



Crl.O.P.No.29393 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :19.07.2024

Pronounced on :24.07.2024

CORAM:

THE HONOURABLE DR JUSTICE G.JAYACHANDRAN

Crl.O.P.No.29393 of 2022

R.D.Sakthi

.. Petitioner

/versus/

T.S.Murali

.. Respondent

Criminal Original Petition has been filed under Section 482 of Cr.P.C.to call for the records in S.T.C.No.2533 of 2022 on the file of the Metropolitan Magistrate Court No.IV, Fast Track, George Town, Chennai and quash the same as illegal.

For Petitioner :Mr.H.S.Mohammed Rafi

For Respondent :No appearance



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ORDER

The petitioner herein is the sole accused in the private complaint initiated under Section 138 of Negotiable Instruments Act.

2. This petition to quash the complaint is filed on the ground that the subject cheque was not issued by the petitioner from the account maintained by him in the bank to attract offence under Section 138 of Negotiable Instruments Act, 1881.

3. According to the learned counsel for the petitioner, the cheque which is subject matter of the complaint in S.T.C.No:2533/2022 is drawn in favour of S.Murali T.N. Srinivasan for a sum of Rs. 8,25,000/- dated 03/02/2021. The drawer of the cheque is 'Rose Health Care' which is a partnership firm, in which, the petitioner is one of the partner and signed the cheque. The statutory notice dated 19/04/2021 issued to the petitioner and not to the drawer which is a partnership firm as



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contemplated under Section 141 of NI Act. The petitioner issued the cheque but not to discharge his liability. For the cheque issued on behalf of the firm, the petitioner cannot be held vicariously liable without prosecuting the firm which has issued the cheque. In spite of a detailed reply to the statutory notice denying the liability, the Judicial Magistrate has wrongly taken cognizance of the offence.

4. The Learned counsel for the petitioner relies on the following judgments to buttress his submissions:

(i) Aneeta Hoda –vs- M/s Godfather Travels

& Tours (P) Ltd: AIR 1012 SC 2795

(ii) C. Balasubramanian –vs- Velpandian:

Crl.OP (Md) 13585/2022 dated 25/11/2022 by

Justice Sathi Kumar Sukumara Kurup.

5. On receipt of the notice, the respondent/defacto complainant entered appearance through his counsel Mr. Yuvaraj. On the date of final hearing, there was no representation on behalf of the respondent.



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6. The cheque dated 03/02/2021, which is the subject matter of the complaint, is drawn from the account maintained by 'Rose Health Care' in IDBI Bank, Tondaiarpur, Chennai. The return memo dated 26/03/2021 issued by the complainant bank (UCO Bank, Sowcarpet Branch) indicates that the cheque returned, since funds insufficient. The complainant had issued the statutory notice dated 19/04/2021 to the petitioner by name. As per the notice, the petitioner borrowed loan of Rs.1,50,000/- on 25/09/2018 and Rs.3,27,000/- on 17/02/2018 with promise to repay with interest. The cheque for Rs.8,25,000/- was issued to discharge the said loan.

7. In his reply to the notice, the petitioner has stated that he borrowed only Rs.1,50,000/- and the same was repaid by adjusting the chit amount payable by the complainant. He has further contended that, the cheque given as security for the chit transaction in the year 2018 has been misused by filling it with the amount and presenting it in the year



8. The statutory notice was not issued to 'Rose Health Care' from whose account the cheque was issued. Why the cheque of 'Rose Health Care' been issued for discharging the personal liability of the petitioner has not been explained in the complaint. Since the cheque is drawn by a partnership firm, the presumption which will arise is that the cheque issued for discharge of the firm's liability. In such case, the partner will be vicariously liable as per Section 141 of the Negotiable Instruments Act, 1881. By deeming fiction if the case of the complaint as found in the notice and complaint that the petitioner personally borrowed and issued the cheque to discharge his personal liability, then it is necessary to explain in the complaint, why the petitioner gave the cheque of his firm to discharge his personal liability. In the absence of explanation, the signatory of the cheque alone cannot be held liable for prosecution. The prosecution under Section 138 of NI Act against the partner alone is not maintainable without arraigning the account holder ie. The partnership firm. In this case, neither in the notice nor in the reply



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or in the complaint there is mention about 'Rose Health Care' the holder of the account from which the cheque issued.

9. In *Aneetha Hoda case* cited supra, the Hon'ble Supreme Court after analysing the law on vicarious liability and deeming fiction as found under Section 141 of NI Act, 1881 had observed as below:-

“38. At this juncture, we may usefully refer to the decision in *U.P. Pollution Control Board v. Modi Distillery* [(1987) 3 SCC 684 : 1987 SCC (Cri) 632] . In the said case, the company was not arraigned as an accused and, on that score, the High Court quashed the proceeding against the others. A two-Judge Bench of this Court observed as follows:

“Although as a pure proposition of law in the abstract the learned Single Judge's view that there can be no vicarious liability of the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors under sub-section (1) or (2) of Section 47 of the Act unless there was a prosecution against Modi Industries Ltd., the Company owning the industrial unit, can be termed as correct, the objection raised by the petitioners before the High Court ought to have been viewed not in isolation but in the conspectus of facts and events and not in vacuum. We have already pointed out that the technical flaw in the complaint is attributable to the failure of the industrial unit to furnish the requisite information called for by the Board. Furthermore,



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the legal infirmity is of such a nature which could be easily cured. Another circumstance which brings out the narrow perspective of the learned Single Judge is his failure to appreciate the fact that the averment in para 2 has to be construed in the light of the averments contained in paras 17, 18 and 19 which are to the effect that the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors were also liable for the alleged offence committed by the Company.”

