IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

****

Criminal Petition No.10630 of 2013

Between:

Dintakurthi Krishna Moorthy Gupta. ....

Petitioner/Accused

And

The State of A.P. rep by P.P
High Court of A.P, Hyderabad
and another. ....

Respondents

DATE OF JUDGMENT PRONOUNCED: **06.06.2016**

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers may be allowed to see the judgments? Yes / No

2. Whether the copies of judgment may be marked to Law Reporters / Journals? Yes / No

3. Whether Their Lordship wish to see the fair copy of the Judgment? Yes / No

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Respondents

! Counsel for Petitioner : Sri K. Suresh Reddy

^ Counsel for Respondent No.1 : Public Prosecutor for State (AP)

^ Counsel for Respondent No.2 : Sri Nimmagadda Satyanarayana

< Gist:

> Head Note:

? Cases referred:

1) AIR 2000 SC 954
2) ILR 2000 (2) Kerala 557 = 2000 (1) KLJ 757
3) 2007 (1) ALD (Cri)8 (Mad) = 2006 CriLJ 2289 (Mad)

THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

Criminal Petition No.10630 of 2013

ORDER:

In this petition filed under Section 482 Cr.P.C., petitioner/A.2 seeks to quash the proceedings in C.C.No.232 of

2011 on the file of Judicial Magistrate of First Class, Giddalur, Prakasam District.

2 a) The second respondent/ complainant filed C.C.No.232 of 2011 against A.1 and A.2, who are M/s Vijetha Agro Farms (P) Limited, Guntur and its Managing Director for the offences under Section 138 of Negotiable Instruments Act and Section 420 of IPC.

b) The Complainant's case is that the accused have issued a Cheque bearing No.911705, dt:30.04.2011 for Rs.17,000/- drawn on Syndicate Bank, Markapur Branch in connection with the complainant's purchasing Unit Certificate issued by the Accused Company and the said Cheque on being presented by the complainant in State Bank of India, Cumbum, the same was returned with an endorsement 'insufficient funds in the account of the accused Company. Inspite of issuance of notices, there was no response from the accused. Hence, the complaint.

The instant petition is filed by petitioner/A.2 who is the Managing Director of Accused No.1 Company.

3) Heard both sides.

4) Learned counsel for petitioner/A.2 sought for quashment of proceedings on two main grounds:

a) Firstly, he argued that A.2 was appointed as Managing Director of M/s Vijetha Agro Farms (P) Limited Company, Guntur (for short 'the Company'), on 18.11.1995 and resigned on 29.09.2001 and since then he had nothing to do with the affairs of the Company.

b) Secondly, he argued that M/s Vijetha Depositors Samkshema Sangam, Anakapalli, Andhra Pradesh (for short 'Sangam') had earlier filed a Company Petition No.128 of 2005 before the Hon'ble High Court, Hyderabad seeking winding up of M/s Vijetha Agro Farms India (P) Limited under the provisions of Companies Act, 1956 on the ground that it has accepted the deposits from the members of the said Sangam and failed to return their amounts. By Order dt. 04.12.2006, the Hon'ble High Court passed winding up orders and appointed Official Liquidator to look after the affairs of the Company and since the Company itself was wound up, any person who has grievance against the Company, shall approach the Official Liquidator to resolve his grievance and therefore, the Criminal Case is not maintainable.

5 a) Per contra, the respondent/complainant argued that the petitioner during the relevant period acted as Managing Director of accused No.1's Company and he was incharge of and responsible to the conduct of the business of the Company and therefore he along with A.1 is liable for the offences levelled against them.

b) Nextly, he argued that mere issuance of winding up proceedings is not a bar for proceeding against the Company and other persons connected with the Company, who have committed the offences. In this context, he relied upon a decision reported in ***M/s Kusum Ingots and Alloys Limited v.***

M/s Pennar Peterson Securities Limited and others[1].

6) In the light of above rival arguments, the point for determination is:

“ Whether there are merits in this petition to allow?

7) **<u>POINT:</u>** The record shows that A.1 Company issued the impugned Cheque dt. 30.04.2011 for Rs.17,000/- drawn on Syndicate Bank, Markapur Branch, to the complainant and on being presented for collection in the State Bank of India, Cumbum by the complainant, the said Cheque was returned with a Memo dt. 23.05.2011 as insufficient funds in the account of the accused Company. So, *prima facie,* offence under Section 138 of NI Act is attracted. Since A.1 is a Company and A.2 is its Managing Director, who is alleged to be incharge of and responsible to the conduct of the business of the Company, both are liable for prosecution under Section 141 of NI Act.

8) Be that as it may, the first submission of the petitioner is that he acted as Managing Director of the Company from 18.11.1995 to 29.09.2001 and thereafter he resigned and he had nothing to do with the affairs of the Company. The petitioner has not produced any tangible material to this effect and therefore, the said contention at this stage cannot be accepted.

9) The next crucial contention raised by the petitioner is that A.1 Company was already wound up by an Order of High Court of A.P. in C.P.No.128 of 2005, dt:04.12.2006 and hence instant

C.C is not maintainable. The Order copy produced no doubt shows that M/s Vijetha Depositors Samkshema Sangam, Anakapalli, filed the said Company Petition against A.1's Company with the allegations that the members of the Sangam made deposits with A.1's Company and it failed to pay back their amounts and therefore they filed Criminal Complaint with CID, Vijayawada, in Cr.No.21 of 2002, but it yielded no results and therefore, they were constrained to file the said C.P. The Order further shows that though notice was ordered to A.1 Company, but it did not choose to appear before the Court and contest the claim of the petitioners and hence, the Court was pleased to pass the order for winding up the respondent Company and appointed an Official Liquidator and direct him to take possession of the assets of the Company. It is on the strength of the said Order, the petitioner now contends that as the A.1 Company was long back wound up by virtue of the Order of the High Court and as the Company is no more in existence, the Criminal Proceedings against A.1 and also against the Petitioner/A.2, are not maintainable. Hence, the question is whether Criminal Prosecution under Section 138 of NI Act r/w 141 is maintainable against the Company. Law on this aspect is no-more *res integra* as we have atleast two decisions of High Court of Kerala and Madras i.e, ***Jose Antony Kakkad v. Official Liquidator, High Court of Kerala and another***[2] and ***Counter Point Advt. Private Limited v. Harita Finance Limited***[3].

