IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.09.2020

CORAM

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

Crl.O.P.Nos.4669 & 5115 of 2020 and
Crl.MP.Nos.2915 & 2661 of 2020

Crl.OP.No.4669 of 2020

M.L.Ganesh ... Petitioner

Vs.

CA V.Venkata Siva Kumar ... Respondent

Prayer: Criminal Original Petition filed under Section 482 Cr.P.C., praying to call for the records and quash the complaint in CC.No.5095 of 2019 on the file of XVII Metropolitan Magistrate Court, Chennai, insofar as the petitioner is concerned.

For Petitioner : Mr.S.Arunkumar

For Respondent : Mr.V.Venkata Sivakumar,
Party in person

Crl.OP.No.5115 of 2020

1.R.Subramania Kumar
2.Madaswamy

3.Kedarnath
4.V.Malarvizhi ... Petitioners

Vs.

CA V.Venkata Siva Kumar ... Respondent

Prayer: Criminal Original Petition filed under Section 482 Cr.P.C., praying to call for the records and quash the criminal complaint in CC.No.5095 of 2019 on the file of XVII Metropolitan Magistrate Court, Chennai.

For Petitioners : Mr.P.B.Benjamin George

For Respondent : Mr.V.Venkata Sivakumar,
Party in person

COMMON ORDER

These criminal original petitions have been filed to quash the proceedings in CC.No.5095 of 2019 on the file of the XVII Metropolitan Magistrate, Saidapet, Chennai, having been taken cognizance for the offences under Sections 500, 192 r/w 34 of IPC.

2. The learned counsel for the petitioners in Crl.OP.No.5115 of 2020 submitted that the petitioners are arrayed as A1, A3 to A5 in the complaint lodged by the respondent for the offences punishable under Sections 500, 192 r/w 34 of IPC. The first petitioner is the former Managing Director and Chief Executive Officer of Indian Overseas Bank, the second petitioner is the former Assistant General Manager of Central Bank of India and the third petitioner is the General Manager, attached to the Central Office of IOB and the fourth petitioner is the Assistant General Manager of IOB attached to Zonal Office, Chennai. He further submitted that the appointment and removal of Resolution Professional(hereinafter called as RP) is provided under the Insolvency and Bankruptcy Code. In Corporate Insolvency Resolution Process(hereinafter called as CIRP), the interest of the creditors and the stakeholders is paramount. Since the Committee of Creditors(hereinafter called as COC) may compromise of several institutions, to manage the CIRP the Code provides appointment of RP. However, he cannot act independently and he has to act upon the guidelines of COC and his actions are subject to the approval of COC. Therefore, COC unanimously

resolved to remove the respondent and appointed another RP. Therefore, the decision taken by the COC which comprises of 5 financial institutions and as such such removal cannot be termed as defamatory.

2.1 He further submitted that COC comprises of the financial creditors and they are exercising the statutory powers conferred under the provisions of Insolvency and Bankruptcy Code(hereinafter called IBC). Therefore the action taken under the IBC would not amount to any offence. The COC have statutory powers under IBC to replace Resolution Professional and they can very well appoint other RP. In fact the respondent challenged the order passed by the COC before this Court by way of writ petition and the same was dismissed and aggrieved by the same, he also filed writ appeal and the said writ appeal was also dismissed. Thereafter approached the National Company Law Appellate Tribunal and the same was also dismissed. The respondent completely suppressed all those details and lodged the present impugned complaint. The learned Magistrate also without even looking into the allegations made in the complaint, mechanically had taken cognizance and issued

summons to the petitioners. The petitioners are being public servants and they vested with statutory duty conferred under the IBC and no sanction of the Government was obtained to prosecute them. Even according to the respondent, the petitioners did not make any statement, thereby detaining the respondent herein. In fact, COC had acted in the interest of the institutions, in which they represented and safeguard the public funds. Therefore, there is absolutely no iota of material to attract the offence under Section 500 of IPC. He also relied upon the judgment in the case of ***K.Virupaksha and others Vs State of Karnataka and others*** reported in (2020) 4 SCC 440.

