BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 11.11.2022

DELIVERED ON : 30.06.2023

CORAM

THE HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

CRL.OP.(MD)No.15124 of 2022
and
CRL.MP(MD).Nos.9900 & 9901 of 2022

1. S.Venkatachalam
2. SP.Seviappan : Petitioners/Accused

Vs.

A.Ramu : Respondent/Complainant

PRAYER: Criminal Original Petition filed under Section 482 of Criminal Procedure Code, to call for the records relating to the Complaint in STC.No.552 of 2019 on the file of the learned Judicial Magistrate No.I, (Fast Track Court at Magisterial Level), Madurai and quash the same.

For Petitioners : Ms.A.L.Gandhimathi
Senior Counsel,
for Mr.B.Saravanan for

For Respondent : Mr.D.Saravanan

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ORDER

This Criminal Original Petition has been filed to quash the Complaint in STC.No.552 of 2019 on the file of the learned Judicial Magistrate No.I, (Fast Track Court at Magisterial Level), Madurai.

2.The brief facts, which are necessary to decide this Criminal Original Petition, are as follows:

2.1. The Petitioners herein are arrayed as Accused in the complaint under Section 138 of the Negotiable Instruments Act, 1881, preferred by the Respondent herein. Originally, the first Petitioner, Venkatachalam, son of the second Petitioner and the Respondent herein were carrying on business in partnership under the name and style of M/s.V.R.Builders. In 2019 difference of opinion arose between the partners. On 30.07.2019 it was decided that the Respondent in this Petition/the Complainant in S.T.C.No. 552 of 2019 will retire from the partnership firm and in his place the second Petitioner Mr.SP.Seviappan will be inducted as a partner in the business. Accordingly, the dispute was resolved. A sum of Rs.40,00,000/- (Rupees Forty Lakhs only) would be paid to the Respondent/Complainant in S.T.C.No.552 of 2019 for his retirement from the partnership firm. As per the complaint, the first Petitioner herein handed over a cheque dated 30.07.2019 bearing No.939700 drawn on ICICI Bank, O.Siruvayal Branch to the Respondent/Complainant. He had presented the cheque on 16.08.2019 in his Bank account viz., Karur Vysya Bank in Tallakulam Branch, Madurai. The said cheque was returned with an endorsement that "payment stopped by drawer". On 28.08.2019 the Complainant issued Lawyer's notice and the same was received by the Petitioners on 29.08.2019. After receipt of notice on 29.08.2019 the Petitioners had not paid the amount nor replied to the Advocate notice. Therefore, the Respondent herein as Complainant presented the complaint before the learned Judicial Magistrate No.I, Madurai on 16.09.2019. A sworn statement of the Respondent herein as Complainant was recorded by the learned Judicial Magistrate No.I, Madurai and on taking cognizance of the offence, the learned Judicial Magistrate No.I, had issued summons to the Petitioners. The Petitioners herein as Accused before the learned Judicial Magistrate No.I, Madurai, had filed Crl.M.P.No.1100 of 2021 in STC No. 552 of 2019 seeking direction to send the cheque along with a documents containing admitted signatures to the Forensic Department. The said Petition was dismissed by the learned Judicial Magistrate No.I, Madurai by order dated 22.12.2021.

3. The learned Counsel appearing for the Petitioners submitted that the first Petitioner is the son of the second Petitioner. They are arrayed as Accused in the Complaint in STC.No.552 of 2019 on the file of the learned Judicial Magistrate No.I, Fast Track Court at Magisterial Level, Madurai.

4. It is the contention of the learned Counsel appearing for the Petitioners that the Respondent filed a Private Complaint under Section 138 of Negotiable Instruments Act, 1881, against the Petitioners herein and that the averments in the said complaint is that the Respondent was running a partnership firm since 06.04.2012 along with the first Petitioner in the name and style of M/s.V.R.Builders. As dispute arose between the partners, on 30.07.2019, the partners sat together for a settlement, in which, it was agreed orally that the first Petitioner will induct his father, who is the second Petitioner herein, as a partner and the Respondent will exit from the firm on payment of Rs.40,00,000/- (Rupees Forty Lakhs only). On that agreement, a cheque was issued by the Petitioners herein and the same was drawn at ICICI Bank, Siruvayal Branch, Sivagangai District. The Respondent had presented the cheque on 16.08.2019 and it was returned on 17.08.2019. The Respondent sent a statutory notice on 28.08.2019, under Section 138 of the Negotiable Instruments Act. Subsequently, on 08.09.2019, a reply was sent.

