IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 25.08.2020

PRONOUNCED ON: 02.09.2020

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.O.P.No.3727 of 2017 and
Crl.M.P.Nos.2746 & 2747 of 2017

Y.G.Rajendran ...Petitioner/Accused No.3

Vs.

Mrs.Molly Abraham,
Represented by her power of attorney Holder,
Mr.Thomas Abraham,
No.9-A, 3rd Street,
Dr.Subbaya Street,
Chennai-600 024. ...Respondent/Complainant

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the records in C.C.No.7117 of 1998 pending on the file of the learned Fast Track No.III Metropolitan Magistrate Court at Saidapet, and quash the complaint and all further proceedings.

For Petitioner : Mr.S.Ashok Kumar

For Respondent : Mr.John Sathyan

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ORDER

The petitioner, who is A3 in the private complaint in C.C.No.7117 of 1998 filed by the respondent, before the learned Fast Track Court No.III, Metropolitan Magistrate, Saidapet, for offence under Section 138 of the Negotiable Instruments Act.

2.The gist of the case is that M/s.Srivari Investments Private Limited subscribed debentures. The respondent purchased the debentures from M/s.Srivari Investments Private Limited and A1 stood as Guarantor for redemption and repurchase of the debentures by M/s.Srivari Investments Private Limited. Towards redemption of the debentures, A1 company/M/s.Synergy Financial Exchange Limited, issued cheque bearing No.844272, dated 04.03.1998, for a sum of Rs.13,57,331/-, drawn on State Bank of India, Travancore, Chennai. When the respondent presented the cheque for collection in the bank viz., Canara Bank, Vadapalani, it was returned for the reason that "Exceeds Arrangements" on 02.09.1998. The dishonour of cheque was informed to the respondent by the bank on 03.09.1998. Thereafter, the respondent issued statutory notice on 11.09.1998, but the accused failed to pay the cheque amount. Hence, the respondent has filed the above complaint.

3.The learned counsel for the petitioner submitted that the petitioner is the 3rd accused and he is not incharge of the management and affairs of A1 company. He further submitted that the petitioner during the year 1999, filed Crl.O.P.No.13504 of 1999 against the above private complaint and made his submissions that he was no more Director of the A1 company on the date of commission of the offence i.e., on 03.09.1998, since he was resigned from the company on 01.08.1998. This Court by order dated 29.11.2002, dismissed the said petition, giving liberty to raise all the points before the Court below and to agitate his rights. He further submitted that the dismissal of the earlier petition by this Court, would not be an impediment or disqualification for the petitioner to file fresh petition under Section 482 Cr.P.C., based on subsequent development and on the facts and circumstances of the case, this petition is filed with different ground from what prevailed at the time of earlier petition, which was dismissed by this Court on 29.11.2002. The Hon'ble Apex Court had given an authoritative finding in the case of "S.M.S Pharmaceuticals Limited Versus Neeta Bhalla and another reported in (2005) 8 SCC 89" in invoking Section 141 of the Negotiable Instruments Act. Further, the respondent failed to progress the criminal case for several years and the same is kept pending without any progress. Hence, the petitioner is entitled for filing a fresh petition under Section 482 Cr.P.C.

4.In order to substantiate his arguments, the learned counsel for the petitioner relied upon the following citations:-

- S.M.S Pharmaceuticals Limited Versus Neeta Bhalla and another reported in (2005) 8 SCC 89.
- National Small Industries Corporation Limited Versus Harmeet Singh Paintal and another reported in (2010) 3 SCC 330.
- Anita Malhotra Versus Apparel Export Promotion Council and another reported in (2012) 1 SCC 520.
- Ashoke Mal Bafna Versus Upper India Steel Manufacturing and Engineering Company Limited reported in (2018) 14 SCC 202.
- State represented by DSP, SB CID, Chennai Versus K.V.Rajendran and others reported in (2008) 8 SCC 673.
- Anil Khadkiwala Versus State (Government of NCT of Delhi) and another reported in 2019 SCC OnLine SC 941.

5.It is further submitted that for prosecuting the Director of the company under Section 141 of the Negotiable Instruments

Act, an authoritative pronouncements in the case of "S.M.S Pharmaceuticals Limited" (cited supra) was rendered by the Hon'ble Apex Court, which has been followed in the case of "National Small Industries Corporation Limited" (cited supra). In "S.M.S Pharmaceuticals Limited" (cited supra), the Hon'ble Supreme Court held 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.

