IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.06.2022	Pronounced on : 15.06.2022

Coram::

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Criminal Original Petition No.6316 of 2019

1. M/s.FIPOLA Retail India Pvt Ltd.,
   Represented by its Managing Director/CEO,
   Sushil Kanugolu.

2. Saravanan Sundaram, 40 years.
   Director.

3. Susil Kanugolu, 35 years.
   Managing Director/CEO.

4. Kanugolu Venkataramana, 65 years.
   Additional Director.

5. Malakondaiah Maddineni, 60 years
   Additional Director.

All having office at,
'Office No.2B, Door No.ACS,
2nd Floor, 2nd Avenue,
Anna Nagar, Chennai – 600 040. ... Petitioners/Accused 1 to 5

/versus/

N.Marithasan,
Proprietor,
Polytech Engineers,
Door No.10/150-A, 1st Floor,
10th Street, Kamaraj Street,
GKM Colony,
Chennai – 600 082. ... Respondent

Prayer: Criminal Original Petition filed under Section 482 of Cr.P.C., to call for the records culminated in C.C.No.840 of 2018 pending on the file of the Judicial Magistrate-cum-Fast Track Court, Ambattur and quash the same.

For Petitioners : Mr.E.Om.Prakash, Senior Counsel, for Mr.S.Vijaya Ganesh.

For Respondent : Mr.M.Govindaraju.

O R D E R

N.Marithasan, Proprietor of Polytech Engineers engaged in business of electrical wiring and fittings has laid a private complaint under Section 138 of Negotiable Instrument Act against M/s.FIPOLA Retail India Pvt Limited. Challenging its maintainability, this Criminal Original Petition under Section 482 of Cr.P.C is filed, seeking quash of the same.

2. The gist of the complaint is that, from April 2017, the complainant been carrying on interior projects in the outlets of the accused/petitioner's company. As per the request of the Directors, interior for the outlets of the 1st accused company was done and completed as per the schedule. At every stage of the work, the accused used to enquire about the projects and insisted to complete it within the time schedule and they assured that on completion of the work, they will settle the outstanding amount. Totally 14 purchase orders have been issued and payments were made either by NEFT or through cheques with holding Rs.7,81,182/- as security deposit. While so, four cheques paid towards the discharge of the balance amount returned with an endorsement "Payments stopped". On receipt of the intimation from the drawer's bank the accused/petitioners were informed about the return of the cheques. They assured that, they will settle the dues without any further delay and requested the complainant to represent the cheques. Accordingly, following four cheques were represented on 10.05.2018.

S.No.	Dates	Bank	Cheque	Amount
1.	12.02.2018	Axis Bank, Anna Nagar Branch	778645	Rs.7,03,023.00
2.	26.02.2018	Axis Bank, Anna Nagar Branch	778646	Rs.7,03,023.00
3.	12.03.2018	Axis Bank, Anna Nagar Branch	778647	Rs.7,03,023.00
4.	26.03.2018	Axis Bank, Anna Nagar Branch	778648	Rs.7,03,023.00

3. The above said cheques were again returned on the next day with endorsement "Payments stopped by the drawer".

4. The complainant caused statutory notice dated 23.05.2018 which was received by all the accused, except the 5th accused. Reply to the statutory notice dated 11.06.2018 received by the complainant contending evasive reply. Alleging that, cheques were drawn to discharge the debts were not honoured with ulterior motive and therefore, liable to be

prosecuted. Private complaint filed and it was taken cognizance in C.C.No.840 of 2018 on the file of Judicial Magistrate/Fast Track Court, Ambattur.

5. Summons were issued to all the accused persons. On receipt of the summons, the accused persons have filed this petition to quash the proceedings on the ground that during the month of September - 2017, the 1st petitioner Company/1st accused entered into a contract with the respondent/complainant to carry out interior developments on various outlets of the 1st petitioner Company. Purchase orders were issued for value of Rs.71,05,128/-. Totally Rs.37,34,870/- was paid on various dates in instalments. The respondent/complainant has failed to complete the job as per the specification mentioned in the purchase order and within the time schedule. As per the purchase order, immediately after completion, independent auditor has to be appointed by the respondent/complainant and he should furnish certificate of job completion and only then, the complainant is entitled for release of balance 20%. Since the respondent/complainant delayed in completing the job as per specification and also failed to give certificate of completion from independent auditor, the balance 20% was not paid. However when the respondent/complainant insisted for security for the balance payment, the subject cheques bearing Nos.778645 to 778648 drawn at Indian Overseas Bank, Shenoy Nagar Branch was handed over to the respondent/complainant only as security and not for discharge of any liability. These cheques were presented without instruction and without production of certificate of completion. Hence, concern Bank was instructed not to honour the cheques and accordingly the payment were stopped.