5. The learned Counsel appearing for the Petitioners submits that the averments in the Complaint is not at all maintainable. He attacks the Complaint on the ground that as per Section 31(2) of the Partnership Act,

liability of the newly inducted partner starts from the date of induction. He is not liable to pay for the past liabilities on the date of drawal of cheque, dated 30.07.2019. There shall be a legally enforceable debt. Here, no such debt has arisen. Therefore, he attacks the maintainability of the Complaint. It is the submission of the Petitioners that the Complaint filed by the Respondent is not at all maintainable as per the Provisions of the Indian Partnership Act.

6. It is the submission of the learned Counsel for the Respondent that a sum of Rs.40,00,000/- was forged during the course of the business transaction between the Petitioners and the Respondent. It is not a disputed fact that the cheque belongs to the partnership firm. It is an individual cheque. There was a dispute between the first Accused and the Complainant, who are close relatives and in 2019, there was a misunderstanding between them. The cheque, which was stolen, was not issued to him. The Complainant is the close relative. He used to visit the house regularly. There was no Complaint with regard to missing of the cheque. It was a partnership firm. Thereafter, there was an oral agreement. The second Respondent joined in the business only on 31.07.2019. Hence, he will not be placed as an Accused and there is no offence made out

against him, as the cheque is not a firm cheque. The names of the Accused 1 and 2 are mentioned in the cheque. So, they are liable for the offence under Section 138 of Negotiable Instruments Act, which has to be proved before the trial Court.

7. It is an admitted fact that there is business transaction between the first Accused and the Complainant. He is only a person, who just participated in the business.

8. In support of his contention, the learned Counsel for the Respondent would rely on the following Judgments:

(i) In the case of ***M/s.Modi Cements Limited Vs. Kuchil Kumar Nadi*** reported in ***AIR 1998 Supreme Court 1057,*** it has been held as under:-

> *"16. we see great force in the above submission because once the cheque is issued by the drawer a presumption under section 139 must follow and merely because the drawer issues a notice to the drawee or to the Bank for stoppage of the payment it will not preclude an action under section 138 of the Act b the drawee or the holder o a cheque in due course. The object of Chapter XVII, which is intituled as "OF PENALTIES IN CASE OF DISHONOUR OF CENTAIN CHEQUES FOR INSUFFICIENCY OF FINDS IN THE ACCOUNTS" and contains Sections 138 to 142, is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. It is for this reason we are of the considered view that the observations of this court in Electronics Trade & Technology Development Corporation Ltd ., Secunderabad, (1996 AIR SCW 840) (supra) in paragraph 6 to the effect :Suppose after the cheque is issued to the payee or to the holder in*

due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the bank for payment and when it is returned on instructions, Section 138 does not get attracted ." does not fit in with the object and purpose for which the above chapter has been brought on the Statute Book"

(ii) In the case of ***Rangappa Vs. Sri Mohan*** reported in ***(2011) 1 Supreme Court Cases (Cri) 184,*** the Hon'ble Supreme Court has held as follows:-

"A. Negotiable Instruments Act,1881-S.139- presumption under – Scope of – Held, presumption mandated by S.139 includes a presumption that there exists a legally enforceable debt or liability – However,such presumption is rebuttable in nature – Criminal Trial – Proof – Presumptiond - Generally

B. Negotiable Instruments Act,1881 – Ss. 138 and 139 – Purpose, relative scope and functioning of, explained - Rebuttable presumption under S.139 – Standard of proof fpr rebutting , stated – Manner in which defence can be raised by accused, outlined – Reliance on prosecution materials by accused to prove defence, held, permissible – Criminal Trial – Proof – Burden and Onus of proof – Reverse onus statutory clauses – Interpretation of - Standard of proof in such cases

