IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.12.2022

CORAM:

THE HON'BLE Ms.JUSTICE R.N.MANJULA

Crl.O.P.No.22181of 2019
and
Crl.MP.No.11498 of 2019

1.M/s.Team Sustain Limited
rep. by its Managing Director
Mr.George Mathew

2.George Mathew,
Managing Director
M/s.Team Sustain Limited.

3.Mareena George,
Director,
M/s.Team Sustain Limited. .. Petitioners

Versus

M/s.Nordic (India) Solutions Pvt. Ltd,
rep. by S.Rajamanickam Finance Manager. ... Respondent

Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure to call for the records and quash the proceedings in STC.No.610/2018 on the file of the Fast Track Court, Poonamallee against the petitioners.

For Petitioners : Mr.V.Vijayakumar

For Respondent : Mr.Rajeswaran for
M/S. Nathan & Associates

ORDER

This Criminal original petition has been filed to quash the proceedings in STC.No.610/2018 pending on the file of the Fast Track Court, Poonamallee against the petitioners.

2.The petitioners are the accused 1 to 3 in the private complaint given by the respondent for the offence under Section 138 NI Act.

3.The case of the respondent is that the respondent company had business dealings with the first accused company and towards the discharge of outstanding dues, the first accused through the accused 2 to 5 had issued a cheque bearing No.000452 dated.31.07.2018 drawn on HDFC Bank at K & T Tower Kakkanad, Kochi Branch, in favour of the respondent for a sum of Rs.21,42,000/-. When the cheque was presented for collection on 24.09.2019, it was returned as 'fund insufficient'. Hence the criminal complaint has been filed for the offence under Section 138 NI Act against the 1st accused who is a company and the accused 2 to 5 who are in charge of the affairs of the company.

4. Heard the submissions made by the learned counsel on either side and perused the materials available on record.

5. The learned counsel for the accused 1 to 5 has submitted that the mandatory notice has to be issued to the first respondent company before filing the complaint; however, that has not been issued to the first accused; without complying the due mandatory requirement, the case has been filed against the 1st accused company for the offence under Section 138 NI Act and that is not maintainable.

6.The learned counsel for the respondent submitted that originally the respondent has filed a complaint only against the accused 2 to 5 and later, the first accused who is the company has also been impleaded; since the cheque has been issued for the company, the company is also liable and hence the petition should be dismissed.

7.On perusal of the records, it is not known that the cheque has been issued by the company for discharging the liability of the company. The cheque has been signed by the authorized signatory on behalf of the company only. Since the cheque has been issued for discharging of liability of the company, the respondent ought to have issued statuary notice to the company before filing the complaint. Admittedly no notice was issued to the company who is the first accused herein before filing the complaint.

8. A liability under Section 141 of Negotiable Instruments Act is vicariously fastened on a person connected with a company though the principal accused is the company itself. But without impleading the company who is liable to pay the cheque amount, its directors cannot be impleaded for a criminal proceedings against them in their individual capacity. Because the criminal liability on account of dishonour of the cheques primarily falls on the drawer of the cheque. In the case on the hand, the cheques have been drawn only by the company. The petitioner being an authorised signatory has signed the cheque on behalf of the company. Since the primary liability is on the company, in compliance of Section 141 of Negotiable Instruments Act, the company should have been impleaded as the first accused. Since the company is a juristic person and it has to perform its affairs only with the persons in charge of the same, such persons should also be impleaded as parties by alleging how they are responsible to the affairs of the company.

9. Since the petitioner had not issued the cheque in his personal capacity but as the Director of the company, the company ought to have been added as the party to the proceedings. In the averments of the complaint it has not been stated that the cheque has been issued by the company. It is alleged that the petitioner had availed loan for his own business. In fact in the statement of the respondent, he has stated that the petitioner had availed the loan in order to meet out his family cum business expenses. But in reality, the cheques have been issued only by the company. So the respondent who had his dealings with the company had omitted to implead the company as a party but fixed the liability on the petitioner in his personal capacity.

10. It might be true that the petitioner is in charge of day-to-day affairs of the company and he was responsible for the conduct of the company. But without impleading the company, no criminal action can be sustained as against the petitioner in his individual capacity.

