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Crl.O.P.(MD)Nos.9784, 9787 and 9788 of



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 06.07.2022

PRONOUNCED ON: 16.08.2022

CORAM

THE HONOURABLE MR.JUSTICE **K.MURALI SHANKAR**

Crl.O.P.(MD)Nos.9784, 9787 and 9788 of 2019

and

Crl.M.P.(MD)Nos.6211, 6212, 6213, 6214, 6215 and 6216 of 2019

Crl.O.P.(MD)No.9784 of 2019:

M.Buvaneswari

: Petitioner/Accused No.3

Vs.

S.Dharmaraj (died)

Ganapathy Raja

: Respondent/Complainant

(Amended as per order of this Court dated
18.04.2022, in Crl.M.P.(MD)No.4896 of
2022.

PRAYER : Criminal Original Petition has been filed under Section 482 Cr.P.C,
to call for the records pertaining in S.T.C.No.1581 of 2017, filed by the
respondent herein before the learned Judicial Magistrate, Tiruchendur and quash
the same in respect to the petitioner herein.



Crl.O.P.(MD)No.9787 of 2019:

M.Buvaneswari

: Petitioner/Accused No.3

Vs.

S.Dharmaraj (died)

Ganapathy Raja

: Respondent/Complainant

(Amended as per order of this Court dated
18.04.2022, in Crl.M.P.(MD)No.4894 of
2022.

PRAYER : Criminal Original Petition has been filed under Section 482 Cr.P.C,
to call for the records pertaining in S.T.C.No.1169 of 2017, filed by the
respondent herein before the learned Judicial Magistrate, Tiruchendur and quash
the same in respect to the petitioner herein.

Crl.O.P.(MD)No.9788 of 2019:

M.Buvaneswari

: Petitioner/Accused No.3

Vs.

S.Dharmaraj (died)

Ganapathy Raja

: Respondent/Complainant

(Amended as per order of this Court dated
18.04.2022, in Crl.M.P.(MD)No.4895 of
2022.



PRAYER : Criminal Original Petition has been filed under Section 482 Cr.P.C, to call for the records pertaining in S.T.C.No.1739 of 2017, filed by the respondent herein before the learned Judicial Magistrate, Tiruchendur and quash the same in respect to the petitioner herein.

For Petitioner
in all cases : Mr.S.M.Mohan Gandhi

For Respondent
in all cases : Mr.C.Arulvadivel @ Sekar

COMMON ORDER

These Criminal Original Petitions have been filed, invoking Section 482 Cr.P.C., seeking orders to call for the records pertaining to the cases in S.T.C.Nos.1581, 1739 and 1169 of 2017, pending on the file of the Judicial Magistrate, Tiruchendur and quash the same as against the petitioner.

2. The petitioner is the third accused in all the three S.T.C., cases pending on the file of the Judicial Magistrate Court, Tiruchendur. The original respondent in these Criminal Original Petitions has filed private complaints under Section 200 Cr.P.C., against three persons including the petitioner for the alleged offence under Section 138 r/w 142 of the Negotiable Instruments Act. During the pendency of the above Criminal Original Petitions, the original respondent, who has filed the above private complaints, had died and hence, the



present respondent Ganapathy Raja who is the son of the deceased original complainant got himself impleaded as the only respondent in all the above petitions.

3. The case of the complainant is that the first accused is a partnership firm, that the accused 2 and 3 are its partners, that there existed good relationship between the families of the complainant and the accused, that the accused 2 and 3 have borrowed a sum of Rs.5,50,000/- on 30.10.2016 to meet out their urgent business purposes in the presence of the complainant's son Ganapathy Raja, that in order to repay the loan amount, the accused 2 and 3 and on behalf of the first accused and through the second accused, who is the authorized signatory, have issued five cheques for Rs.1,00,000/- each and sixth cheque for Rs.50,000/- drawn on Tamil Nadu Mercantile Bank, Athur Branch in favour of the complainant, that the cheques were presented for collection, but the same were returned for want of sufficient funds in the bank account of the accused, that the complainant has sent a legal notice dated 06.04.2017, demanding payment of the amounts covered by the cheque, that the accused having received the legal notice have neither sent any reply nor made any payment, that the second accused has sent a notice dated 07.02.2017 alleging that he had received only Rs.1,30,000/- as loan and that therefore, the complainant was constrained to lodge the above complaints.



