

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.3944 OF 2019

Dr.Prashant Prabhakar Rao & Anr. ... Petitioners

Versus

M/s.Hospitality Essentials & Ors. ... Respondents

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Mr.Girish R. Agrawal, Advocate for the Petitioners.

Mr.Swapnil S. Mhatre, Advocate for the Respondent No.1.

Mr.R.M.Pethe, the Additional Public Prosecutor for the Respondent No.2/State.

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CORAM : A.M.BADAR J.

DATED : 10th FEBRUARY 2020.

ORAL JUDGMENT :

1 Heard.

2 Rule. Rule is returnable forthwith. Heard finally by consent of parties.

3 This is a petition by accused persons, who were summoned subsequently to answer the charge for the offence

punishable under Section 138 of the Negotiable Instruments Act, 1881 in view of allowing an application for amendment made by respondent No.1 herein/original complainant.

4 Heard the learned Counsel appearing for parties. On behalf of petitioners, the pleadings in the complaint lodged by respondent No.1 herein/original complainant pointed out with a submission that no role whatsoever in the transaction in question is attributed to the present petitioners and, therefore, they cannot be vicariously liable and subsequently they ought not to have been summoned by the learned trial Magistrate. The learned Counsel argued that the complaint cannot be amended at a later stage in order to add accused persons and no cognizance of the offence can be taken on second time by directing issuance of summons to such newly added accused persons against whom there is no averements in the main complaint. As against this, it is urged on behalf of the respondent No.1 herein/original complainant that an application for amendment was made for amending the complaint in order to incorporate complicity of the petitioners in the crime in

question as they happen to be the Secretary and the Treasure of the accused No.1 Trust. It is further argued that accused Nos.4 and 5 in the original complaint are the Secretary and the Treasure of the accused No.1 Trust and subsequently, the complainant came to know about names of incumbent on those posts and, therefore, by moving an application for amendment, they were impleaded as party respondents in the complaint on the basis of the Order of the learned trial Magistrate. On behalf of the respondent No.1/original complainant reliance is placed on the Judgment of the Honourable Apex Court in the matter of ***A.K.Singhania v. Gujarat State Fertilizer Co. Ltd. & Anr.***¹

5 I have considered the submissions so advanced and perused the material placed on record.

6 The complainant supplied school uniforms to accused No.1 Dombivali Shikshan Prasarak Mandal. The cheque representing the price of material supplied came to be dishonoured. This has resulted in lodging complaint against

1 AIR 2014 SC 73.

accused No.1 Dombivali Shikshan Prasarak Mandal. Chairman and Headmistress of that Trust came to be arraigned as accused Nos.2 and 3 by their names. Further, Secretary and Treasurer of the Trust came to be arraigned as accused Nos.4 and 5 by designation. Averments casting constructive liability to accused persons pleaded in the complaint are to the effect that accused No.2 is Chairman and accused No.3 is the Headmistress of the School and they have participated in the transaction with the complainant. It is further averred that these two accused persons have signed the cheque. It is further averred in the complaint that accused No.3 Headmistress had forwarded the cheque with a covering letter. Ultimately that cheque came to be dishonoured and the complaint came to be lodged. Except arraigning the Secretary and the Treasurer of the Trust as accused Nos.4 and 5 in the cause title of the complaint, there is no whisper against them in the entire body of complaint.

7 Subsequently, two amendment applications came to be moved by the respondent No.1 herein/original complainant before the learned trial Magistrate on the very same day. In one application it is averred that the complainant had traced out

names of accused Nos.4 and 5. In another application, it is averred that as the demand notice was served upon the accused No.1 Trust, all Officers of accused No.1 Trust, who were in-charge and looking after the affairs of accused No.1 Trust are presumed. It is difficult to gather meaning of this sentence. However, it appears that with these averments, constructive liability is sought to be imposed on persons holding the posts of the Secretary and the Treasurer of the accused No.1 Trust. Both these applications for amendment in the complaint came to be allowed by the impugned Order with the only reason that these applications are on affidavit.

8 The summons was then issued to the petitioners, who were holding the posts of Secretary and the Treasurer of the trust.

9 Even if the averments made in the original complaint so also in the applications for amendment moved on behalf of the respondent No.1 herein/original complainant are accepted as they are, then also there is nothing to cast vicarious liability on the petitioners in the alleged crime. They were sought to be added at

a later stage by amending the complaint subsequent to the Order of issuance of process against other accused persons. The learned Counsel for the petitioners has rightly pointed out the Judgment in the matter of ***Subodh Salaskar v. Jayprakash M. Shah & Anr.***² to point out that such an amendment cannot be allowed at a later stage and the Court was not having any jurisdiction to allow the amendment of such a nature after issuance of process to the other accused persons. Similarly, in the matter of **S.R.Sukumar v. S. Sunaad Raghuram**³ cited by the learned Counsel for the petitioners, the following are the observations of the Honourable Apex Court as are finding in Paragraph 18 thereof.

“**18.** What is discernible from the U.P. Pollution Control Board’s (AIR 1988 SC 1128) case is that easily curable legal infirmity could be cured by means of a formal application for amendment. If the amendment sought to be made relates to a simple infirmity which is curable by means of a formal amendment and by allowing such amendment, no prejudice could be caused to the other side, notwithstanding the fact that there is no enabling provision in the Code for entertaining such amendment,

² 2008(3) Apex Court Judgments 699 (SC).

³ AIR 2015 Supreme Court 2757.

the Court may permit such an amendment to be made. On the contrary, if the amendment sought to be made in the complaint does 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, then the Court shall not allow such amendment in the complaint.”

10 In the light of this law laid down by the Honourable Apex Court, the learned trial Court ought not to have allowed the amendment as was sought for by the respondent No.1 herein/original complainant and subsequently ought not to have issued summons against accused persons who were sought to be added by effecting amendment. Both the impugned Orders are as such illegal and cannot be sustained. In this view of the matter, the following Order :

ORDER

- (i) The Petition is allowed in terms of prayer clause (b) and (c).
- (ii) The Petition is accordingly disposed of.

(A.M.BADAR, J.)

**Raju D.
Gaikwad**

Gaikwad RD

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