



*Crl.O.P.No.26935 of 2018*

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**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

**RESERVED ON : 15.07.2022**

**PRONOUNCED ON : 28.09.2022**

**CORAM**

**THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN**

**Crl.O.P.No.26935 of 2018**  
**and Crl.M.P.No.15550 of 2018**

G.Ajay Agarwal

.. Petitioner/Accused No.3

Vs.

M/s.Bhagwandas and Co.,  
A Partnership firm,  
Rep. By its General Power Agent,  
Mr.K.Iyyappan,  
Old No.45, New No.46,  
Sembudoss Street,  
Chennai-600 001.

.. Respondent/Complainant

**PRAYER**: This Criminal Original Petition is filed under Section 482 of Cr.P.C., to call for the records in C.C.No.899 of 2018 pending on the file of the IV Fast Track Court (Magistrate Level) at George Town, Chennai and quash the same as against the petitioner/Accused No.3.

For Petitioner : Mr.M.A.Mathew Berchmans

For Respondent : Mr.K.Bijai Sundar



*CrI.O.P.No.26935 of 2018*

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**ORDER**

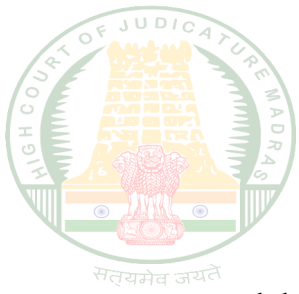
Third accused is the petitioner herein.

2. The petitioner/A3 has filed the Criminal Original Petition under Section 482 of Cr.P.C., to quash the CC No.899 of 2018, on the file of the the IV Fast Track Court [Magistrate level] at George Town, Chennai.

3. Short facts necessary for determining of this petition are as under:

(i) On 28.02.2018 the respondent herein had filed a private complaint under Section 190 of Cr.P.C. against the petitioner herein and 2 accused persons, before the learned IV Fast Track Judge at George town, Chennai, for alleged offence under Section 138 of Negotiable Instruments Act, 1881. Subsequent to the filing of complaint on 10.04.2018, the respondent had filed a proof affidavit.

(ii) Based on the proof affidavit filed by the respondent dated 10.04.2018, the learned IV Fast Track Judge, George Town, Chennai had marked exhibits P1 to P7 and took cognizance over the private complaint filed by the respondent by way of assigning Calendar Case No.899 of 2018



*CrI.O.P.No.26935 of 2018*

WEB COPY

and has issued process to the petitioner and other accused persons under Section 204 of Cr.P.C.

(iii) In the private complaint filed by the respondent herein, it is alleged that

(a) the 1<sup>st</sup> accused is a company wherein the 2<sup>nd</sup> accused is the authorised signatory of the 1<sup>st</sup> accused company and 3<sup>rd</sup> accused/petitioner herein is the Managing Director of the 1<sup>st</sup> accused company.

(b) The respondent/complainant being a partnership firm, in requirement of TMT bars, approached the 1<sup>st</sup> accused company for supply of 60 metres of TMT bars within a period of 3 months. For the purchase of 60 meters of TMT bars, the respondent/complainant had remitted a sum of Rs.25,00,000/- as an advance payment to the bank of 1<sup>st</sup> accused. The 1<sup>st</sup> accused company even after the receipt of the advance payment of Rs.25,00,000/- had failed to supply the 60 Meters of TMT bars



*Crl.O.P.No.26935 of 2018*

WEB COPY

within the period of 3 months to the respondent/complainant.

Hence, the respondent/complainant had insisted the 1<sup>st</sup> accused company to refund the advance amount of Rs.25,00,000/- along with an interest at the rate of 27 percent.

(c) On 19.03.2015, the 1<sup>st</sup> accused company as a part payment alleged to have paid a sum of Rs.10,00,000/- to the respondent-complainant along with a sum of Rs.65,464/- as interest. By the end of 31.12.2017 the amount due which alleged to have been paid to the respondent/complainant stands as Rs.23,64,570/- i.e. a sum of Rs.15,00,000/- as principal amount and Rs.8,64,570/- as interest.