Be it noted, the two-Judge Bench has correctly stated that there can be no vicarious liability unless there is a prosecution against the company owning the industrial unit but, regard being had to the factual matrix, namely, the technical fault on the part of the company to furnish the requisite information called for by the Board, directed for making a formal amendment by the applicant and substitute the name of the owning industrial unit. It is worth noting that in the said case, M/s Modi Distilleries was arrayed as a party instead of M/s Modi Industries Ltd. Thus, it was a defective complaint which was curable but, a pregnant one, the law laid down as regards the primary liability of the company without which no vicarious liability can be imposed has been appositely stated.

39.It is to be borne in mind that Section 141 of the Act is concerned with the offences by the company. It makes the other persons vicariously liable for commission of an offence on the part of the company. As has been stated by us earlier, the vicarious liability gets attracted when the condition precedent laid down in Section 141 of the Act



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stands satisfied. There can be no dispute that as the liability is penal in nature, a strict construction of the provision would be necessitous and, in a way, the warrant.

42.From middle, The words ‘as well as’ have to be understood in the context. In *RBI v. Peerless General Finance and Investment Co. Ltd.* [(1987) 1 SCC 424] it has been laid down that the entire statute must be first read as a whole, then section by section, clause by clause, phrase by phrase and word by word. The same principle has been reiterated in *Deewan Singh v. Rajendra Pd. Ardevi* [(2007) 10 SCC 528] and *Sarabjit Rick Singh v. Union of India* [(2008) 2 SCC 417 : (2008) 1 SCC (Cri) 449] . 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.”



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10. Following the dictum laid in *Aneetha Hoda case*, this Court and the Hon'ble Supreme Court has repeatedly held that for the liability of the firm, prosecution under Section 138 of NI Act cannot sustain against the partners without arraigning the partnership firm as an accused. For completion, the below passage in the Hon'ble Supreme Court judgment *Dilip Hariramani –vs- Bank of Baroda*, dated 09/05/2022 reported in [2022 SCC OnLine SC 579] is extracted below:-

“16.The provisions of Section 141 impose vicarious liability by deeming fiction which presupposes and requires the commission of the offence by the company or firm. Therefore, unless the company or firm has committed the offence as a principal accused, the persons mentioned in sub-section (1) or (2) would not be liable and convicted as vicariously liable. Section 141 of the NI Act extends vicarious criminal liability to officers associated with the company or firm when one of the twin requirements of Section 141 has been satisfied, which person(s) then, by deeming fiction, is made vicariously liable and punished. However, such vicarious liability arises only when the company or firm commits the offence as the primary offender. This view has been subsequently followed in *Sharad Kumar Sanghi v. Sangita Rane*,¹⁷ *Himanshu v. B. Shivamurthy*,¹⁸ and *Hindustan Unilever Limited v. State of Madhya Pradesh*.¹⁹



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The exception carved out in *Aneeta Hada* (supra),²⁰ which applies when there is a legal bar for prosecuting a company or a firm, is not felicitous for the present case. No such plea or assertion is made by the respondent.”

11. This Court is conscious of the later judgment of the Hon’ble Supreme court in *Ajay Kumar Radheshyam Goenka –vs- Tourism Finance Corporation of India dated 15/03/2023 reported in [2023 SCC OnLine SC 26]*, wherein the Hon’ble Supreme Court has explained the judgment in *Aneetha Hoda case* with the aid of the legal maxim ‘***Lex non cogit ad impossibilia***’ and made clear that not in all cases, excluding the principal (i.e) company or firm as accused is fatal for continuing the prosecution against its directors or partners. Natural person, who acted on behalf of a company, cannot be allowed to escape from prosecution on specious plea.

12. However, in the case in hand, the complaint is silent about why the drawer of the cheque namely the firm not beenarraigned as accused. No explanation in the complaint given stating any legal



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impediment or justification for prosecuting the authorised signatory of the firm excluding the firm which is the holder of the account from which the cheque issued. Therefore, for the said reasons, Crl OP No: 29393 /2022 is allowed.

13. As a result, the prosecution against the petitioner in S.T.C.No. 2533/2022 on the file of Metropolitan Magistrate,(FTC-IV), Egmore stands quashed.

24.07.2024

Index:yes
Speaking order/non speaking order
Neutral citation:yes/no
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To

The Metropolitan Magistrate Court No.IV, Fast Track, George Town,
Chennai



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Dr.G.JAYACHANDRAN,J.

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delivery Order made in
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