3. The learned counsel for the petitioner in Crl.OP.No.4669 of 2020 would submit that the petitioner is arrayed as A2. He is practicing advocate with more than 28 years of experience representing various bank and also private financial institutions before this Court and Debt Recovery Tribunal, National Company Law Tribunal and also National Company Law Appellate Tribunal and Supreme Court. On instruction from his client, the petitioner has filed application in

CP.No.563(IB)CB/17 under Section 27 of Insolvency and Bankruptcy Code before the National Company Law Tribunal, Chennai for replacement of the respondent herein and proposed another person to be appointed as Resolution Professional. The said application was filed at the behest of Indian Overseas Bank, Central Bank of India, State Bank of India and IDBI Bank having 87.42% of voting shares in the aforesaid corporate debtor company, such as M/s.Oceanic Edibles International Ltd. The respondent had published an invitation for expression of interest (EOI) for resolution plan of the CD company on 23.01.2018 in two newspapers without getting approval from the COC member banks which is in violation of amended provision under Section 25(2)(h) of IBC.

3.1 He further submitted that the respondent had sent unsigned letter to the Chairman of IOB, CBI and SBI wherein made scathing and derogatory remarks against the top officials who represented the COC meeting. Issuance of notice to then IRP without the knowledge and information of COC member banks and sent letter,

e-mail on 08.02.2018 and 09.02.2018. Without consulting the COC member banks proposed appointment of forensic auditor to look into the undervalued preferential transactions. The respondent has not minutised the serious key issues as raised in the COC meeting by CBI which is against the code of conduct under regulations 7(2)(g) of IBC. Unwanted e-mails sent to top executives of the COC member banks containing baseless, misleading allegations in a threatening manner. Discussion of the COC meetings posted in the whatsapp group created by the respondent. Improperly recording the minutes of meeting held on 09.02.2018 wherein included the agenda not discussed in the COC meeting by the member banks. Sending e-mails on 10.02.2018, 11.02.2018, 12.02.2018, 13.02.2018, 15.02.2018, 16.02.2018 to the top executives of the bank in a very unethical manner. He further submitted that on the application based on the records and arguments of both the sides, the application was allowed and he was removed. In fact during the enquiry, the respondent has sent e-mail to the petitioner threatening him that he will take action before the Bar Council of Tamil Nadu for making statement against him. He also had posted so many messages.

He also threatened the members of COC vide email dated 11.02.2018 that he will file defamation case for damages to the tune of ten crores. The respondent also challenged the order passed by NCLT before the High Court, National Company Law Appellate Tribunal, New Delhi but failed to sustain his vexatious contentions. Without even disclosing those orders filed the impugned complaint alleging that the petitioner along with other accused persons have made defamatory statement against the respondent herein.

3.2 He further submitted that the petitioner is being an advocate he represented on behalf of his client and as such his representation and arguments made in the court cannot be construed or termed as defamatory in nature as alleged by the respondent herein. If it is treated as defamation, no legal professional will render legal assistance to any aggrieved person afraiding of vexatious complaint from the other side. He further submitted that the legal profession always enjoins immunity while arguing the case for his client in the open court which cannot be termed as defamation. In support of his contention, he relied upon the following judgments:

(i) ***Ayeasha Bi Vs.Peerkhan Sahib*** reported in ***1954 AIR Mad 741.***

(ii) Judgment of High Court of Chhattisgarh in Crl.MP.No.1984 of 2018 between ***Arun Takur and State of Chattisgarh and others.***

4. Per contra, the respondent appeared party in person and filed counter and stated that he was appointed as Resolution Professional of one Corporate Debtor M/s.Oceanic Edibles Private Limited undergoing Corporate Insolvency Resolution Process by the National Company Law Tribunal, Chennai Bench. The respondent was being neutral Court officer was entrusted with managing the company as a going concern as per Section 16,17 and 18 of Insolvency and Bankruptcy Code, 2016. During investigation, he found that about 320 crores worth of stocks of prawns were returned of as damaged stock and thrown in the sea. Therefore, he moved a Resolution Professional conducting a domestic audit, which was objected by the COC. Therefore it was taken up before the first accused. The first accused instead of cooperating with the resolution process, was already annoyed with the respondent because of an earlier instance wherein the respondent as the

