IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.11.2023

CORAM:

THE HONOURABLE MR.JUSTICE **G.K.ILANTHIRAIYAN**

Crl.OP.Nos.19804 & 19808 of 2019 and
Crl.MP.Nos.10147 & 10149 of 2019

Crl.OP.No.19804 of 2019

1.Gautam Sarwan Kumar Poddar
2.Sarwan Kumar Poddar
3.Mahendra Kumar Poddar
4.Krishna Murari Shankarlal Poddar ... Petitioners

Vs.

M/s.Anamika Enterprises Private Limited,
Rep. by its Director, Manmohan Kajaria,
Regs.Office at 23, Bharathi Park Road,
Coimbatore 641 043 ... Respondent

PRAYER: Criminal original petition is filed under Section 482 of Cr.P.C. to call for the records in CC.No.241 of 2018 on the file of the Judicial Magistrate(FTM No.1) of Coimbatore and to quash the same.

For Petitioners : Mr.A.Nagarajan

For Respondent : Mr.C.Deivasigamani

Crl.OP.No.19808 of 2019

1.Gautam Sarwan Kumar Poddar
2.Sarwan Kumar Poddar

3.Mahendra Kumar Poddar
4.Krishna Murari Shankarlal Poddar ... Petitioners

Vs.

M/s.Anamika Enterprises Private Limited,
Rep. by its Director, Manmohan Kajaria,
Regs.Office at 23, Bharathi Park Road,
Coimbatore 641 043 ... Respondent

PRAYER: Criminal original petition is filed under Section 482 of Cr.P.C. to call for the records in CC.No.242 of 2018 on the file of the Judicial Magistrate(FTM No.1) of Coimbatore and to quash the same.

For Petitioners : Mr.A.Nagarajan

For Respondent : Mr.C.Deivasigamani

COMMON ORDER

These Criminal Original Petitions have been filed to call for the records in CC.Nos.241 & 242 of 2018 on the file of the Judicial Magistrate(FTM No.1) of Coimbatore thereby taken cognizance for the offence under Section 138 r/w 141 of NI Act.

2. The respondent filed both the complaints alleging that the petitioners and the respondent were trading in textile fabrics with each other for many years. As per the mutual, open and current ledger accounts maintained by the respondent in the regular course of business with the petitioners, there

was an outstanding liability to the tune of Rs.1,01,10,976/-. The said liability was acknowledged by the accused to the tune of Rs.98,59,476/- by e-mail dated 18.02.2017. On the request made by the respondent, the accused towards part discharge of the subsisting liability, issued cheques on 07.07.2016. The cheques were drawn from Punjab and Sind Bank, Nariman Point, Mumbai. The accused promised the respondent that the cheques would be honoured on presentation for collection. The cheques were presented for collection and the same were returned unpaid for the reason 'drawers signature differs' on 23.01.2018. After causing legal notice on 17.02.2018, the respondent lodged the complaints.

3. The learned counsel for the petitioners submitted that the first accused is a Public Limited Company. All the petitioners are Directors and arrayed as A2 to A5. The first accused company was wound up by an order dated 23.03.2016 made in CP.No.215 of 2012 on the file of the Hon'ble High Court of Bombay. Accordingly, Official Liquidator shall forthwith act for the first accused company. Accordingly, Official Liquidator was appointed to take charge of the affairs of the company. All the alleged cheques were post dated cheques and issued for the date 20.12.2017. Thereafter, those cheques were presented for collection. The first accused company was directed to be wound

up and was a company under liquidation on the date of presentation of the cheques. Therefore, the very initiation of the proceedings under Section 138 of NI Act is not maintainable against the first accused. As such, the petitioners are being Directors no way be held liable nor can the proceedings maintained against them for the offence punishable under Section 138 of NI Act.

3.1 In support of his contention, the learned counsel appearing for the petitioners relied upon the judgment of the High Court of Kerala in the case of ***K.P.Francis, Former Director, Kshemanidhi Kuries & Loans (P) Ltd. and another Vs. Fair Kuries Pvt.Ltd. Rep by its Managing Director and others*** reported in ***2018 SCC Online Ker 23371***, wherein it is held held that if the cause of action arose subsequent to the order of winding up of the company, it cannot be said that the offence under Section 138 of NI Act is completed. The date on which the cheque was handed over would have no bearing. The cause of action arise only when the cheque presented for encashment is dishonoured and the drawer fails to make payment of the cheque amount within the statutory period after the receipt of demand notice. Therefore, if the company is wound up as per the order of the court prior to the completion of the offence under Section 138 of NI Act, no complaint against the company and its erstwhile Directors is maintainable. On the other hand, if the company is ordered to be wound up by the court subsequent to the completion of the offence under Section 138 of NI Act, the prosecution under Section 138 of NI Act is maintainable against the company and its directors notwithstanding the order passed by the Court for winding up the company.

