HON'BLE SRI JUSTICE M.S.K.JAISWAL

Criminal Revision Case No.1131 of 2013

ORDER:-

The revision petition is filed questioning the correctness of the order of the learned IV-Special Magistrate, Kukatpally, Miyapur in Crl.M.P.No.375 of 2013 in C.C.No.128 of 2012 (Old No.93/2012) filed under Section 319(1) Cr.P.C., by the petitioner/complainant to implead M/s.Moon Light Constructions represented by its Managing Partner – B.T.V.Srinivas Rao as 2nd respondent. By order, dated 22-05-2013, the learned Magistrate has dismissed the petition holding that the same is not maintainable.

2. Aggrieved by the said dismissal, the complainant preferred the present revision.

3. Learned Counsel appearing for the petitioner/complainant contends that during the course of trial, the petitioner/complainant came to know about the role of the proposed respondent and since this fact surfaced only during the course of trial, the petition under Section 319 Cr.P.C. is maintainable and legally valid. It is submitted that all through the transaction and the proceedings, the petitioner/complainant was under impression that it is only respondent No.1 who was dealing with the petitioner and was not aware about the 2nd respondent or its role in the subject transaction. It is further submitted that the learned Magistrate has erred in holding that since the mandatory provisions under Section 141 of the Negotiable Instrument Act (for short 'the Act') have not been complied with, the petition is not maintainable and erroneously dismissed the same thereby committing a grievous error. Hence, the revision.

4. The 2nd respondent – proposed party has filed a counter denying the contentions of the petitioner. It is submitted that by a reasoned order, the learned Magistrate has dismissed the Crl.M.P. and there is absolutely no grounds to interfere with the same. The case of the petitioner/complainant had been that it is the petitioner, who issued the cheque in question, in his personal capacity which ultimately bounced

and therefore it is not open to the petitioner to seek impleading the 2nd respondent. It is contended that insofar as the 2nd respondent is concerned, the statutory requirements of the Act with regard to the existence of subsisting liability, the cheque having been drawn by the accused in favour of the complainant, issuance of notice to the accused to pay the cheque amount within the prescribed period etc., have not been complied with. Without compliance of the said requirements, at the fag end of the trial, the proposed respondent cannot be impleaded. Therefore, the dismissal of the petition is proper and do not warrant any interference.

5. Arguments of both sides heard.

6. The point that arises for consideration is as to whether order in Crl.M.P.No.375 of 2013 passed by the learned IV-Special Magistrate, Kukatpally at Miyapur suffers from any material illegality or irregularity warranting interference by the revisional Court?

7. **Point**:- The revision petitioner is the complainant in C.C.No.128 of 2012 which was originally numbered as C.C.No.93 of 2012. It was filed against the sole respondent by name B.T.V.Srinivas Rao, S/o.Venkataratnam. His contention is that the petitioner was owner of two Ashok Leyland lorries/10 tyre tippers. In the month of April, 2010, the respondent/accused approached the complainant with a request to hire/let out the two lorries for utilizing the same for the purpose of road laying works since the accused acquired a contract from GMR Group at the relevant point of time. It was agreed that the lorries will be hired at the rate of Rs.4,000/- each per day, which amount should be payable by the accused. It is alleged that for about a year, the accused had been making the deficit payments and therefore ultimately by May, 2011, the accused fell in arrears in an amount of Rs.13,00,000/- and on repeated demands, the accused issued the cheque bearing No.578648 drawn on ICICI Bank Ltd., Punjagutta Branch, Hyderabad, in discharge of the said arrears of hire charges. It is further alleged that on the said date, the respondent/accused also executed a promissory note. Subsequently, when the cheque was presented, the same was dishonoured for want of

sufficient funds and the notice as contemplated under Section 138(2) Cr.P.C. of the Act was issued, which the accused received on 12-12-2011 but neither made the payment nor gave any reply. Hence the complaint.

8. After taking cognizance, the respondent/accused made his appearance and when examined under Section 251 Cr.P.C., he denied the accusations. Trial commenced and the complainant examined himself as PW.1 and produced Exs.P.1 to P.8. He was elaborately cross-examined, which concluded by 09-01-2013. Thereafter, on behalf of the complainant, one Mangaiah, S/o.Buchaiah was examined as PW.2 and his evidence was concluded by 08-02-2013. The respondent/accused was examined under Section 313 Cr.P.C., where he denied the evidence on record and specifically contended that at the time of contract itself, he issued blank cheques and executed a promissory note by way of security. He further contended that the lease amount of the tippers/lorries was paid as and when due and that he is not due any amount to the complainant. Thereafter, the respondent/accused himself examined as DW.1 and his evidence concluded on 08-05-2013.

