

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 1544 OF 2005

Mr. Shrinivas Madhav Dolare,
Age 40 years, Occ. Business
R/o. Gangaram Plot, Bhusawal,
District Jalgaon

...Applicant

versus

Punamchand Chudaman Holye
Age 71 years, Occ. Retired
R/o. 23, Chudaman Muktanand Colony
Kasturi Nagar, Bhusawal
District Jalgaon

...Respondent

WITH
CRIMINAL APPLICATION NO. 1706 OF 2005

Mr. Shrinivas Madhav Dolare,
Age 40 years, Occ. Business
R/o. Gangaram Plot, Bhusawal,
District Jalgaon

...Applicant

versus

Punamchand Chudaman Holye
Age 71 years, Occ. Retired
R/o. 23, Chudaman Muktanand Colony
Kasturi Nagar, Bhusawal
District Jalgaon

...Respondent

...
Advocate for Applicant : Mr. P S Shendurnikar
Advocate for Respondents : Mr. N.B. Patekar h/f Mr. P.R. Katneshwar
.....

CORAM : V. K. JADHAV, J.
DATED : 7th OCTOBER, 2016

ORAL JUDGMENT:-

1. By both these criminal applications, the applicant is seeking

quashment of order passed by the learned J.M.F.C. Bhusawal, dated 4.2.2000 thereby issuing process against the applicant, for having committed offence punishable under Section 138 of Negotiable Instruments Act. The applicant also prays for quashment of criminal case Nos. 150 of 2000 and 151 of 2000 pending before the learned J.M.F.C. Bhusawal.

2. Brief facts giving rise to the present criminal applications are as follows:-

a) There exist a registered partnership firm, by name "Shri Plast" of the preset applicant, his brother Milind and son of respondent Punamchand by name Nitin. The firm was doing the business of manufacturing polythene milk bags at Block No. 25, M.I.D.C. Bhusawal. The present applicant has been appointed as power of attorney holder by other two partners. There is dispute between the partners about rendition of account however, partnership firm was not dissolved.

b) On 25.12.1999 respondent Punamchand had issued notice to the applicant in his personal capacity calling upon him to pay an amount of Rs.1,10,000/-. It has contended that on 1.11.1999, 3.11.1999 and 5.11.1999, the applicant had issued cheques in the

name of respondent Punamchand for the aforesaid amount and on presentation of the said cheques in the bank, the same came to be dishonoured. Accordingly, respondent Punamchand had issued said notice to the applicant in his personal capacity. The applicant has replied the notice and denied the liability in toto. However, the respondent Punamchand had filed complaints against the applicant for having committed offence punishable under Section 138 of Negotiable Instruments Act.

c) The learned J.M.F.C. Bhusawal, in both the complaints, by order dated 4.2.2000 issued process for the offence punishable under section 138 of Negotiable Instruments Act. In response to the said process, the applicant appeared before the trial court and also filed an application for recalling of order of issuance of process. It was also prayed to discharge the applicants in both the criminal cases. However, learned Magistrate has rejected the said application. Hence, these criminal applications.

3. Learned counsel for the applicant submits that the cheques, allegedly issued by the applicant accused, indicate that the same have been issued in the capacity as a partner of M/s. Shri Plast, on the account maintained by the said partnership firm. The respondent original complainant Punamchand has issued notice to the applicant

in his individual capacity, calling upon him to pay the amount under cheques, within 15 days from the date of receipt of notice. No transaction had taken place between the applicant and the respondent original complainant. On bare perusal of said cheques, it appears that the applicant has signed those cheques in his capacity as a partner of the firm of said partnership firm. Admittedly, those cheques are drawn on the account maintained by the partnership firm. The respondent complainant has not arraigned the partnership firm as accused though the partnership firm is having legal entity. Thus the prosecution of the applicant alone in absence of the partnership firm being implemented or arraigned as an accused, is not in accordance with the provisions of Section 141 of the Negotiable Instruments Act and thus the complaints filed by the respondent have initial defects in its sustainability and this defect cannot be cured by amending the proceedings by taking recourse to the provisions of Section 319 of the Cr.P.C.

