IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL WRIT PETITION NO. 352 OF 2021

(Ashok S/o Shaymbihari Agrawal vs. Mr. Sharad Modi and another)

Office notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's Orders.

Ms. R. S. Dewani, Advocate for petitioner.
Mr. Amol Hunge, Advocate for respondent No.2.

CORAM : MANISH PITALE J.
DATE : 03/08/2021

Hearing was conducted through Video Conferencing and the learned counsel agreed that the audio and visual quality was proper.

2. By this petition, the petitioner (original complainant) has challenged order dated 18/02/2021, passed by the Court of Joint Civil Judge Senior Division and Additional Chief Judicial Magistrate, Nagpur, whereby an application filed on behalf of the petitioner (Exh.67) under Section 319 of the Code of Criminal Procedure, 1973 (CrPC) was rejected.

3. The petitioner filed complaint before the Court of Chief Judicial Magistrate at Nagpur, bearing Summary Criminal Case No. 2302 of 2016, under Section 138 of the Negotiable Instruments Act, 1881. In this complaint, the respondents were joined as accused persons. It was stated in the complaint that loan by way of cash was advanced to the respondent No.1 and that cheques were issued on behalf of the respondents for return of the said loan, which were dishonoured. In the complaint it was stated that the cheques were signed by the respondent No.1 as Proprietor of Ruby Enterprises. It was also stated in paragraph 4 thereof that according to the information available with the petitioner, even the original accused No.2 i.e. wife of the accused No.1 was running the business of Ruby Enterprises, being a Proprietorship and that both the accused persons were in collusion with each other and they had played fraud on the petitioner.

4. The Court of the Magistrate passed an order on 25/10/2016, holding that there was lack of material to issue process against Kiran Modi i.e. the wife of the respondent No.1. It was recorded that merely because the petitioner stated that the said Kiran Modi was Proprietor of Ruby Enterprises and that she was in collusion with her husband, process could not be issued against her, particularly in the backdrop that the cheques in question had been signed only by the said Sharad Modi as Proprietor, Ruby Enterprises.

5. The case proceeded further before the Magistrate and on 12/01/2018, evidence of the official of the concerned bank was recorded. The said witness specifically stated in his deposition that Kiran Modi was the Proprietor of the said Ruby Enterprises. Documents from the records of the bank were placed on record by the said witness showing that applications submitted before the bank on behalf of Ruby Enterprises were all signed by the said Kiran Modi, as the Proprietor. The said bank witness was cross-examined by the respondents, wherein the said witness specifically stated that there was no document on record to show that the said Sharad Modi was a Proprietor of Ruby Enterprises.

6. In the face of the evidence of the bank official and the documents that had come on record, on 25/04/2018, the petitioner moved an application under Section 319 of the CrPC, for issuance of process against the said Kiran Modi. This application was opposed by the respondent by filing their reply.

By the impugned order dated 18/02/2021, the said application stood rejected.

7. The present petition has been filed not only challenging the order dated 18/02/2021, but also the earlier order dated 25/10/2016 passed by the Magistrate refusing to issue process against the said Kiran Modi.

8. Ms. Dewani, learned counsel appearing for the petitioner submitted that the Magistrate erred in rejecting the application filed under Section 319 of the CrPC. It was submitted that the oral and documentary evidence that had come on record on behalf of the bank was sufficient to support contentions raised in the said application. It was submitted that the requirements of Section 319 for proceeding against the aforesaid Kiran Modi were clearly satisfied in the facts and circumstances of the present case and that therefore, the impugned order deserved to be set aside and the application deserved to be allowed in the interest of justice. The learned counsel invited attention of this Court to the evidence of the bank witness, as also the documents that had come on record at the behest of the said witness. It was further submitted that in the light of the aforesaid circumstances, it was clear that the earlier order dated 25/10/2016, was also erroneous and that therefore, the writ petition deserved to be allowed.

9. Mr.Amol Hunge, learned counsel appearing for the respondents submitted that the earlier order dated 25/10/2016 was never challenged by the petitioner. Therefore, he was not entitled to now claim that by the very same allegations made in the complaint, process could be issued against Kiran Modi as Proprietor of Ruby Enterprises. It was submitted that nothing had changed from the time when the earlier order dated 25/10/2016 was passed by the Magistrate and that merely because the bank witness had made certain statements and produced some documents, process could not be issued against the said Kiran Modi. It was further submitted that the requirements under Section 319 of the CrPC were not satisfied by the material on record and that therefore, the writ petition deserved to be dismissed.