9. In the course of the evidence, it is spoken to by the respondent/accused that he is working as Civil Contractor under partnership firm under the name and style of Moon Light Constructions and that there are two partners in the firm and that in July, 2011, the firm received the contract work from GMR Company. He also produced Ex.D.2 which is the certificate issued by the Registrar of Firms. Therefore, the complainant preferred Crl.M.P.No.375 of 2013 under Section 319 Cr.P.C. for impleading the said partnership firm as the respondent/accused.

10. In **SAROJBEN ASHWINKUMAR SHAH AND OTHERS v. STATE OF GUJARAT AND ANOTHER** [1] the Supreme Court has culled out from the material provisions of Section 319 of the Code and the decided cases of the Supreme Court and laid down the following legal position:-

(i) The Court can exercise the power conferred on it under Section 319 of the Code *suo motu* or on an application by someone.

(ii) The power conferred under Section 319 (1) applies to all Courts including the Sessions Court.

(iii) The phrase "any person not being the accused" occurring in Section 319 does not exclude from its operation an accused who has been released by the police under Section 169 of the Code and has been shown in Column 2 of the charge sheet. In other words, the said expression covers any person who is not being tried already by the Court and would include person or persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the Court.

(iv) The power to proceed against any person, not being the accused before the Court, must be exercised only where there appears during inquiry or trial sufficient evidence indicating his involvement in the offence as an accused and not otherwise. The word "evidence" in Section 319 contemplates the evidence of witnesses given in Court in the inquiry or trial. The Court cannot add persons as accused on the basis of materials available in the charge sheet or the case diary but must be based on the evidence adduced before it. In other words, the Court must be satisfied that a case for addition of persons as accused, not being the accused before it, has been made out on the additional evidence let in before it.

(v) The power conferred upon the Court is although discretionary but is not to be exercised in a routine manner. In a sense, it is an extraordinary power which should be used very sparingly and only if evidence has come on record which sufficiently establishes that the other person has committed an offence. A mere doubt about involvement of the other person on the basis of the evidence let in before the Court is not enough. The Court must also be satisfied that circumstances justify and warrant that the other person be tried with the already arraigned accused.

(vi) The Court while exercising its power under Section 319 of the Code must keep in view full conspectus of the case including the stage at which the trial has proceeded already and the quantum of evidence collected till then.

(vii) Regard must also be had by the Court to the constraints imposed in Section 319 (4) that proceedings in respect of newly added persons shall be commenced afresh from the beginning of the trial.

(viii) The Court must, therefore, appropriately consider the above aspects and then exercise its judicial discretion.

11. Clause (iv) of the above decision of the Supreme Court is clearly

attracted to the case in hand. In the case in hand, the respondent/accused do not deny that there was a fiduciary relationship in between him and the complainant. Taking the lorries on hire, rate of charges be payable etc., are not denied. As a matter of fact, even in Section 313 Cr.P.C., examination, the respondent/accused admits the said transaction but asserts that he has made the payments as and when due to the complainant and that nothing is payable. It is also on record that the 1st respondent/accused has filed I.P.No.14 of 2012 (Ex.P.12) on the file of the Senior Civil Judge at Vijayawada under the provisions of Provincial Insolvency Act. The 1st respondent in the said I.P. is the complainant herein. In the said petition he admits that he is liable to pay a sum of Rs.2,00,000/- to the complainant herein. He also admits that he is liable to pay certain amounts to three other persons. This petition is filed by the 1st respondent/accused on 15-02-2012. The complaint in hand came to be filed on 19-01-2012 after issuing the statutory notice (Ex.P.5) on 08-12-2011 which was received by the 1st respondent/accused on 12-12-2011 (Ex.P.7). The said I.P. is not filed by the partnership firm but it is filed by the 1st respondent/accused in his individual capacity and he admitted the existence of a debt in favour of the complainant herein.

12. However, when it came to the evidence in the present complaint, the 1st respondent/accused has come out with the contention for the first time that he is one of the partners of Moon Light Constructions, which consists of two partners. It is not the case of the 1st respondent/accused that there was any agreement in between the complainant and the 1st respondent in his representative capacity of a partnership firm. What could be gathered from the material on record is that till the evidence was let in, the complainant was not aware that the 1st respondent/accused was a managing partner of the firm, which is the 2nd respondent, and that the cheque in question was issued by him in the capacity of a managing partner of the firm. When this material aspect came to the knowledge of the complainant for the first time only after leading the material evidence,

the only option that is open to the complainant is to invoke the provision of Section 319 Cr.P.C.

