IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.10.2021

C O R A M

THE HON'BLE MR. JUSTICE KRISHNAN RAMASAMY

CRL.OP.No.6340 of 2017
and CRL.M.P.Nos.4676 & 4677 of 2017

K.Sadhasivam ...Petitioner

Vs

Jayakumar ...Respondent

Prayer Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, prayed to call for the records in C.C.No.4934 of 2015 on the file of the learned III Fast Track Court, Saidapet, Chennai and quash the same.

For Petitioner : Mr.V.Lakshminarayanan
For Respondent : No Appearance

ORDER

This Criminal Original Petition has been filed seeking to quash the proceedings in C.C.No.4934 of 2015 on the file of the learned III Fast Track Court, Saidapet, Chennai.

2.The defacto complainant filed a complaint under Section 138 of the Negotiable Instruments Act, 1881,(hereinafter referred as "the Act"), against the petitioner, for the dishonour of the cheque.

3.Challenging the said complaint, the present Criminal Original Petition has been filed by the petitioner.

4.Notice was ordered to the respondent and the same has been served. The name of the respondent was also printed in the cause list. When the matter is called today, none appeared on behalf of the respondent. Therefore, this Court after hearing the petitioner proceeded to pass orders.

5.The learned counsel for the petitioner/first accused submitted that originally, there was a Memorandum of Understanding entered between the respondent/defacto complainant, the petitioner/first accused and the second accused. In terms of the Memorandum of Understanding, A2 undertakes to pay a sum of Rs.2,61,00,000/-. Therefore, he issued a cheque dated 10.02.2015, bearing No.018098, for a sum of Rs.61,00,000/- drawn on ICICI Bank, Porur, Chennai. When the said cheque was presented, the same was returned with an endorsement stating 'Payment stopped by drawer'. Therefore, a complaint was lodged against the petitioner and other accused.

6.He further submitted that the cheque was issued only by the second accused and the petitioner is no way responsible for the said cheque. If there is any contractual liability in terms of Memorandum of Understanding entered between the defacto complainant and the petitioner, it is purely a civil dispute. Therefore, he supposed to have invoked Civil Court, where the legal remedies available for the respondent. On the strength of the dishounour of the cheque issued by the second accused, the petitioner has been arrayed as first accused which is legally unsustainable. Hence, the complaint against the petitioner is liable to be quashed.

7.In support of his contention, he relied on the decision of the Hon'ble Apex Court in the case of Alka Khandu Avhad vs. Amar Syamprasad Mishra & Another reported in CDJ 2021 SC 186. By relying on the said judgment, the learned counsel for the petitioner submitted that the petitioner cannot be prosecuted under Section 138 of the Act. Therefore, he prayed to quash the complaint.

8.Heard the learned counsel for the petitioner and perused the material available on record.

9.The question to be decided in the present case is as to whether the petitioner can be prosecuted under Section 138 of the Act, for the dishonour of the cheque issued by the second accused in his independent capacity? The answer to the question is directly no. Under Section 138 of the Act, only a person who issued and signed the cheque can be prosecuted and it is the settled law.

10.For better appreciation, Section 138 of the Act, is extracted hereunder:

> "138. Dishonour of cheque for insufficiency, etc., of funds in the account. —Where any cheque drawn by a person 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, is returned by the bank unpaid, either

because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:
Provided that nothing contained in this section shall apply unless—
(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.
Explanation.— For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.] "

11.From the above reading, it is clear that for initiating the proceedings under Section 138 of the Act, the cheque has to be drawn by a person 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 and the same is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account.

12.Therefore, only the signatory to the cheque can be prosecuted under Section 138 of the Act. Further, if a person issued a cheque from his independent account, he is wholly responsible for the dishonour of the cheque. In the present case, the defacto complainant included the name of the petitioner as first accused in terms of the Memorandum of Understanding entered between the defacto complainant and the petitioner, even if no cheque is issued, the remedy available for the defacto complainant is to approach the civil Court and not the criminal Court. The second accused undertaken to pay a sum of Rs.2,61,00,000/- and issued a cheque from his independent account. When the second accused is responsible for dishonor of the cheque, under no stretch of imagination, a complaint under Section 138 of the Act can be filed against the petitioner, who is not a signatory to the cheque and also not a joint account holder. In such view of the matter, I do not find any merit on the complaint lodged by the defacto complainant against the petitioner under Section 138 of the Act, for the cheque issued by the second accused. As stated above, if there is any grievance against the petitioner, the respondent-defacto complainant can workout his remedy through civil Court but not by filling proceedings under Section 138 of the Act, without any jurisdiction.

13.At this juncture, it would be appropriate to extract the judgment rendered by the Hon'ble Apex Court cited supra. The relevant portion is extracted hereunder:

> "It emerges from the record that the dishounoured cheque was issued by original accused No.1 - husband of the appellant. It was drawn from the bank account of original accused No.1. The dishonoured cheque was signed by original accused No.1. Therefore, the dishonoured cheque was signed by original accused No.1 and it was drawn on the bank account of original accused No.1. The appellant herein-original accused No.2 is neither the signatory to the cheque nor the dishonoured cheque was drawn from her bank account. That the account in question was not a joint account."

14.The Hon'ble Apex Court in the case of Aparna A.Shah Vs.Sheth Developers Pvt. Ltd & Another in S.L.P.(Crl)No.9794 of 2010 dated 01.07.2013, has stated as follows:

> 22.In the light of the above discussion, we hold that under Section 138 of the Act, it is only the drawer of the cheque who can be prosecuted. In the case on hand, the appellant is not a drawer of

the cheque and she has not signed the same. A copy of the cheque was brought to our notice, though, it contains name of the appellant and her husband, the fact remains that her husband alone put his signature. In addition to the same, a bare reading of the complaint as also the affidavit of examination-in-chief of the complainant and a bare look at the cheque would show that the appellant has not signed the cheque."

15.In the above judgments the Hon'ble Apex Court held that only the drawer of the cheque can be prosecuted. The person who is not the drawer and not the signatory to the cheque cannot be prosecuted. The said principle is squarely applicable for the case in hand. As the petitioner in this case is neither a drawer nor a signatory to the cheque, this Court is of the view that the petitioner cannot be prosecuted under Section 138 of the NI Act. Thus, the complaint lodged against the petitioner/first accused is liable to be quashed. Accordingly, the case in C.C.No.4934 of 2015 against the first accused alone is quashed and the Court below is directed to proceed with the case as far as the second accused is concerned in accordance with law as expeditiously as possible. Connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

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To:

The III Fast Track Court, Saidapet,
Chennai.

+1cc to M/s.V.Lakshmi Narayanan, Advocate SR. No.56046

CRL.OP.No.6340 of 2017
and CRL.M.P.Nos.4676 & 4677 of 2017

KSM (CO)
PR (02/12/2021)