

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :01.08.2017

PRONOUNCED ON : 20 .09.2017

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

Crl.OP Nos.16389 and M.P.No.1 of 2010
and
Crl.O.P.No.19988 of 2010

S.Soundappan
 S/o.Soundappa Chettiar
 Partner in Leo Sales Corporation,
 38,Arcot Road,
 CEE BROS Garden,
 J/4, Brim Rose,
 Virugampakkam,
 Chennai.

... Petitioner in Crl.O.P.No.16389 of 2010

M.Sivaji
 S/o.A.Muthusamy,
 Partner, Leo Sales Corporation,
 No.7, Devi Nagar, Karpakkam,
 Porur,Chennai - 600 116.

... Petitioner in Crl.O.P.No.19988 of 2010

...Vs...
 सत्यमेव जयते

M/s.Sri Pathy Fashions,
 Rep by its Partner,
 A.Gopal,
 At 49, Sivanandha 2nd street,
 Anupperpalayam,
 Tirupur-2

.. Respondent in Crl.O.P.No.16389 of 2010

1.M/s.Sri Pathy Fashions,
 Rep by its Partner,
 Mr.A.Gopal,M/A 39 years,
 S/o.Arunachalam,
 Business at 49, Sivanandha
 2nd street, Anupperpalayam,
 Tirupur-2.

2.Leo Sales Corporation(A-1),
Rep.by its Partner,
S.Soundappan, M/A 56 years,
7,Devi Nagar, Karampakkam,
Porur,Chennai - 600 116.

3.S.Soundappan (A-2),
The Partner of M/s.Leo Sales Corporation,
J-4,Prime Rose,
Ceebrose Gardens,
Virugambakkam,
Chennai - 600 092.

4.J.S.Kesavanm,M/A 50 years (A-4),
The partner of Leo Sales Corporation,
7,Devi Naga, Karampakkam,
Porur,Chennai - 600 116. ..Respondent in Crl.O.P.No.19988 of 2010

Common Prayer in Crl.O.P.No.16389 and 19988 of 2010:- Criminal
Original Petition filed under Section 482 Cr.P.C., to call for the records in
C.C.No.2936 of 2009 on the file of the Judicial Magistrate No.I, Tirupur and
quash the same as against the same.

For Petitioner :Mr.Sundarmohan
For M/s.Suresh Associates
in Crl.O.P.No.16389 of 2010
For Petitioner :Mr.S.Jayakumar in Crl.O.P.No16389 of 2010
For Respondents :Mr.P.M.Duraiswamy in both Crl.O.Ps

COMMON ORDER

Both Criminal Original Petitions have been filed under Section 482
Cr.P.C., challenging the correctness of the taking cognizance of the
S.T.C.No.2936 of 2009, Judicial Magistrate No.I, Tirupur against the
respective petitioner.

2. In CrI.O.P.No.16389 of 2010, the second accused in S.T.C.No.2936 of 2009 is the petitioner, seeking quashment of the summons issued in the above said S.T.C on taking cognizance for the dis-honoured of the cheque-in-issue of M/s.sripathy Fashions in which he is one of the partner.

3. In CrI.O.P.No.19988 of 2010, the third accused in S.T.C.No.2936 of 2009, Judicial Magistrate No.I, Tirupur is the petitioner seeking the quash the private complaint filed in above S.T.C.No. in respect of the cheque issued by the A1 Partnership firm.

4. The complainant company is the partnership firm and A.Gopal and A.Ravi are partners of the said firm as per partnership deed dated 8.7.2005. One of the partner, A.Gopal had filed the above private complaint with authorization letter dated 09.10.2009 of another partner. The complainant firm is running the business of manufacturing Garments under the name and style of M/s.Sri Pathy Fashions at the above mentioned address.

5. While so, the second respondent firm is the partnership firm of which the respondents 3 and 4 are the partners carrying on the business of Exports of Garments under the name and style of M/s.Leo Sales Corporation. The respondents 3 & 4 are actively taking part in the day today affairs of the 2nd respondent firm.