13. The contention of the learned Counsel appearing for the proposed party that the mandatory requirements of Section 141 and other provisions of the Act are not fulfilled since no notice was issued to the proposed party cannot be a ground to reject the petition under Section 319 Cr.P.C. If the complainant knew about there being the existence of a partnership firm and had the statutory notice been issued prior to institution of the complaint, there is no question of invoking Section 319 Cr.P.C., since it will be clearly in contravention of the requirements of the Code. Section 319 Cr.P.C., has to be invoked only when the prosecuting party is not aware about the existence of involvement of some person other than who is being prosecuted. Only then, the question of invoking Section 319 Cr.P.C., will arise. Therefore, to say that the proposed party/2nd respondent cannot be impleaded for non-compliance of the issuance of the statutory notice under the Act is not correct and such a contention cannot be countenanced.

14. In **PLYWOOD HOUSE v. WOOD CRAFT PRODUCTS LTD.**[2], Kerala High Court held at para 7 as under:-

> "In the aforesaid context, a reference to Section 319 of the Code is necessary. Under sub-sec.(1) the Court is given power to proceed against any other person who appears to have committed any offence for which such person could be tried together with the accused already arraigned in the case. Once the Court decides to proceed against such other person then sub-sec.(4) will save the earlier act of taking cognizance of the offence. Sub-sec.(4) says that "the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced". Hence the stage at which the new accused was brought in the array of the accused has no legal impact on the proceedings."

In **VIJAY KUMAR AGARWAL v. UNITED PHOSPHORUS LTD.**[3] High Court of Delhi at para 12 held as under:-

> "In my opinion, power under Section 319 of the Code can be exercised by the Court suo motto or on an application by someone including accused already before it. If the Court is

satisfied that any person other than the accused has committed an offence, he is to be tried together with the accused. The power is discretionary and such discretion must be exercised judiciously having regards to the facts and circumstances of the case. Indisputedly, it is an extra ordinary power, which is conferred on the Court, and should be used very sparingly and only if compelling reasons exists for taking actions against the persons, against whom the action has not been taken earlier.

Though, the petitioner was not made party specifically in the complaint filed under Section 138 of the Negotiable Instruments Act, but keeping the aforesaid Full Bench Judgment of the Supreme Court, the Managing Director is responsible for the day to day affairs of the Company."

In **BOMMIDIPATI MADHAVI v. STATE OF ANDHRA PRADESH AND ANOTHER** [4]**,** this Court held at paras 11 and 12 as under:-

"The material, which is filed along with the complaint, i.e., the cheque bearing No.000174, dated 10-11-2011 and the 69 bills would show that the cheque was issued by the petitioner in favour of the 2nd respondent drawn on Union Bank of India, Chandram Palem, Madhurawada, Visakhapatnam, as an authorized signatory of Sai Santhosh Constructions and the 9 bills show purchase of the material by Sai Santhosh Constructions.

Therefore, the cheque in dispute, was issued by the petitioner as an authorized signatorye of Sai Santosh Constructions. In order to substantiate the said plea namely, that the cheque was issued by the petitioner as a partner of the firm, the learned Counsel for the petitioner mainly relied upon the original of acknowledgment of Registration of firm, wherein it is mentioned that the petitioner was running the business in the name of Sai Santhosh Constructions, Ratna Residency, P.M.Palem, Visakhapatnam and the same was entered in the Registrar of Firms as S.No.730/2007 at Visakhapatnam. Along with the acknowledgment of registration of firms, the petitioner also placed on record the original partnership deed entered into between the petitioner and her husband. The certificate of registration of firm would also discloses that the Registrar of Firms, Andhra Pradesh, acknowledges the receipt of the statement prescribed under Section 58(1) of Indian Partnership Act.

In **B.RAMAN AND OTHERS v. M/S.SHASUN CHEMICALS AND DRUGS LTD.**[5]**,** Madras High Court held in paras 21, 27 and 32 as under:-

21. As held by the Supreme Court in S.M.S.

PHARMACEUTICALS LTD. V. NEETA BHALLA 2005 (Supreme Court Cases (Cri.) 1975), by a deeming provision contained in Section 141 of the Act, relating to the offences committed by the company, such of those persons are also vicariously liable to be held guilty, when the main ingredients for creating criminal liability have been established. The said ingredients are : (i) issuance of a cheque; (ii) presentation of the cheque; (iii) dishonour of the cheque; (iv) service of statutory notice on the person sought to be made liable and (v) non-compliance or non-payment in pursuance of the notice within 15 days of the receipt of the notice. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person, who is sought to be made vicariously liable for an offence of which the principal accused is the company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. In other words, the persons, who had nothing to do with the matter, need not be roped in. A company, being a juristic person, all its deeds and functions are the result of acts of others. Therefore, officers of the company or directors of the company, who are responsible for the acts done in the name of the company, are sought to be made personally liable for the acts, which result in criminal action being taken against the company. It makes 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, liable for the offence. The proviso to the sub-section contains an escape route for persons, who are liable to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence.

