

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Decided on: 11th May, 2017**

+ **CRL.M.C. 376/2016 & CrI.M.As. 1600-1601/2016.**

SANJAY GAMBHIR Petitioner
Represented by: Mr. Shiv Chopra, Advocate.
versus

STATE AND ANOTHER Respondents
Represented by: Ms. Rajni Gupta, APP for the
State.
Mr. Sunil Narula, Adv. for
respondent No.2.

+ **CRL.M.C. 76/2017 & CrI.M.A. 347/2017.**

TARUN KUMAR Petitioner
Represented by: Mr. Sidharth Agarwal and Mr.
Yashpreet Singh, Advocates.
versus

STATE AND ANOTHER Respondents
Represented by: Mr. Ashok Kumar Garg, APP
for the State.
Mr. Sunil Narula, Adv. for
respondent No.2.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. A complaint was filed by respondent No.2 M/s Shree Ram Enterprises a partnership firm through its partner Satyapriya Lakhotia against M/s Rangoli Projects Pvt. Ltd. through its Director Sanjay Gambhir (in short

‘M/s Rangoli Projects’) under Section 138 read with Sections 141 and 142 of the Negotiable Instruments Act, 1881. In the said complaint, neither Sanjay Gambhir in his personal capacity nor Tarun Kumar were impleaded as accused. This Court need not go into the allegations in the complaint as the same are not material for the purpose of decision of the present petitions.

2. On the said complaint, learned Metropolitan Magistrate vide order dated 9th April, 2012 took cognizance and issued summons against the accused i.e. M/s Rangoli Projects. However, on a process fee being filed by respondent No.2 for issuance of summons both against the company and Sanjay Gambhir, summons were issued against both of them. Sanjay Gambhir appeared before the learned Metropolitan Magistrate on 1st June, 2013 and was admitted to bail. While framing notice under Section 251 Cr.P.C. the learned Metropolitan Magistrate on 21st July, 2014 noted the fact that Sanjay Gambhir was never made an accused in the complaint nor summoned however inadvertently summons were issued to him and thus passed the following order-

“CC No.2012/14

Shree Ram Enterprises Vs. Rangoli Projects Pvt. Ltd. & Anr.

21.07.2014

*Present: Ld. Counsel for the complainant.
Ld. Counsel for the accused.*

In the present matter memo of parties shows that complainant has filed the complaint against Rangoli Projects Pvt Ltd. through its director Sh. Sanjay Gambhir meaning thereby only the company was arrayed as accused which was accordingly summoned in the case to face the trial vide order dated 09.04.2012 by my Ld. Predecessor. The company accordingly has duly appointed an authorized representative Mr. Tarun Kumar to

pursue the present case vide resolution dated 10.05.2014 which is on record.

However, it appears that inadvertently Sanjay Gambhir has also been putting his appearance in the present matter but infact he is not a party to the present complaint.

As per Section 305 of Cr.P.C. when a corporation is an accused person, it may appoint representative for the purpose of enquiry or trial. Accordingly, accused company has appointed Sh. Tarun Kumar to represent in the present trial. Although, the present case has been filed against the company whose director is Sanjay Gambhir but as per Section 305 of Cr.P.C, it is choice of the complainant to appoint a representative and not that of the accused. Hence, accused Sanjay Gambhir's presence is not required in the present case. In fact, he was never summoned in the present case. Needless to mention, proceedings against him stands dropped as his appearance was due to a bonafide mistake.

Be listed for cross-examination of the complainant after moving an application U/s 145(2) by the accused for 20.09.2014."

3. As noted in the order, Tarun Kumar, the petitioner in CrI.M.C. 76/2017 was appointed as authorized representative of the company M/s Rangoli Projects and thus represented the company and was not summoned as an accused in his own capacity.
4. Aggrieved by the order dated 21st July, 2014, respondent No.2 filed a revision petition before the learned Additional Sessions Judge which was withdrawn with liberty to file an application before the learned Metropolitan Magistrate for issuance of the summons to the Director of the accused company. Thereafter respondent No.2 filed an application dated 23rd December, 2014 before the learned Metropolitan Magistrate seeking to make the two petitioners as accused in the complaint armed with the order dated 15th November, 2014 passed by the learned Additional Sessions Judge.