6. The 2nd respondent company is the regular customer of the first defendant. As per invoices and statements of account maintained by the first respondent firm/complainant a sum of Rs.2,87,870/- is due and payable by the second respondent firm to the first respondent. For the above said due, the third respondent as the partner of the second respondent firm, had issued the following cheques to the first respondent firm viz., cheque bearing Nos.043945 and 043946 dated 25.07.2009 and 26.08.2009 for an amount of Rs.1,25,000/- and 1,50,000/- drawn on Punjab National Bank, Luz Church Road, Mylapore, Chennai respectively. Cheque being bounced the complaint has been alleged after observing the statutory notice, the private complaint has been alleged before the Tirupur Judicial Magistrate and cognizance was taken and the summons were issued.

7. Challenging the issuance of the summons after taking cognizances of the private complaint this CrI.O.P.No16389 filed by the third accused. On the sole ground that though he is a partner with the second respondent firm/Leo Sales Corporation (arrayed as A1) however by deed of retirement deed on 01.01.2008, the petitioner herein on retirement from the partnership firm and the same fact was communicated to the other two partners which are arrayed as third and fourth respondent herein and also send a communication through letter on 24.07.2009 and since the petitioner has retired from the partnership as early as on 01.01.2008, the private

complaint which was emerged from cheque dated 25.07.2009 and 26.08.2008, he cannot be coupled with the criminal liability and seeks the quashment of the private complaint in so far as third accused is concerned.

8. In CrI.O.P.No.16389 of 2010 by the second accused, he prays for quashment of the private complaint in S.T.C.No.2936 of 2009 on the ground that he was already declared as insolvent on 03.09.2009 as per the orders of the High Court in I.P.No.121 of 2009 and hence, he cannot be prosecuted of the non-payment of the cheque amount.

9. The short point that needs to be addressed in the above two cases are as under:-

i) Is "an Insolvent" a immune from criminal prosecution arising out of dishonour of cheque?

ii) Whether the "retired partner" is liable for criminal prosecution for dishonour of cheque and whether such a plea can be considered in the quashment of the private complaint arising out of dishonour of cheque?

10. CrI.O.P.No.16389 of 2010:-

The petitioner/the second accused seeks to quash the S.T.C.No.2936 of 2009, Judicial Magistrate No.I, Tirupur on the ground that he was declared as "insolvent" by the orders of the High Court in I.P.No.121 of 2009 dated 03.09.2009. Incidentally, the same date with the private complaint has been filed before the Judicial Magistrate No.I, Tirupur for non-payment of the cheque amount on the ground of insufficient funds.

11. The learned counsel for the petitioner has submitted that the orders of the High Court passed in I.P.No.121 of 2009 filed under Presidency Towns Insolvency Act by the Soundappan and another person wherein in the schedule of the property, the cheque in issue in S.T.C.No.2936 of 2009 is also mentioned and the copy of the schedule filed by the petitioner in the above said I.P.No.121 of 2009 before the official assignee has been furnished in the additional typed set of papers.

12. The learned counsel for the petitioner has submitted that on the date of the filing of the private complaint by the first defendant/complainant before the Judicial Magistrate No.I, Tirupur Court on the very same date, this petitioner herein has been adjudged as insolvent and hence, criminal proceedings against the said person cannot be carried on for the non-payment of the amount covered under the cheque, since, he has entitled to protection under the Presidency Towns Insolvency Act.

13. This Court has given in anxious consideration for the submission made by the counsel for the petitioner, it is the basic jurisprudence of the insolvency law in India that the protection given under the insolvency Act is only in respect of the "civil person" for default in payment of money due under the pro-note or cheque issued during the course of the business transaction. However, that position was related to before the amendment of the 138 Negotiable Instrument Act.

14. It may not be out of place to mention here that the chapter 28 of Negotiable Instrument Act was brought in, combined statement by act 66 of 1988 with effect from 14.8.98 and this chapter comprises of the Section 138 to 147, and on and from the said date bouncing of cheque for insufficient of fund and other conditions stated under Section 138 are made criminal offence and for which sentence has been prescribed therefor.