11.As per Section 138 (b) NI Act, notice should be issued to the drawer of the cheque within 30 days from the date of receipt of the information about the return of the cheque. The said condition is not directory but mandatory and hence it should be complied without fail. As per Section 141(1) of the Act, when a person committed an offence u/s.138 NI Act is a company, every person who at the time of commence of the offence was incharge and was responsible for the affairs of the company and the company shall be deemed to be guilty for the offence. Since the primary liability is on the company and the drawer of the cheque is also the company who is the first accused, the failure to issue mandatory notice to the first accused will invalidate the complaint.

12. The Hon'ble Supreme Court has held in the case of ***MSR Leathers Vs. S.Palaniappan and another [2013 (1) SCC 177].*** In the said case it is held that a demand for payment is to be made in the form of notice in writing to the drawer of the cheque within 30 days from the receipt of information by him from the bank regarding the return of the cheque as unpaid in order to make a complaint maintainable under 138 NI Act.

13.The said position of law has already been well settled and it has been followed in various judgement of the Supreme Court. In this regard it is relevant to refer of the judgement of the Hon'ble Supreme Court in the case of ***N.Harihara Krishnan Vs. J. Thomas [(2018) 13 SCC 663]*** wherein it is held as under:

20. The offence under Section 138 of THE ACT is capable of being committed only by the drawer of the cheque. The logic of the High Court that since the offence is already taken cognizance of, there is no need to take cognizance of the offence against DAKSHIN is flawed. Section 141 stipulates the liability for the offence punishable under Section 138 of THE ACT when the person committing such an offence happens to be a company - in other words when the drawer of the cheque happens to be a company. Relevant portion of Section 141 reads as follows:-

> *"Section 141. Offences by companies.— (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:"*

21. This Court in Aneeta Hada, had an occasion to examine the question "whether an authorised signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 (for brevity "the Act") without the company being arraigned as an accused" and held as follows:-

> *"59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. ..." Yet the High Court reached a conclusion that the revision filed by the petitioner is not maintainable because DAKSHIN did not choose to challenge the trial court's order.*

The High Court failed to appreciate that the liability of the appellant (if any in the context of the facts of the present case) is only statutory because of his legal status as the DIRECTOR of DAKSHIN. Every person signing a cheque on behalf of a company on whose account a cheque is drawn does not become the drawer of the cheque. Such a *signatory is only a person duly authorised to sign the cheque on behalf of the company/drawer of the cheque. If DAKSHIN/drawer of the cheque is sought to be summoned for being tried for an offence under Section 138 of THE ACT beyond the period of limitation prescribed under THE ACT, the appellant cannot be told in view of the law declared by this Court in Aneeta Hada that he can make no grievance of that fact on the ground that DAKSHIN did not make any grievance of such summoning. It is always open to DAKSHIN to raise the defense that the initiation of prosecution against it is barred by limitation. DAKSHIN need not necessarily challenge the summoning order. It can raise such a defense in the course of trial.*

Coming to the view of the High Court that only the offence is taken cognizance of and there is no need to take cognizance of an offence accused-wise is an erroneous view in the context of a prosecution under THE ACT. Most probably the High Court recorded such conclusion (though not expressly stated) on the basis of the judgment of this Court in Raghubans Dubey v. State of Bihar, AIR 1967 SC 1167, where it was stated:

"Para 9. ... In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders;

once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. ..." Such a statement of law was made by this Court in the background of the scheme of the CrPC."

14. The principle laid down in the above said cases is squarely applicable to the present case. When there is no reliable or probable material available against the petitioner, the ends of justice can be served only by quashing the proceedings.

In the result, the Criminal Original Petition is **allowed**. The proceedings against the accused 2 & 3 in STC.No.610/2018 on the file of the Fast Track Court, Poonamallee against the petitioners is quashed. Consequently, connected miscellaneous petitions are closed.

15.12.2022

Index: Yes/No
jrs

To:

1.The the Fast Track Court,
Poonamallee

2.The Public Prosecutor,
High Court, Madras.

R.N.MANJULA, J.,

jrs

Crl.O.P.No.22181of 2019
and
Crl.MP.No.11498 of 2019

15.12.2022