4. The petitioner's case is that she is working as a Teacher in the Girls Higher Secondary School at Eral, that the first accused is a proprietorship concern and not a partnership firm as alleged by the complainant, that the second accused A.R.R.Muthuramalingam is her husband and the proprietor of the first accused concern and that the petitioner has no connection whatsoever with the business of the first accused concern, nor with the issuance of the alleged cheques.

5. It is pertinent to note that the complainant in the complaint has arrayed the first accused M/s Vadivoo Agency as a partnership concern and the second accused A.R.R.Muthuramalingam as partner and authorized signatory and Tmt.M.Buveneswari as partner of the first accused firm. As rightly contended by the learned Counsel for the petitioner, the complainant has not produced any *prima facie* material to show that the first accused is a partnership firm and the accused 2 and 3 are its partners. The petitioner has now taken a specific stand that the first accused is not a partnership firm and is a sole proprietorship concern and that the second accused is the sole proprietor. In order to substantiate the same, the petitioner has produced the trading and profit and loss account for the year ended 31.03.2015 issued by their Chartered Accountant along with Income Tax returns acknowledgment for the assessment year



2014-2015, loan passbook issued by the Tamil Nadu Mercantile Bank Ltd., and the copies of the cheque allegedly issued by the first accused.

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6. The learned Counsel for the respondent would submit that the above documents are self-serving documents and they cannot be relied at this stage to decide about the nature of the first accused concern and that the same is a matter for trial.

7. It is evident from the said documents that in trading and profit and loss account, the second accused has been shown as the proprietor of M/s Vadivoo Agency and that in the loan passbook issued by the Tamil Nadu Mercantile Bank Ltd., also, the name of the customer has been shown as M/s Vadivoo Agency and the second accused as its proprietor. Moreover, the cheques were allegedly signed by the second accused as authorized signatory of the first accuse, ie., Vadivoo Agency.

8. As rightly contended by the learned Counsel for the petitioner, the complainant cannot add any person as accused at his whims and fancies and at the time of filing the complaint, he must shown some *prima facie* proof to implicate any person as accused. As already pointed out, the petitioner has been arrayed as an accused only on the basis that she is a partner of the first accused



firm. As already pointed out, the complainant has not produced any material or evidence to show prima facie that the petitioner was the partner of the first accused firm and that the learned Magistrate, without considering the same, has taken cognizance of the above cases. It is settled law that no person can be forced to face the prosecution in the absence of any prima facie materials to implicate the said person in the alleged commission of offence.

9. The Hon'ble Supreme Court in *Alka Khandu Avhad Vs. Amar Syamprasad Mishra & Anr. (CRIMINAL APPEAL NO. 258 OF 2021, dated 08.03.2021)* has specifically held that the drawer of the cheque alone can be prosecuted for the offence under Section 138 of the Negotiable Instruments Act and the relevant passage is extracted hereunder:

“7. On a fair reading of Section 138 of the NI Act, before a person can be prosecuted, the following conditions are required to be satisfied: i) that the cheque is drawn by a person and on an account maintained by him with a banker; ii) for the 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 iii) the said cheque 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. Therefore, a person who is the signatory to the cheque and the cheque is drawn by that person



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on an account maintained by him and the cheque has been issued for the discharge, in whole or in part, of any debt or other liability and the said cheque has been returned by the bank unpaid, such person can be said to have committed an offence. Section 138 of the NI Act does not speak about the joint liability. Even in case of a joint liability, in case of individual persons, a person other than a person who has drawn the cheque on an account maintained by him, cannot be prosecuted for the offence under Section 138 of the NI Act. A person might have been jointly liable to pay the debt, but if such a person who might have been liable to pay the debt jointly, cannot be prosecuted unless the bank account is jointly maintained and that he was a signatory to the cheque.”