27. When it is a settled law, as laid down by the Supreme Court, that there must be a specific averment in the complaint against the accused persons to the effect that they are in charge of and responsible for the conduct of the business of the company, during the relevant time the offence has been committed, with their connivance, i.e., all the more reason, the complainant shall give an opportunity to those persons to explain the complainant about their position in the company. In other words, the complainant can prosecute the company as well as the other directors, only when he is satisfied that the persons, sought to be prosecuted, are in charge of and responsible for the conduct of the business of the company and also, in spite of the demand of the cheque amount through service of notice, they have not chosen to pay the amount within time.

32. It is not the intention of the legislature that these persons, namely, directors and others could be permitted to establish their innocence only before the Court. The wordings of Sections 138 AND 141 would clearly indicate that the complainant can come to the Court only after cause of action. The cause of action, as

indicated above, is only non-payment of the cheque amount, despite service of notice. When the directors, sought to be prosecuted, have not been given an opportunity either to rectify the mistake within the time or to explain the complainant that they were not responsible for the affairs of the company or to establish their defence, then, it is meaningless for the complainant to rush to the Court, by filing a complaint against all, whether they are really connected with the company or not, to make them to stand as accused before the criminal Court. It is a sheer waste of time for the parties as well as the Court. When the choice is given to the complainant to choose the persons sought to be prosecuted, naturally, a chance has to be given by the complainant to those persons concerned, by sending notice, at least, to get reply, to enable the complainant to find out the extent of their involvement in the commission of offence. There may be sleeping directors, who are not closely connected with the affairs of the company; there may be directors, who would have resigned from the company and there may be some directors, for namesake. Therefore, the meaning of the word "drawer", as contemplated under Section 138, has to be interpreted in the case of company as the company as well as the persons, who are responsible for the commission of offence. If such is the interpretation, then, the complainant has to send notice to the drawer, which means, the company and its directors and officers, responsible for the business of the company and for the commission of the offence."

In **D.CHANDRA REDDY v. GOWRISETTY PRABHAKAR RAO AND ANOTHER** [6], this Court at paras 9, 10, 11 and 12 held as under:-

"What is pertinent to note in this case is that the Company in question is not an accused and it is an individual who is an accused in this case. Obviously, Section 141 of the Negotiable Instruments Act (for short 'the Act') contemplates that if a person committing the offence is a Company every person 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 accordingly. When the Company is not itself proceeded against for an offence under Section 138 of the Act, and in the absence of any allegation that the accused was in-charge of and was responsible to the Company, the question of proceeding against any Director of the Company would not arise.

What is significant in this case is that apart from the fact that the Company itself is not shown as an accused, the solitary accused in this case has not been shown or described as Managing Director of the Company, namely, Vijaya Industrial Gasses Ltd. All the allegations in the complaint, a copy of which has been filed with the petition, so that they have been made against the solitary accused-petitioner herein in his individual capacity. But, as seen from the cheque itself a Photostat copy of which has been filed, it was issued by the Company, namely, Vijaya Industrial Gasses Ltd., as evident from the words "Managing Director" below the signature. There can be no manner of doubt that the cheque was issued on behalf of Vijaya Industrial Gasses Ltd. It was not issued by the accused in his personal capacity on his personal account.

Section 138 of the Act contemplates that for commission of an offence under Section 138 of the Act in respect of a cheque which was returned unpaid on the ground of insufficiency of funds, etc., the cheque must have been issued by the accused "on an account maintained by him with a Banker".

As stated above, in this case, the accused petitioner is sought to be prosecuted in his individual capacity. He has not even been described as Managing Director of the Company. Even assuming that he has signed the cheque in question, inasmuch as the cheque was drawn not on an account maintained by the Company, namely, Vijaya Industrial Gases Limited, the requirement of Section 138 of the Act cannot be said to have been complied with."

In **A.C.GUPTA v. RENU GAUTAM** [7]**,** Himachal Pradesh High Court at paras 10, 11, 14 and 16 held as under:-

"In view of the above position in law there remains no doubt that the cheque in question having been issued by the firm and thus being the drawer of the cheque, the non-impleading of the firm will render the complaint defective and incompetent to prosecute the partner thereof and the learned trial Magistrate has rightly taken such a view.