auditor for SWIFT transaction audit involving a fraud of Rs.300 crores committed by one employee of IOB at Chandigarh Branch in connivance with the staff at Head Office. During the 4th COC meeting represented by accused 3 to 5, abused the respondent in spite of that he was being the Chairman of the meeting and created ruckus resulting in media persons waiting outside the conference room becoming inquisitive. Therefore, the first accused directed COC to file petition before the NCLT, Chennai for removal of the respondent by making defamatory, and false and baseless allegations as against the respondent. It would impact on the profession and reputation among the fraternity. The following defamatory statements were made by the accused persons:

a) Resolution Professional "is not up to the expected standard" (para 21)

b) "He is only keen on entering into the brawl with everyone, thus undermining the judicial process, if he is allowed to continue the interest of COC will be jeopardized"(para 21)

c) COC had already lost precious 50 days from the date of his appointment, no effective business has been conducted to evolve the resolution process in a

forward moving directions (para 22)

d) Resolution professional has misrepresented to media violating the code of conduct (para 23)

e) seeking amendments in IBC is beyond the Rps scope(para 18)

f) resolution professional again sent mails to the top executives wherein he had made statements to the top executives in a very unethical manner and uncalled for (para 19)

4.1 He further submitted that the second accused is a counsel on record and during the first hearing, filed counter and started abusing respondent making serious unfounded baseless allegations. When the respondent pointing out such serious baseless allegations are harming his reputation and advised the second respondent to avoid such abusive attacks. Therefore it would attract the offence under Section 499 of IPC and as such the learned Magistrate rightly taken cognizance for the offence under Section 499 of IPC as against the accused persons. In this regard, the respondent relied upon the following judgments:

(i) ***Prem Kumar Vs. Nehar Singh*** reported in

1991 (1) SLJ 668.

(ii) ***And Krishnan Lal Verma Vs. State of Haryana***

reported in ***AIR 1976 SC 1947***

(iii) ***Bhupen Dutta Bhowmik Vs. State of Tripura***

reported in ***1993 Crimes 846 at p.848***

(iv) ***Dr.Radhanath Rath Vs. Balakrishna Swain***

reported in ***1985 Cr.L.J. 735 at p.740, 741(Orissa).***

4.2 He further submitted that the points raised by the petitioners are mixed question of facts and as such it cannot be considered before this Court under Section 482 of Cr.P.C. It has to be considered only during the trial before the trial court by let in evidence. Therefore, he sought for dismissal of the quash petitions.

5. Heard, Mr.S.Arunkumar, learned counsel for the petitioner in Crl.OP.No.4669 of 2020, Mr.P.B.Benjamin George, learned counsel for the petitioners in Crl.OP.No.5115 of 2020, and the respondent, Mr.Venkata Siva Kumar appeared party-in-person.

6. There are totally five accused, in which the petitioners are arrayed as A1 to A5. The second accused is an advocate appeared on behalf of other accused persons. A1, A3, A4 and A5 are members of the Committee of Creditors. Initially, the respondent herein was appointed as Insolvency Resolution Professional of M/s.Oceanic Edibles International Ltd. which is undergoing Corporate Insolvency Resolution Process by the National Company Law Tribunal, Chennai Bench. Due to various allegations as against the respondent, accused 1, 3, 4 and 5 instructed the second accused to file an application to remove the respondent and seeking appointment of another Resolution Professional in CP No.563(IB)CB/2017 under Section 27 of Insolvency and Bankruptcy Code, 2016 before the National Company Law Tribunal, Chennai. The said application was allowed and the respondent herein was removed and another person was appointed as Resolution Professional. According to the respondent, the following statements made by the petitioners are defamatory nature and thereby defamed the respondent's reputation.

