IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :22.03.2022

PRONOUNCED ON :29.03.2022

CORAM:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

CRL.O.P.NO.31018 OF 2019
AND
CRL.M.P.NOS.16884 AND 16886 OF 2019

P.Saravana Kumar, aged about 46 years (A-2)
S/o M.Ponnusamy,
Authorized Signatory,
Jaandar Apparels,
D.No.20/24, M.G.R.Nagar,
8th Street, Behind Santhi Theatre,
P.N.Road,
Tiruppur Lakshmi Nagar,
Tamil Nadu 641 602. .. Petitioner/Accused

/versus/

S.P.Vijaya Kumar, aged about 50 years,
S/o Mr.Subramanian
No.25-A, Rangarajapuram Main Road,
Kodambakkam,
Chennai 600 024. ..Respondent/Complainant

Criminal Original Petition has been filed under Section 482 of Cr.P.C., praying to call for the records in C.C.No.2951/2019 pending on the file of the learned Metropolitan Magistrate, FTC No.III, Saidapet, Chennai, quash all further proceedings as against him in the said case in C.C.No.2951/2019.

For Petitioner :Mr.R.Baskar

For Respondents :Mr.S.V.D.Rajendra Prasad

O R D E R

This Criminal Original Petition has been filed praying to call for the records in C.C.No.2951/2019 pending on the file of the learned Metropolitan Magistrate, Fast Track Court No.III, Saidapet, Chennai, quash all further proceedings as against him in the said case in C.C.No.2951/2019.

2.The petitioner is the second accused in the private complaint laid under Section 138 of Negotiable Instruments Act, 1881. He prays to quash the complaint against him on the ground that the subject cheque is issued from the account maintained by M/s Jaandar Apparels, a Proprietorix concern owned by the first accused Mrs.Thilagavathy. He is the authorised signatory of the Proprietorix concern to sign cheques, but he is not the drawer of the cheque on the account maintained by him. Therefore, for dishonour of the subject cheque, he cannot be criminally held liable to be prosecuted under Section 138 of the Negotiable Instruments Act 1881.

3.The learned counsel for the petitioner/accused submitted that, Section 138 of the Negotiable Instruments Act, 1881 holds responsible only the person, who draws the cheque on an account maintained by him. Section 7 of the Negotiable Instruments Act, 1881 defines, who is a Drawer. In case of a bank account in the name of the Proprietor concern, only the proprietor is liable and not the mandate holder or the authorised signatory be liable for the dishonour of the said cheque. Unlike ‘company’ defined in Section 141 of the Negotaiable Instruments Act, a ‘Proprietor concern’ is not owned by collection of persons but owned by individual. Therefore, the principle of vicarious liability will not apply. The said individual, who owns the Proprietor concern alone is liable to be prosecuted, since he/she alone maintains the account and not the authorised signatory.

4.To buttress his submission, the learned counsel for the petitioner rely upon the judgment of this Court rendered in N.Gopalan -vs- K.Udayakumar reported in [2009(4) CTC 217].

5.The Learned Counsel for the respondent/defacto complainant in contra submitted that, the petitioner is the person, who has drawn the cheque in the capacity as the authorised signatory of the Proprietor concern “Jaanthar Apparels”. The cheque was issued to discharge the debt of the proprietor concern. The proprietor of the concern ‘Jaanthar Apparels’ is the first accused Thilagavathy, who is none else than the wife of this petitioner. The petitioner is arrayed as an accused not vicariously but for issuing a cheque without sufficient fund in the account which he is maintaining as authorised signatory. Under Banking Law, the account holder need not necessarily be the person, who is authorised to maintain. Whether it is Company or Partnership firm or Proprietorship concern, bank permits persons to represent those entities on due authorisation or mandate.

6.Having signed the cheque in the capacity as the authorised signatory of the account holder, the petitioner becomes the drawer of the cheque. The authorisation given by the proprietor and the permission given by the Bank to the petitioner indicates that he is the person maintaining the account. Except the petitioner none else can maintain the account of the Proprietor concern, in view of the authorisation. The judgment relied on is different factual matrix and not applicable to the facts of the case in hand.

7.Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the respondent.

8.Before adverting to the legal issues, the facts leading to the filing of the complaint is extracted below:-

The first accused Thilagavathi and the second accused Saravanakumar are spouse. The first accused in the Proprietrix of 'M/s Jaandar Apparels'. To tide over the financial crisis in the business, during the month of July 2017, the first accused has borrowed money from the complainant for interest on various dates and has repaid part of the loan amount with interest. Finally, to clear the entire balance principal amount, the first accused firm "M/s Jaanthar Apparels" issued cheque dated 22/02/2019 for Rs.10 lakhs drawn on Lakshmi Vilas Bank, Trippur. For 'M/s Jaanthar Apparels' the second accused signed as authorised signatory. When the cheque was presented for collection, the same was returned with an endorsement "ACCOUNT BLOCKED" (SITUATION COVERED IN 21-25). Having issued the cheque, in order to cheat the complainant, the first and second accused have instructed the bank to block the account. The first accused as the Proprietorix of M/s Jaanthar Apparels and the second accused as the authorised signatory both are responsible and liable to be prosecuted. Hence, after issuance of the statutory notice complaint under Section 138 of Negotiable Instruments Act, 1881.