3.2 He also relied upon the judgment of the Hon'ble High Court of Delhi in the case of ***M.L.Gupta Vs. Ceat Financial Services Ltd*** reported in ***2006 SCC Online Del 1448***, wherein it is held that complaint under Section 138 of NI Act cannot be filed as on the date of presentation of the cheque the company was in liquidation and cannot be stated to have committed any offence. Even the Directors were not in charge of the day to day affairs and conduct of the business of the company on that date. No doubt there are allegations of cheating as well and the complaint is under Section 420 r/w Section 120(b) IPC as well. It would have reference to the date when the cheques were issued with intent to cheat and complaint to that extent may be maintainable if *prima facie* under these provisions is made out.

4. The learned counsel for the respondent submitted that the first accused company was wound up by an order dated 23.03.2016 in CP.No.215

of 2012. The petitioners admitted their liability by e-mail dated 18.02.2017. Thereafter, they had issued post dated cheques dated 20.12.2017. Therefore, they suppressed the fact and falsely represented and issued post dated cheques towards part discharge of their subsisting liability on purchase of textile fabrics. Therefore, they are liable to be punished for the offence punishable under Section 138 of NI Act. He further submitted that even the company was wound up, they are liable to be prosecuted under Section 138 of NI Act.

5. Heard, the learned counsel appearing on either side.

6. The core issue arises in these petitions is that when the entire administration of the company was turned over by the Official Liquidator after winding up, whether the accused cannot be prosecuted for the offence punishable under Section 138 of NI Act?

7. If the company was wound up, they are not liable for any civil liability whereas it is a penal provision for issuance for cheques without any money and got bounced, they are liable to be punished for the offence punishable under Section 138 of NI Act. In the case of ***Ajay Kumar***

Radheyshyam Goenka Vs. Tourism Finance Corporation of India Limited rendered in Crl.A.No.172 of 2023 dated 15.03.2023, the Hon'ble Supreme Court of India dealt with an issue whether the respondent is a secured financial creditor or unsecured financial creditor within the meaning of Insolvency and Bankruptcy Code or any appeal preferred therefrom and held that we cannot lose sight of the fact that Section 138 of NI Act are not recovery proceedings. They are penal in character. A person may face imprisonment or fine or both under Section 138 of NI Act. They are not akin to suit proceedings. We are unable to accept the plea that Section 138 of NI Act proceedings are primarily compensatory in nature and that the punitive element is incorporated only at enforcing the compensatory proceedings. The criminal liability and the fines are built on the principle of not honouring a negotiable instrument, which affects trade. This is apart from the principle of financial liability *per se*.

8. This Court in the case of ***M/s.Counter Point Advt.P.Ltd Rep.by its Director, Naresh Purushotham and another Vs. M/s.Harita Finance Limited rep. by its Special Legal Assistant, Ms.Gular Sayeeda*** reported in ***2006-1-LW(Crl.)417,*** after referring the judgment of the Hon'ble Division

Bench of the High Court of Kerala rendered in the case of ***Jose Antony Kakkad Vs. Official Liquidator*** reported in ***(2000 Company Cases (Vol.100)811)***, held that the proceedings under Section 138 of NI Act can end only in the conviction or acquittal of the accused and no recovery of any amount covered by the dishonoured cheques can be made in the criminal proceedings. Therefore, the proceedings under Section 138 of NI Act are not in respect of the assets of the company. Hence, the criminal proceedings cannot be stayed under Section 446 of the Companies Act. More over, Sections 138 to 142 in Chapter XVII of the NI Act were introduced by the Central Act 66 of 1988 with effect from 01.04.1989. It was inserted with intention to safeguard and sustain the credibility of commercial transactions and the provision was introduced while Section 446 of the Companies Act was in force. When specific provision has been made with respect to the commission of an offence under Section 138 of NI Act by a company or its Director or its employee, it has to be presumed that parliament introduced the said provision fully knowing that the provision under Section 446 was there in the Companies Act. Therefore, the company and its Directors cannot shrink their criminal liability on the ground that the company was already wound up and Official Liquidator has taken charge of the affairs of the company.

9. Further, the Hon'ble Supreme Court of India in the case of ***Pankaj Mehra and another Vs. State of Maharashtra*** reported in ***2000 Crl LJ 1781***, held as follows:

> *25 There is no provision in the Companies Act which prohibits enfor-cement of the debt due from a company. When a company goes into liquidation, enforcement of debt due from the company is only made subject to the conditions prescribed therein. But that does not mean that the debt has become unenforceable altogether. Perhaps due to want of sufficient assets for the company the realisation of a debt would be difficult. But that is no premise to hold that the debt is legally unenforceable. Enforceability of a debt is not to be tested on the touchstone of the modality or the procedure provided for its realisation or recovery. Hence the contention that the special provision incorporated in the Companies Act regarding the debts and liabilities due from the company will render the debt unenforceable, cannot be accepted.*
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> *26. The alternative approach is this : Even assuming that any disposition of the property made by a company after commencement of the winding up proceedings is null and void, how that is an escape ground from the offence*

under Section 138 of the NI Act? That section created a statutory offence which on the confluence of the various factors enumerated therein, commencing with the drawing of the cheque and ending with the failure of the drawer of the cheque to pay the amount covered by it within the time stipulated, ripens into a penal liability.