a) Resolution Professional "is not up to the expected standard" (para 21)

b) "He is only keen on entering into the brawl with everyone, thus undermining the judicial process, if he is allowed to continue the interest of COC will be jeopardized"(para 21)

c) COC had already lost precious 50 days from the date of his appointment, no effective business has been conducted to evolve the resolution process in a forward moving directions (para 22)

d) Resolution professional has misrepresented to media violating the code of conduct (para 23)

e) seeking amendments in IBC is beyond the Rps scope(para 18)

f) resolution professional again sent mails to the top executives wherein he had made statements to the top executives in a very unethical manner and uncalled for (para 19)

7. The order passed by the National Company Law Tribunal, Chennai Bench was challenged by the respondent before this Court by way of writ petition. The writ petition at the stage of SR in

WP.SR23210 of 2018 was dismissed as not maintainable before this Court. Aggrieved by the same, the respondent also filed writ appeal in WA.No.1232 of 2018 and the same was also dismissed by granting liberty to the respondent to avail alternative remedy provided under the Insolvency and Bankruptcy Code. The respondent later challenged the order passed by the National Company Law Tribunal before the National Company Law Appellate Tribunal in Appeal (AT)No.668 of 2018. It was also dismissed as withdrawn. As rightly pointed out by the learned counsel for the petitioners, the petitioners are members of COC, and they have vested with statutory powers under the IBC to replace the Resolution Professional in the manner provided under IBC. Accordingly, they instructed their counsel, namely the second accused to file an application before the NCLT. Therefore, it would not attract offence under Section 499 of IPC. It is relevant to extract provision under Section 499 of IPC hereunder:

> 499. Defamation.—Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any

> imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person.

8. On perusal of the statement made by the petitioners in the application are not at all attracted any offence under Section 499 of IPC. Insofar as A2 is concerned, he is being an advocate for other accused persons, filed an application on instruction of COC before National Company Law Tribunal to remove the respondent. In this regard, the learned counsel for the petitioner in Crl.OP.No.4669 of 2020 relied upon the judgment in the case of ***Ayeasha Bi Vs.Peerkhan Sahib*** reported in ***1954 AIR Mad 741,*** wherein this court has held as follows:

> 31. In regard to the decision of Meredith J. in AIR 1948 Pat 56 (Z33) It would be wholly improper for me to canvass the correctness of this single Judge's decision of another High Court which is not binding upon me except to the extent that it refers to the decision of Burn J. in 1935 Mad WN Cr 76 (A). The learned Judge writes :

"I have been referred to the notes in Ratanlal's Penal Code for a Madras case, 1935 Mad WN Cr 76 (A) which, according to the learned commentator, laid down that where the accused was charged with defamation because his vakil put a defamatory question to the complainant and the vakil gave evidence that he did so on the instruction of his client, the accused, the instructions of the accused to his vakil were inadmissible under Section 126, Evidence Act and the accused was not guilty of defamation committed as it were by proxy through the mouth of his vakil. Unfortunately, the decision is not obtainable In the library here. but the reasoning quoted, seems to me sound."

It Is quite possible that if Meredith J. had perused the entire report he might have come to a different conclusion. In any event, his conclusion that no one could ever be prosecuted for defamation in regard to any instructions which he might have given to his lawyer, because it is the lawyer's business to decide whether he could properly act upon the instructions, and whatever responsibility might ensue from acting upon those instructions would be his and no one else's, is opposed to the entire trend of decisions defining the scope and

> extent of the privilege conferred upon the lawyer and secondly, it will make a lawyer's position in India hopelessly impossible if he were to be held vicariously responsible for all the instructions given by his client and in fact it would be a case not of the lawyer representing his client but of a lawyer doubling or substituting for his client-accused. This would cut at the root of the 'impersonality' of advocacy which is the basis of our criminal administration of Justice. A lawyer is an advocate -- one who speaks for another. Naturally beyond what his client tells him the lawyer has no opportunity to test the truth or falsity of the story put forward by the client. It would therefore be unrighteous to make the lawyer the whipping-boy for his client.

