BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATE ON WHICH RESERVED : 17.02.2021

DATE ON WHICH PRONOUNCED : 15.3.2021

CORAM:

THE HON'BLE MR JUSTICE G.ILANGOVAN

Crl.O.P.(MD)No.13249 of 2017
and
Crl MP(MD)Nos. 8972 & 8973 of 2017

1.M/s.R.S.Infortainment Pvt Ltd.,
Rep by its Managing Director,
S.Elred Kumar
No.5, Bagavantham Street,
T.Nagar, Chennai - 600 017.

2.S.Elred Kumar
3.R.Jayaraman ... Petitioner/Accused No.1 to 3

Vs.

M/s.The Safire Offset Printers,
a Partnership firm,
Represented by it's Partner,
M.Selvam,
S/o.Madasamy Nadar,
No.59, N.R.K.R.Road,
Sivakasi,
Virudhunagar District. ... 2nd Respondent/ Complainant

Prayer: Criminal Original Petition filed under Section 482 Cr.P.C., to call for the records in C.C.No.113 of 2017 on the learned Judicial Magistrate, Sivakasi and quash the same.

For Petitioner : Mr.K.P.S.Palanivel Rajan
For Respondent : Mr.N.Dilip Kumar

ORDER

This Criminal Original Petition has been filed to quash the proceedings in C.C.No.113 of 2017 on the file of the learned Judicial Magistrate, Sivakasi.

2. Facts in brief as stated by the respondent before the Trial Court in C.C.No.113 of 2017:-

The respondent/complainant is a firm registered under the provisions of Indian Partnership Act and the partners of the complainant firm executed a special power of attorney on 23.02.2017 in favour of one Mr.M.Selvam, who is the Clerk of the firm, for filing the complaint and conduct the trial proceedings. On the basis of the power of attorney, executed by the partners of the firm, the complaint has been filed.

3. The respondent/complainant, is a leading manufacturer of cine wall posters at Sivakasi. The first accused is a private limited company. The accused numbers 2 and 3 are the Directors of the Company. They are conducting day- to-day affairs of the first accused Company and the accused Company had dealings with the complainant by way of getting cine wall posters on credit basis. As per the books of accounts maintained by the complainant firm, the accused was liable to pay a sum of Rs.27,23,646.76/-. To discharge, the accused issued the following cheques,

SL.No	Date	Cheque No	Name of the Bank	Amount
1.	30.11.2016	001470	Karur Vysya Bank Limited, Chennai Dhandapani Street – 600 017.	Rs.4,11,270/-
2.	01.12.2016	000969	''	Rs.5,00,000/-
3.	02.12.2016	000970	''	Rs.4,00,000/-

4. Though, the cheques were presented for payment through Tamilnadu Mercontile Bank Limited, Sivakasi Branch, all the cheques were returned with an endorsement 'payment stopped by the drawer'. The return memos were dated 03.01.2017 and 06.01.2017. So, the complainant issued a notice on 19.01.2017 and the same was received by the authorised person on 21.01.2017. A reply notice notice was sent on 04.02.2017 containing false allegations. So, a complaint was filed by the complainant for the offence punishable under Section 138 of Negotiable Instruments Act.

5. To quash the complaint, the accused filed this petition mainly on the ground that the cheques, mentioned in the complaint, were given only for the purpose of security and no liability exists either on the date of issuing cheques or on the date of presentation of the cheques for collection and demand notice issued by the complainant.

6. According to the petitioner, as per the agreement between the parties, advance cheques were to be issued, towards the credit transaction and whenever the amount is paid, that will be made a credit and used to return the cheques. So, according to him, this practise was followed till the dispute arose between the parties and as a result of which, they presented the cheques for payment and got it dishonoured and filed the false complaint. So, according to him,

no amount remains to be paid in the business transaction and the disputed cheques were properly vouched by the authorised agent of the respondent. They also produced the copy of the cash payment vouchers in the typed set of papers, dated 18.11.2016 and 22.11.2016, mentioning various amounts, wherein, we also find that the disputed cheques numbers are mentioned as if, the amounts were settled through cheques bearing Nos. 001470, 000969 and 000970. In the last cash payment voucher, dated 22.11.2016, it has been stated that it is a final settlement amount, so, also in cash voucher dated 18.11.2016. But, these documents are not admitted by the respondent/complainant. It is a settled law that the Court while exercising jurisdiction under Section 482 Cr.P.C can rely only upon sterling and unimpeachable documents. But, the cash payment vouchers are not of such category. Those documents have to be proved by tendering proper oral evidence at the time of trial.

