

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

MONDAY, THE 5TH DECEMBER 2005 / 14TH AGRAHAYANA 1927

Crl.L.P..No. 704 of 2005()

CC.464/1997 of J.M.F.C.,THALASSERY
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PETITIONER/COMPLAINANT

PADMINI AMMA K.,
(POWER OF ATTORNEY HOLDER SUDHAKARAN),
W/O.E.M.BALAKRISHNAN NAIR,
ELLATH MEETHAL (PADMASREE).

BY ADV. SRI.P.V.MOHANAN

RESPONDENTS: RESPONDENTS/STATE

1. A.CHANDRAMATHI, MANAGING PARTNER,
ANANDA KRISHNA BUS SERVICE, THANA, KANNUR.
2. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

By PUBLIC PROSECUTOR SRI. C.P. SAJI

THIS CRIMINAL LEAVE PETITION HAVING BEEN FINALLY HEARD
ON 05/12/2005, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

K. HEMA, J.

Crl. L.P.No.704 of 2005

Dated this the 5th day of December, 2005

ORDER

The petitioner seeks to grant leave for filing an appeal against the order of acquittal for offence under Section 138 of the Negotiable Instruments Act (for short, 'the Act'). As per the complaint filed by the petitioner before the trial court, the first respondent-accused borrowed a sum of Rs.4 lakhs on 8.12.1995 and another amount of Rs.4 lakhs on 12.12.1996 and issued a cheque for Rs.8 lakhs drawn on Canara Bank, South Bazar, Kannur to the complainant. The cheque when presented for encashment was returned dishonoured with an endorsement 'funds insufficient'. When a registered notice was sent for which no reply was sent by the first respondent and no amount was also paid. Hence, complaint was filed alleging that the first respondent committed offence under Section 138 of the Act.

2. The compliant was originally filed by one Sri.E.M.Balakrishnan Nair. In the cause title of the complaint, one Padmini Amma, W/o.E.M.Balakrishnan Nair is shown as the complainant. Under what circumstances, she was inducted into the

complaint is not seen discussed anywhere. A reading of Section 138 of the Act would go to show that a person will be liable for offence under Section 138 of the Act only if he draws a cheque on an account maintained by him with a banker for payment of any amount or money to another person from out of the account for the discharge of any debt or liability etc. The case of the complainant appears to be, as revealed from the complaint, that the cheque was drawn by first respondent in her personal capacity from her own account. At the time of evidence, it was brought out in cross-examination of PW1, the son of the original complainant, (who, according to learned counsel for petitioner is no more) that the cheque is drawn by the Managing Partner of Anandakrishna Bus Service and that the cheque was issued by the partnership firm. It is also revealed from the evidence given in cross-examination that the amount was borrowed on behalf of the firm. A perusal of the copy of cheque also shows that the same was drawn on the account maintained by the partnership firm. Learned counsel for the petitioner would submit that the account was also that of the firm. In such circumstances, the offence under Section 138 of the Act is deemed to have been committed by the firm and not by first respondent in her personal capacity.

3. However, there is absolutely no whisper in the complaint that the offence was committed by the firm. It is not stated in the complaint that the cheque was drawn by the firm from the account

maintained by the firm. What is stated therein is that the accused issued a cheque, The accused referred to in the cause title is as “Managing Partner, Anandakrishna Bus Service”. But there is absolutely nothing in the complaint to show that the firm has committed the offence. The evidence goes to show that the liability is of the firm and the person who committed the offence is a firm. In the above circumstances, in the absence of sufficient materials in the complaint to show that an offence is committed by the firm, first respondent cannot be made liable for offence committed by the firm.

4. This is particularly so in the light of Section 141 of the Act. Unless the complaint discloses that an offence is committed by a company no person on behalf of the company can be made liable for the said offence. A person can be made an accused by virtue of Section 141 of the Act in which a complainant can establish that such person was in charge of and responsible to the firm in the conduct of its business at the time when the cheque was drawn. There is absolutely no case for the complainant that the first respondent nor the firm committed the offence and the first respondent was the person responsible and in charge of the firm at the time when the cheque was drawn.

5. Learned counsel for petitioner submitted that there is no legal bar in launching complaint against a person who has drawn the cheque and an offence under Section 138 will lie against a person in personal capacity. It was submitted that it is the person, who issued

the cheque, is liable for offence under Section 138 of the Act. I am unable to accept this argument for more than one reason. The Section itself is very clear on this aspect. As per section 138, it is not sufficient if a cheque is drawn by a person but the cheque must be drawn from the account maintained by that person with a banker.

6. If any person draws a cheque by filling up a cheque and signing the same sends to another person, even if it is for discharge a legally enforceable debt, unless complainant can establish that the person who issued the cheque has drawn the cheque on an account maintained by him with a banker, no offence will lie against such person. In this case, though the cheque was signed by first respondent, even if the entire allegations are accepted, the account was maintained not by first respondent in his personal capacity but it was maintained by a firm.

7. Though it is not necessary that the firm is made an accused or is impleaded as accused in the cause title, there must be allegations in the complaint that the firm has committed an offence. The liability of the partners of the firm arises only if, as per the allegations in the complaint, the company has committed an offence. As long as such allegations are not there, no person, even if he has signed the cheque of a firm, and he has drawn a cheque on an account maintained by him such a person cannot be made liable for offence under Section 138 of the Act. There must be allegations to show that the firm has committed the offence for making partners liable for

offence under Section 138 of the Act. In the light of Section 141, the liability of the partners arise only if the firm has committed an offence, going by the language of Section 138 of the Act.

8. Learned counsel appearing for petitioner relied upon a decision reported in **Babu v. Suresh** [2004(2) KLT 83] and contended whether the cheque issued by a person or firm or not the person who has drawn the cheque is liable for offence under Section 138. A complaint can be launched against the person who has drawn the cheque whether in his capacity as proprietor or in his personal capacity. On a reading of the said decision, I find that it was a case where cheque was issued by a proprietor of a proprietary concern and not a firm. Proprietary concern is not covered by Section 141 of the Act and hence the said dictum laid down in the said decision is applicable to the facts of this case. In this case, as per the evidence, cheque was drawn by a firm and the cheque was signed by the Managing Partners of a firm, which is purported to be covered by Section 141 of the Act.

In the above circumstances, there is absolutely no ground for interference. Special Leave is therefore rejected. Petition is dismissed.

Sd/-

K. HEMA, JUDGE.

krs.