It is held that a lawyer is an advocate, one who speaks for another. Naturally beyond what his client tells him the lawyer has no opportunity to test the truth or falsity of the story put forward by the client. Therefore no lawyer could ever be prosecuted for defamation in regard to any instructions which he might have given to his lawyer, because it is the lawyer's business to decide whether he could properly act upon the

instructions, and whatever responsibility might ensue from acting upon those instruction would be his, and no one else's, is opposed to the entire trend of decisions defining the scope and extent of the privilege conferred upon the lawyer.

9. It is also held in Crl.Misc.Petition No.1984 of 2018 in the case of ***Arun Thakur Vs. State of Chhattisgarh and others*** as follows:

> 17. The Allahabad High Court in the matter of B Sumat Prasad Jain v. Sheo Dutt Sharma and another MANU/UP/0046/1945 : AIR 1946 Allahabad 213 with regard to the privilege of an advocate acting professionally in a cause observed as under:-
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> > "So long as the interests of litigants in this country are entrusted to recognized and qualified professional men and so long as the Courts repose their confidence in the Bars which practise before them, I respectfully agree with Sir Henry Richards in thinking that it would be a disaster to the litigating public, both if the liberty of speech or action of their

advocates were circumscribed by exposure to civil suits for words spoken or written in the course of the administration of cause entrusted to them, and if the Courts were by law compelled to withdraw their confidence from them. Such exposure would, I think, be calculated to limit their freedom and independence in their clients' interests to a greater extent than would be the case in England, if no absolute privilege existed there, since the risk of vexatious and often ruinous litigation in India is far greater. Nor do I perceive for what good reasons, so long as the same principles of the practice and administration of justice are maintained, or aimed at, in this country as in England the necessity for the maintenance of the absolute privilege of the Bar should be less. Indeed, there is the greater need for it in a country in which the advocate is exposed to larger risks of spiteful litigation. If it be said that conversely, the risk of the abuse of an absolute privilege is also greater, I should still maintain that it were

> better in the public interest that the immunity of the advocate should be sufficiently large to enable him to perform his duty fearlessly than that some relatively few cases of abuse should be made the subject of a just civil liability. If abuse occurs, as sometimes from inexperience and sometimes from less excusable causes is bound to happen, the remedy lies, I think, not in an alteration of the law relating to the privilege but in fostering high standards of practice, in the censure of the public and in the continuous vigilance of the Courts themselves."

18. Likewise, in the matter of K. Daniel v. T. Hymavathy Amma MANU/KE/0048/1985 : AIR 1985 Kerala 233 it was observed by the Kerala High Court that the English Courts have reiterated the view during last four hundred years that the statements made by Judges, Juries, counsel, parties and witnesses in the course of judicial proceedings are not actionable in civil law for defamation as the occasion is absolutely privileged. It was further held that the English Common Law relating to absolute privilege enjoyed by Judges, advocates, attorneys, witnesses and parties in regard to words spoken or uttered

during the course of a judicial proceeding is applicable in relation to a civil suit filed for damages for defamation. The reasons for granting absolute privilege to the statements made in the course of judicial proceedings are laid down in paragraph 11 of the judgment which are as follows:-

> "11. It is imperative that Judges, counsel, parties and witnesses participating in a judicial proceeding must be able to conduct themselves without any apprehension of being called upon to answer a claim for damages for defamation. They must be able to act uninfluenced by any such fear. Freedom of speech on such occasions has to be totally safeguarded. Hence it is necessary to protect the maker of statements on such occasions. The privilege arises on account of privilege attached to the occasion and not to the individual. It is possible that sometimes counsel or the parties or witnesses may take advantage of the occasion and indulge in false or malicious statement which has the effect of bringing down the reputation of some other person; that would certainly be mischievous. But to say that statement would be privileged

> only in the absence of malice would put these persons in considerable strain and apprehension on such occasions. Basis of privilege is not absence of malice or the truth of statement or the intention of the maker but public policy. Any restriction on privilege during the occasion would create constraints in the process of administration of justice."

19. Likewise, in the matter of Chunni Lal v. Narsingh Das MANU/UP/0325/1917 : AIR 1918 Allahabad 69, the Full Bench of the Allahabad High Court has held that defamatory words used in connection with the judicial proceedings are not actionable on the ground of absolute privilege and as such the suit for damages for defamation instituted by the plaintiff was dismissed.