10. Section 141 of the Negotiable Instruments Act imposes vicarious liability and deals with the offences committed by the company or firm and at this juncture, it is necessary to refer the recent judgment of the Hon'ble Supreme Court in ***Dilip Hiraramani vs Bank Of Baroda*** reported in ***2022 Live Law SC 457*** and the relevant passages are extracted hereunder:

“7. Before we refer to the pertinent legal ratio in the case of [Aneeta Hada v. Godfather Travels and Tours Private Ltd.](#), we would like to refer to an earlier apposite judgment of this Court in [State of Karnataka v. Pratap Chand and Others](#), in which case prosecution had been initiated under the Drugs and [Cosmetics Act](#), 1940 against a partnership firm and its partners. Reference was made to [Section 348](#) of the [Drugs and Cosmetics Act](#), which is *pari materia* to



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Section 141 of the NI Act. Therefore, for the sake of convenience and for deciding the present appeal, we will reproduce Section 141 of the NI Act:

“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:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or 7 (1981) 2 SCC 335 8 34.

Offences by companies.—(1) Where an offence under this Act has been committed by 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:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent



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or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section—

(a) “company” means a body corporate, and includes a firm or other association of individuals; and

(b) “director” in relation to a firm, means a partner in the firm”

Sub-section (1) to [Section 141](#) of the NI Act states that where a company commits an offence, 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, as well as the company itself, shall be deemed to be guilty of the offence. The expression ‘every person’ is wide and comprehensive enough to include a director, partner or other officers or persons. At the same time, it follows that a person who does not bear out the requirements of ‘in charge of and responsible to the company for the conduct of its business’ is not vicariously liable under [Section 141](#) of the NI Act. The burden is on the prosecution to show that the person prosecuted was in charge of and responsible to the company for conduct of its business. The proviso, which is in the nature of an exception, states that a person liable under sub-section (1) shall not be punished if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. The onus to satisfy the requirements and take benefit of the proviso is on the accused. Still, it does not displace or extricate the initial onus



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and burden on the prosecution to first establish the requirements of sub-section (1) to [Section 141](#) of the NI Act. The proviso gives immunity to a person who is otherwise vicariously liable under sub-section (1) to [Section 141](#) of the NI Act.

9. In *Pratap Chand* (supra), specific reference was made to the Explanation to [Section 34](#) of the *Drugs and Cosmetics Act*, which states that for [Section 34](#), a 'company' means a body corporate and includes a firm or association of individuals, and a 'director' in relation to a firm means a partner in the firm. Thereafter, the conviction of the second respondent, one of the partners in the firm therein, was quashed on the ground that he cannot be convicted merely because he has the right to participate in the firm's business in terms of the partnership deed. Thus, notwithstanding the legal position that a firm is not a juristic person, a partner is not vicariously liable for an offence committed by the firm, unless one of the twin requirements are satisfied and established by the prosecution. This Court gave the following reasoning:

"7. It is seen that the partner of a firm is also liable to be convicted for an offence committed by the firm if he was in charge of, and was responsible to, the firm for the conduct of the business of the firm or if it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of the partner concerned. In the present case the second respondent was sought to be made liable on the ground that he along with the first respondent was in charge of the conduct of the business of the firm. [Section 23-C](#) of the *Foreign Exchange Regulation Act, 1947* which was identically the same as [Section 34](#) of the *Drugs and Cosmetics Act* came up



for interpretation in *G.L. Gupta v. D.H. Mehta*, (1971) 3 SCC 189 where it was observed as follows:

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“What then does the expression ‘a person in- charge and responsible for the conduct of the affair of a company’ means? It will be noticed that the word ‘company’ includes a firm or other association, and the same test must apply to a director in-charge and a partner of a firm in-charge of a business. It seems to us that in the context a person ‘in-charge’ must mean that the person should be in overall control of the day to day business of the company or firm. This inference follows from the wording of Section 23-C(2). It mentions director, who may be a party to the policy being followed by a company and yet not be in- charge of the business of the company. Further it mentions manager, who usually is in charge of the business but not in overall charge. Similarly the other officers may be in charge of only some part of business.”

