BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 31.10.2022

PRONOUNCED ON : 25.11.2022

CORAM

THE HON'BLE MR.JUSTICE **SATHI KUMAR SUKUMARA KURUP**

CRL.O.P(MD)No.13585 of 2022
and
Crl.M.P(MD)No.8651 of 2022

C.Balasubramanian ...Petitioner

vs

Velpandian ...Respondent

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C, praying to call for the entire records pertaining to the case in S.T.C.No.91 of 2022 pending on the file of the learned Special Judicial Magistrate (Negotiable Instruments Act Cases), Tirunelveli and to quash the same as against the Petitioner.

For Petitioner :Mr.R.Anand

For Respondent :Mr.T.Selvan

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O R D E R

This Criminal Original Petition has been filed to quash the case in S.T.C.No.91 of 2022 pending on the file of the learned Special Judicial Magistrate (Negotiable Instruments Act Cases), Tirunelveli.

2.Heard the learned Counsel for the Petitioner and and the learned Counsel for the Respondent.

3.It is the contention of the learned Counsel for the Petitioner that the Petitioner is arrayed as Accused in S.T.C.No.91 of 2022 on the file of the learned Special Judicial Magistrate (Negotiable Instruments Act Cases), Tirunelveli. As per the averments in the complaint, the Accused is C.Balasubramanian, Partner, "Balasubramanian Blue Metal Industries", Pappiahpuram, Tirunelveli Taluk and District.

4.It is the contention of the learned Counsel for the Petitioner that as per the complaint, the Complainant and the Accused are acquaintances. On 23.09.2021, for developing the business, a sum of Rs.42,00,000/- was obtained as loan from the Complainant by the Accused. On 24.12.2022, a cheque belonging to the Partnership was given to the Complainant. On the same day, it was presented to the Bank. On the same day, it was returned as "Drawer's signature not as per mandate". Again, the Respondent/Complainant re-presented the cheque on 07.03.2022. The next day, the cheque was returned with an endorsement "Drawer's signature to operate account not received". On 12.03.2022, the Respondent/Complainant sent a Statutory Notice. The Accused had replied to the said notice on 02.04.2022. Since the demand was not met, the Respondent/Complainant proceeded with lodging of the complaint on 23.04.2022.

5.The learned Counsel for the Petitioner/Accused attacked the complaint on the following grounds:

(a)Without making Partnership Firm as accused, the Complaint against the lone partner is not maintainable;

(2)The Statutory Notice was not issued to the Partnership Firm. It was issued only to C.Balasubramanian, the Petitioner herein.

(3)The cheque was not returned for insufficient funds. It was returned for "signature is not as per mandate".

6.As per Section 141 of Negotiable Instruments Act, Statutory Notice to the Company, Partnership Firm had to be sent to the

Company and individually to all its Directors, similarly, the Partnership Firm and individually to all the partners of the Partnership Firm. Here, Statutory Notice was sent only to C.Balasubramanian, as individual and not as Partner.

7.It is the further submission of the learned Counsel for the Petitioner that, as per Point-1, without making the Partnership Firm as accused, the complaint against one partner alone is not maintainable. The cheque belonging to the Partnership Firm. By virtue of the issuance of cheque and dishonour of cheque, the Firm committed offence under Section 141 of Negotiable Instruments Act. All the partners are deemed to have committed offence under Section 141 of the Act. In the absence of *vicarious* liability and in the absence of Firm as accused, a partner alone cannot be prosecuted for the offence under Section 141 of Negotiable Instruments Act. The learned Counsel for the Petitioner also invited the attention of this Court to the signature found in the Cheque.

8.Section 138 of Negotiable Instruments Act, reads as follows:

> *"138. 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 8 [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, 9 [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."

9.Section 141 of Negotiable Instruments Act, reads as follows:

"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 that he had exercised all due diligence to prevent the commission of such offence:

[Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for

prosecution under this Chapter.]

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

10.The learned Counsel for the Petitioner invited the attention of this Court to the reported ruling of the Honourable Supreme Court in the case of ***Aneeta Hada vs Godfather Travels and Tours Private Limited***, reported in ***(2012) 5 SCC 661***. The relevant paragraph of the said judgment reads as follows:

"7.While assailing the said order before the two-Judge Bench, the substratum of argument was that as the Company was not arrayed as an accused, the legal fiction created by the legislature in Section 141 of the Act would not get attracted. It was canvassed that once a legal fiction is created by the statutory provision against the Company as well as the person responsible for the acts of the Company, the conditions precedent engrafted under such deeming provisions are to be totally satisfied and one such condition is impleadment of the principal offender.