20. Recently, in the matter of, Pradip Kumar Mitra v. Lipi Basu and others MANU/WB/0153/2017, the Calcutta High Court relying upon the decision of the Full Bench of the Allahabad High Court in Chunni Lal (supra) and that of the Kerala High Court in K. Daniel (supra) while following the view has held that the privilege extended to the Judges, Juries, counsel, parties and

witnesses are based on the principle of public policy.

21. Likewise, in the matter of Bennett Coleman & Co. Ltd. and others v. K. Sarat Chandra and others MANU/AP/1026/2015, the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh held that the privilege of Judges, Counsel, Jury, Witnesses or Parties to be the absolute privilege and observed as under:-

> "Absolute privilege-a statement is said to have absolute privilege when no action lies whether against Judges, Counsel, Jury, Witnesses or Parties, for words spoken in the ordinary course of any proceedings before any Court or Tribunal recognized by law. It is manifest that the administration of justice would be paralyzed if those who were engaged in it were liable to actions of libel or slander upon the imputation that they had acted maliciously and not bona fide. The privilege extends not only to words spoken but also to documents properly used and regularly prepared for in the proceedings."

22. The Calcutta High Court in the matter of P.C. Gupta v. The State MANU/WB/0392/1970 : (1970) ILR 2 Cal 254 has held that the doctrine of absolute privilege is not applicable to criminal proceeding. It was held as under:-

> "It is abundantly clear, therefore, that even in the said Single Bench decision of the Bombay High Court, the doctrine of absolute privilege enjoyed by a lawyer in regard to words spoken or uttered during the course- of a judicial proceeding was applied only to civil suits filed for damages for libel or slander and it was noted that there was originally a divergence of opinion and ultimately the preponderance of the decisions of the different High Courts is that the said doctrine of absolute privilege should not be applied to a criminal proceeding where the party prosecuted should be required to bring his case within exception 9 to Section 499 of the Indian Penal Code."

23. The Calcutta High Court further relied upon the observation by the Master of the Rolls in the case of Munster v. Lamb (1882) SUR. 11 Q.B.O. 588 which is as

under:-

> "If any one needs to be free of all fear in the performance of his arduous duty, an advocate is that person and, therefore, unless and until there is a proof of 'express malice' on the part of the lawyer, in the discharge of his professional duties, he does not come within the bounds of the offence of defamation. In ancient Rome a class of persons called the jurisprudence came into existence though they were not professional lawyers in their true sense. Notion of law does not include of necessity the extent of a distinct profession of lawyers whether as Judges or as Advocates, but 'there cannot well be a science of law without such profession'. The lawyers are the high priests in pursuit of truth at the altar of justice and there should be no spoke in the wheels of justice by fettering unreasonably the freedom of such lawyers. Fiat justitia mat caelum: Let justice be done, though heavens may fall."

24. In light of above-stated legal analysis, an

> advocate, who acted professionally as per instructions of his/her client, cannot be made criminally liable for the offence of defamation under Section 500 of the IPC unless contrary is alleged and established.

The Hon'ble Supreme Court of India and also various High Courts repeatedly held that an advocate who acted professionally as per the instruction of his or her client cannot be made criminally liable for offence of defamation under Section 500 unless contrary is alleged and established.

10. In the case on hand, allegations made in the application filed on behalf of the members of COC filed by the second respondent are not defamatory in nature. In fact, on the application the respondent was removed and the same was also challenged upto National Company Appellate Tribunal, Delhi and confirmed.

11. In view of the discussion, the impugned complaint is clear abuse of process of court and as such it cannot be sustained as against the petitioners. Accordingly, these criminal original petitions are allowed, and the entire proceedings in CC.No.5095 of 2019 on the file of

XVII Metropolitan Magistrate Court, Chennai is quashed. Consequently, connected miscellaneous petitions are closed.

30.09.2020

Index: Yes/No
Internet: Yes/No
Speaking/Non-Speaking order

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To

The XVII Metropolitan Magistrate Court,
Chennai

G.K.ILANTHIRAIYAN, J

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30.09.2020