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Crl.O.P.No.24924 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.03.2023

CORAM:

THE HON'BLE MR.JUSTICE **SUNDER MOHAN**

Crl.O.P.No.24924 of 2019 and
Crl.M.P.No.13315 of 2019

K.Saravanan

... Petitioner

Vs.

J.Balasanthanan

... Respondent

PRAYER : Criminal Original Petition is filed under Section 482 of Cr.P.C., to call for the records in STC No.962 of 2018 on the file of Learned Judicial Magistrate No.II, Salem and quash the same.

For Petitioner : Mr.S.Senthil

For Respondent : No appearance

ORDER

This petition is filed to quash the complaint under Section 138 of the Negotiable Instruments Act. It is alleged that the accused is running a concern called as "S.K.Oil Mills. The accused and the complainant are friends for the past five years. The accused had borrowed a sum of Rs.15 lakhs for business purpose. For discharge the said liability, the petitioner issued a cheque on 12.03.2018 for the said sum. However, when the cheque was



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presented, it was returned unpaid for the reasons, 'funds insufficient'. Though statutory notice was issued to the petitioner, he had not made any payment and hence, the complaint.

2. Learned counsel for the petitioner submitted that the cheque was issued in the name of the partnership concern by name 'S.K.Oil Mill'. The petitioner had issued a cheque from the account of the partnership firm in his capacity as Managing Director. However, in the complaint, the partnership concern is not shown as accused. Hence, this complaint is not maintainable without arraigning the partnership concern as an accused as against the petitioner who is the Managing Partner. The learned counsel relied upon the judgment of the Hon'ble Apex Court in *Aneeta Hada v. Godfather Travels and Tour Private Limited* (2012) 5 SCC 661 and *Himanshu v. B. Shivamurthy and Another* (2019) 3 SCC 797.

3. Though notice was served on the respondent, the respondent has not entered appearance before this Court.



4. A reading of the complaint and the cheque produced by the petitioner shows that the cheque was issued from the account of the partnership firm.

However, the complainant has not sent the statutory notice on the partnership firm and has not made the partnership firm as an accused. This is squarely covered by the Judgment of the Hon'ble Supreme Court. The relevant portion of the Judgment of the Hon'ble Supreme Court in (2019) 3 SCC 797 is extracted herein:

“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.”

The Hon'ble Apex Court considered various judgments including the judgment in ***Aneeta Hada and Godfather Travels and Tour Private Limited reported in (2012) 5 SCC 661*** and made the above observations.



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5. In view of the settled position of law, since the partnership firm, which is the principal offender, has not been made an accused, the petitioner alone, who is only vicariously liable as Managing Director cannot be prosecuted. Therefore, this impugned complaint in S.T.C.No.962 of 2018 is quashed and hence, this Criminal Original Petition is allowed. Consequently, connected miscellaneous petition is closed.

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Index: Yes/No

Speaking Order / Non-Speaking Order

Neutral Citation: Yes / No

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To

The Judicial Magistrate No.II,

Salem



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SUNDER MOHAN, J

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