C.Negotiable Instruments Act,1881 - Ss.138 and 139 – Dishonour of cheque – Conviction for – Matters to be considered by the court – Held, what courts have to consider is whether ingredients of offence enumerated in S.138 have been met and if so, whether accused was ale to rebut statutory presumption contemplated under S.139

D. Negotiable Instruments Act,1881 – S. 138 – Dishonour of post dated cheque – On account of "stop payment" instructions sent by drawer to his bank – S.138 if attracted – Held, S.138 can be attracted in such a case, irrespective of insufficiency of funds in his account.

E. Negotiable Instruments Act, 1881 – Ss.138 and 139 – Dishonour of cheque – Conviction confirmed – Appellant-Accused, drawer of cheque in question, neither raising a probable defence nor able to contest existence of a legally enforceable debt or liability – High Court reversing his acquittal – Sustainability – Held, complaint discloses prima facie existence of a legally enforceable debt or liability – Since appellant admitted that signature on the cheque was his, statutory *presumption under S.139 comes into play and the same was not rebutted even with regard to the materials submitted by the Complainant – Appellant not able to prove "lost cheque" theory – Apart from not raising a probable defence, appellant was also not able to contest the existence of a legally enforceable debt or liability – Hence, his conviction by High Court, held, proper."*

9. In these circumstances, the learned Counsel for the Respondent would submit that the Petitioner has to rebut the presumption by way of making evidence before the trial Court. He had discharged the initial burden before the trial Court. The disputed cheque was given by the Accused 1 and 2 to honour their liability during the course of the business transaction. This Complaint should not be thrown away. Therefore, he sought for dismissal of this Petition.

10. By way of reply, the learned Counsel for the Petitioners would submit that there was a compromise between the first Accused and the Complainant and the second Petitioner has no role in the compromise reached between them. The Complainant has to retire from the partnership firm. The Petitioners shall be inducted as partners. The cheque was issued based on the compromise. The second Petitioner has been inducted in the firm. It is an admitted fact that the second Petitioner is not a partner and he has nothing to do with the business of the firm. Therefore, he may not have any debt or liability to discharge the duty with reference to the firm. There

is no averment contained in the Complaint. It is the duty of the Complainant to establish that the Petitioners have issued the cheque against the legally enforceable debt, but that is completely absent.

11. In support of his contention, he relied on the following Judgments of the Hon'ble Supreme Court:-

(i) In the case of ***Sampelly Satyanarayana Rao Vs. Indian Renewable Energy Development*** reported in ***(2016) 10 Supreme Court Cases 458,*** the Hon'ble Supreme Court has held as under:-

> *"9. We have given due consideration to the submission advanced on behalf of the appellant as well as the observations of this Court in Indus Airways with reference to the explanation to Section 138 of the Act and the expression "for discharge of any debt or other liability" occurring in Section 138 of the Act. We are of the view that the question whether a post-dated cheque is for "dishcarge of debt or liability" depends on the nature of the transaction. If on the date of the cheque, liability or debt exists or the amount has become legally recoverable, the section is attracted and not otherwise."*

(ii) In the case of ***Dashrathbhai Trikambhai Patel Vs. hitesh Mahendrabhai Patel and another*** reported in ***2022 SCC Online SC 1376.***

(iii) In the case of ***Lalit Kumar Sharma and another Vs. State of Uttar Pradesh and another*** reported in ***(2008) 5 Supreme Court Cases 638*** the Hon'ble Supreme Court has held as under:-

> *"Negotiable Instruments Act, 1881 – Ss. 138 and 118 – Legally enforceable debt, ingredients of – Complaint in respect of dishonour of second cheque issued in a compromise in lieu of first*

cheque already dishonoured and subject-matter of another complaint under S.138- tenability of – Finding of the lower Court as well as the High Court that second Complaint is maintainable, held, is totally misconceived – Second cheque was issued in terms of the compromise, it did not create a new liability – As the compromise did not fructify, the same cannot be said to have been issued towards payment of debt.”