Learned counsel for the applicant, in order to substantiate his submissions, places reliance on the judgments in following cases:-

- i) *Aneeta Hada vs., Godfather Ravels and Tours Pvt. Ltd.* (2012) 5 SCC 661
- ii) *Oanali Ismailji Sodikot vs. State of Gujarat, reported in 2016 (1) Crimes 739,*

4. Learned counsel for the respondent original complainant submits that the applicant had issued said cheques in his individual capacity for the transaction between him and respondent complainant and the cheques were drawn by him in his personal capacity. Though the cheques were drawn on the account maintained in the name of partnership firm, the applicant had issued the said cheques in his personal capacity and thus he is liable to face the consequences, as said cheques, on presentation in the bank, came to be dishonoured. There is no question of arraigning or impleading the partnership firm or other partners as accused in the complaint filed under Section 138 of Negotiable Instruments Act.

Learned counsel for respondent No.2 in order to substantiate his submissions places reliance on the judgments in following cases:-

- i) *Mainuddin Abdul Sattar Shaikh vs. Vijay D. Salvi, reported in 2015 AIR (SC) 2579*
- ii) *P.J. Agro Tech Limited & Ors. vs. Water base Limited, reported in 2010 AIR (SC) 2596.*

5. On careful perusal of complaints bearing Criminal case Nos. 150 of 2000 and 151 of 2000, it appears that the respondent complainant has alleged in the criminal case No. 150 of 2000 that the

applicant accused has issued three cheques for amount of Rs.40000/- each in his individual capacity and in the complaint bearing Criminal Case No. 151 of 2000 it has alleged that the applicant accused has issued five cheques of Rs.40,000/- each in his individual capacity. It has also alleged in the complaint that on account of some financial difficulties, the respondent complainant had given amount under the said cheques in cash to the applicant accused and in order to repay the said amount, the applicant accused had issued said cheques. Since the said cheques came to be dishonoured, the respondent complainant has issued demand notice to the applicant-accused and even the applicant accused has given reply to the said notice. The respondent complainant has referred reply of the said notice in his complaint by stating that the reply is false.

6. On perusal of the said reply, it appears that the applicant accused has contended that there is partnership firm in existence and the applicant, his brother Milind and son of respondent complainant are the partners of partnership firm named and styled as "Shri Plast". So far as existence of said partnership firm is concerned, the same is also not disputed by the respondent complainant. The respondent complainant has produced before the court alongwith his complaint the said cheques and mere perusal of

the said cheques, it appears that said cheques have been issued, drawn and signed by the present applicant accused in the capacity of partner of M/s. Shri Plast, on the account maintained by the said partnership firm.

7. In the case of ***Oanali Ismailji Sadikt vs State of Gujarat (supra)*** and relied upon by learned counsel for the applicant, following three questions fall for consideration of the Supreme Court.

- i) Whether a partnership is a legal entity like a company so far as the offence punishable under Section 138 of the Negotiable Instruments Act is concerned?
- ii) Is the prosecution of the partners of a firm, by virtue of Section 141 of the Act, maintainable in the absence of the partnership firm being impleaded or arraigned as an accused?
- iii) When the complaint under Section 138 of the Negotiable Instruments Act has the initial defect in its sustainability, can such defect be cured by amending the proceedings by virtue of an application under Section 319 of Cr.P.C.?

8. The Apex Court has answered first question in affirmative and answered second question by referring ***Aneeta Hada's case (supra)*** relied upon by learned counsel of the applicant to the effect that the

partnership firm is required to be impleaded and arraigned as an accused and the prosecution in absence of partnership firm, being impleaded as an accused, is not sustainable. So far as the third question referred to above, is concerned, the Supreme Court has answered that when the complaint has initial defect in its sustainability, that defect cannot be cured by amending the proceeding. Section 319 of Cr.P.C., no doubt, provides for impleading any other accused, which was party to the commission of offence. On impleading such co accused under Section 319 of Cr.P.C. will not have any bearing as to the maintainability of the proceedings against other accused. It has also observed that Section 319 of Cr.P.C. is not intended in the Cr.P.C. for curing the infirmity in the proceedings but only to bring all the culprits before the court when their role in the commission of the offence was brought to light only after the evidence before the Court.