9.The point canvassed by the petitioner/second accused is that, the authorised signatory will not fall within the meaning of drawer. He is not the person, who maintains the account.

“Section 7 of the Negotiable Instruments Act, 1881 defines “Drawer”, “drawee” as below:-

“The maker of a bill of exchange or the cheque is called the “Drawer”, the person thereby directed to pay is called the “drawee” .

“The expression drawer under Section 7 of the Act can be a natural person or an incorporated person or a body of persons whether incorporated or not. The word 'person' as defined in Section 11 of the Indian Penal Code includes a natural person, an incorporated person or even an unincorporated association or body of persons like a patnership.

The expression 'drawing' is not defined under the Act but the 'drawer' is defined under Section 7 of the Act. The 'drawer' is defined as the person who 'makes' the cheques. Word 'make' means 'prepare', 'create' etc. Therefore, the Court has to consider whether there is evidence to show that the accused has 'made' the cheque. That is, whether he has created or prepared the cheque. To prepare the cheque, he can certainly take the aid of another person to fill up the relevant details int he cheque especially if he is illiterate or if he is unable to prepare the same for some reason or due to any other justifiable reason. Thus, he may either prepare or create the cheque by himself or it cause the relevant details in the cheque to be filled up by another person under his instruments. But, the cheque shall be signed by the drawer himself.”

Section 138 of the NI Act, says,

“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 provision 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 of other liability means a legally enforceable debt or other liability."

10. In the instant case, the petitioner having signed the cheque, he is undoubtedly the drawer of the cheque. His defence is, he is not maintaining the account and the account is maintained in the name of the Proprietor concern, namely "M/s Jaandthar Apparels". Since the penal provision under the Negotiable Instruments Act, 1881 says, cheque drawn by a person on an account maintained by him.

11.The learned counsel appearing for the petitioner cited the judgment of this Court rendered in N.Gopalan -vs- K.Udayakumar (2009 (4) CTC 217) which has relied on in Surendra Mal Metha and Another -vs- M/s Gillette India Ltd. reported in [2006(1)MWN (Cri.) (DCC) 88] and R.Ravi chandran -vs- C. Subramanaian @C.S.Maniam Mandate Holder of M/s Southern Biologicals, Coimbatore reported in [2006(1)MLJ (crl.) 68] and submit that the Courts have consistently held that the mandate holder/authorised signatory cannot be held liable for the dishonour of the cheque issued on the account maintained by the principal.

12.On reading N.Gopalan case, which has been referred in the subsequent judgment, the learned Judge has relied upon the Hon'ble Supreme Court Judgment rendered in Ragu Lakshminarayanan -vs- Fine Tubes reported in [2007(5) SCC 103] and has held that,

> "Para10:- "To prosecute a person for an offence under Section 138 of the Negotiable Instruments Act, the cheque should have been issued by him on an account maintained by him with a banker. The opening words of Section 138 of the Negotiable Instruments Act reads as follows:-
>
> "Where any cheque drawn by a person on an account maintained by him with a banker..........
>
> Only he who issued the cheque drawn on an account maintained by them can be prosecuted for an offence under Section 138 of the Negotiable Instruments Act. In this case, admittedly, the cheque was not drawn on an account maintained by the petitioner herein and the same was drawn on an account maintained by the wife of the petitioner in the name of the proprietary concern run by her. The judgements of the Apex Court and this Court cited above squarely apply to

the facts of the case on hand.”

13.The facts of the Ragu Lakshminarayanan case relied in N.Gopalan case is regarding the challenge of the prosecution under Section 138 of the Negotiable Instruments Act,1881, by a person not a signatory to the cheque. Reading of that judgment, we understand that, in the complaint, Fine Tubes had alleged that the first Respondent is a business concern and respondents 2 to 6, are its Managers, Directors and Partners. By representing themselves to be so responsible for the dealings and day to day working of the first Respondent, hence, all liable for dishonouring the cheque.

14.In the said factual context, the Hon’ble Supreme Court in Ragu Lakshminarayanan –vs- Fine Tubes reported in [2007(5) SCC 103] has observed as below:-

> “8. The description of the accused in the complaint petition is absolutely vague. A juristic person can be a company within the meaning of the provisions of the Companies Act, 1956 or a partnership within the meaning of the provisions of the Partnership Act, 1932 or an association of persons which ordinarily would mean a body of persons which is not incorporated under any statute. A proprietary concern, however, stands absolutely on a different footing. A person may carry on business in the name of a business concern, but he being proprietor thereof, would be solely responsible for conduct of its affairs. A proprietary concern is not a company. Company in terms of the Explanation appended to Section 141 of the Negotiable Instruments Act, means any body corporate and includes a firm or other association of individuals. Director has been defined to mean in relation to a firm, a partner in the firm. Thus, whereas in relation to a company, incorporated and registered under the Companies Act, 1956 or any other statute, a person as a Director must come within the purview of the said description, so far as a firm is concerned, the same would carry the same meaning as contained in the Partnership

Act.