12.Point For Consideration:

Whether the complaint lodged by the Respondent against the Petitioners in STC No.552 of 2019 pending before the Court of the learned Judicial Magistrate No.I, (Fast Track Court at Magisterial Level) Madurai, is to be quashed as the complaint is not maintainable?

13. On consideration of the rival submissions and on perusal of the typed set wherein the notice issued by the Respondent as Complainant, the reply notice issued by the Petitioners and copy of the Complaint, it is found that the cheque was issued by the second Petitioner. He having been inducted in the place of the Complainant as a partner. As per Section 31(2) of Indian Partnership Act which reads as follows:

“31 (2). Subject to the provisions of Section 80, a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner.”

14. The newly inducted partner is not liable for the past liability of the partnership firm. The cheque issued by the newly inducted partner as

security in the partnership firm was put to use by the Complainant herein. Therefore, the Complaint preferred against the Petitioners herein based on the cheque issued by the newly inducted partner cannot be considered as prior liability, enforceable liability to attract the presumption of Section 139 of Negotiable Instruments Act. The rulings relied by the learned Counsel for the Respondent reported in ***AIR 1998 Supreme Court 1057*** in the case of ***M/s.Modi Cements Limited Vs. Kuchil Kumar Nadi*** and ***(2011) 1 Supreme Court Cases (Cri) 184*** in the case of ***Rangappa Vs. Sri Mohan*** are not applicable to the facts of this case as the second Petitioner was the newly inducted partner in the place of the Respondent/Complainant. He cannot be held liable for the past liabilities of the partnership firm. Regarding the dispute between the partners viz., the Complainant and the first Petitioner, it is to be tried as a civil dispute and not as a criminal case. As per the reply notice given by the Petitioners to the statutory notice of the Respondent, they had clearly stated that the newly inducted partner is not liable for the past liabilities of the partnership firm. Under those circumstances, the defacto Complainant proceeding with Section 138 of Negotiable Instruments Act is found not at all maintainable. In the light of the rulings cited by the learned Counsel for the Petitioner reported in ***(2016) 10 Supreme Court Cases 458*** in the case of ***Sampelly***

Satyanarayana Rao Vs. Indian Renewable Energy Development; 2022 SCC Online SC 1376 in the case of ***Dashrathbhai Trikambhai Patel Vs. hitesh Mahendrabhai Patel and another and (2008) 5 Supreme Court Cases 638*** in the case of ***Lalit Kumar Sharma and another Vs. State of Uttar Pradesh,*** in the absence of any liability against the newly inducted partner/second Petitioner viz., Seviappan, the Complaint initiated by the Respondent against the Petitioners 1 and 2 is not at all maintainable. As per the reported ruling of the Hon'ble Supreme Court in ***1992 Supp (1) SCC 335:1992 SCC (cri) 426*** in the case of ***State of Haryana Vs. Bhajanlal,*** the party, who is not liable need not be forced to face the trial proceedings.

15. In the light of the above, the point for consideration is answered in favour of the Petitioners and against the Respondent. The complaint lodged by the Respondent against the Petitioners in STC No.552 of 2019 pending before the Court of the learned Judicial Magistrate No.I, (Fast Track Court at Magisterial Level) Madurai, is to be quashed as the complaint is not maintainable.

In the result, ***this Criminal Original Petition is allowed***. The Complaint in STC.No.552 of 2019 on the file of the learned Judicial

Magistrate No.I, (Fast Track Court at Magisterial Level), Madurai is quashed. Consequently, connected Miscellaneous Petitions are closed.

30.06.2023

Index: Yes/No
Internet: Yes/No
Speaking Order/Non-speaking Order

mm/dh

To

The Judicial Magistrate No.I,
(Fast Track Court at Magisterial Level),
Madurai.

SATHI KUMAR SUKUMARA KURUP, J.

dh

Order made in

CRL.OP.(MD)No. 15124 of 2022

30.06.2023