10. Heard learned counsel for the rival parties and perused the material on record. It is significant that in paragraph 4 of the complaint filed by the petitioner under Section 138 of the Negotiable Instruments Act, 1881, the following submission has been made :-

> ***"4.*** *It is submitted that after getting information from reliable sources, it has come to the knowledge of the complaiant that it is the accused no.2 who also runs the business of Ruby Enterprises. It is submitted that the accused no.1 has issued a false cheque and signed the cheque as a Proprietor of Ruby Enterprises, therefore it is submitted that accused person in collusion with each other have played a fraud upon the complainant by issuing the aforesaid false cheques. The present complaint has been filed by the complainant on the basis of the representation made by the complainant. In view of the fact that it appears that the accused person have cheated the complainant, it therefore necessary that the complainant should reserve his rights to make necessary amendments as may be required in the complainant. The complainant is further making inquires in this regard. Needless to state at the cost of repetition that the loan amount was given by the complainant to the accused no.1 in cash and he has issued receipt on the letter head if ruby enterprise and the cheques in question were given by accused no.1 and he signed on the said cheques in the presence of the complainant."*

11. There is statement in the complaint itself regarding allegations against the said Kiran Modi. It appears that at the stage when the order dated 25/10/2016 was passed by the Magistrate, evidence was yet to be recorded and on the material then available, the Magistrate found that on the mere saying of the petitioner process could not be issued against Kiran Modi and hence process was issued only against Sharad Modi. There is no dispute about the fact that the cheques in question had been signed by Sharad Modi claiming to be the Proprietor of Ruby Enterprises.

12. What is significant in the present case is that during the course of recording of evidence on 12/01/2018, the witness of the concerned bank clearly stated in his deposition that Kiran Modi was indeed the Proprietor of Ruby Enterprises and that there were documents in the custody of the bank indicating the same. In fact, such documents were also brought on record before the Magistrate. These documents prima facie show that all applications made on behalf of the Ruby Enterprises were signed by Kiran Modi as Proprietor and that even the sample signatures in the records of the bank for Ruby Enterprises were that of Kiran Modi. In the cross-examination of the said witness, nothing significant could be brought up. In fact, in the cross-examination the said witness stated that there was no document on record of the bank to show that Sharad Modi was the Proprietor.

13. It is in the backdrop of the aforesaid material that the petitioner moved the application on 25/04/2018, under Section 319 of the CrPC. The aforesaid provision reads as follows :-

> ***"319. Power to proceed against other persons appearing to be guilty of offence.**—(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.*
>
> *(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.*
>
> *(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.*
>
> *(4) Where the Court proceeds against any person under sub-section (1), then—*
>
> > *(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;*
> >
> > *(b) subject to the provisions of clause (a), 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."*

14. A bare perusal of the above quoted provision would show that when during the course of an inquiry or a trial, it appears that any person not being an accused has committed any offence, the Court may proceed against such person. It is settled law that even where the initially the Court has not proceeded against the person who is an accused and subsequently material comes on record which appears to indicate the involvement of such a person in commission of the offence in question, the Court can indeed exercise power under Section 319 of the CrPC.

15. If the material available on record in the present case is examined on the touchstone of the said position of law, it becomes clear that in the present case the Magistrate committed an error in passing the impugned order dated 18/02/2021. The Magistrate observed in the impugned order that as per the material available on record, there appears to be no evidence to show the involvement or complicity of Kiran Modi in the transaction, apart from what was already stated in the complaint. It was then recorded that admittedly, the said Kiran Modi had not signed the cheques as drawer.

16. This Court is of the opinion that the aforesaid observations made in the impugned order are erroneous. Not only were statements made in respect of role attributable to Kiran Modi in the above quoted paragraph 4 of the complaint, but subsequently the deposition of the bank witness along with documents that came from the custody of the bank was material enough to show prima facie involvement of Kiran Modi as Proprietor of Ruby Enterprises. It is significant that the cheques in question were issued by Ruby Enterprises through its Proprietor. It is a different matter that the said Sharad Modi signed the cheques as Proprietor of the Ruby Enterprises.

17. In fact, when the petitioner as the complainant proceeded to file the complaint in the context of the cheques signed by Sharad Modi as the Proprietor of Ruby Enterprises. He was bound to array Ruby Enterprises as an accused and Sharad Modi also as an accused, because he had signed the cheques purportedly as the Proprietor. The petitioner took the care of adding Kiran Modi as an accused to the complaint on the basis of statements made in paragraph 4 thereof. At the relevant time, it appears that other than statements made in the complaint, there was insufficiency of material to proceed against

Kiran Modi and this was the reason why in order dated 25/10/2016 the Magistrate issued the process only against Sharad Modi.

18. Once the petitioner as the complainant had been able to bring on record material indicating the involvement of Kiran Modi, inasmuch as documents were placed on record indicating that she was Proprietor of Ruby Enterprises, the scenario had changed, which the Magistrate failed to appreciate in the correct perspective. This Court is of the opinion that material placed on record while filing application under Section 319 of the CrPC was sufficient to meet the requirements of the said provision and that the application at Exh.67 ought to have been allowed by the Magistrate.

19. In view of the above, the present petition is allowed. The impugned order dated 18/02/2021 is quashed and set aside. The application at Exh.67 is allowed in terms of the prayer made therein. The Magistrate shall now proceed against the accused Kiran Modi also in view of the fact that the application at Exh.67 stands allowed.

20. Insofar as the order dated 25/10/2016 is concerned, at the relevant time, it appears that the when statement was made in the complaint, there was material yet to be placed on record to show the exact nature of involvement of the said Kiran Modi and therefore, no interference is warranted in the said order. In any case, efficacy of the said order pales into insignificance in view of the fact that this Court has set aside the order dated 18/02/2021 passed by the Magistrate and the application at Exh.67 stands allowed.

21. Considering that the complaint was filed by the petitioner in the present case as far back in the year 2016, the concerned Court of Magistrate is directed to expeditiously dispose of the complaint and preferably within a period of six months from today.

JUDGE