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58.Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words as well as the company" appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact *that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted."*

11.The learned Counsel for the Petitioner also invited the attention of this Court to the reported ruling of the Honourable Supreme Court in the case of ***2019 SCC OnLine Mad 17188***, in the case of ***Rangabashyam vs Ramesh***. The relevant paragraph of the said judgment reads as follows:

"3.The brief facts of the case are that the respondent has filed a complaint against the petitioners for an offence under Section 138 of the Negotiable Instruments Act on the ground that he was a partner in the firm named as 'Laxmi Agencies' and he was compelled to retire from the Partnership Firm. There were certain amounts due and payable to the respondent and towards the discharge of the said liability, the accused persons namely the petitioners issued a cheque for a sum of Rs.3,00,000/- (Rupees three lakhs only). The said cheque was dishonored on the ground of in-sufficiency of funds and after the issuance of the statutory notice, the respondent proceeded to file a complaint against the petitioners.

4.The petitioners who are shown as accused persons in this complaint, have filed this petition to quash the proceedings primarily on the ground that the cheque in question was drawn in favour of the respondent only on behalf of the partnership firm. Therefore, the complaint cannot be maintained without issuing the statutory notice to the partnership firm and making the partnership firm as an accused in the complaint.

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20. In view of the above discussion, this Court is not in agreement with the submissions made by the learned counsel for the respondent. In this case admittedly, the cheque was given in the name of the Partnership Firm and after the cheque was dishonored, no statutory notice was issued to the Partnership Firm, and the Partnership Firm was not made as an accused in the complaint. Only *the partners have been shown as accused persons in this complaint. Such a complaint is unsustainable and not in accordance with Section 141 of the Negotiable Instruments Act and the law laid down by the Hon'ble Supreme Court. Therefore, the proceedings will have to be necessarily interfered with by this Court in exercise of its jurisdiction under Section 482 of Cr.P.C. In the result the proceedings in C.C.No. 550 of 2012, pending on the file of the learned Judicial Magistrate No.I, Villupuram, is hereby quashed and the Criminal Original Petition is accordingly allowed. Consequently, the connected miscellaneous petitions are closed."*

12.The learned Counsel for the Petitioner submitted that the ratio laid down by the Honourable Supreme Court in the case of ***Himanshu vs B.Shivamurthy***, reported in ***(2019) 3 SCC 797***, squarely applicable to the facts of the case. The relevant paragraph of the said judgment reads as follows:

"11. In the present case, the record before the Court indicates that the cheque was drawn by the Appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the Appellant. The complaint was lodged only against the Appellant without arraigning the company as an Accused.

12. The provisions of Section 141 postulate that if the person committing an offence Under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or 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.

13. In the absence of the company being arraigned as an Accused, a complaint against the Appellant was therefore not maintainable. The Appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an Accused.

14. We, accordingly, are of the view that the High Court was in

> *error in rejecting the petition Under Section 482 of the Code of Criminal Procedure. We hence allow the appeal and set aside the judgment of the High Court. In consequence, the complaint, being C.R.P. No. 27/2004 shall stand quashed."*

13.Also, he had invited the attention of this Court to the order passed by the learned Single Judge of this Court in the case of ***Vaikundamani and others -vs- Bakrudeen***, in ***Crl.O.P.No.15223 of 2018***. The relevant paragraph of the said judgment reads as follows:

> *"5.In support of her contentions, the learned counsel for the petitioners relied upon the decisions of the Apex Court in the case of Aneeta Hada vs. Godfather Travels and Tours Private Limited reported in (2012) 5 SCC 661 and Himanshu vs. B.Shivamurthy and another reported in (2019) 3 SCC 797. Further, she relied on the decisions of this Court in the case of Anandhanarayanan vs. K.Harish reported in 2020 SCC Online Mad 16233 and Balasubba Naidu vs. Balakrishna Naicker and others reported in 2020 SCC Online Mad 6568. She further submitted that the consistent view and dictum of the Apex Court is that in the absence of company arrayed as accused, the prosecution of its Directors and erstwhile Directors cannot be proceeded with. It is a precondition to array the Company as an accused. Admittedly in this case, the Company not arrayed as an accused.*
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> *7.The learned counsel for the petitioners submitted that the respondent's contention is no more res integra for the reason that the decision in Sheoratan Agarwal's case was considered and overruled by the Apex Court in the case of Aneeta Hada and in view of the same, the decision of the Andhra Pradesh High Court and Karnataka High Court cannot be considered. She further submitted that the other citation referred by the respondent in the case of Medekar Intisar Mohamed is a police case for offence under Section 420 IPC. Hence, the submission of the respondent does not merit consideration.*
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> *9.Considering the submissions made and on perusal of the*

materials, it is not in dispute that the Company, viz., M/s.Himaalayaa Agro Tech Limited was not arrayed as an accused. Further, on perusal of the cheque, it is seen that the cheque was issued by the Company signed by its authorised signatory. In a proceedings under Negotiable Instruments Act the Directors and others of the Company fastened with vicarious liability invoking Section 141 of the Negotiable Instruments Act and in the absence of Company [Principal] being arrayed as accused, the proceedings against others invoking Section 141 of the Negotiable Instruments Act is not sustainable. Added to it, on perusal of the notice and the complaint, it is seen that there is no specific averments against the petitioners who had taken part in the dayto-day affairs of the Company. Hence, it is imperative to array the company as an accused and thereafter, proceed against the Directors and others. Thus, looking from any angle the accused cannot be prosecuted and hence, the complaint against the petitioners is not sustainable."

