

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.08.2018

C O R A M

THE HONOURABLE MR. JUSTICE M.V.MURALIDARAN

Crl.O.P.No.21968 of 2012
and
M.P.Nos.1 and 2 of 2012

- 1.Religare Finvest Limited,
Rep. by its Chairman cum Managing Director,
Sunil Godhwani
 - 2.Religare Finvest Limited,
Rep. by its Director and Group C.E.O.,
Sachindra Nath
 - 3.Religare Finvest Limited,
Rep. by its Executive Director,
Anil Saxena
 - 4.Religare Finvest Limited,
Rep. by its Director,
Ravi Mahrotra
 - 5.Religare Finvest Limited,
Rep. by its Branch Manager,
Natarajan
- ... Petitioners
- सत्यमेव जयते
Vs.

Joseph John ... Respondent

PRAYER: Criminal Original Petition is filed under Section 482 of Cr.P.C., to call for the records of the case registered as Criminal Complaint No.16/12 dated 06.11.2011 titled Mr.Joseph John vs. Mr.Sunil Godhwani & Ors. Under Sections 120-B, 403, 405, 420, 464, 468, 471 & 499 of the Indian Penal Code pending adjudication in the Court of Judicial Magistrate No.III, Salem and quash the same.

For Petitioners : Mr.M.Guruprasad

For Respondent : Mr.R.Asokan

O R D E R

The petitioners in the instant original Petition are accused for the alleged offence under section 120(b), 403, 405, 420, 464, 468, 471 and 499 of India Penal Code, in the Calendar Case No.16 of 2012, on the file of the Learned Judicial Magistrate No.III, Salem. The original petition is filed to quash the aforesaid proceedings as well as to quash summoning dated 18.06.2012 issued in the aforesaid proceedings.

2.The case of the petitioners is that they are in the board of Religare Finvest Limited, a company which is a non banking financial institution engaged in the business of granting loans and their institution is regulated by the Reserve Bank of India. Further, one such business transaction had taken place with the respondent herein who is the complainant in the aforesaid C.C.No.16 of 2012 and who is also the proprietor of one Alfa Rubber Industries, having office in Salem. Further, the respondent herein borrowed a sum of Rs.3,64,000/- as loan from the company on 30.07.2008. The loan is to be repayable on 36 equated monthly installments of a sum of Rs.13,528/-. The further case of the petitioners is that at the time of providing loan assistance, cheque leaves were obtained as security along with loan agreement, promissory note and other documents from the respondent herein. The installments payable was commenced from 25.08.2008 and as per the schedule the same has to be completed on 25.07.2011. Since the borrower became a defaulter, the company was constrained to fill-up a cheque for a sum of Rs.2,88,948/- and presented the said cheque. As the respondent became a defaulter, the company issued a letter dated 07.09.2011 by closing the loan account.

3.By leveling these allegations and also other allegation that the cheque issued by the respondents herein got dishonoured, the same culminated into the initiation of proceedings under the Negotiable Instruments Act. Therefore, the respondent herein filed the impugned complaint under section 200 of Cr.P.C for the offences aforesaid. It is the further case of the petitioners that by perusing the impugned complaint, the learned Judicial Magistrate concerned, on 18.06.2012 issued the impugned summoning order to the petitioners to appear before

him. Since the summoning order issued by the concerned Magistrate is not in accordance with law and the cognizance was taken without the application of judicial mind, the petitioners are constrained to file the instant original petition.

4. According to the learned counsel for the petitioners that no vicarious liability can be fastened upon the petitioners as the complaint does not contain any allegation to attract the offences as alleged. He adds further that the 1st petitioner is the Chairman and Managing Director of another company and he resigned from the board of the company as early as on 14.11.2011. At the same time, the learned Magistrate has failed to note that the 2nd petitioner was appointed as a Director of the company on 14.11.2011 only, but the alleged offence said to have taken place in September, 2009. Moreover, the learned counsel has also pointed out that though the 4th petitioner is nothing to do with the company, he also been arrayed as one of the accused, which would show that the learned Magistrate has taken cognizance without adverted into the facts of the case.