10) The facts in ***Jose Antony***'s case (2 supra) are that the complainant filed C.C.456 of 1996 under Section 138 of NI Act against the accused Company and its Managing Director. First accused was under liquidation as per the Order of the Company Court in C.P.No.20 of 1994 and an Official Liquidator had been appointed and the second accused filed an application before the Company Court stating that he issued the cheque as Managing Director of the Company and as there was no allegation made personally against him, the liability in Criminal Case was ultimately upon the Company and as the Company went into liquidation, the entire proceedings have to be stayed under Section 446 of the Companies Act but the said Petition was dismissed. Hence, he approached the High Court of Kerala. In that context, the Kerala High Court happened to consider whether the Criminal Prosecution under Section 138 of NI Act can be continued against the winding Company and its Managing Director after the Company went into liquidation. As Section 446 of the Companies Act had a bearing with the issue, it extracted the said provision which reads as follows:

> *"**446. Suits stayed on winding up order**.--(1) When a winding up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of winding up order, shall be proceeded with, against the Company, except by leave of the court and subject to such terms as the court may impose.*
>
> *(2) The court which is winding up the Company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of-*

a) any suit or proceedings by or against the Company;

b) any claim made by or against the Company (including claims by or against any of its branches in India) ;

c) any application made under section 391 by or in respect of the Company ;

d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the Company ;

Whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the Company, or before or after the commencement of the Companies (Amendment) Act, 1960.

(3) Any suit or proceeding by or against the Company which is pending in any court other than that in which the winding up of the Company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that court.

(4) Nothing in Sub-section (1) or Sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court."

11) On consideration of various decisions, it ultimately held thus:

"A consideration of the above decision would make it clear that the expression "other legal proceedings" in Section 446 of the Companies Act does not take in all proceedings and the proceedings under the special Act have an overriding effect over the general provisions

under the Companies Act. The object of winding up of a Company by the court was to facilitate the protection and realisation of its assets with a view to ensure an equitable distribution thereof among those entitled. Once the court has taken the assets of a Company under its control or has passed an order for its being wound up, in the ordinary course, it will not be proper to allow proceedings to be started or continued against the Company. Section 446 is intended to avoid multiplicity of proceedings and to safeguard the assets of a Company against wasteful or expensive litigation in regard to matters capable of being determined expeditiously and effectively by the winding up court itself. Though the words "legal proceedings" in Section 446 of the Companies Act is wide enough to take in criminal proceedings also, such criminal proceedings must be in relation to the assets of the Company. Criminal proceedings which are not in respect of the assets of the Company but end in the conviction or acquittal of the accused, cannot be stayed under Section 446 of the Companies Act. The proceedings under Section 138 of the Negotiable Instruments Act can end only in the conviction or acquittal of the accused in the case and no recovery of any amount covered by the dishonoured cheques can be made in the criminal proceedings. As the criminal proceedings under Section 138 of the Negotiable Instruments Act are not in respect of the assets of the Company, the proceedings pending in the criminal courts cannot be stayed under Section 446 of the Companies Act. Hence the proceedings initiated against the appellant under Section 138 of the Negotiable Instruments Act before the criminal court cannot be stayed invoking Section 446 of the Companies Act".

12) It is further observed as follows:

"<u>Para 13</u>: Section 138 to Section 142 in Chapter XVII was introduced in the Negotiable Instruments Act by the Central Act 66 of 1988 with effect from April 1, 1989. The above provisions were incorporated in the Negotiable Instruments Act with the intention of safeguarding and sustaining the credibility of commercial transactions and those provisions were 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 by a Company or its directors or its employees, it has to be presumed that Parliament introduced the above provisions in the Negotiable Instruments Act fully knowing that Section 446 was there in the Companies Act".

13) In another instance, the High Court of Madras has come across a similar issue i.e., when the entire administration of the Company was taken over by the Official Liquidator on winding up, whether the accused can be prosecuted for the offence under Section 138 of NI Act. Relying upon the ratio in ***Jose Antony's*** case (2 supra), the Madras High Court has dismissed the Criminal Petition filed by the accused to quash the Criminal Proceedings against them.

12) The decision in ***Kusum Ingots and Alloys Limited***'s case (1 supra) cited by Respondent has no direct relevance with the facts of the instant case. However, the ratio in the above two cases applies with all its force in the instant case. Since in the Criminal Proceedings initiated against the accused Company and its Managing Director under Section 138 of N.I Act complainant is not seeking intervention of the Criminal Court in respect of the assets and the administration of the Company which was taken over by the Official Liquidator, Cumbum, mere fact that the Company went into liquidation cannot be a ground to quash the proceedings. So, in substance, there are no merits in this Petition to allow.

14) Accordingly, this Criminal Petition is dismissed.

As a sequel, miscellaneous petitions pending, if any, shall stand closed.

U.DURGA PRASAD RAO, J

Dt: 06.06.2016

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[1] AIR 2000 SC 954

[2] ILR 2000 (2) Kerala 557 = 2000 (1) KLJ 757

[3] 2007 (1) ALD (Cri)8 (Mad) = 2006 CriLJ 2289 (Mad)