

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL MISC. APPLICATION NO.101 OF 2020
IN
STAMP NUMBER MAIN NO.945 OF 2020

Mrs. Kiran Anant Shirwaikar Applicant

Versus

Mr. Santosh Shiva Faldessai & Anr. Respondents

Mr. Jatin Ramaiya, Advocate for the Applicant.

Mr. A.D. Bhobe with Mr. Chirag Angle, Advocate for the Respondents.

CORAM : - SMT. M.S. JAWALKAR, J.

Reserved on : 17th August 2021

Pronounced on : 30th August 2021

ORDER :

The present application is filed for grant of special leave to file appeal against judgment and order dated 13/01/2020 for acquittal made by the learned JMFC at Quepem in Criminal Case No.36/OA/NIA/2017/B on the grounds mentioned in the memo of appeal.

2. It is contended that the order of the applicant resulted in failure of justice and miscarriage of justice. The order came to be passed without considering the material placed on record as also without considering the statutory scheme as envisaged in Negotiable Instruments Act.

3. It appears that during the pendency of the proceedings the complainant moved an application under Section 319(1) of the Code of Criminal Procedure wherein it is prayed that Mukta Developers, a partnership firm be added as accused no.2 and its partner Nandkishore Kanekar be added as accused no.3 in the case.

4. It is contended that the accused, in reply, never raised any defence that Mukta Developers is a partnership firm and one Nandkishor Kanekar along with the accused are its partners. It was his further contention that in the course of the trial of the present case, it appears from the evidence that Mukta Developers is a partnership firm. The learned JMFC dismissed the said application as, though cheque was signed by both the partners representing Mukta Developers, at this stage their addition is of no use as there was no legal notice issued to the firm. He also moved an application for amendment of complaint proposing to add that he was not aware about the partnership firm and during the trial only he came to know. Accused Santosh Faldessai and Nandkishor Kanekar were incharge and responsible for business of said firm. The said application also came to be dismissed holding that complainant was aware about the said fact as the same is reflecting in the

said cheque. Hence, the complainant now cannot say that the said fact came within his knowledge at the stage of trial.

5. It was the case of the complainant that there was some civil litigation pending. The accused along with one Ajit Kantak offered to the complainant and her husband an amount of ₹20,00,000/- and plot admeasuring an area of 30,000 sq. mts. Complainant accepted the offer of the accused and Ajit. The accused issued to the complainant and her husband four cheques for a sum of ₹5,00,000/- each. Out of these four cheques, three cheques were realised, however, cheque bearing no.201948 dated 05.01.2017 returned dishonoured with endorsement "funds insufficient" by Bank of India by its memorandum dated 07.03.2017. The complainant issued demand notice as per provisions of law.

6. Accused gave reply and denied the contents. Thereafter, complainant filed the complaint before the JMFC. Complainant's power of attorney holder deposed as per his complaint, however, in cross he has admitted that he has not sent any separate notice to Mukta Developers and not added Mukta Developers as party to the present case. The learned JMFC has duly considered the evidence on record which clearly

goes to show that the complainant was very much aware about the transaction. The cheques are signed by the partners of Mukta Developers. On bare perusal of the cheques also it appears that there is a stamp of "Mukta Developers", and below it "For Mukta Developers Authorised Signatory" and there are two signatures on the same.

7. The learned Counsel for the applicant relied on ***Amol Shripal Sheth V/s. Hari Om Trading Co. and Ors., 2014 (6) MhLJ 222***, wherein it is observed that the power under section 319 of CrPC is part of normal process in the administration of justice. The power under section 319 is discretionary in nature. The observations of the Apex Court and this provision of CrPC again show that the Magistrate takes cognizance of the offence and not of the offender. It is further held at para 18 of the said judgment as under :

"18. The complainant being stranger to the company, may not have the knowledge about the management or affairs of the company. Section 138 (b) of N.I. Act shows that statutory notice needs to be given to the drawer of the cheque, to the company. In view of this circumstance, the Director receiving notice for the company or other office bearer receiving notice for the company, is expected to give the name of person incharge and responsible for the conduct of the business of company. If the office bearer receiving notice prefers to give the reply to statutory notice, it is not sufficient for him to only deny the responsibility, but it becomes

necessary for him to say something on behalf of the company about the person who can be held responsible in view of the aforesaid provision. It is already observed that in view of the proviso to section 141 (1) of N.I. Act, the burden is on the office bearer like the Managing Director to give such information, so that he can show that the offence was committed without his knowledge. These are the provisions of Special Enactment viz. N.I. Act. and are not inconsistent with the general provisions of Cr.P.C., which are already quoted. Thus, provisions of N.I. Act show that there is burden of proof of defence on the person like Managing Director of the company under the proviso of section 141(1) of N.I. Act."