(d) Towards the payment of principal sum, on 29.12.2017, the second accused namely one Ankit Agarwal on behalf of the 1<sup>st</sup> accused company alleged to have issued a cheque for a sum of Rs.15,00,000/- and on 30.12.2017 the respondent/complainant through his bankers namely Karur



*Crl.O.P.No.26935 of 2018*

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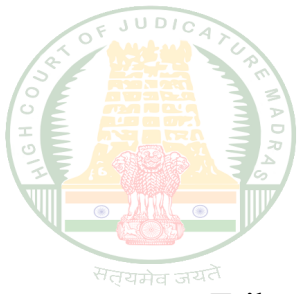
Vysya Bank, Thambu Chetty Street branch alleged to have presented the cheque issued by the 2<sup>nd</sup> accused.

(e) On presentation of the cheque, the same was returned with an endorsement “Account Blocked Situated covered in 2125”. As against the same, the respondent/complainant after the issuance of legal notice had filed the private complaint numbered as C.C.No.899 of 2018.

Seeking to quash the said C.C.No.899 of 2018, the present petition has been filed by the petitioner herein/A3.

4. Heard the learned counsel for the petitioner as well the learned counsel for the respondent.

5. Both counsel admit that the Central Bank of India and State Bank of India as a financial creditors, initiated proceedings against the first accused company namely M/s.Ashok Magnetics Ltd., under Section 7 of the Insolvency and Bankruptcy Code 2016, before the National Company Law



*CrI.O.P.No.26935 of 2018*

WEB COPY

Tribunal, Chennai and on 04.09.2017, the judgment has been delivered by the Company Law tribunal which reads as follows:

“10... We declare the moratorium which shall have effect from the date of this Order till the completion of corporate insolvency resolution process, for the purposes referred to in section 14 of I&B code, 2016.”

6. The contention of the petitioner is that prior to the issuance of the alleged cheque dated 29.12.2017, the management of the 1<sup>st</sup> accused company has been taken over by one Mr.Venkataramanarao Nagarajan, the Interim Resolution Professional (IRP).

7. It is further contended that right from the date of judgment pronounced by the National Company Law Tribunal in CP No.551 (IB)/CB/2017 i.e., from 04.09.2017, all the business operations of the 1<sup>st</sup> accused company including financial and operational payments of the 1<sup>st</sup> accused company as well as the entire day-to-day management of the 1<sup>st</sup> accused company has been carried out by Mr.Venkataramanarao Nagarajan (IRP) and the petitioner herein/A3 is not in-charge of the 1<sup>st</sup> accused



*CrI.O.P.No.26935 of 2018*

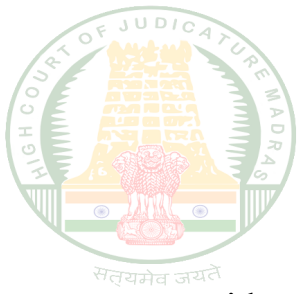
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company operations and also he is no way connected with the 1<sup>st</sup> accused company. Hence the case in C.C.No.899/2018 as against the petitioner herein/A3 is liable to be quashed by this Hon'ble Court.

8. The alleged cheque is dated 29.12.2017. Interim Resolution Professional was appointed by the National Company Law Tribunal, Chennai on 04.09.2017. After exchange of notice, the private complaint under section 138 read with 141 of Negotiable Instruments Act, was filed on 28.02.2018 and cognizance is taken on 10.04.2018.

9. The main contention of the petitioner is that on the date of issuance of the disputed cheque dated 29.12.2017, the petitioner is not the Managing Director of the 1<sup>st</sup> accused company and he has not signed the disputed cheque and also claimed that during moratorium period as contemplated under Section 14 of the Insolvency and Bankruptcy Code, 2016 (in short 'I&B Code'), criminal proceedings cannot be initiated.