6. It is contended by the petitioners that as per the auditor's report, the actual work done by the complainant is only worth Rs.47,31,000/-. Out of which, already a sum of Rs.37,34,850/- was paid and only Rs.9,96,150/- remains to be paid. While so, presentation of cheques given as security and filing of private complaint is sheer abuse of process of law and hence, liable to the quashed.

7. The substance of the quash petition is the respondent/complainant not entitled for the cheque amount as per the valuation report of the auditor and the cheques given for security cannot be subjected to criminal prosecution under Section 138 of Negotiable Instrument Act. Admitting the 1st petitioner company is liable to pay only Rs.9,96,150/-, the cheque value of aggregated sum of Rs.28,12,092/- will not fall within the preview of under Section 138 of Negotiable Instrument Act, since those cheques does not cover any legally enforceable debt. Further, the 3rd accused/Susil Kanugolu, Managing Director/CEO alone is the signatory of the cheques. The other

non-executive Directors, who are not involved in the day to day affairs of the Company cannot be held liable for prosecution under Section 138 of Negotiable Instrument Act, 1881.

8. The Learned Senior Counsel appearing for the petitioners submit that, the cheques were issued only as security for the payment towards the work's contract, which is agreed to be finalised only on receipt of the independent auditor's report. Without furnishing the certificate of completion and report from the auditor, cheques were presented. All the non-executive Directors of the Company are arrayed as accused. Though the 3rd accused/Susil Kanugolu, Managing Director of the Company alone was looking after the affairs of the Company and signatory of the cheques. The rest of the Directors and they were not in-charge of day to day affairs.

9. Relying upon the Judgement of the Hon’ble Supreme Court in S.M.S.Pharmaceuticals Ltd -v- Netta Bhalla reported in 2005 8 SCC 89, which was followed and reiterated by the Hon’ble Supreme Court subsequently in National Small Industries Corporation Limited -v- Harmet Singh Paintal and another reported in (2010) 3 SCC 330 would submit that the cheques issued not as security and not for any legally enforceable debt. The cheques signed on behalf of the 1st accused by the 3rd accused. The rest of the accused 2, 4 and 5 are neither signatories to the cheques nor person in-charge of the affairs of the Company and therefore, the complaint which is malafide action is liable to be quashed.

10. Per contra, the Learned Counsel for the respondent/complainant would submit that, the cheques were issued only after completion of the work and after much delay in payment. These four cheques were given with specific request to be presented on the date on which is bearing to discharge the debt of Rs.28,12,092/-. All the Directors including the signatory of the cheques were monitoring the work and giving instructions for the execution of the work. The said overt act of the accused persons been specifically mentioned in the complaint itself. Therefore, the plea that final settlement is payable only on receipt of the auditor’s report and the cheques were issued only as security is an imaginary defence not based on any agreed terms of contract. Therefore, the petitioners herein are bound to face the trial and discharge the burden of proving their innocence.

11. The Learned Counsel appearing for the respondent further submit that the basic averments which makes out the case against the Directors is sufficient and the power under Section 482 of Cr.P.C., to quash the criminal complaint has to be sparingly exercised and cannot be invoked merely for asking. In

support of his submission, the Learned Senior Counsel for the petitioner would rely upon the observation of the Hon'ble Supreme Court made in Gunmala Sales Private Limited and others -v- Navkar Promoters Private Limited and others reported in 2015 1 SCC 104.

12. In response to the above submission of the respondent counsel, the Learned Senior Counsel appearing for the petitioners refer clause (c) of Terms and Conditions found in the Purchase Order and state that, the parties agreed for chequered payments. Initially 30% along with purchase order, 20% while processing, 30% after completion of the work and balance 20% after certification. And also referring the e-mail communications between the parties submit that, the subject cheques were issued, pending certification and not towards the agreed balance amount payable. Referring the reply notice to the statutory notice he submit that, it has been made clear to the complainant that, the accused 2 &4 are not in-charge of the affairs of the Company and not signatory to the cheques or purchase orders therefore, not liable for any prosecution.

13. In National Small Industries Corporation Limited cited supra, the Hon'ble Supreme Court, after considering the language employed in Section 141 of the Negotiable Instruments Act, 1881, and the provisions of Companies Act, had evolved the following principles for prosecuting the Company and its Directors.