There is yet another aspect of the matter. The respondent has been named as an accused in the complaint in her personal capacity. There is no averment or allegation against the respondent in her capacity as a partner of the firm who is the drawer of the cheque. In view of the provisions of Section 141 of the Act, it is clear that liability can be fastened on the Director/partner of the Company/firm provided that it is averred and proved that the person arrayed as an accused as Director/Partner was at the time of the commission of the offence incharge of and was responsible to the Company for the conduct of the business of the Company. Unless it is averred and proved the Director/partner cannot be deemed to be guilty of the offence.

In view of the above settled position and there being no allegation that the respondent was incharge of and responsible to the Company i.e., the drawer of the cheque for the conduct of its business she could not be held vicariously liable and the learned trial Magistrate has rightly concluded so.

In the case in hand, admittedly, no written demand notice had been served on the firm vijay Imporieum which is the drawer of the cheque in dispute. Therefore, the complaint against the respondent is liable to be dismissed for want of compliance of the provisions of Clauses (b) and (c) of the proviso to Section 138 of the Act."

15. The above authorities cited are the guiding factors in the matters such as one in hand. The facts of the case in hand are quite distinct from the one referred to in the above authorities. Here is a case where the original respondent claims to be the Managing Director of the respondent firm which comprises of two partners. The mandatory requirements of the provisions of the Act have *prima facie* been complied with by the petitioner/complainant insofar as the original respondent who claims to be the Managing Partner of the partnership firm is concerned. As already stated, the original respondent after the present complaint is filed have even filed an Insolvency Petition in a Court of competent jurisdiction in his individual capacity showing '4' creditors, one of whom is the present complainant. Even in that proceedings, it is not contended that the original respondent herein and the partnership firm of which he claims to be a managing partner is insolvent. In the said I.P. proceedings, the original respondent admits his liability towards the complainant herein for a sum of Rs.2 lacs as against Rs.13 lacs claimed by the petitioner/complainant herein. It is also on record that except during the course of evidence, at no stage prior thereto, the original respondent brought to the notice of the complainant that the transaction in between the complainant and the 1st respondent is for and on behalf of the partnership firm. Therefore, when for the first time during the course of evidence, the original respondent contended that he is the managing partner of the proposed respondent firm, the petitioner/complainant had no option except to invoke the provisions of Section 319 Cr.P.C., so as to implead the firm of which the original respondent is a managing partner.

16. The legal aspects as to whether there is compliance of the mandatory requirements of the Act as against the original respondent but not against the proposed respondent firm are the aspects which have to

be dealt with at the time of disposal of the case after full-fledged trial.

17. The learned Magistrate has committed an error by rejecting the request of the petitioner to implead the proposed respondent partnership firm of which the original respondent is the Managing Director holding that the provisions of the Act are not complied with insofar as the proposed respondent is concerned. That would have certainly been the case had the transaction in between the petitioner/complainant and the original respondent were done on behalf of any partnership firm. There is no controversy insofar as the transaction proper is concerned viz., the complainant was the owner of two lorries/tippers which the original respondent took on hire on a rental basis agreeing to pay Rs.8,000/- per day for the two vehicles but is alleged to have committed defaults, fell in arrears, and issued the cheques and executed the promissory note. As noticed above, these aspects are not denied but the 1st respondent would have it that at the time of entering into the transaction, the petitioner/complainant obtained the promissory note and blank cheques, which have been pressed into service.

18. In view of the foregoing discussion, the petitioner is held to be entitled to implead the proposed respondent firm as 2nd respondent in the Calender Case by setting aside the impugned order. Needless to say that the learned Magistrate shall dispose of the case on its merits in accordance with law uninfluenced by any of the observations contained in this order.

19. In the result, the Criminal Revision Case is allowed setting aside the order passed in Crl.M.P.No.375 of 2013 in C.C.No.128 of 2012 (Old No.93/2012) on the file of the IV-Special Magistrate, Kukatpally, Miyapur. The learned Magistrate is directed to implead the proposed respondent firm as 2nd respondent in C.C.No.128 of 2012.

Miscellaneous petitions, if any, pending in this Criminal Revision Case shall stand closed.

M.S.K.Jaiswal, J

30th June, 2015
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[1] (2011) 13 SCC, 316

[2] 1993-LAWS(KER)-7-50

[3] LAWS (DLH) – 2011 – 8 - 259

[4] 2014(1) ALD (Crl) 205 (A.P.

[5] 2006 Cri.L.J.4552

[6] 1999 (2) ALT (CRI.)A.P. 497

[7] 2003 Cri.L.J. 1458