10. Considered the submissions made by the learned counsel on



*Crl.O.P.No.26935 of 2018*

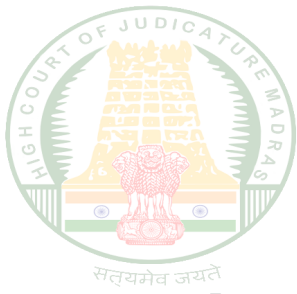
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either side and I had the benefit of going through the order dated 09.01.2020 passed by My learned Brother Mr.Justice G.R.Swaminathan, Crl.OP.(MD) No.34996 of 2019 etc. batch, and perused the decisions cited therein, which are reproduced hereunder.

(i) In *Indorama Synthetics (I) Ltd. Nagpur Vs. State of Maharashtra and others* reported in 2016 (4) Mh.L.J.249, the question that arose was whether the expression “suit or other proceedings” mentioned in Section 446(1) of the Companies Act, 1956 would include criminal proceedings under Section 138 of the Negotiable Instruments Act, 1881. In the said case, it was answered in the negative after observing that the main object of Section 138 of the Negotiable Instruments Act is to safeguard the credibility of commercial transactions and to prevent bouncing of cheques by providing a personal criminal liability against the drawer of the cheque in public interest.

(ii) A learned Judge of this Court (Mr.Justice G.K.Ilanthiraiyan) vide order dated 02.04.2019 in Crl OP No.8869 of 2018 (*M/S.Nag Leathers Pvt Ltd vs J.L.Sobhana*), held that Section 138 of Negotiable





*Crl.O.P.No.26935 of 2018*

WEB COPY

Instruments Act is not a civil proceeding and that even fine imposed by the criminal court cannot be held to be a money claim or recovery against corporate debtor and that it is not covered under the prohibition set out in Section 14 of the Insolvency and Bankruptcy Code, 2016.

(iii) In *State Bank of India Vs. V. Ramakrishnan and Ors.*, [(2018) 17 SCC 394], the question that arose was whether Section 14 of the Insolvency and Bankruptcy Code, 2016 which provides for moratorium for the limited period mentioned in the Code on admission of an insolvency petition, would apply to a personal guarantor of a corporate debtor.

(iv) In *JK Industries Limited vs. Amarlal V.Jumani* (2012) 3 SCC 255, the Hon'ble Supreme Court held that sanction of a scheme under Section 391 of the Companies Act, 1956 will not lead to any automatic compounding of offence under Section 138 of the Negotiable Instruments Act without the consent of the complainant. Neither Section 14 nor Section 31 of the Code can produce such a result. The binding effect contemplated by Section 31 of the Code is in respect of the assets and management of the



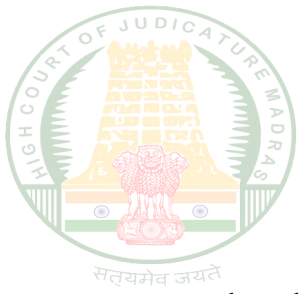
*Crl.O.P.No.26935 of 2018*

WEB COPY

corporate debtor. No clause in the Corporate Insolvency Resolution Plan even if accepted by the adjudicating authority/appellate Tribunal can take away the power and jurisdiction of the criminal court to conduct and dispose of the proceedings before it in accordance with the provisions of the Code of Criminal Procedure.

(v) (a) The Hon'ble Supreme Court in *Aneeta Hada v. Godfather Travels & Tours (P) Ltd.*, (2012) 5 SCC 661, even while overruling the decision in *Anil Hada v. Indian Acrylic Ltd* (2000) 1 SCC 1, as not laying down the correct law in so far as it states that the Director or any other officer can be prosecuted without impleadment of the company, proceeded to hold that the matter would stand on a different footing where there is some legal impediment as the doctrine of *lex non cogit ad impossibilia* gets attracted. It was specifically observed that the decision in *Anil Hada* [cited supra] is overruled with the qualifier as stated in para 51 therein.

