**IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH**

**Date of Decision:05.03.2020**

**1. CRM-M-55577-2018 (O & M)**

Prannath Khanna

... Petitioner

Versus

M/s Shri Shyam Enterprises and another

... Respondents

**2. CRM-M-56091-2018 (O & M)**

Prannath Khanna

... Petitioner

Versus

M/s Shri Shyam Enterprises

... Respondent

**3. CRM-M-56104-2018 (O & M)**

Prannath Khanna

... Petitioner

Versus

M/s Satyan & Company

... Respondent

**AND**

**4. CRM-M-61579-2018 (O & M)**

Prannath Khanna

... Petitioner

Versus

M/s Satya & Company

... Respondent

**CORAM: HON'BLE MR. JUSTICE HARNARESH SINGH GILL**

Present: Mr. Vaibhav Narang, Advocate,
for the petitioner in all the petitions.

Mr. Sanjeev Kumar Bawa, Advocate,
for respondent No.1 in all the petitions.

**HARNARESH SINGH GILL, J.**

This order of mine shall dispose of the above mentioned four petitions as identical questions of facts and law are involved therein.

Prayers in all these petitions i.e. CRM-M-55577-2018, CRM-M-56091-2018, CRM-M-56104-2018 and CRM-M-61579-2018, have been made for quashing of criminal complaints No.9335/2014/RBT/5067 of 2016 dated 09.11.2014, titled as 'M/s Shri Shyam Enterprises Vs. M/s Adigear International and others, No.8496/1 dated 15.09.2014/RBT No.5576 of 2016, titled as M/s Shri Shyam Enterprises Vs. M/s Adigear International and others, No.9334/2014/RBT/5572 of 2016 dated 01.11.2014, titled as 'M/s Satya & Company Vs. M/s Adigear International and others' and Mo.1708/1/15/RBT No.CC/5567/2016 dated 15.01.2015, titled as 'M/s Satya & Company Vs. M/s Adigear International and others', respectively, filed under Sections 138, 141 and 142 of the Negotiable Instruments Act, 1881 (for brevity, 'N.I.Act') alongwith all the subsequent proceedings arising therefrom qua the petitioner, on the ground that neither any preliminary evidence was led by the complainant nor any summoning order was passed (except CRM-M-56091-2018), whereas non-bailable warrants were straightway issued against the petitioner, which had been recalled in CRM-M-55577-2018 and CRM-M-61579-2018; and moreover the petitioner-accused retired from the firm on 29.02.2012 whereas cheques in question were issued after his retirement.

For the facility of reference, the facts are being taken from CRM-M-55577-2018.

Facts of the case, in brief, are that respondent No.1-complainant, Shri Shyam Enterprises filed a complaint under Sections 138, 141 and 142 of the N.I.Act on the ground that the petitioner alongwith co-accused was in business transactions with it, but due to some differences, the business relationship had ended. After the termination of contract, full and final settlement of account took place on 19.04.2013 and in this regard, a receipt dated 19.04.2013 was also executed, vide which the petitioner alongwith other accused had accepted the legal liability/debt of Rs.7,50,000/-. Accordingly, three cheques dated 15.05.2013, 30.05.2013 and 10.06.2013, amounting to Rs.2,50,000/- each, were issued by the petitioner and co-accused Sanjay Khanna, to clear the aforesaid legal liability towards the complainant. Out of the aforesaid three cheques, two cheques were dishonoured when presented for encashment. A complaint qua the same was filed, which was referred to the Mediation Centre, Gurgaon, where a compromise was effected between the parties on 04.04.2014. In that compromise, the petitioner and co-accused issued several post dated cheques, amounting to Rs.6,00,000/-, in favour of the complainant. However out of these cheques, three cheques, as stated above, got dishonoured following which the accused persons had issued demand drafts. Later, when other cheques bearing No.868875 dated 25.08.2014 and No.868876 dated 25.09.2014, amounting to Rs.1 lakh each, were presented for encashment, the same got dishonoured with the remarks "Insufficient Funds". Thereafter, the petitioner alongwith co-accused was served with the legal notice, but to no avail.

