

HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Misc. Application No. 1733 of 2023

Himanshu Sinha

.....Applicant.

Versus

Bhuwan Chandra Joshi

.... Respondent

Present :

Mr. Sumit Bajaj, Advocate, for the applicant.

JUDGMENT

Hon'ble Sharad Kumar Sharma, J.

This case in itself is the best example of an abuse of process of law, where a professional applicant an ex member of Bar Council, has preferred this C-482 Application, thereby challenging the summoning order dated 13th July, 2015, for the first time by filing C-482 Application on 24th August, 2023, i.e., almost after eight years, as it was issued against him, in Complaint Case No. 2501 of 2015, Bhuwan Chandra Joshi Vs. Himanshu Sinha, by the Court of 2nd Addl. Civil Judge / Judicial Magistrate, Haldwani, District Nainital, being the proceedings drawn under Section 138 of the N.I. Act.

2. The argument extended by the learned counsel for the applicant is, that the summoning order happens to be in violation to the provisions contained under Section 142 (a) of the Negotiable Instruments Act, for the reasons being, that in accordance with para 1 of the complaint, he contends that since the complainant is an agent of an institution named as J.B. Brothers, of which, Mr. Jeevan Chandra Joshi, was one

of the proprietors, who was admittedly the complainant's younger brother.

3. The learned counsel for the applicant has submitted, that in the light of the judgment of the three-Judges Bench of the Hon'ble Apex Court as reported in **(2014) 11 SCC 790, A.C. Narayanan Vs. State of Maharashtra and another**, a question was formulated therein, was as to whether an agent can institute a complaint on behalf of the principle under Section 138 of the Act, i.e., on behalf of a Firm. The said question finds reference in para 21 of the said judgment, which reads as under :-

“21. In terms of the reference order, the following questions have to be decided by this Bench:

21.1. Whether a Power of Attorney holder can sign and file a complaint petition on behalf of the complainant?/Whether the eligibility criteria prescribed by Section 142(a) of NI Act would stand satisfied if the complaint petition itself is filed in the name of the payee or the holder in due course of the cheque ?

21.2. Whether a Power of Attorney holder can be verified on oath under Section 200 of the Code ?

21.3. Whether specific averments as to the knowledge of the Power of Attorney holder in the impugned transaction must be explicitly asserted in the complaint ?

21.4. If the Power of Attorney holder fails to assert explicitly his knowledge in the complaint then can the Power of Attorney holder verify the complaint on oath on such presumption of knowledge ?

21.5. Whether the proceedings contemplated under Section 200 of the Code can be dispensed with in the light of Section 145 of the N.I. Act which was introduced by an amendment in the year 2002 ?”

4. In fact, in nutshell, if para 21.1 is taken into consideration, it was dealing with Section 142 (a), raising a question to the effect, that as to, whether, the attorney holder can sign! and file a complaint petition! on behalf of the principle complainant and whether the eligibility criterion prescribed under Section 142 (a) would stand satisfied. The said answer has been given by the Hon'ble Apex Court in para 28 of the said judgment, which is extracted hereunder :-

“28. The power-of-attorney holder is the agent of the grantor. When the grantor authorizes the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates such legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder and not by the attorney holder in his personal capacity. Therefore, where the payee is a proprietary concern, the complaint can be filed by the proprietor of the proprietary concern, describing himself as the sole proprietor of the payee, the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor, and the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor. However, we make it clear that the power of attorney holder cannot file a complaint in his own name as if he was the complainant. In other words, he can initiate criminal proceedings on behalf of the principal.”

5. It has been observed in its para 22, that the power of attorney holder is an agent of the grantor, and when the grantor has been authorized to initiate legal proceedings, when the attorney holder accordingly initiates such legal proceedings. He does so, as an agent on behalf of the grantor, and the initiation of proceedings would be treated to be by

the grantor represented by his attorney holder and not by the attorney holder in his personal capacity. Therefore, the Hon'ble Apex Court in para 28 has observed, that where the payee and a proprietary concern, in his personal capacity, the complaint can be filed by the proprietor or the proprietorship concerned describing himself as to be the sole proprietor of the payee, represented by its sole proprietor or the co-proprietor or proprietorship concern, who was in the instant case represented by the attorney holder under a power of attorney which was executed by the sole proprietor, he cannot file a complaint in his own name, as if he was the complainant.