9. In the instant case, the allegations have been made against the applicant accused about the cheques being issued in his individual capacity for repayment of amount borrowed by him. However, on perusal of cheques, it appears that the said cheques have been issued in the capacity as partner of the firm on the account maintained by the firm.

10. In view of the observations made by the Hon'ble Supreme Court in the case of ***Oanali Ismailji Sadikot (supra)*** and the ratio laid down in the said case, which squarely applies to the facts and circumstances of the present case, in absence of the partnership firm being impleaded as an accused in the instant complaint, the complaints have initial defect in its sustainability and in the backdrop of the allegations made in the complaints, even such defect cannot be cured by taking recourse to the provisions of Section 319 of Cr.P.C. The Supreme Court observed that such fundamental defect cannot be cured by taking recourse to Section 319 of Cr.P.C.

11. In the case of ***Mainuddin Abdul Sattar Shaikh (supra)***, relied upon by learned counsel for the respondent original complainant, in the facts of said case, the cheque was drawn by the accused in his individual capacity and not in the capacity of Director. The cheque was also drawn on personal account maintained by the accused with the bank. In the said case the accused person was drawer of the cheque and it is therefore held that the company and its Director cannot be made liable under Section 138 of Negotiable Instruments Act, when the cheques were drawn by the accused in his personal capacity and on his personal account and not on the account maintained by the company.

12. In second case i.e. ***P.J. Agro Tech Limited and others (supra)***, relied upon by learned counsel for the respondent complainant, the appellant company is an agro-based company and the appellant No.2 and 3 are the Managing Director and Chairperson of the company. Respondent No.1 company approached the appellants for distribution of prawn feed manufactured by it. However, the said venture did not turn out to be very successful. Consequently, appellant No.1 company took a decision to discontinue its dealings with respondent No.1 company. Accordingly, all outstanding dues were settled and further the appellant company also gave authorization letter to respondent No.1 company to collect all other dues directly from the customers of appellant No.1 company, who had bought the feed but were yet to pay the price therefor. Even the appellant company requested respondent No.1 company to coordinate with one K. Balasahnkhar Reddy, the then General Manager at Nellore, for collecting the dues, which were still outstanding. The respondent company had accepted the said offer. However, it was found that some of its employees had conspired with the said K. Balashankar Reddy and had misappropriated some amounts of money. Even respondent No.1 company requested the appellant company to take action against said Balashankar Reddy and its concerned employees. However, said K. Balshankar Reddy issued cheque drawn on State Bank of Hyderabad, Nellore Branch in

favour of respondent No.1 company and the same had been returned dishonoured with an endorsement "account closed". In the facts and circumstances of this case, the Supreme Court in para 9 of the judgment has made following observations:-

"9. In the instant case, the cheque which had been dishonoured may have been issued by the respondent No.11 for discharging the dues of the appellant No.1 Company and its Directors to the Respondent No.1 Company and the respondent. Company may have a good case against the appellant No.1 Company for recovery of its dues before other fora, but it would not be sufficient to attract the provisions of Section 138 of the 1881 Act. The Appellant company and its directors cannot be made liable under Section 138 of the 1881 Act for a default committed by the respondent No.11. An action in respect of a criminal or a quasi-criminal provision has to be strictly construed in keeping with the provisions alleged to have been violated. The proceedings in such matters are in personam and cannot be used to foist an offence on some other person, who under the statute was not liable for the commission of such offence."

In the instant case, the facts are altogether different and the petitioner original accused being partner of the firm, issued a cheque in the capacity as partners of the firm on the account maintained by the firm. Thus, the ratio laid in the aforesaid case cannot be made applicable to the facts and circumstances of the present case.

13. In view of the above discussion, I do not think that the impugned order is sustainable. Thus, continuation with both the complaints would be a sheer abuse of process of the Court. Hence, I proceed to pass the following order:-

O R D E R

- I. Both the criminal applications are hereby allowed in terms of prayer clauses 'B'. The complaints bearing criminal Case Nos. 150 of 2000 and 151 of 2000 pending before the learned J.M.F.C. Bhusawal are hereby quashed and set aside.
- II. Both the criminal applications are disposed of accordingly.
Rule made absolute in the above terms.

(V. K. JADHAV, J.)

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