Learned counsel for the petitioner contended that without recording preliminary evidence, non-bailable warrants had been issued which had been recalled on the applications moved by the petitioner for cancellation of the same, by observing that the same had been issued inadvertently. The learned counsel further argued that issuance of summons, including non-bailable warrants, which had been recalled, without recording the preliminary evidence and without examining the complainant, was not in accordance with law and, therefore, the complaints and subsequent proceedings arising therefrom, are liable to be quashed in respect of the petitioner.

Still further, the learned counsel for the petitioner argued that the Magistrate had not applied his mind judiciously. Since the judicial notice has not been taken, the complaints alongwith subsequent proceedings arising therefrom, are liable to be set aside. The Magistrate has to satisfy himself either by examining the complainant and the witnesses or by the inquiry contemplated under Section 202 Cr.P.C. In support of his contentions, the learned counsel has relied upon the judgment of the Hon'ble Supreme Court rendered in Adalat Prasad Vs. Rooplal Jindal, 2004 (4) RCR (Criminal) 1, wherein it was held as under:

> *"**12.** Section 200 contemplates a Magistrate taking cognizance of an offence on complaint to examine the complaint and examine upon oath the complainant and the witnesses present if any. If on such examination of the*

> *complaint and the witnesses, if any, the Magistrate if he does not want to postpone the issuance of process has to dismiss the complaint under Section 203 if he comes to the conclusion that the complaint, the statement of the complainant and the witnesses has not made out sufficient ground for proceeding. Per contra if he is satisfied that there is no need for further inquiry and the complaint, the evidence adduced at that stage has materials to proceed, he can proceed to issue process under Section 204 of the Code."*

Another point raised by the learned counsel for the petitioner is that the petitioner retired from the partnership firm (accused) i.e. M/s Adigear International on 29.02.2012 as per the deed of retirement and accordingly, memorandum by way of Form -C was issued by the Registrar of Firms Delhi on 28.08.2012 and cheques in question are dated 25.08.2014 and 25.09.2014, amounting to Rs.1 lakh each, therefore, the petitioner-accused was neither a partner of the firm nor a signatory to the cheques. Hence, the complaint and the subsequent proceedings arising therefrom are liable to be set aside qua the petitioner.

Per contra, the learned counsel for respondent No.1-complainant has argued that the same was the situation when the complaint had earlier been filed against the petitioner and on 04.04.2014, the compromise had been effected, but no such objection had been raised by the petitioner that he had retired from the partnership firm or Form-C had been issued by the Registrar of Firms, Delhi, rather the same is not an authenticated document.

The learned counsel for respondent No.1 has further argued that in the earlier round of litigation i.e. in earlier complaint where *inter se* compromise had been effected during mediation and while accepting legal liability, no such issue was raised that the petitioner had retired from the firm and the cheques were of 15.05.2013, 30.05.2013 and 10.06.2013 i.e. after his alleged retirement. The learned counsel has also relied upon the judgments of the Hon'ble Supreme Court in the cases of Indian Bank Association and others Versus Union of India and others 2014(2) R.C.R. (Criminal) 598 and CREF Finance Ltd. Vs. Shree Shanthi Homes Pvt. Ltd. and another 2005(4) R.C.R.(Criminal) 26, on the issue that the Magistrate can allow both, the complainant and accused, to give evidence on affidavit for speedy disposal of case and the Magistrate shall scrutinize the complaint accompanied by the affidavit and to take cognizance and it is not necessary for the Magistrate to record the words "cognizance taken".

I have heard the learned counsel for the parties and with their able assistance, have also gone through the record on the file.

Section 200 Cr.P.C. reads as under:

> ***"200. Examination of complainant.*** *A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:*
>
> *Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-*

> *(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or*
>
> *(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:*
>
> *Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re- examine them.*

From the bare reading of Section 200 Cr.P.C., it is mandatory for the Magistrate to examine upon oath the complainant and the witnesses and only exemption has been given for non-examination of the complainant and the witnesses, if the complaint is filed by a public servant acting or purporting to act in the discharge of his official duties or if the Magistrate makes over the case for inquiry.

