IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.03.2020

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

Crl.O.P.No.26470 of 2019
and
Crl.M.P.Nos. 14168 & 14169 of 2019

A.Amutha ... Petitioner

-Vs-

Usha Rani ... Respondent

Prayer: Criminal Original petition filed under Section 482 of Code of Criminal Procedure, to call for the records in C.C.No.105 of 2019, on the file of Court of Judicial Magistrate, Arakkonam and quash the same.

For Petitioner : Mr.P.K.Sabapathi
For Respondent : Mr.A.Balasingh Ramanujam

ORDER

This petition has been filed to quash the proceedings initiated for the offence punishable under Section 138 of Negotiable Instruments Act, in C.C.No.105 of 2019 pending on the file of the learned Judicial Magistrate, Arakkonam.

2. The brief facts of the case is that the petitioner is an accused in C.C.No.105 of 2019 on the complaint lodged by the respondent and the allegation is that the husband of the respondent advanced a loan in the year 2015 to the petitioner to the tune of Rs.85 lakhs. The petitioner also executed a promissory note to the tune of Rs.85 lakhs in favour of her husband. It is further alleged that the petitioner also used to borrow money from the respondent. Towards the repayment of money, the petitioner has issued a cheque for a sum of Rs.30 lakhs as part payment of loan borrowed by her from the respondent's husband. It was presented for collection and the same was returned with an endorsement "payment stopped". Therefore, the respondent issued a statutory notice and initiated proceedings under Section 138 of Negotiable Instruments Act.

3. The learned counsel for the petitioner submitted that the promissory note was executed in favour of the husband of the respondent herein to the tune of Rs.85 lakhs. Without making over the said pro-note in favour of the respondent, the respondent cannot maintain the complaint under Section 138 of Negotiable Instruments Act, since the entire complaint based only upon the pro-note executed by the husband of the respondent herein. Therefore, it is completely in violation of the Section 46 of the Negotiable Instruments Act and the complaint is not at all maintainable and it is liable to be quashed.

4. The learned counsel for the petitioner further submitted that the respondent is not the holder of the Negotiable Instrument as contemplated under Section 8 of Negotiable Instruments Act and the respondent has no locus to lodge any complaint. Absolutely, there is no legally enforceable debt of the respondent and as such, the cheque alleged to have issued in favour of the respondent is not for any loan borrowed by the petitioner. In support of his contention, he also relied upon a judgment of the Nagpur High Court reported in 1956 AIR (Nagpur) 65

> "30.The promissory note in this suit is payable to a particular person i.e. Chaitram defendant No.5. It does not contain any words prohibiting transfers or indicating that it shall not transferable. This note therefore is a negotiable instrument payable to order (-See Gulabgir V. Nathmal, 27, Nag LR 327 at P.331: AIR 1932 Nagpur 23 at p.25). Section 14 of the Negotiable Instruments Act defines 'negotiation'. Section 15 defines 'endorsement' and Section 48 defines the method of negotiation of a negotiable instrument which is payable to order.
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> The aforesaid sections when read together establish that such an instrument is negotiable by the holder by endorsement and delivery and the person negotiating the instrument must have the necessary intention to constitute the person in whose favour the endorsement is made as the holder thereof and the endorsement must have been made for that purpose. In other words, there must be intention in the mind of the endorser to constitute the endorsee as a holder of the pro-note accompanied by delivery of the negotiable instrument. See Chapman V. Cottrell, (1865) 34 LJ Ex 186; Castrique V. Buttigief, (1855) 10 Moo PC 933 at p.108 and Denton V. Peters, (1870) 5 QB 475.

32.We have already shown that to constitute a valid negotiation it is necessary to establish that the endorser endorses the negotiable instrument in favour of the endorsee with a view to constitute him a holder of the instrument and transfers the instrument to the endorsee. Unless this is established, the negotiation of a negotiable instrument is not complete. We will have to examine whether the other endorsements appearing ex facie on the promissory note are made with a view to negotiate the promissory note.