5. Contention of learned counsels for the petitioners is that there is no concept of amendment of the complaint and by filing an application, the complainant cannot amend the complaint and seek issuance of summons to additional accused. Admittedly, in the complaint, Sanjay Gambhir in his personal capacity was not impleaded as an accused and further Tarun Kumar only appeared as the authorized representative of the company M/s Rangoli Projects vide resolution dated 10th May, 2014 and was also sought to be summoned by filing an application by respondent No.2 pursuant to the order of the learned Additional Sessions Judge dated 15th November, 2014. Further by permitting the two applications and granting liberty to respondent No.2, learned Metropolitan Magistrate vide order dated 11th December, 2015 sought to recall its order dated 9th April, 2012 wherein summons were issued only against the company M/s Rangoli Projects and 21st July, 2014 clarifying that Sanjay Gambhir was never summoned as an accused which is impermissible in law. Learned counsels for the petitioners further submit that learned Additional Sessions Judge vide the impugned order dated 15th November, 2014 permitted respondent No.2 to file applications before the learned Metropolitan Magistrate adversely affecting the rights of the petitioners without issuing them notice or hearing them.

6. Learned counsel for respondent No.2 on the other hand contends that inadvertently respondent no.2 did not implead Sanjay Gambhir as an accused however learned Trial Court rightly summoned him as an accused and directed to appear in person. Vide order dated 21st July, 2014, learned Trial Court could not have recalled its previous order and dropped the proceedings qua Sanjay Gambhir. As held by the Supreme Court in the decision reported

as (2004) 7 SCC 338 Adalat Prasad Vs. Rooplal Jindal a Magistrate cannot review its own order on an application filed by the summoned accused.

7. Thus, there is no dispute between the parties and there can be none that the Magistrate has no power to review or recall its order. The issue is whether on facts the learned Metropolitan Magistrate recalled its earlier order. As noted above, vide order dated 9th April, 2012 summons were issued only to the company M/s Rangoli Projects however in the process fee form filed by respondent No.2 since name of Sanjay Gambhir was also mentioned, summons were issued to him as well. This was not a judicial order but purely an administrative act. Vide order dated 21st July, 2014 while noting this error and issuing the clarification, learned Metropolitan Magistrate did not recall its earlier order of issuance of summons to the single accused i.e. the company M/s Rangoli Projects but rectified the administrative mistake. Hence it cannot be held that there was any error in the order dated 21st July, 2014 passed by the learned Metropolitan Magistrate clarifying that Sanjay Gambhir was never summoned as an accused, his appearance was a bonafide mistake and the proceedings qua him are dropped.

8. The second limb of argument of learned counsel for the petitioners that the learned Additional Sessions Judge could not have granted liberty to respondent No.2 to file an application and add additional accused thereby permitting amendment of the accused in the complaint is required to be allowed on two counts.

9. Firstly, the order passed by learned Additional Sessions Judge was in non-compliance of the decision of the Supreme Court reported as (2012) 10 SCC 517 Manharibhai Muljibhai Kakadia & Anr. Vs. Shaileshbhai

Mohanbhai Patel & Ors. which categorically held that while exercising revisional powers the Sessions Court or the High Court under Sections 399 or 401 Cr.P.C. cannot pass adverse to the accused without issuing notice and providing him an opportunity of being heard.

10. Supreme Court in the decision reported as (2015) 9 SCC 609 S.R. Sukumar Vs. S. Sunaad Raghuram dealing with the issue whether amendment in criminal complaint is permissible held that there was no specific provision in the Cr.P.C. to amend the complaint. However, if the amendments made relate to simple infirmity which is curable by means of a formal amendment which causes no prejudice to the other side, the Court may permit such an amendment to be made but if the amendment sought to be made do not relate either to a curable infirmity or the same cannot be corrected by a formal amendment or if there is likelihood of prejudice to the other side, amendment cannot be allowed.

11. This Court in the decision reported as 2012(130)DRJ 656 Yahoo! India Pvt. Ltd. Vs. State & Another noting the various provisions of Cr.P.C. held that there was no provision in the Cr.P.C. which permits amendment of the complaint or produce documents after issuance of the summons.

12. Thus, amending a complaint by filing an application to add an accused not initially impleaded is not a curable defect and would cause serious prejudice to the accused sought to be summoned and hence amendment to such an extent is impermissible in law. Therefore, the impugned order passed by learned Additional Sessions Judge is liable to be set aside on the count as well.

13. Consequently, the impugned order dated 15th November, 2014 passed by the learned Additional Sessions Judge permitting respondentNo.2 to

withdraw the revision petition with liberty to file appropriate application before the Metropolitan Magistrate and the consequential order dated 1st December, 2015 passed by the learned Metropolitan Magistrate to the extent it permits respondent No.2 to take steps within seven days to file an application making additional persons as accused are set aside.

14. Petitions and applications are disposed of.

(MUKTA GUPTA)
JUDGE

MAY 11, 2017
‘v mittal’