(b) Where the proceedings under Section 138 of the Act had



*CrI.O.P.No.26935 of 2018*

WEB COPY

already commenced and during the pendency, the company gets dissolved, the Directors and the other accused cannot escape by citing its dissolution. What is dissolved is only the company, not the personal penal liability of the accused covered under Section 141 of the Negotiable Instruments Act, 1881. They will have to continue to face the prosecution in view of the law laid down in *Aneeta Hada* case [cited supra]. Where the company continues to remain even at the end of the resolution process, the only consequence is that the erstwhile Directors can no longer represent it.

(vi) The Hon'ble Supreme Court in *Innovative Industries Limited vs. ICICI Bank and another* (2018) 1 SCC 407, has held that once an insolvency professional is appointed to manage the company, the erstwhile Directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company. This petition has been filed only by the erstwhile Managing Director. He cannot maintain a prayer for quashing the entire prosecution. At best, he can confine the relief to himself.

11. Further, in *P.Mohanraj Vs. Shah Bros. Ispat (P) Ltd.*,



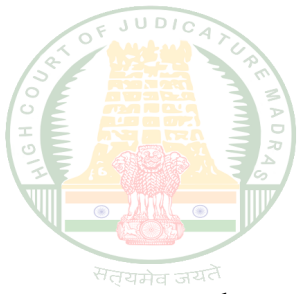
*Crl.O.P.No.26935 of 2018*

WEB COPY

reported in **2021 (6) SCC 258** at paragraph No.102, the Hon'ble Supreme Court has held as follows:

“....Thus, for the period of moratorium, since no Section 138/141 proceeding can continue or be initiated against the corporate debtor because of a statutory bar, such proceedings can be initiated or continued against the persons mentioned in Section 141(1) and (2) of the Negotiable Instruments Act. This being the case, it is clear that the moratorium provision contained in Section 14 of the IBC would apply only to the corporate debtor, the natural persons mentioned in Section 141 continuing to be statutorily liable under Chapter XVII of the Negotiable Instruments Act.”

12. The question as to whether by operation of provision of I&B Code, the criminal prosecution initiated under Section 138 r/w 141 of Negotiable Instruments Act, r/w 200 of Cr.P.C can be terminated, is no longer *res integra* in view of the above stated judgment in *P.Mohanraj's case [cited supra]*, wherein the Hon'ble Supreme Court has categorically held that Section 138/141 proceeding against a corporate debtor is covered by Section 14(1)(a) of I&B Code. Moratorium order would not cover person in those cases who are not a corporate debtor, but a Director thereof. In other words, the moratorium provision not extending to persons other than



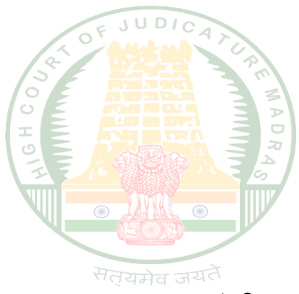
*CrI.O.P.No.26935 of 2018*

WEB COPY

the corporate debtor. In respect of persons other than the corporate debtor, Director or Managing Director, as the case may be, Section 14 of I&B Code did not apply to Section 138 proceedings and further, issued direction that complaint is directed to continue against the Managing Director and Director, respectively and observing that Section 14 of I&B code could not cover proceedings already initiated under Section 138 of NI Act, held that such a proceedings can continue against erstwhile Directors/persons in charge of and responsible for the conduct of the business of the corporate debtor.

13. Therefore, in view of the above, I find that the main plank of the petitioner herein/A3 as to the maintainability of the criminal complaint against him, who is the Managing Director, after the moratorium period, stands negatived.

14. The next contention raised is that petitioner herein was arrayed as the 3<sup>rd</sup> accused in the above CC No.899 of 2018. The Interim Resolution Professional [IRP] was appointed on 04.09.2017 and he has taken charge.