11. If Accused 1 was not a company within the meaning of Section 141 of the Negotiable Instruments Act, the question of an employee being proceeded against in terms thereof would not arise. The respondent was aware of the difference between a "partnership firm" and a "business concern" as would be evident from the fact that it described itself as a partnership firm and Accused 1, as a business concern. Significantly, the respondent deliberately or otherwise did not state as to in which capacity the appellant had been serving the said business concern. It, as noticed hereinbefore, described him as in-charge, Manager and Director of Accused 1. A person ordinarily cannot serve both in the capacity of a Manager and a Director of a company.

12.The distinction between partnership firm and a proprietary concern is well known. It is evident from Order 30 Rule 1 and Order 30 Rule 10 of the Code of Civil Procedure. The question came up for consideration also before this Court in Ashok Transport Agency v. Awadhesh Kumar [(1998) 5 SCC 567] wherein this Court stated the law in the following terms : (SCC pp. 569-70, para 6)

"6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Partnership Act, 1932. Though a partnership is not a juristic person but Order 30 Rule 1 CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 of

> Order 30 which make applicable the provisions of Order 30 to a proprietary concern, enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order 30 have no application to such a suit as by virtue of Order 30 Rule 10 the other provisions of Order 30 are applicable to a suit against the proprietor of proprietary business 'insofar as the nature of such case permits'. This means that only those provisions of Order 30 can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case."

15.The dictum laid in this judgment by the Hon'ble Supreme Court is on a contest of vicarious liability in respect of a non-signatory to the cheque. This dictum cannot be applied to the signatory of a cheque, who is authorised to maintain the account on behalf of the Proprietor concern. Misapplication of the dictum of the Hon'ble Supreme Court by the Courts below can not be taken as a precedent or binding. It is to be ignored as obitor dicta.

16.This Court put a pointed question to the learned counsel for the petitioner, whether if the account not blocked and sufficient fund available in the account, would the bank have cleared the cheque?. The answer was positive. Therefore, the understanding between the account holder, authorised signatory and the bank is that the cheque drawn by the authorised signatory will be honoured, provided there is sufficient fund available in the account. That means, the account opened in the name of the Proprietor concern, is in fact maintained by the authorised signatory and not the person in whose name the proprietor concern stands.

17.Again going back to the commentaries on the Negotiable Instruments Act by Bhashyam and Adiga's 11th Edition, the liabllity of the authorised signatory in a cheque bounce case is explained in the following terms:-

"62.Cheque issued by authorised signatory:Liability :-

In this regard, the position in law is that, when the cheque is issued by a drawer on behalf of the principal, the principal cannot escape from his liability on a claim made by the affected person. A principal is always bound by the act of his or her attorney so long the Attorney does not exceed this right. When the power is given in general, it applies to every thing in which the grantor is interested. But when it is special, it applies t specific matter, such as the power to sign cheques, to make transfers, to receive money, to present documents, etc. Thus, the cheque issued by the constituted attorney in partial discharge of the debt is deemd to have been issued under the authority of the principal. Moreover, in the absence of the principal placing any material to show that the abovesaid authorization was revoked before the cheques in questions were issued, there was no substance in the submission made that the authorised signatory had retired and therefore, no liability was there on the principal."

18.One can easily visualise the object of Section 138 of the Negotiable Instruments Act, 1881, will be defeated, If the proposition canvassed by the petitioner is held legally valid. Fraudsters will open the Bank Account in the name of Proprietor concern by one individual and another individual will be nominated as Authorised Signatory. Allow the cheque drawn by the authorised signatory gets bounced and pleads that he is only the drawer of the cheque, but not the person maintaining the account.

19.The Court cannot give an interpretation to the provision of law, which will be contrary to object of the Act and defeat the very purpose of the Act.

20.Therefore, this Court finds no merit in the petition to quash the complaint under Secction 138 of the Negotiable Instruments Act, 1881 against the petitioner being the drawer of the cheque, and drawn the cheque as authorised signatory of the person who opened the account.

21.In the result, this Criminal Original Petition is dismissed. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To:

The Metropolitan Magistrate,
FTC No.III, Saidapet, Chennai.

+2ccs to Mr.R.Baskar, Advocate, S.R.No.20952
+1cc to Mr.S.V.D.Rajendra Prasad, Advocate, S.R.No.21133

Crl.O.P.No.31018/2019
and
Crl.M.P.nos.16884 and 16886 of 2019

NRL(CO)
PM/06/04/2022