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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 30.09.2021

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

Crl.OP.Nos.27705 & 27966/2015 & MP.Nos.1, 1, 2 & 2/2015 [4 MPs]

[Video Conferencing]

R.Sumathi

...Petitioner in both Petitions/
Accused in No.3 both petitions

Versus

Sri Balaji Yarns,
Rep. by its Partners,
1)Rahja Manickam,
2)S.Jayakumar
Having its place of business at
No.44 B, Rakkipalayam Road,
Ammapalyam,
Anuparpalyam Post, Avinashi Taluk,
Rep. By its Office In-charge &
Power of Attorney Agent,
S.Mani

...Respondent in both petitions/
Complainant in both petitions

Common Prayer : - Criminal Original Petitions filed under
Section 482 of Cr.P.C., to call for records in C.C.No.29/2017
and CC.No.28/2017 pending on the file of Learned Judicial
Magistrate Court, Avinashi and quash all further proceedings in
the said case as against the petitioner herein.

Prayer amended as per Order of the Court dated 20/09/2021 made
in crl.OP.No.27705 & 27966/2015.

For Petitioner in both
Petitions : Mr.R.Baskar

For Respondent in both
Petitions : Mr.N.Umapathi

COMMON ORDER

(1) Heard Mr.R.Baskar, learned counsel for the petitioner and
Mr.N.Umapathi, learned counsel for the respondent.



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- (2) Since common arguments were advanced with respect to both the petitions, a common order is passed.
- (3) In both the petitions, parties are also the same and they are also agitating more or less on the same issue.
- (4) Two complaints came to be filed by the respondent in both the petitions, under Section 138 of the Negotiable Instruments Act read with 200 Cr.P.C., before the learned Judicial Magistrate No.1, at Tiruppur.
- (5) The complaint given with respect to Crl.OP.No.27705/2015 had originally been taken cognizance as CC.No.306/2015 by the learned Judicial Magistrate, Fast Track Court at Magisterial Level at Tiruppur. I am also informed that it had been subsequently transferred to the learned Judicial Magistrate at Avinashi and registered as CC.No.29/2017.
- (6) The complaint with respect to Crl.OP.No.27966/2015 had originally been taken cognizance as CC.No.304/2015 by the learned Judicial Magistrate, Fast Track Court at Magisterial Level at Tiruppur and subsequently, had been transferred to the Court of Judicial Magistrate, Avinashi, and renumbered as CC.No.28/2017.
- (7) The respondent in both the cases/complainant is Sri Balaji Yarns, represented by its Partners. They had, transactions with A1, viz., SRS Knitting at Tiruppur, which is a Partnership Firm. The partners had been shown as A2 and A3. They are spouses.
- (8) In view of the business transactions, two cheques had been issued towards an existing liability. Both the cheques were dated 08.12.2008. The first cheque bore No.640583 and the second cheque bore No.090309. They were both drawn on the South Indian Bank Limited, Main Branch, Tiruppur. The first cheque was for a sum of Rs.2,62,850/- and the second cheque was for a sum of Rs.3,73,200/-.
- (9) Crl.OP.No.27705/2015 is with respect to cheque amount Rs.2,62,850/- and Crl.OP.No.27966/2015 is with respect to cheque amount Rs.3,73,200/-. Both the cheques when presented for payment, returned dishonoured. In view of that particular fact, after issuing notice and after going through required procedural process, the defacto complainant had given two separate complaints, originally before the learned Judicial Magistrate/Fast Track Court at Magisterial Level, Tiruppur and which Court had taken cognizance of both the complaints as aforesaid, as CC.Nos.306/2015 and 304/2015. On transfer, they are now



pending on the file of the Court of Judicial Magistrate, Avinashi.