*11. In the present case, we have reproduced the contents of the complaint and the deposition of PW-1. It is an admitted case of the respondent Bank that the appellant had not issued any of the three cheques, which had been dishonoured, in his personal capacity or otherwise as a partner. In the absence of any evidence led by the prosecution to show and establish that the appellant was in charge of and responsible for the conduct of the affairs of the firm, an expression interpreted by this Court in *Girdhari Lal Gupta v. D.H. Mehta and Another*¹¹ to mean ‘a person in overall control of the day-to-day business of the company or the firm’, the conviction of the appellant has to be set aside. The appellant cannot be convicted merely because he was*



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a partner of the firm which had taken the loan or that he stood as a guarantor for such a loan. [The Partnership Act](#), 1932 creates civil liability. Further, the guarantor's liability under the [Indian Contract Act](#), 1872 is a civil liability. The appellant may have civil liability and may also be liable under the [Recovery of Debts Due to Banks and Financial Institutions Act](#), 1993 and the [Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act](#), 2002. However, vicarious liability in the criminal law in terms of [Section 141](#) of the NI Act cannot be fastened because of the civil liability. Vicarious liability under sub-section (1) to [Section 141](#) of the NI Act can be pinned when the person is in overall control of the day-to-day business of the company or firm. Vicarious liability under sub-section (2) to [Section 141](#) of the NI Act can arise because of the director, manager, secretary, or other officer's personal conduct, functional or transactional role, notwithstanding that the person was not in overall control of the day-to-day business of the company when the offence was committed. Vicarious liability under sub-section (2) is attracted when the offence is committed with the consent, connivance, or is attributable to the neglect on the part of a director, manager, secretary, or other officer of the company.”

11. Even assuming for arguments sake, that the first accused is a partnership firm and the petitioner is its partner, it is to be seen as to whether the complainant has raised the necessary averments in the complaint. In the complaint, it has been stated that the third accused is another partner of the first accused firm and that since the petitioner was dealing with the capital and the



accounts, she has been acting as directly participating partner. Except the above averments, there is no further pleadings in the complaint to mulct the liability on the petitioner. Admittedly, the alleged cheques were drawn by the second accused, as the authorized signatory of the first accused concern.

12. As rightly contended by the learned Counsel for the petitioner, there is absolutely no evidence to show that the petitioner was the partner and was in-charge of the day-to-day affairs and the business of the first accused firm and that she was aware of the loan obtained from the complainant and the issuance of the cheques by the second accused. As per the legal dictum laid down by the Hon'ble Supreme Court in the above referred cases, the liability under Section 141(1) of the Negotiable Instruments Act can be made when the partner is in over all control of the day-to-day business of the firm.

13. In the case on hand, as already pointed out, there is no prima facie material to show that the petitioner was a partner at the relevant point of time nor is there any averment so as to attract vicarious liability under Section 141 of the Negotiable Instruments Act. It is pertinent to note that even assuming that the petitioner was jointly liable, as per the dictum of the Hon'ble Supreme Court, in case of joint liability, the drawer of the cheque alone can be prosecuted and a person other than the person, who has drawn the cheque cannot be prosecuted for



the offence under Section 138 of the Negotiable Instruments Act. Considering the above, the complaint lodged against the petitioner under Section 138 of the Negotiable Instruments Act can only be considered as an abuse of process of law and hence, the same is liable to be quashed.

14. In the result, the Criminal Original Petitions are allowed and the proceedings in S.T.C.Nos.1581, 1739 and 1169 of 2017, pending on the file of the Judicial Magistrate Court, Tiruchendur as against the petitioner are quashed. Consequently, the connected Miscellaneous Petitions are closed.

15. Considering the fact that the complaints under Section 138 of the Negotiable Instruments Act are pending from 2017 onwards for the past more than four years, this Court is of the view that necessary directions are to be issued for early disposal of the cases. Accordingly, the learned Judicial Magistrate, Tiruchendur is directed to complete the trial and dispose of the above cases as expeditiously as possible, preferably within a period of three months from the date of receipt of a copy of this order.

16.08.2022

Index : Yes/No
Internet : Yes/No
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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 Court, Tiruchendur.



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K.MURALI SHANKAR, J.

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PRE-DELIVERY ORDER MADE IN

Crl.O.P.(MD)Nos.9784, 9787 and 9788 of 2019

16.08.2022