15. It is relevant to note that in the decision reported in **CDJ Law Journal (Yogendra Pratap Singh Vs.Savitri Pandey & another)**

wherein it related as held in the decision

32) Section 138 of the NI Act has been analysed by this Court in Kusum Ingots&Alloys Ltd.[M/s.Kusum Ingots & Alloys Ltd. v.M/s.Pennar Peterson Securities Ltd and ors.etc; [AIR 2000 SC 954:(2000)2SCC745] wherein this Court said that the following ingredients are required to be satisfied for making out a case under Section 138 of the NI Act:

- (i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of debt or other liability;
- (ii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
- (iii) that cheque is returned by the bank unpaid, either because the amount of money standing to credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to paid from that account by

an agreement made with the bank;

(iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

16. The petitioner herein who was arrayed as second accused has been declared as insolvent by the order of the High Court in I.P.No.121 of 1991 and the cheque-in-issue and subject matter of the private complaint is dated 25.07.2005 and 26.08.2009 and the same has been bounced for insufficient offence on 05.09.2009. It remains to be stated that the private complaint has been lodged before the jurisdiction Magistrate Court on 22.10.2009. As observed earlier, there is no prohibition either in the insolvency act or Negotiable instrument act for the aggrieved party to approach the criminal Court to take a penal action against the accused for the offence under Section 138 of Negotiable Instrument Act.

17. Therefore, the protection given under Section 29 and 31 of the Presidency Towns Insolvency Act is only in respect of debtor for a "civil decree" and he cannot be detained in "civil detention" and the civil arrest has contemplated under the Civil Procedure Code. The primary concept of the

arrest" for a person for non-payment of money in the business transaction either based on the pro-note or a cheque before the amendment. But after the amendment, as stated supra, in respect of bouncing of cheque that has been specifically declared as an "offence" and hence, the protection contemplated under the Section 29 and 31 of the Presidency Towns Insolvency Act does not loom large and protect the petitioner herein. Since, after the amendment as stated above dishonor of cheque has become a criminal liability and a similar view on a different analysis is taken by this Court in decision reported 1999 criminal law journal (B.Kannan v.B.C.Santhanam) I am also fortified by the said decision and in this view of the matter I am of the considered view that though the petitioner herein be declared as "insolvent" under the "Presidency Towns Insolvency Act". However, it does not cloth him with immunity from criminal prosecution for dishonour of cheque and in this view of the matter this petition is devoid of merits and the same is dismissed. Consequently, connected Miscellaneous Petition is closed.

18. Crl.R.C.No.19988 of 2010:-

The sole point that was emphasized by the petitioner herein for the quashment of the issuance of summons and issue taking of cognizance in S.T.C.No.2936 of 2009 wherein the petitioner herein is arrayed as accused No.3 is that he has already retired from the partnership firm viz., the second respondent herein/A1 on 01.01.2008 and therefore, the petitioner cannot be held liable for the mismanagement and action of the remaining partners

namely the respondents 2 and 3 herein.

19. The learned counsel for the petitioner has submitted that as early as on 01.01.2008, the petitioner herein/A3 retired from the partnership firm and same was intimated to the third and fourth respondent on letter dated 24.07.2009 and also he moved the City Civil Court restraining the other defendants from using his name in the partnership firm by way of permanent injunction.

20. The learned counsel for the petitioner has submitted that in view of the factual position that the petitioner herein has retired from partnership firm even before the date of the cheque the subject matter of the private complaint. After hearing the rival submissions and perusing the deed of partnership which was entered between the accused A2 to A4. The partnership firm came into existence on 14.05.2006 and the same is unregistered one. According to the petitioner, he has retired on 01.01.2008 and the same was reduced into writing by way of retirement deed dated 01.01.2008. The said deed of retirement is also un-registered one.

21. This Court has given its anxious consideration for the said contention and also perused the document of deed of retirement. The cheque-in-issue relating dated 25.07.2009 and 26.08.2009. According to the petitioner herein he has retired from the partnership firm on 01.01.2008 itself admittedly, the deed of the partnership was not registered one under the

Indian Partnership Act, the retiring partner has to issue a statutory notice under Section 32 sub clause(2) to its notice of the retirement and made, manner and method of issuance a public notice is enshrined under Section 72 of the Indian Partnership Act.

22. The learned petitioner counsel is not in a position to appraise this Court whether the mandatory statutory condition as enshrined under Sub Clause (2) of Section 32 and Section 72 of the Indian partnership Act has been duly complied with to substantiate his claim that his retirement was in accordance with law.