7. The argument on the part of the learned counsel for the petitioner is that the respondent has not specifically denied his case under the reply notice and no substantive document was filed by the complainant along with the complaint to show the subsisting liability on the date of the petition. He further contended that Section 190 (1) (a) of Cr.P.C., should not be mechanically invoked. But, this argument does not hold good, as these things has got to be decided only at the time of trial. The Trial Court before taking cognizance is not expected to go into the merits of the rival claims. So, this argument is not acceptable. According to the learned counsel for the respondent, copy of the vouchers were not sent along with the reply notice by the petitioner. So, the question of enclosing document showing the subsisting liability does not arise at all and all the formalities that got to be complied with for filing the complaint under Section 138 Negotiable Instruments Act, have complied.

8. The next point according to the learned counsel for the petitioner is that as per the judgment of the Hon'ble Supreme Court reported in **Indus Airways Private Limited Vs Magnum Aviation Private Limited and Another (2014) 12 Supreme Court Cases 539**, Offence under Section 138 Negotiable Instruments Act, will not attract if the disputed cheques were issued as a security for the business transaction. The question which arose before the Hon'ble Supreme Court is **Whether in particular facts and circumstance of the case, any criminal liability arose to attract the offence under Section 138**. In that case, the facts are that as per the contract of the agreement between the parties, the purchaser had to pay the advance amount for the supply of the goods. Towards that advance amount, he issued two cheques. But, after that, due to some dispute between the parties, the contract was cancelled and the goods were not supplied. Later, the supplier tried to supply the goods, which was refused by the Purchaser. In those circumstance, the question which arises before the Hon'ble Supreme Court is whether any criminal liability will arose. Para 9 of the judgment reads as under:-

"The Explanation appended to Section 138 of the NI Act explains the meaning of the expression 'debt of other liability' for the purpose of Section 138. This expression means a legally enforceable debt or other liability. Section 138 treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The Explanation leaves no manner of doubt that to attract an offence under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of existing or past adjudicated is a sine qua non for bringing on offence under Section 138. If a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise, and material or goods for which purchase order was placed is not supplied, the cheque cannot be held to have been drawn for an existing debt or liability. The payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability."

9. Pare 15 of the judgment, runs like this:

" If at the time of entering into a contract, it is one of the conditions of the contract that the appellant purchaser had to pay the amount in advance and there is breach of such condition then the appellant purchaser may have to make good the loss that might have occasioned to the seller but that does not create a criminal liability under Section 138. For a criminal liability to be made out under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque"

10. So, a combined reading of para 9 and 15 shows that no criminal liability can be attached to such a circumstance and if at all, only a civil liability for damage will arise. So, the point which, the Hon'ble Supreme Court has held is that unless there was an existing liability on the date of either issuance of the cheque or dishonour of the cheque or demand of amount, then the offence under Section 138 of Negotiable Instruments Act will not be attracted.

11. But, here, the facts of this case are entirely different. As mentioned earlier, there was a continuous transaction between the

parties and that too, credit facility extended to the petitioner. So, whether the entire liability was discharged or not is a question of fact that got to be decided only during the course of trial. Simply because, the petitioner has stated in his reply notice that the disputed cheques were issued only as a security for due performance of payments, no liability can be attached, cannot be accepted at threshold. As rightly pointed out by the learned counsel for the respondent, this disputed question of facts can be gone into only at the time of trial. So, the persistent argument submitted by the learned counsel for the petitioner that the Trial Court ought not have taken cognizance of the offence without reading the contention of the reply notice sent by the petitioner is not at all acceptable. So, the said argument is rejected. The matter has to be tried as per law.

12. In the result, this Criminal Original Petition fails and accordingly, it stands dismissed. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

The Judicial Magistrate,
Sivakasi.

+1 CC to M/s.N.DILIP KUMAR, Advocate (SR-11222[F] dated 15/03/2021)

+1 CC to M/s.K.P.S.PALANIVEL RAJAN, Advocate (SR-11236[F] dated 15/03/2021)

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MJ(CO)
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