27. The last factor for constituting the offence under Section 138 of the NI Act is formulated in clause c of the proviso to the Section which reads thus : "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."

28. The words "the drawer of such cheque fails to make the payment" are ostensibly different from saying "the drawer refuses to make payment". Failure to make payment can be due to the reasons beyond the control of the drawer. An illustrative case is, if the drawer is not a company but individual who has become so pauper or so sick as he cannot raise the money to pay the demanded sum. Can he contend that since failure to make payment was on account of such conditions he is entitled to be acquitted? The answer cannot be in the affirmative though the aforesaid conditions can be put forth while considering the question of sentence.

29. We therefore feel that legislature has thoughtfully used the word "fails" instead of other expressions as failure can be due to variety of reasons including his disability to pay. But the offence would be complete when the drawer "fails" to make payment within the stipulated time, whatever be the cause for such failure.

10. It is relevant to extract provision under Section 138 of NI Act hereunder:

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 provisions 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.

10.1 Thus, it created a statutory offence which on the confluence of the various factors enumerated therein, commencing with the drawing of the cheque and ending with the failure of the drawer of the cheque to pay the amount covered by it within the time stipulated, ripens into a penal liability. Though the drawer of the cheque can have different explanations for the failure to pay the amount covered by the cheque, but no such explanations would be sufficient to extricate him from the tentacles of the offence contemplated under Section 138 of NI Act.

11. In the case of ***Indorama Synthetics (I) Ltd. Vs. State of Maharashtra and others*** reported in ***2016(2) MWN (Cr.) DCC 61(DB) (Bom.)***, the Hon'ble Division Bench of the High Court of Bombay held as follows:

> *24. Thus, the sum and substance of all these judicial decisions is that the provisions of Section 446(1) of the Companies Act are to be invoked judiciously only when it has got any concern with either the winding-up WP-1280-10.doc proceedings or with the assets of the Company. The expression "suit or other proceedings", therefore, as used in Section 446(1) of the Companies Act, has to be construed accordingly and not to be interpreted so liberally and widely so as to include each and every proceeding of whatsoever nature initiated against the Company, including even the criminal proceedings like for the offence under Section 138 of N.I. Act, which has got no bearing on the winding-up proceedings of the Company and are not concerned with, directly with the assets of the Company, but are mainly dealing with the penal and personal liability of the Directors of the Company.*
>
> *30. Thus, there is a long line of decisions making the position clear that the expression 'suit or legal proceedings', used in Section 446(1) of the Companies Act, can mean only those proceedings which can have a bearing on the assets of*

the companies in winding-up or have some relation with the issue in winding-up. It does not mean each and every civil proceedings, which has no bearing on the winding-up proceedings, or criminal offences where the Director of the Company is presently liable for penal action.

11.1 Therefore, the expression 'suit or other proceedings' used in Section 446 (1) under Chapter II of Part VII of Companies Act, 1956, does not include criminal complaints filed under Section 138 of NI Act. That apart, the statutory notice issued by the respondent was duly received by two of the Directors of the first accused company. Even then, they failed to issue any reply. In fact, after winding up of the company by order dated 23.03.2016, the post dated cheques were issued on 07.07.2016. Therefore, the contention raised by the learned counsel for the petitioners cannot be considered and the judgments cited by the learned counsel for the petitioners are not helpful to the case on hand since it was held on different facts and circumstances.

12. The petitioners also raised ground that they cannot be made liable in relation to the cheques issued by the company and though they are directors of the first accused company, they never involved in the day to day administration of the company. On perusal of the complaint, revealed that the

petitioners directly involved in the purchase and transaction of the first accused company. They had personal knowledge of the transaction. In fact, the petitioners promised the respondent that the cheques would be honoured on its presentation. They also promised that the balance amount would be paid in due course. That apart, notice sent to accused 1 and 2 were returned as 'unclaimed'. Therefore, they were duly intimated about the notices. Insofar as A2 and A4 are concerned, they duly received notice and failed to reply. Therefore, all the accused persons are held liable to be punished for the offence punishable under Section 138 of NI Act.

13. In the result, both the criminal original petitions stand dismissed. Consequently, connected miscellaneous petitions are closed.

23.11.2023

Index :Yes/No
Internet : Yes/No
Speaking order/non-speaking order
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G.K.ILANTHIRAIYAN, J.

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To

1.The Judicial Magistrate(FTM No.1) of Coimbatore
2.Manmohan Kajaria,
Director,
M/s.Anamika Enterprises Private Limited,
Regd.Office at 23, Bharathi Park Road,
Coimbatore 641 043

Crl.OP.Nos.19804 & 19808 of 2019

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