5. In addition to that it is the contention of the learned counsel for the petitioners that the summoning order passed by the learned Magistrate is also unsustainable for the reason that it is passed in cryptic manner absolutely without adduced any reason. He has brought to the notice of this Court that to make out an offence under section 403 of Indian Penal code, the element of dishonesty and misappropriation are very much essential, but in the instant case, though it is admitted by the respondent herein that he has received financial assistance from the company, then no offence under section could be made out, but unfortunately, it has not been gone into by the learned Magistrate while issuing summoning order as against the petitioners. As such he has also pointed out that since the petitioners are not the custodian of the cheques issued by the respondent, but it was entrusted only for loan purpose, no question of offence as allegedly made out under Sections 405, 464 and 420 of IPC.

6. Apart from that it is the contention of the company that factually and technically the complaint filed by the respondent herein before the learned Magistrate is unsustainable for the reason that when the company filed a case against the respondent herein under the Negotiable Instruments Act, the same was withdrawn on 12.10.2011 as the amount was realized by the company. However, with ill intention, the instant impugned complaint is filed belatedly as a counter case without any justification for the delay.

7.To support his contention, the learned counsel for the petitioner has relied on judgment of the Hon'ble Supreme Court reported in (1998) 5 SCC, 749 Pepsi Food Vs The Special Magistrate, wherein it is held that no summons could be issued mechanically without application of mind by the Judicial Magistrate. He also resorted the assistance of the other judgments of the Hon'ble Supreme Court reported in (2002) 1 SCC 241 in respect of the procedure adopted to cull out the truth attached with the compliant and (1992) Suppl 1 SCC 335 with regard to the exercise of power of the High Court under section 482 of Code of Criminal Procedure. Moreover, the learned counsel for the petitioners would rely on the judgment of the Hon'ble Supreme Court reported in (2016) 10 SCC 458, wherein it is held that the crucial point is whether cheque represents discharge of existing enforceable debt or liability or whether it represents advance payment without there being any subsisting liability. Once loan amount was disbursed and as per agreement, installments had fallen due on date of issuance of cheque, dishonour of such cheque would fall under section 138 of NI.Act., such issuance of cheque undoubtedly represents outstanding liability.

8.Another judgment relied on by the learned counsel for the petitioner is reported in (2015) 12 SCC 420, wherein it is held that process must not be issued in a mechanical manner or as a matter of course, the application of mind by the Magistrate in taking cognizance and issuing process to accused, the indication of in the order is essential. Though no formal or speaking or reasoned orders are required at the stage of section 190 and 204 of Cr.P.C., there must be sufficient indication in the order that the Magistrate is satisfied that (i) the facts alleged in the complaint constitute an offence, and (ii) these facts when considered along with the statements recorded under section 200 Cr.P.C., and the result of inquiry or report of investigation under section 202 of Crpc, if any, prima facie make the accused answerable before the criminal Court. In absence of any such indication in the order, the High Court under section 482 is bound to invoke its inherent power in order to prevent abuse of power of criminal Court..."

9.By submitting all the legal and factual aspects, the learned counsel for the petitioner would submit that the application under section 482 on behalf of the petitioners is fit to be considered in their favour.

10.Per contra, the learned counsel for the respondent would

vehemently contend that the petition filed under section 482 is not maintainable to decide the facts and even the mixed question of fact and law also cannot be decided. The cognizance was taking by the learned Judicial Magistrate is well within the procedure as contemplated under the Cr.P.C. Apart from that he also adds that the complaint given by the respondent herein before the learned Magistrate is a written complaint and all the allegations are based on records. When the Complainant approached the learned Magistrate, it is for the Magistrate concerned to decide to take the complainant on file based on the averments and materials available before him. In the case on hand after the careful perusal of the complaint, the Magistrate concerned thinks fit to take cognizance against the petitioner herein. In this regard he is sheltering his submission into the section 200 of Cr.P.C., "A Magistrate taking cognizance of an offence or complaint shall examine upon oath the complainant and the witness present, if any and the substance of such examination shall be reduced to writing.."