6. Further, answer to it has been given in para 31, by the Hon'ble Apex Court wherein, it has been observed, that the attorney holder cannot file complaint in his own name, as if was he was the complainant but he can initiate the criminal proceedings on behalf of the principal. Para 31 is extracted hereunder :-

“31. In view of the discussion, we are of the opinion that the attorney holder cannot file a complaint in his own name as if he was the complainant, but he can initiate criminal proceedings on behalf of his principal. We also reiterate that where the payee is a proprietary concern, the complaint can be filed:

(i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the "payee";

(ii) the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor; and

(iii) the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor.”

7. The argument extended by the learned counsel for the applicant has to be scrutinized and applied under the light of the facts of the instant case, which was the subject matter of consideration before the Hon'ble Apex Court, which was dealt with in para 4 of the said judgment, where in the said case, **'the issue was against the rejection of discharge'**, wherein, the Addl. Chief Metropolitan Magistrate, IXth Court, Bandra, Mumbai, dismissed the application filed by the appellant, therein, before the Hon'ble Apex Court. It was dismissed by the said Court, as it has been therein preferred by the applicant in Criminal Application Nos. 797, 798, 799, 801, 802 and 803 of 2002, for quashing of the complaint. But by the impugned order, which was under challenge therein, it was an application of discharge, which was rejected on 12th August, 2005, in the said case.

8. The facts of the said case before the Hon'ble Apex Court, was based upon altogether a different context, and set of facts wherein, it was a registered company called as Harvest Financial Limited, having its registered Office at Bombay. The appellant in the capacity of being a Vice Chairman and the Managing Director of the Company, who has collected various amounts, were made subject matter of the complaint proceedings.

9. The facts of the instant case happens to be absolutely divergent to the facts, which were at hand before the Hon'ble Apex Court, because here, the status of the so called firm M/s J.B. Brothers, which is altogether a distinct cohesive entity, it has been mentioned, that it was a

proprietorship firm, which was having two proprietors, Mr. Jeevan Chandra Joshi, who was the younger brother of the complainant.

10. The registration of the complaint by younger brother of the proprietorship firm, and the power to institute a complaint was not on the basis of any right being conferred upon the complainant, he was simply an attorney holder to institute the complaint under Section 138 of the N.I. Act.

11. Apart from the fact, that the judgment of the Hon'ble Apex Court being distinct to the instant case, the Full Bench of Allahabad High Court in the matter of **Syed Wasif Hussain Rizvi Vs. Hasan Raza Khan and others**, as reported in **2016 SCC OnLine All. 175**, has observed in para 15 that the provisions of order 3 Rule 1 of the CPC, that an appearance application or an act before any Court which is required to be made or done, the party in the Court can be effectively made or done by the party in person or by recognized agent. The underlining principles though in a civil case almost happens to be same.

12. The recognized agent for the purposes includes the person, who holds the power of attorney, which in its specific application, will hold an authority to institute the complaint and initiation of the said complaint will not be barred under law.

13. So far as the present case is concerned, it cannot be ruled out that the present applicant is a legal professional.

Institution of the complaint proceedings was as back as on 3rd July, 2015, in relation to the instrument as it was executed on 9th May, 2015, was very well in the knowledge of the present applicant because, from as per the ordersheet, summons were issued, and it has been vaguely asserted in the C-482 Application, particularly in para 7, that the summons were not received by the present applicant.

14. It has been submitted that the knowledge of the summons could not be served upon the applicant because, he has shifted to Kusum Khera, Haldwani, District Nainital, and he could get the knowledge of the same, only when legal notices were issued and bailable warrants were issued against him and then only, he could gather the knowledge of the proceedings only at the stage when the proceedings under Section 82 was drawn.

15. But then, this Court cannot be oblivious of the fact, that the consequential action of the issuance of the non bailable warrants and resorting to the proceedings under Section 82 has been because of non responding of the summons issued as back as on 13.07.2015, by an order dated 13th July, 2015, which has now been put to challenge in the instant C-482 Application.

16. Entertaining of the C-482 Application at this belated stage after eight years of issuance of the summoning order in itself will be an abuse of process. The applicant is required to surrender and take all his defence, which are available to him before the Court of Chief Judicial

Magistrate, Haldwani, in accordance with law because, considering the aspect about the sustainability of the complaint at the behest of the attorney holder as argued from the perspective of para 1 of the complaint, would still be an issue open to be argued before the Trial Court because, it would be entailing a consideration of the fact and evidence both, as to what is the nature of firm, its legal status and what is the inter se relationship between the proprietors of the firm and the complainant, who has filed the proceedings under Section 138 of the N.I. Act, which requires a determination of the fact.

17. Hence, since there being belated challenge to the summoning order after eight years, this Court is not inclined to interfere in the C-482 Application. The same is accordingly dismissed.

(Sharad Kumar Sharma, J.)

29.08.2023

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