8. Learned Counsel for the respondent Shri A.D. Bhobe vehemently submitted that there is no case to grant leave as order passed is perfectly justified and one cannot go beyond the provisions of law inspite of knowledge that Mukta Developers is a partnership firm and signatories are authorised to sign on behalf of the Mukta Developers. No notice was issued to the Mukta Developers nor it is made party in the complaint.

9. Learned Counsel Shri Bhobe relied on ***N. Hariharan Krishnan V/s. J. Thomas (2018) 13 SCC 663.*** The complainant therein filed application under Section 319 of Cr.P.C. with a prayer to implead M/s. Dakshin Granites as accused A1 in criminal proceedings. His contention is that it came to the notice of the respondent during the course of cross-examination of the appellant herein at the trial. The said

application was contested. However, the learned JMFC allowed the said application. The revision against that order is also dismissed. Therefore, criminal appeal came to be filed. The Hon'ble Apex Court held at paragraphs 28 & 29 as under :

28. The question whether the respondent had sufficient cause for not filing the complaint against DAKSHIN within the period prescribed under THE ACT is not examined by either of the courts below. As rightly pointed out, the application, which is the subject matter of the instant appeal purportedly filed invoking Section 319 CrPC, is only a device by which the respondent seeks to initiate prosecution against DAKSHIN beyond the period of limitation stipulated under the Act.

29. No doubt Section 142 authorises the Court to condone the delay in appropriate cases. We find no reason to condone the delay. The justification advanced by the respondent that it is during the course of the trial, the respondent realized that the cheque in question was drawn on the account of DAKSHIN is a manifestly false statement. On the face of the cheque, it is clear that it was drawn on account of DAKSHIN. Admittedly the respondent issued a notice contemplated under clause (b) of the proviso to Section 138 to DAKSHIN. The fact is recorded by the High Court. The relevant portion is already extracted in para 15.

10. In present matter also, I have seen the copy of cheque. The cheque clearly has a stamp as "Mukta Developers Authroised Signatory" and there are two signatures below it. The complainant has not taken any steps as per provisions of NI Act to serve notice to the firm or to other signatory. Section 142 opens with non-obstant clause and mandates that no Court shall take cognizance of any offence punishable under Section

138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque and, such complaint is made within one month of the date on which the cause of action arise. Proviso to section 142(1)(b) states that the cognizance of complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he has sufficient cause for not making a complaint within such period.

11. The application under Section 319 of CrPC by which Mukta Developers is sought to be impleaded is in fact the complaint against Mukta Developers, which is filed nearly after 2 & half years after the expiry period as stipulated under clause (c) of proviso to Section 138. Thus, it is barred under Section 142(1)(b). The reason for such delay is given as during the trial complainant came to know. However, as discussed above, the cheque itself clearly disclosed that the cheque is issued by authorised signatories of Mukta Developers.

12. There were two signatories. Secondly, notice issued to accused shows address as c/o Mukta Developers. Thus, there is no substance in the contention that he was not aware that cheque is issued by Mukta Developers. Thus, explanation

offered for not joining accused Mukta Developers or other signatory as accused is false. There is no justification whatsoever. On the face of the cheque itself it is clear that it was drawn in favour of Mukta Developers.

13. Thus, in view of facts and circumstances involved in the matter and provisions of NI Act the order passed by the JMFC is perfectly justified. There is no case made out to entertain the appeal. Hence, leave to appeal is rejected. All rights and contentions of the parties are expressly left open, if any Civil Suit is pending.

M.S. JAWALKAR, J.

NH/-