6.The Hon'ble Apex Court had categorically held that the repetition of golden words will not suffice in the absence of specific averments. On the ruling of the Hon'ble Apex Court and on the subsequent views, the proceedings against A2 and A6, who are also Directors similarly placed as that of the petitioner/A3, was quashed by this Court in Crl.O.P.No.17566 of 2001 on 30.11.2009. Further, a bare reading of the complaint filed by the respondent, it is seen that except paragraph No.7, nowhere any averments against the petitioner/Director. In paragraph No.7 of the complaint, it is stated as follows:-

> 7.The Second, Third, Fourth, Fifth and Sixth accused are incharge of the management and affairs of the First Accused and the cheque was returned dishonoured only with their consent and connivance.

7.In this case, the statutory notice was not served on the petitioner, since the petitioner was resigned from A1 company on 01.08.1998 and the same was accepted in the board meeting, which was held on 08.09.1998. To prove the resignation, the petitioner submitted Form 32, dated 11.09.1998 issued by the Registrar of Companies, Chennai. Admittedly, the cheque was presented for encashment on 03.09.1998 and the statutory notice was issued on 11.09.1998. In the sworn statement, it is stated by the respondent that the notice was received by A1 company on 14.09.1998 and as regards, notice sent to other accused, it was returned for the reason that no such person available in the noticee address, which fortifies and confirms that the petitioner was resigned from A1 company on 01.08.1998.

8.After quashing of the proceedings against A2 and A6 by this Court and till this quash petition was filed, the respondent not examined himself before the trial Court. Further, Form 32 is a public document, which is of impeachable sterile quality and the same can be considered by this Court, as held in the case of "State of Orissa Versus Debendra Nath Padhi reported in (2005) 1 SCC 568".

9.Therefore, the learned counsel for the petitioner prayed to quash the proceedings against the petitioner.

10.The learned counsel for the respondent submitted that the complaint was filed in the year 1998, at that time, there was no such requirement as held in the case of "S.M.S Pharmaceuticals" (cited supra). Hence, in the complaint in paragraph No.7, except mentioning that the petitioner as Director of A1 company along with other Directors, no other averments made against the petitioner/A3. In this case, the cheque is dated 04.03.1998, the petitioner resigned from A1 company on 01.08.1998. The resolution for resignation of the petitioner was passed on 08.09.1998 and thereafter, the same was filed on 11.09.1998. The cheque was presented on 02.09.1998 and the same was returned on 03.09.1998. Coming to know about the return of cheque, the petitioner hurriedly resigned from A1 company and pre-dated his resignation and filed Form 32 to escape from the prosecution.

11.The petitioner is one of the Promotee Director along with the other accused. Hence, he cannot now claim that he was was not incharge of the affairs of A1 company. The points agitated by the petitioner are to be decided only during the trial. With regard to quashing of the proceedings against A2 and A6 in Crl.O.P.No.17566 of 2001, the learned counsel for the respondent submitted that one Mr.M.Kempraj, learned counsel was appointed as Amicus Curiae and he was not aware whether all the facts were putforth therein. Further, he fairly admitted that against the said order, no appeal is preferred. He further submitted that the petitioner delaying the proceedings by taking advantage of subsequent judicial pronouncements, cannot be permitted, since the petitioner is one of the cause for the delay in progress of the trial. In this case, the respondent is a lady, who lost huge sums of money by purchasing debentures through M/s.Srivari Investments Private Limited. These debentures were purchased, since A1 stood as a Guarantor for redemption. The petitioner being the Director of the company cannot absolve from the case. Hence, the petition for quashing of the proceedings, is liable to be dismissed.

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

13.It is not in dispute that the petitioner is a Director of A1 company and in the complaint lodged by the respondent except paragraph No.7, nothing is averred against the petitioner. It is seen from the paragraph No.7 of the complaint that except mentioning the magical word that the accused are incharge of the management and affairs of the company, there is nothing more. The Hon'ble Apex Court laid the guidelines in "S.M.S Pharmaceuticals" (cited supra) in the case of prosecution of Directors and others 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)
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> > "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."

14.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.

15.For the aforesaid reason, this Criminal Original Petition is allowed and the proceedings in C.C.No.7117 of 1998, on the file of the Fast Track Court No.III, Metropolitan Magistrate Court, Saidapet is, hereby, quashed, as against the petitioner/A3 alone. Consequently, the connected Criminal Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The Judge,
Fast Track No.III, Metropolitan Magistrate Court,
Saidapet.

2.The Chief Metropolitan Magistrate,
Egmore, Chennai.

+1cc to M/s.S.Ashok Kumar, Advocate in Sr.28615

ORDER IN
Crl.O.P.No.3727 of 2017

SAI(CO)
RV(08/10/2020)