11. So, according to the learned counsel the cognizance was taken by the learned Magistrate coupled with the summoning order may not be disturbed and the petition filed by the petitioners does not make out any ground to warrant interference of this Court by invoking the inherent power as contemplated under Section 482 of Cr.P.C., and he prays for the dismissal of the quash petition.

12. I heard Mr. M. Guruprasad, learned counsel appearing for the petitioners and Mr. R. Asokan, learned counsel appearing for the respondent and the materials available on record are perused.

13. It is the case of the petitioners that they are the responsible office bearers in the Board of Religare Finvest Limited, a company which is a non banking financial institution. Though they are not liable for the legal action of the respondent herein as they were not holding the office of the said Religare Finvest Limited at the relevant point of time of the cause action of the case, the act of taking cognizance of the complaint of the respondent by the learned Magistrate is not in accordance with law. It is seen from the records that the private complaint was filed by the respondent for the offence stated above and the said complaint was filed under section 200 of Code of Criminal Procedure. But the perusal of the certified copy of the complaint, it would show that on 18.06.2012 the following order was passed by the learned Magistrate that is "Complainant absent Petition filed under section 256(1) of Cr.P.C., and allowed. Complaint and statement perused. Prima

facie, offence under section 120(b), 403, 405, 420, 464, 468, 471 and 499 of India Penal Code made out. Complaint is ordered to be taken under section 120(b), 403, 405, 420, 464, 468, 471 and 499 of India Penal Code. On payment of process by the complainant, issue summons to the accused for the hearing call on 19.07.2012. The order passed by the learned Magistrate does not say anything about the satisfaction to take the case on file. Further, there is no reference in the complaint as to whether the complainant or his witnesses were examined or not. All along the complainant was absent and his absence was condoned by allowing the petition. Further the case was periodically adjourned for clarification. When the final order is passed to take cognizance, there is no reference as to whether any clarification was sought for by the Magistrate and offered on the side of the complainant.

14. Though, there is no necessity on the part of the learned Magistrate to pass a detailed speaking order while taking cognizance, but he must record his satisfaction to take the case on file and thereafter order to issue process to the accused. In this case, the summoning order is issued without any prima facie satisfaction and the same, in the considered opinion of this Court is unsustainable.

15. As far as the order passed in taking the case on file, the learned magistrate has not followed the procedures as contemplated under Section 200 of Cr.P.C. Further the learned Magistrate has simply recorded that he perused the complaint and the statement and came to a conclusion that the offence as stated in the complaint are made out. In the considered opinion of this Court, the said order is nothing but unsustainable. Moreover the same is to be remanded back for reconsideration by setting aside the said order.

16. As far as quashing the proceedings in the Calendar Case No.16 of 2012 in the opinion of this Court the same cannot be accepted as it is involved the mixed question of facts and law. Here the question as to whether how many cheques were given to the petitioners herein and for what purpose they have been received, whether the company is entitled to fill up the cheque in dispute for the whole liability or for the monthly installment only cannot be decided in this application under Section 482 of Cr.P.C.

17. At this juncture this Court is having an occasion to have perusal of the judgment of the Hon'ble Supreme Court in

Bholu Ram vs State Of Punjab & Anr on 29 August, 2008, wherein it is held that:

"45.The correctness of K.M. Mathew again came up for consideration before a three-Judge Bench of this Court in Adalat Prasad v. Rooplal Jindal & Ors., (2004) 7 SCC 338. In Adalat Prasad, the accused, after issuance of summons against him by the trial Magistrate, filed an application under Section 203 of the Code for dismissal of complaint recalling the order of summons. After hearing the parties, the Magistrate granted the prayer and recalled the summons. The order of the Magistrate was challenged by the complainant in the High Court inter alia on the ground that the Magistrate had no jurisdiction to recall the earlier order. The High Court allowed the petition. The accused approached this Court.