14.The additional point argued by the learned Counsel for the Petitioner is that the Petitioner/Accused is the relative of the Respondent. The Petitioner is a practicing Advocate. The Petitioner was supporting the estranged wife of the Complainant. Therefore, with the *mala fide* intention, the Respondent has grabbed the cheque from the Petitioner without the knowledge of the Petitioner and presented the cheque with an intention to defame the Petitioner. This news was circulated through the Respondent group with the *mala fide* intention. The cheque was misused and twice returned. The Complainant had removed the cheque from the custody of the Petitioner without his knowledge surreptitiously. Three occasions, the cheque was presented. It was returned with an endorsement that the "signature is not as per mandate". The Petitioner had clearly replied to the Statutory Notice categorically stating that the Petitioner has not given the cheque. Para 1 of the complaint does not mention the details of the borrowings of such huge amount of 42,00,000/- for the development of the business. If it is for the business purpose, the Partnership Firm should have been the first Accused. As per the Reserve Bank of India guidelines, the money, more than Rs.20,000/-, shall be transferred by way of cheque. Why such transfer of such huge amount had not been stated in the complaint.

15.The learned Counsel for the Respondent vehemently objected to the line of arguments of the learned Counsel for the Petitioner. The learned Counsel for the Respondent invited the attention of this Court to the complaint given by the Complainant, in which Partnership Firm and the address is mentioned. The transaction is admitted by the Accused. The accused, C.Balasubramanian is the Principal Partner of Partnership Firm. The Partnership Firm stands in the name of C.Balasubramanian. The case was filed correctly. Pappiahpuram is the address of the Petitioner. It is not a private address. So the case was filed correctly. It is not an individual complaint. Hence, the Principal Partner as well as other partners are also liable.

16.The second point argued by the learned Counsel for the Respondent is that the signature was forged. That is why the cheque was not honoured. This forgery is to be decided by the Trial Court and not by this Court by exercising the power under Section 482 of Cr.P.C.,

17.The third point is that the Drawer's signature is not as per mandate. Therefore, the complaint is maintainable. The learned Counsel for the Respondent invited attention of this Court to the judgment of High Court of Karnataka in ***Crl.P.No.6917 of 2015*** in the case of ***Sri.H.N.Sudesh Kumar vs Beardsell Limited***. The relevant paragraph of the said judgment reads as follows:

> *"6. So far as the submission as to the dishonour of the first cheque for the reason 'Drawer's signature not as per mandate' and therefore Section 138 is not attracted, it has to be stated, in the case of GATROD AGRO BIO-FUELS PVT. LTD., AND OTHERS -VS- GARG DISTILLERIES PVT. LTD., AND OTHERS reported in 2013 AIR SCW 3468, in para 15, the Supreme Court held as under:-*
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> *"15. The above line of decisions leaves no room for holding that the two contingencies envisaged under Section 138 of the Act must be interpreted strictly or literally. We find ourselves in respectful agreement with the decision in NEPC Micon Ltd. (supra) that the expression amount of money ...... is insufficient appearing in Section 138 of the Act is a genus and dishonour for reasons such as account closed, payment stopped, referred to the drawer are only species of that genus. Just as dishonour of a cheque on the ground that the*

account has been closed is a dishonour falling in the first contingency referred to in Section 138, so also dishonour on the ground that the signatures do not match or that the image is not found, which too implies that the specimen signatures do not match the signatures on the cheque would constitute a dishonour within the meaning of Section 138 of the Act. This Court has in the decisions referred to above taken note of situations and contingencies arising out of deliberate acts of omission or commission on the part of the drawers of the cheques which would inevitably result in the dishonour of the cheque issued by them. For instance this Court has held that if after issue of the cheque the drawer closes the account it must be presumed that the amount in the account was nil hence insufficient to meet the demand of the cheque. A similar result can be brought about by the drawer changing his specimen signature given to the bank or in the case of a company by the company changing the mandate of those authorised to sign the cheques on its behalf. Such changes or alteration in the mandate may be dishonest or fraudulent and that would inevitably result in dishonour of all cheques signed by the previously authorised signatories. There is in our view no qualitative difference between a situation where the dishonour takes place on account of the substitution by a new set of authorised signatories resulting in the dishonour of the cheques already issued and another situation in which the drawer of the cheque changes his own signatures or closes the account or issues instructions to the bank not to make the payment. So long as the change is brought about with a view to preventing the cheque being honoured the dishonour would become an offence under Section 138 subject to other conditions prescribed being satisfied. There may indeed be situations where a mismatch between the signatories on the cheque drawn by the drawer and the specimen available with the bank may result in dishonour of the cheque even when the drawer never intended to invite such a dishonour. We are also conscious of the fact that an authorised signatory may in the ordinary course of business be replaced by a new signatory ending the earlier mandate to the bank."