In the present case, neither the complaint was filed by the public servant nor any inquiry has been initiated by the Magistrate before proceeding with the complaint. The complainant was not examined which shows that the Magistrate had not judiciously applied his mind, meaning thereby, mere examination of the complainant is not enough but taking of judicial notice by the Magistrate is also mandatory before passing the summoning order.

"*Cognizance of offence*" means taking notice of the accusation and applying the judicious mind which can only be done by examination of the complainant because when the complainant is being examined, at that stage the Magistrate is merely gathering the material on the basis of which he is to decide whether or not a prima facie case is made out for taking the cognizance of the offence and the Magistrate cannot be said to have *ipso facto* taken the cognizance.

A three Judge Bench of the Hon'ble Supreme Court in the case of R.R. Chari Vs. State of Uttar Pradesh, 1951 SCR 312, while considering what the phrase 'taking cognizance' means, approved the decision of Calcutta High Court in Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Abani Kumar Banerjee, AIR 1950 Calcutta 437, wherein it was observed that:

> *"...What is "taking cognizance" has not been defined in the Criminal Procedure Code and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a), Criminal P.C., he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter,– proceeding under S. 200, and thereafter sending it for enquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence..."*

The same view was reiterated by the Hon'ble Supreme Court in Jamuna Singh & Ors. vs. Bhadai Sah, (1964) 5 SCR 37 and Nirmaljit Singh

Hoon vs. State of West Bengal & Anr., (1973) 3 SCC 753.

The Hon'ble Supreme Court in S.R.Sukumar Vs. S. Sunaad Raghuram 2015(3) R.C.R.(Criminal) 570, has held that for taking cognizance of an offence on complaint, the Court shall examine the complainant upon oath and must have judiciously applied the mind to the contents of the complaint and indicates that the Magistrate takes judicial notice of an offence.

Since the abovesaid mandatory procedure has not been adopted by the Magistrate in the case in hand, the complaints alongwith all the subsequent proceedings arising therefrom, are liable to be quashed qua the petitioner.

The contention raised by the learned counsel for the petitioner that the petitioner had retired from the partnership of the firm and his retirement was accepted by way of issuance of Form-C by the Registrar of the Firms and moreover, he had not signed the cheques in question, also merits acceptance.

It is settled law and the basic requirement that if an offence under Section 138 of the N.I.Act has been committed, every person who, at the time of the offence so committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence. In the present case, the petitioner retired from the partnership firm (accused) i.e. M/s Adigear International, on 29.02.2012 i.e. prior to the issuance of cheques in question and, therefore, making him stand the trial would be abuse of the process of court as no offence is made out against him. Moreover, the

Director who resigned/retired from the company/firm and his resignation/retirement was duly accepted prior to the issuance of the cheques, cannot be held liable. In this regard, reliance can also be placed upon the judgments rendered by the Hon'ble Supreme Court in the cases of Gunmala Sales Private Ltd. Vs. Anu Mehta and others 2015 (1) R.C.R. (Criminal) 54 and Harshendra Kumar D. Vs. Rebatilata Koley etc. 2011 (1) R.C.R.(Criminal) 887.

As the petitioner was neither a partner of the firm nor had he signed the cheques in question, the complaints filed against him and the subsequent proceedings arising therefrom, are nothing but a sheer abuse of the process of law.

In view of the above, all the petitions are allowed. Criminal complaints No.9335/2014/RBT/5067 of 2016 dated 09.11.2014, titled as 'M/s Shri Shyam Enterprises Vs. M/s Adigear International and others, No.8496/1 dated 15.09.2014/RBT No.5576 of 2016, titled as M/s Shri Shyam Enterprises Vs. M/s Adigear International and others, No.9334/2014/RBT/5572 of 2016 dated 01.11.2014, titled as 'M/s Satya & Company Vs. M/s Adigear International and others' and Mo.1708/1/15/RBT No.CC/5567/2016 dated 15.01.2015, titled as 'M/s Satya & Company Vs. M/s Adigear International and others', and all the subsequent proceedings arising therefrom are quashed qua the petitioner.

**05.03.2020** **(HARNARESH SINGH GILL)**
parveen kumar **JUDGE**

Note: Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No