23. Mere raising a plea of retirement from the partnership or filing of unregistered deed of partition cannot IPSO facto prove the said allegation whether the petitioner was retired from the partnership firm as alleged is true or not and documents produced by him is valid in the eye of law is a question of fact. Equally, whether the statutory requirements has contemplated under the Indian Partnership Act has been duly complied with in accordance with law? is a question of fact.

24. It is a matter of evidence that has to be adduced before the trial Court to prove the fact that on the date of the issuance of the cheque in question the petitioner was retired from the partnership firm and since the plea of retirement has not been substantiated in the manner known to law before this Court. However, it is hereby made clear that he can do so before trial by adducing necessary document if he has and if he be so advised.

25. As discussed above, this Court is of the considered view that in the quashment of proceedings under Section 482 Cr.P.C mere a raising plea will not suffice and same has to be substantiated by the necessary document as to the compliance of the mandatory provisions as contemplated under the Indian Partnership Act has to be demonstrated and that can be done only before the trial Court and hence, since it is a matter of evidence that has to be adduced before the trial Court, I am of the view that mere plea of retirement from the partnership firm cannot be entertained in the quashment proceedings under Section 482 and this point is answered in negative against the petitioner herein and hence, both the points are answered in negation against the petitioners

26. In the result, both the Criminal Original Petitions are dismissed. Consequently, connected Miscellaneous Petition is closed.

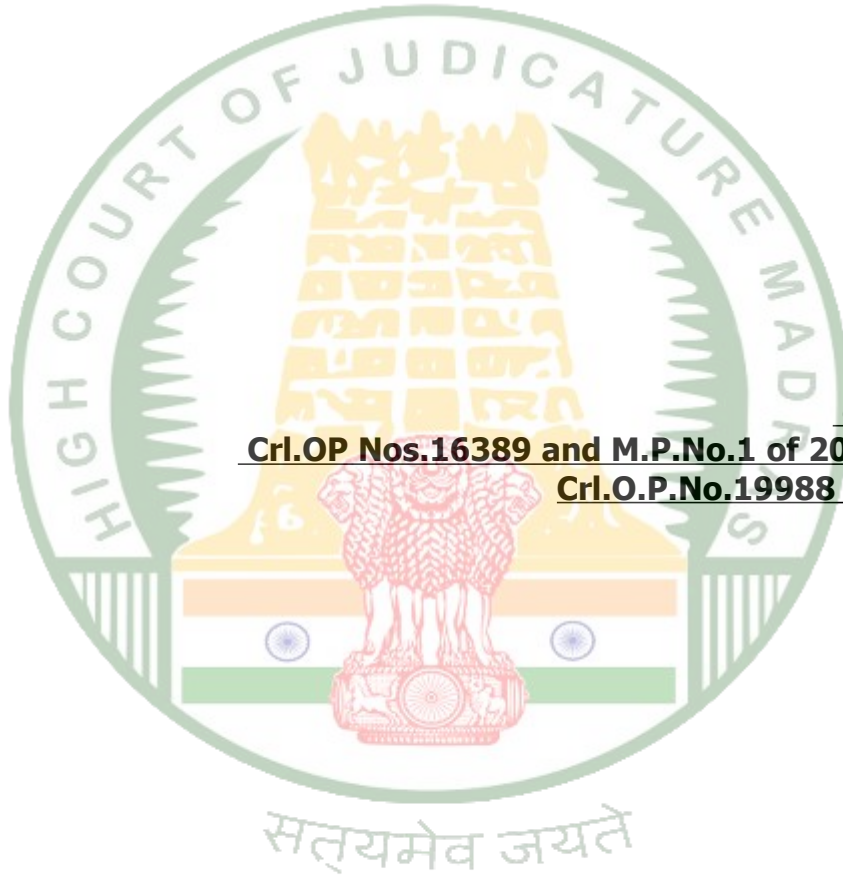
.09.2017

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To

1. The Judicial Magistrate No.I, Tirupur
2. The Public Prosecutor, High Court, Madras.

RMT.TEEKAA RAMAN,J.,



order in
Crl.OP Nos.16389 and M.P.No.1 of 2010 and
Crl.O.P.No.19988 of 2010

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