- (10) Mr.R.Baskar, learned counsel for the petitioner raised one issue, viz., that the petitioner herein/A3 who is also incidentally a partner of A1/Firm, had not signed the cheques. It is also pointed out that except for the allegation, she was responsible for all transactions and also for the day-to-day activities of A1/Firm, it is specifically pointed out that the only further statement made in the complaints is that the cheques were signed by A2/her husband in her presence.
- (11) The said averments have been interpreted in two different ways by both the learned counsels.
- (12) Mr.R.Baskar, learned counsel for the petitioner insists that the said averments are not sufficient to attract the offence u/s.138 of the Negotiable Instruments Act.
- (13) On the other hand, Mr.N.Umapathi, learned counsel for the respondent insists that the said averments are more than sufficient to array the present petitioner herein as an accused and that she should necessarily have to face the prosecution. It is also alleged by the learned counsel for the respondent that these are issues to be examined during the course of trial and that, on a prima facie reading of the complaints, this Court can never come to any conclusion whether she was directly involved or whether she was not directly involved either with the day-to-day affairs of the Partnership Firm or on the fact that the cheques have been allegedly signed in her presence. It is stated that these are issues for trial and can be proved only during the course of trial.
- (14) The learned counsels also relied on the judgments, viz., [1] 2018 [14] SCC 202 [Ashoke Mal Bafna Vs. Upper India Steel Mfg. & Engg. Co. Ltd.] ; [2] 2020 [3] MWN [Cri] DCC 85 [Mad] [Y.G.Rajendran Vs. Molly Abraham] ; [3] 2020 [3] MWN [Cri.] DCC 4 [Mad] [Vijaya Arun Vs. New Link Overseas Finance Limited] ; and also [4] 2019 [15] SCC 550 [A.R.Radha Krishna Vs. Dasari Deepthi and Others].
- (15) In all the four judgments, the point which had been stressed by the Hon'ble Supreme Court of India is that there should be averments that the Director who is arrayed as an accused, should be shown to be having control over the affairs of the Company and should be in-charge of the day-to-day affairs of the Company. It had been stated that if averments in the complaint do not cross that particular



threshold or test, then the Director can seek to quash the complaint as against him/her.

(16) In the instant case also, it is stated by the learned counsel for the petitioner that the averments are not sufficient whereas, the learned counsel for the respondent insist that the averments are sufficient.

(17) Now, let me examine the provisions under Section 138 of the Negotiable Instruments Act, 1881.

(18) Section 138 of the NI Act, reads thus:-

138. Dishonour of cheque for insufficiency, etc., of funds in the account.—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless— (a) the 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;

(b) the payee or the holder in due course of the cheque, as the case may be, 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 thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.



Explanation.—For the purposes of this section, "debt of other liability" means a legally enforceable debt or other liability.''

(19) There is a further section, viz., Section 141 of the Act, which relates to offences by a Company.

(20) Section 141 reads thus:-

141. Offences by companies.—(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was 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 and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section — (a) "company" means anybody corporate and includes a firm or other association of individuals; and (b) "director", in relation to a firm, means a partner in the firm.''



(21) I am more deeply concerned with Explanations to Section 141 of NI Act, 1881.

(22) There is one specific distinction while examining the position of a Director and examining the position of a Partner of a Partnership Firm.

(23) A Director receives a remuneration for services rendered for and behalf of the Company. It is to be noted that there are various categories of Director. There may be a whole time Director. There may be a Professional Director. There may be a Managing Director and there may be a Director simplicitor. Since the post of the Director consists of such categories, the Hon'ble Supreme Court of India had interfered with the prosecution against Companies and had thought it fit that it would only be appropriate that guidelines are given to Courts to examine whether the named Director in a criminal prosecution had a direct role in the affairs of the Company or rather had a direct control over the affairs of the Company. It should also be examined whether the named Director who seeks shelter from the Court, had a direct role in the transactions with the respondent. These are all aspects which will have to be examined so far as a Director is concerned. These are all points which had been stated in all the aforementioned judgments, which I would gladly follow.