1965 AIR (Madras) 157

"6.In a declaration, as is rightly contended by Mr.M.S.Venkatarama Aiyer, there is no transfer of the property in the note. Beneficial ownership does not carry with it a legal title to the property concerned. A declaration that a person is the beneficial owner, does not take the matter further and leaves unaffected the legal title in the person in whom it inheres and it rests there only until it is transferred to the beneficial owner. It was perhaps on that basis Varadachariar, J. in 68 Mad LJ 81: (A.I.R. 1935 Madras 181 (FB)) considered that a beneficial owner would not be competent, merely on the basis of a declaration to that effect to sue on a promissory note and that in order to render him competent to do so, there must be a transfer in his favour. I am therefore unable to accept the contention of Mr.M.R,Narayanaswami that on the basis of a declaration granted to the first respondent she would be competent to recover or the promissory note."

5. Per contra, the learned counsel for the respondent submitted that husband and wife namely the petitioner and her husband jointly borrowed a sum of Rs.85 lakhs from the respondent/defacto complainant for which her husband alone executed a pro-note for the said amount. In fact, the respondent also filed a suit for recovery of money in O.S.No201 of 2019 on the file of the learned Principal District Judge, Nagercoil in which, the plaintiff namely the respondent herein categorically stated that the petitioner and her husband used to borrow loan for their real estate business and also their family expenditure promising to repay with monthly interest at the rate of 2% per month and also executed pro-note in favour of her husband. In

fact, the respondent also categorically stated in her statutory notice dated 29.05.2019 that the petitioner/accused used to borrow money from the respondent/defacto complainant and also her husband on various dates for his business and family expenditure promising to pay at monthly interest at the rate of 2% per month. Therefore, the respondent can very well maintain the complaint against the petitioner herein since the respondent issued a cheque for the part of the amount namely Rs.30 lakhs towards the part repayment of the loan borrowed by the petitioner.

6. Heard the learned counsel for the petitioner and the learned counsel for the respondent.

7. This petition has been filed to quash the proceedings initiated under Section 138 of N.I.Act, on the allegation that the petitioner used to borrow loan from the respondent and her husband for their real estate business and also family expenditure to the tune of Rs.85 lakhs. On receipt of the same, the petitioner executed a pro-note in favour of the respondent's husband thereby promising to pay the monthly interest at the rate of 2% per month. The husband of the respondent also instituted their suit for recovery of money in O.S.No201 of 2019 on the file of the Principal District Court, on the strength of pro-note executed by the petitioner in favour of the husband of the respondent herein.

8. The only point raised by the learned counsel for the petitioner that the pro-note was executed by the petitioner in favour of the husband of the respondent, it was never made over in favour of the respondent herein and on the strength of the pro-note, the present complaint has been lodged and as such, he has no allegation to maintain the petition herein.

9. This Court and the Division Bench of the Nagpur High Court held that such an instrument is negotiable by the holder by endorsement and delivery and the present negotiable instrument to constitute the person in whose favour the endorsement is made as the holder thereof and the endorsement have been made for the purpose. Both the above said judgments are arising out of the suit on pro-note.

10. In the case on hand, there are categorical averments in the complaint as well as the suit filed by the respondent and her husband respectively that the petitioner used to borrow loan for the purpose of their business development and the family

expenditure from the respondent as well as her husband. So far, the petitioner borrowed a sum of Rs.85 lakhs and executed pro-note to the said sum in favour of the husband of the respondent herein, the petitioner has also issued a cheque in favour of the respondent to the tune of Rs.30 lakhs and thereafter the petitioner stopped the payment. Therefore, the above judgments are not helpful to the case of the petitioner.

11. As discussed above, the respondents categorically stated even in her statutory notice that the petitioner used to borrow loan from the respondent as well as her husband. If it is being so, the cheque was issued by the petitioner in favour of the respondent for the payment of loan borrowed from the respondent herein. Therefore, the respondent can very well maintain the complaint against the petitioner. That apart, the mixed question of law cannot be considered under Section 482 of Cr.P.C., by this Court.

12. As such, this Court is not inclined to quash the proceedings and dismissed. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

rpl

To
The Judicial Magistrate,
Arakkonam.

Crl.O.P.No.26470 of 2019
and Crl.M.P.Nos.14168 & 14169 of 2019

SSD (CO)

VSI-2(28.05.2020)