against the aforesaid submission of Mr. Gnanadesikan.

11 Coming to the second submission of Mr. Gnanadesikan qua huge variation in the cheque amount, the agreement dated 27.09.2008 does not confine itself to only Rs.12 lakhs. It clearly states that Rainbow should make payments of Rs.4,88,940/- and Rs.2,47,128/- towards Service Tax and Value Added Tax, respectively, to the Government and also speaks of other payments that were required to be made by Rainbow. Since no payment was made by Rainbow as agreed to by them in the agreement dated 27.09.2008, the amounts started accruing interest, which has been stated in paragraph no.4 of the complaint. Therefore, the contention of Mr.Gnanadesikan that Moogambigai has not explained as to how the sum of Rs.12 lakhs mentioned in the agreement dated 27.09.2008 became Rs.32 lakhs in the complaint, will not be fatal to the case of Moogambigai in the facts and circumstances of this case. Further, as contended by the learned counsel for Moogambigai, a reading of the agreement dated 27.09.2008 in its entirety shows that Rainbow had agreed to make several payments to the Government, but, had failed. In such circumstances, the contention of the learned counsel for Moogambigai that when the cheque of Rs.32 lakhs was given by the accused, negotiations were held and the total amount payable, including the amounts payable to the Government like Service Tax and Value Added Tax with interest, was calculated, merits acceptance. In any event, these are once again disputed questions of fact and an opportunity should be given to Moogambigai to prove their case.

12 As regards the third submission of Mr. Gnanadesikan that the impugned cheque was stolen, the probable defence which the accused may take during trial cannot be a ground for quashing the prosecution, especially in the teeth of the presumption under Section 139 of the NI Act. The impugned cheque has been issued from the account of Venus Enterprises (A.1) and it has been signed by Ayyappan (A.2). This is not in dispute in this case. When the issuance of the cheque is admitted, then, there is a statutory presumption under Section 139 of the NI Act that the cheque has been issued for the discharge of a debt or liability. Trite it is that in a quash application, disputed questions of fact cannot be gone into.

13 As regards the contention of Mr. Gnanadesikan that Rainbow and its Directors were not arrayed as accused, in the opinion of this Court, Moogambigai is not enforcing a civil liability for it to include Rainbow as a party to the litigation in a complaint under Section 138 of the NI Act. Be it noted that in a complaint under Section 138 of the NI Act, the persons who had issued the cheque and the others who are vicariously liable under Section 141 of the NI Act alone need to be included as accused and not all and sundry.

14 As regards the contention of Mr. Gnanadesikan that there are no specific averments against Priya (A.3), there appears to be substance in it, inasmuch as, in the complaint, the complainant has merely stated "A.2 and A.3 doing all business and day-to-day affairs of A.1 concern" without anything more. However, Ayyappan (A.2) who has signed the impugned cheque cannot be discharged from the prosecution.

15 At this juncture, it may be relevant to take note of the allegations made by Moogambigai in their complaint that, Ayyappan (A.2) had lodged a false complaint to the police based on which a case in Cr. No.267 of 2012 was registered and the police forcibly obtained the original cheque from Velumanie. On instructions, the learned Government Advocate (Crl. Side) submitted that the case in Cr.No.267 of 2012 has been closed as "further action dropped". However, the sad fact remains that Moogambigai is forced to prosecute the accused without the original cheque because of police intervention in this dispute. This Court does not want to observe anything more.

In the result, this criminal original petition is partly allowed. The prosecution in C.C.No.655 of 2017 on the file of the Judicial Magistrate No.VI, Coimbatore, as against Priya (A.3) is quashed. Ayyappan (A.2) is directed to appear before the trial Court within a period of two weeks after physical appearance of advocates and parties is permitted and on his appearance, he shall file an application for bail under Section 436 Cr.P.C. and on such bail application being filed, he shall be granted bail by the trial Court on condition of bond as fixed by the trial Court. If, thereafter, Ayyappan (A.2) absconds, a fresh FIR can be registered against him under Section 229-A IPC. He shall cross-examine the witnesses on the day they are examined in chief as held by the Supreme Court in Vinod Kumar vs. State of Punjab [(2015) 3 SCC 220] and shall not adopt dilatory tactics. He shall represent Venus Enterprises (A.1) or authorise someone else to represent Venus Enterprises under Section 305 Cr.P.C. Connected Crl.M.Ps. are closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1 The Judicial Magistrate No.VI, Coimbatore

+1cc to M/s.Gnanadesikan Law Associates SR No.26917
dt 18/8/2020

order in
Crl.O.P. No.7322 of 2018

NSA (CO)
RV (03/09/2020)