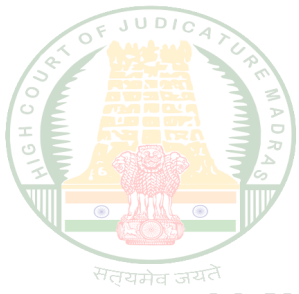
*CrI.O.P.No.26935 of 2018*

WEB COPY

After appointment of IRP, the disputed cheque dated 29.12.2017 was issued by the 2<sup>nd</sup> accused, whereas the petitioner herein was also sued by the respondent in his private complaint as a capacity of the Managing Director. On the date of issuance of the alleged cheque, the petitioner herein was not the Managing Director of the alleged company and also he is no way connected with the affairs of the said company.

15. Complaint against Section 138 of the Negotiable Instruments Act was preferred on 28.02.2018 and cognizance was taken on 10.04.2018. In short, the petitioner contends that at the time of issuance of alleged cheque, at the time of the presentation of the alleged cheque, at the time of presentation of the private complaint, and at the time of cognizance of the said complaint, the petitioner is in no way connected with the company and he has not signed the disputed cheque.

16. The petitioner herein is arrayed as an accused [A3] in the capacity of the Managing Director of the 1<sup>st</sup> accused Company. By virtue of the order passed by the National Company Law Tribunal, one



*CrI.O.P.No.26935 of 2018*

WEB COPY

Mr.Venkatramanarao Nagarajan was appointed as IRP in respect of 1<sup>st</sup> accused Company. As per the decision of the Hon'ble Supreme Court [P.Mohanraj's case], proceedings under Section 138 of the Negotiable Instruments Act, cannot be initiated or continued against the 1<sup>st</sup> accused company alone. As against the A2 and A3, such a proceedings can continue.

17. With regard to the affairs and disputed dates, my attention was drawn to the reply notice issued by the petitioner's counsel that the cheque was given by the accused as a security for the repayment of the amount deposited by the private complainant for the supply of TMT Steel Bars and as the petitioner/accused has not fulfilled the promise, he undertake to repay the amount and paid a part and for the remaining unpaid part, they have issued the cheque. In the reply notice, it is the specific stand on behalf of the accused that the cheque was issued for and on behalf of the Company by the Managing Director and it is only as a security.



*CrI.O.P.No.26935 of 2018*

WEB COPY

18. The private complaint has been filed in C.C.No.899 of 2018 on 28.02.2018. The financial creditors have filed the proof of claim on 26.02.2018. The sworn in statement was filed on 10.04.2018. Cognizance was taken on 10.04.2018.

19. With regard to the dates, after perusing legal notice exchanged between parties before initiation of proceeding, I find that there is a dispute. Disputed facts cannot be gone into by this Court by holding a enquiry or a mini trial at this stage. With regard to maintainability of the complaint, in view of the order passed by the Hon'ble Supreme Court in the above stated decision, the complaint as against this petitioner/A3 and the 2<sup>nd</sup> accused is maintainable and the same can be proceeded. The protection granted vide order of the National Company Law Tribunal under Section 14 of the I&B Code, is not extended to persons involved in the affairs of the company. The protection was only for the corporate debtor. Other disputed facts has to be gone into only at the time of trial. Hence, I find no merits in this case warranting interference by this Court.





*Crl.O.P.No.26935 of 2018*

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20. Accordingly, this Criminal Original Petition is dismissed. It is open to the petitioner/A3 to raise all the factual position / disputed question before the trial Court. Consequently, the connected Criminal Miscellaneous Petition is closed.

**28.09.2022**

Internet : Yes

Index : Yes/No

*ars*

To

The IV Fast Track Court (Magistrate Level),  
George Town, Chennai.



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*Crl.O.P.No.26935 of 2018*

**RMT.TEEKAA RAMAN,J.,**

*ars*

**Pre-delivery order in**  
**Crl.O.P.No.26935 of 2018**

**28.09.2022**