61. It was after the dismissal of revision filed by the State that respondent No.2 moved the Judicial Magistrate to recall the earlier order. The learned Magistrate held that in view of dismissal of revision by the Additional Sessions Judge, an application to recall the order was not maintainable. But the Court also stated;

"No doubt summoning order is on interim order and not a judgment and the same can be reviewed or recalled by the Magistrate. Proceedings against the accused can be dropped of the complaint on face of it does not disclose any offence against him. In the present case, my learned predecessor after going through the statements of examined prosecution witnesses found that there is prima facie offence made out against the accused Sher Singh. Only thereafter accused/applicant She Singh was summoned vide summoning order dated 22.1.1996 passed by Sh. Varinder Aggarwal, PCS, the then Judicial Magistrate, 1st Class, Barnala".

18.Therefore from the above discussion, it is held that the petition filed by the petitioners to quash the proceedings in C.C.No.16 of 2012 on the file of the learned Judicial Magistrate No.3, Salem is not fit for consideration and the same is hereby dismissed to that extent. At the same time the summoning order of the learned Magistrate dated 18.06.2012 is hereby quashed as the same has no reflection either about the examination of complainant or the satisfaction of the learned Magistrate to take the case on file. Therefore, the matter is remanded back to the learned Judicial Magistrate No.III, Salem for fresh consideration based on the procedure laid down under Section 200 of Cr.P.C. The said exercise has to be completed within a period

of 7 days from the date of receipt of a copy of this order and thereafter the same may be proceeded in accordance with law. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CS-VI)

//True copy//

Sub Assistant Registrar

vs

To

The Judicial Magistrate No.III, Salem.

+1cc to Mr.R.Asokan, Advocate SR.No.58125

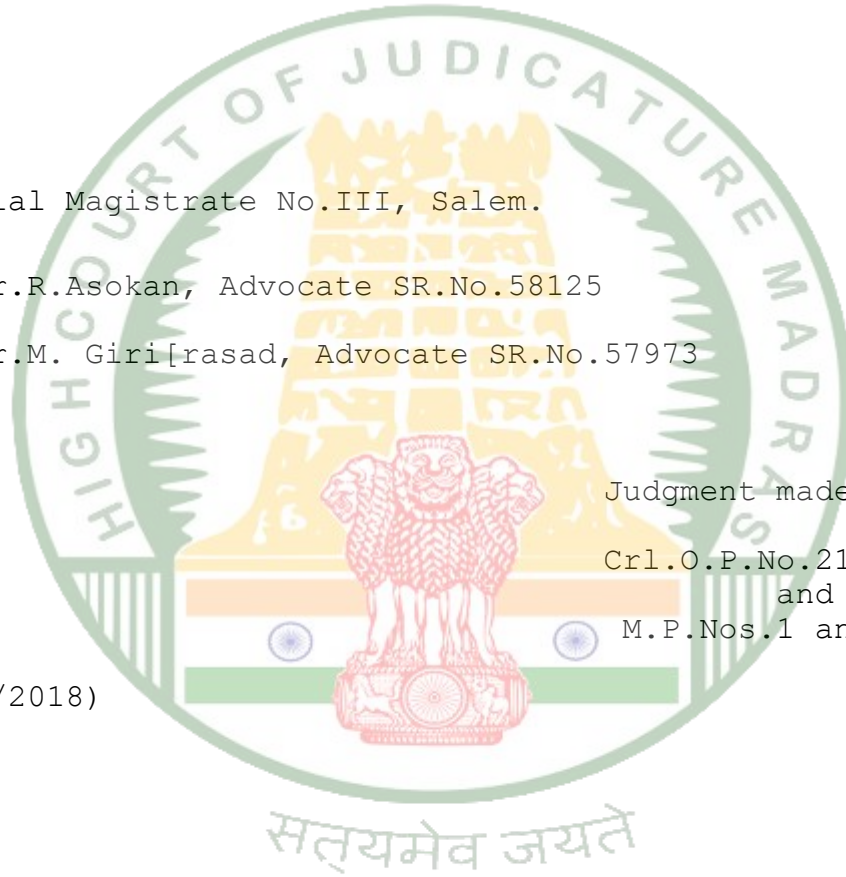
+1cc to Mr.M. Giri[rasad, Advocate SR.No.57973

Judgment made in

Crl.O.P.No.21968 of 2012
and

M.P.Nos.1 and 2 of 2012

GMV (07/09/2018)



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