> (i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.
>
> (ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.
>
> (iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for

offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

(vi) If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.

(vii) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases.

14. While enumerating the above principles, the Hon'ble Supreme Court has made it clear that, merely by stating that, the accused was in-charge of the business of the Company or by stating, he was in-charge of the day-to-day Management of the Company or responsible to the Company for conduct of the business of the Company. He cannot be made vicarious liable under Section 141(1) of Negotiable Instruments Act, 1881 and made it clear that, for making a person liable under Section 141 (2) of the Act, the mechanical reputation of the requirement under Section 141(1) of Negotiable Instruments Act, will be of no assistance. But, there should be necessary averments in the complaint as to how and in what manner, the accused was guilty of consent, connivance or negligence.

15. In Gunmala Sales Private Limited and another, cited supra and relied by the respondent/complainant, the Hon'ble Supreme Court has observed as below:-

"7.2. So far as the decisions cited by

the respondents are concerned, all these decisions purported to follow the law laid down in SMS Pharma (1) [S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89, which does not lay down any general proposition of law that the specific role of a Director sought to be arrayed as an accused has to be elaborated in the complaint itself.

7.3. The doctrine of "indoor management" would be a relevant factor to be considered while assessing the averments to be made to satisfy the requirements of Section 141 of the NI Act. A complainant to whom a cheque is issued by a company may not be aware of the functions performed by a particular Director in the company. The responsibility of each of the Directors is exclusively the internal management of the company itself. In this connection, it would be useful to refer to Rangachari [N. Rangachari v. BSNL, (2007) 5 SCC 108 : (2007) 2 SCC (Cri) 460] and the Delhi High Court's judgment in Shree Raj Travels and Tours Ltd. v. Destination of the World (Subcontinent) (P) Ltd. [Shree Raj Travels and Tours Ltd. v. Destination of the World (Subcontinent) (P) Ltd., (2010) 172 DLT 390 : (2011) 166 Comp Cas 26].

7.4. Finally, it must be noted that vicarious liability is contemplated in the NI Act to ensure greater transparency in commercial transactions. This object has to be kept in mind while considering individual cases and hardship arising out of a particular case cannot be the basis for Directors to try to wriggle out of prosecution. Section 482 of the Code can be invoked where it is clear from documents on record, such as Form 32, that the Director is wrongly arraigned and not in any other case."

16. On reading the complaint, the respondent/complainant in more than one place as averred that, in every stage, all the accused enquired about the project and insisted to complete it within the time schedule and all the accused assured to settle the outstanding amount shortly.

17. While so, it is now contended by some of the accused persons that, they are Non-Executive Directors and not involved in day-to-day affairs of the Company. This is a disputed fact and it has to be proved in the course of trial and cannot be decided summarily.

18. The petitioners admit that the cheque was drawn by them and handed over to the respondent-complainant. However, they contended that the cheques were issued only as security for the balance amount, which is liable to pay after certification. If that is so, the petitioners ought not to have given these cheques with specific dates and amounts without certification. After presentation of the cheques and institution of the complaint, the petitioners herein rely upon the report of auditor dated 25.05.2018 who was apparently appointed by the petitioners herein.

19. As rightly pointed out by the Learned Counsel for the respondent, the power of the Hon'ble Court under Section 482 of Cr.P.C., to quash the criminal complaint has to be exercised sparingly with, circumspection and not on the mere asking. We cannot conduct mini-trial or roving enquiry. From the dates and events, admittedly the cheques were drawn and handed over to the respondent much prior to the appointment of so called independent auditor and receipt of his report. After issuing the cheque for specific amount, admitting the liability, the petitioners herein attempt to make out a case that the cheques were not issued for the liability but only as a security and the liability is much less than the cheque amount. To support their case, they rely upon the auditor's report dated 25.05.2018 which is much later to the date of cheque and its presentation.

20. For the aforesaid reasons, this Court is of the view that the petitioners herein are liable to face the trial and prove their innocence. The power of the High Court under Section 482 of Cr.P.C.,to quash the complaint cannot be exercised, in the case, where the complaint speaks about the participation of the accused persons and issuance of cheques for enforceable debt. Hence, this Criminal Original Petition No.6316 of 2019 is dismissed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

Bsm

To,

The Judicial Magistrate/Fast Track Court, Ambattur.

+1cc to Mr.M.Govindaraju, Advocate, S.R.No.35459
+1cc to Mr.S.Vijaya Ganesh., Advocate, S.R.No.35485

Criminal Original Petition No.6316 of 2019

PL(CO)
CT/24/06/2022