(24) A partner is placed on a slightly different footing. A partner gains when a Partnership Firm gets a profit and a partner loses if the Partnership Firm suffers a loss. The role of a partner oscillates with the role of the Partnership Firm. It is not strictly like a Director. There is a share in the profits and a share in the loss with respect to every transaction of the Partnership Firm. Unless specifically mentioned in the Partnership Deed, every partner either suffers from a loss owing to such transaction or gains from such a transaction. There is also a category of a sleeping partner or a minor inducted for the benefit of the Partnership.

(25) Here is a case where both A2 and A3 are admittedly partners of A1/Firm. They are jointly responsible for both the profits to be earned by A1/Firm and for the losses to be suffered by A1/Firm. On dissolution, a partner is entitled for accounts and to be paid out his/her particular share which had been infused in the Partnership Firm. Accounts will only have to be settled and the Partnership Firm can be reconstituted. There is a rendition of accounts. There are occasions where the Partnership Firm also dissolves.



For eg., when a partner becomes insolvent or when a partner unfortunately dies. These are contingencies which are not attracted vis-a-vis a Director and a Company.

- (26) A Director is appointed and can be removed. A person can be nominated as a Director and even be nominated as a Professional Director. There are also occasions when the Government nominates, in some cases, a person to be appointed as a Director for a Company. Their interest is with respect to the remuneration to be received by them from the Company.
- (27) The interest of a Partner is different. The interest of partners swing according to the manner in which the Partnership Firm functions. If there is a profit, the partner gains. If there is a loss, a partner suffers a loss. At that particular point of time, there cannot be any distinction between the roles of two evenly placed partners.
- (28) In the present case, both A2 and A3 are partners of A1/Firm. When a cheque is issued for a particular transaction on behalf of the Partnership Firm, then both have a co-existing liability with respect to ensuring that the cheque is honoured. If the cheque is dishonoured and the prosecution is launched, then both have a co-existing liability to face such prosecution unless the Partnership Deed specifically excludes a particular partner or includes a partner as a sleeping partner or a minor partner only for the benefit of the Partnership Firm. In all other circumstances, both partners sink together or survive together.
- (29) No specific pleading had been put forth by the present petitioner to point out that she has no direct interest over the Partnership Firm, or that she will not share the profits of the Partnership Firm or that she would not be put to loss if the Partnership Firm suffers a loss. It is to be reliably presumed that both partners have an even interest in the A1/Firm. If that is the case, then both partners are liable to answer any complaint and I would therefore dismiss the present petition.
- (30) With respect to the averments made, the respondent had specifically stated that the petitioner herein is also responsible for the day-to-day activities of the Firm. It had been very specifically stated that the cheques were signed in her presence. Those are facts to be established and trial is the answer.



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- (31) However, I would give more than ample opportunity to the petitioner herein/A2 to put forth all such defences with respect to the specific role played by her in the Partnership Firm which is an issue on fact and cannot be determined by this Court on a reading of the documents presented. If the petitioner herein/A2 is able to establish during the course of trial that she never had any direct role in the transactions of A1/ Partnership Firm or that she would not gain if the Partnership Firm gets a profit or that she would not suffer a loss if the Partnership Firm ends up in loss over any particular transaction, then, evidence adduced in that regard would certainly be properly appreciated by the learned Magistrate.
- (32) All these issues require that the trial process to go on and therefore, I would hold that inciting the parties to adduce evidence would be the proper course to be adopted to examine the points put forth by the petitioners herein, who is A3 in both the Calendar Cases.
- (33) The Criminal Original Petitions are dismissed. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

AP

To

The Judicial Magistrate
Avinashi.

+1cc to Mr.Umapathi, Advocate, S.R.No.51173
+2ccs to Mr.R.Baskar, Advocate, S.R.No.51163

Cr1.OP.Nos.27705 & 27966/2015

AK-II[co]
NSK 13/10/2021