Dishonour on account of such changes that may occur in the course of ordinary business of a company, partnership or an individual may not constitute an offence by itself because such a dishonour in order to qualify for prosecution under Section 138 shall have to be preceded by a statutory notice where the drawer is called upon and has the opportunity to arrange the payment of the amount covered by the cheque. It is only when the drawer despite receipt of such a notice and *despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount that the dishonour would be considered a dishonour constituting an offence, hence punishable. Even in such cases, the question whether or not there was a lawfully recoverable debt or liability for discharge whereof the cheque was issued would be a matter that the trial Court will examine having Cri.Appln.No.6197/2013 & connected matters regard to the evidence adduced before it and keeping in view the statutory presumption that unless rebutted the cheque is presumed to have been issued for a valid consideration."*

18.On consideration of the rival submissions and on perusal of the reported Rulings, it is found that the offences are not attracted as per the provisions of Section 141 of Negotiable Instruments Act. The Drawer's signature is not as per the mandate. Hence, Section 138 of Negotiable Instruments Act is not attracted.

19.In the light of the rulings cited by the learned Counsel for the Respondent/Complainant, the fact that the Petitioner herein, as accused before the learned Judicial Magistrate, Fast Track Court, had replied to the Statutory Notice stating that the signature not as per mandate is not a ground for filing a private complaint under Section 138 of Negotiable Instruments Act, is to be accepted in the light of the rulings cited by the learned Counsel for the Petitioner/Accused.

19.A.In the facts of this case, the rulings relied on by the learned Counsel for the Respondent/Complainant of Karnataka High Court in ***Crl.O.P.No.6917 of 2015*** in the case of ***Sri.H.N.Sudesh Kumar vs Beardsell Limited,*** will not help to the Respondent/Complainant. Already the Petitioner herein as accused in the private compliant had replied to the statutory notice that the cheque belonged to the partnership firm and the cheque had been returned with an endorsement 'not as per mandate'. Also, the huge amount of Rs.42,00,000/- had been transferred to the Petitioner/accused for business transaction, which attracts the RBI regulations that for more than Rs.20,20,000/-, transfer shall be by way of cheque or any negotiable instrument. Therefore, he had specifically stated that the complaint under Section 138 of Negotiable Instruments Act is not at all maintainable. Also, he had made an allegation that the cheque was surreptitiously removed from his office by the Respondent/Complainant and it had been repeatedly presented before the Bank and it repeatedly returned with an endorsement 'not as per mandate'. Therefore, the reported ruling of the Hon'ble Supreme Court in ***Crl.O.P.No.6917 of 2015*** in the case of ***Sri.H.N.Sudesh Kumar vs Beardsell Limited,*** cannot be invoked in this case by the Respondent/Complainant. The same is distinguished.

Considering the reply notice by the Petitioner, the complainant had ignored the reply notice and filed the complaint under Section 138 of Negotiable Instruments Act. Therefore, the complaint has to be quashed as it is hit by three defects, i) repeatedly presented, ii) RBI guidelines and iii) partnership firm was not made as party to the statutory notice.

19.B.In the light of the above discussion, the complaint filed under Section 138 of NI Act is not maintainable.

20.The submission of the learned Counsel for the petitioner that this complaint under Section 141 of the Negotiable Instruments Act is not maintainable is accepted, since the complaint does not mention about the Partnership Firm. Therefore, the complaint is not maintainable.

In the light of the of the above discussion, this Petition is allowed. The case in S.T.C.No.91 of 2022 pending on the file of the learned Special Judicial Magistrate (Negotiable Instruments Act Cases), Tirunelveli, is quashed. The Respondent/Complainant can seek remedy through Civil Court and not before the Criminal Court.

In the result, this Criminal Original Petition is allowed. The complaint in S.T.C.No.91 of 2022 pending on the file of the learned Judicial Magistrate, Special Court for Negotiable Instruments Act cases, Tirunelveli, is quashed. Consequently, connected Miscellaneous Petition is closed.

25.11.2022

Index:Yes/No

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To

1.The Special Judicial Magistrate
(Negotiable Instruments Act Cases), Tirunelveli.

2.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

SATHI KUMAR SUKUMARA KURUP, J.

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Pre-Delivery Order made in
CRL.O.P(MD)No.13585 of 2022

25.11.2022