IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY PVT. PARTY NO.74 OF 2019

BHAURAO CHAVAN SAHAKAR SAKHAR KARKHANA LTD., THROUGH IT'S AUTHORIZED OFFICER KISHAN S/O. MAROTRAO JADHAV
VERSUS
HAJI ABDUL KARIM S/O. MOHD. SETH THEJIYA
...
Advocate for Appellant : Mr. Ghatol Patil Shahaji B.
Advocate for Respondents : Mr. Taher Ali Quadri
...
CORAM : SHRIKANT D. KULKARNI, J.
Dated: August 11, 2022
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PER COURT :-

1. The applicant, a Co-operative Sugar Factory is seeking leave to file an appeal by taking aid of Section 378(4) of the Criminal Procedure Code.

2. Heard learned counsel for respective parties.

3. Mr. Ghatol, learned counsel for the applicant invited attention of this Court to the impugned judgment paragraph no.37. He pointed out that, the observations made by the Trial Court regarding requirement to prove the case of dishonour of cheque are exfacie incorrect. He submitted that, even if cheque

is dishonoured on account of instructions of payment stop, Section 138 of the Negotiable Instruments Act, 1881 attracts. He submitted that the learned Trial Court has committed an error in observing that it is not a case that cheque was dishonoured due to insufficient funds, but it was for 'payment stop'. Mr. Ghatol has placed his reliance on following citations.

i. **Pulsive Technologies Private Limited Vs. State of Gujarat and others** reported in **(2014) 13 Supreme Court Cases 18.**

ii. **HMT Watches Limited Vs. M.A.Abida and another** reported in **(2015) 11 Supreme Court Cases 776.**

iii. **Modi Cements Ltd., Vs. Kuchil Kumar Nandi** reported in **(1998) 3 Supreme Court Cases 249.**

4. By placing reliance on above said citations, learned counsel Mr. Ghatol submitted that the learned Trial Court has committed an error in acquitting the respondent/accused. He submitted that in detail scrutiny of the judgment and order of acquittal needs at the hands of this Court and as such, leave may be granted.

5. Per contra, learned counsel Mr. Quadri for respondent/original accused invited my attention to the impugned judgment and order more, particularly, paragraph nos.10 and 11. He pointed out that cheque in question was issued by the partnership firm Babajan Corporation. He pointed out that there were three partners as per the admission given by CW-2 Shingewar. He pointed out that partnership firm is not made party to the proceedings. Consequently, all the three partners are not made accused. Only one partner is shown as an accused. He submitted that it is not permissible. It is a defect in view of section 141 of the Negotiable Instruments Act.

6. Mr. Quadri learned counsel for respondent submitted that there was no enforceable debt and as such respondent instructed his Bank to stop the payment. Complainant failed to prove it's case that any arrears were due in the name of respondent towards purchase of sugar. As such, the Trial Court has rightly held that there was no enforceable debt. He supported

to the findings recorded by the learned Magistrate while acquitting the accused. He submitted that, no case is made out to grant leave.

7. I have considered the submissions of learned counsel for both sides. Perused the impugned judgment and order of acquittal rendered by the Judicial Magistrate First Class, Nanded in SCC No.938 of 2010.

8. First, I shall deal with the legal point whether instructions of stop payment issued to the Bank would attract section 138 of the Negotiable Instruments Act. In the present case, respondent has issued instructions to his banker to stop payment regarding cheque in dispute. In **HMT Watches Limited Vs. M.A. Abida and another** (supra) the Supreme Court has held that instructions to "stop payment" issued to the Banker could be sufficient for the offence punishable under section 138 of the Negotiable Instruments Act Act. The same view finds place in the remaining two citations i.e. **Pulsive Technologies Private Limited Vs. State of Gujarat and others** reported in **(2014) 13 Supreme**

Court Cases 18 and **Modi Cements Ltd., Vs. Kuchil Kumar Nandi** reported in **(1998) 3 Supreme Court Cases 249.**

9. Having regard to the above legal position the observations made by the learned Judge of the Trial Court in paragraph no.37 of the judgment are found incorrect.

10. Now coming to the another issue raised by Mr. Quadri, learned counsel for respondent. On going through the impugned judgment, particularly, paragraph no.10, it is evident that the cheque in dispute was issued by Babajan Corporation, which is a partnership firm. Cheque was issued in the capacity of partner of Babajan Corporation. Notice issued by the complainant on record also reveals that notice was issued in the name of partnership firm Babajan Corporation. It is not enough, CW 2 Shingewar has admitted in his evidence that there are three partners of Babajan Corporation. Names of partners are also stated by CW 2 Shingewar. When the cheque in dispute was

issued on behalf of the partnership firm, obviously partnership firm must be added as accused in the proceedings initiated under the N.I. Act. It is requirement of section 141 of the NI Act. The learned Trial Court has also relied upon the citation in case of **Shriniwas Madhav Dolare Vs. Punakchand Chudaman Holye** Criminal Application No.1544 of 2005, wherein it is held that partnership firm is a legal entity like a company so far as the offence punishable under section 138 of the Negotiable Instruments Act is concerned. Further, it is held by the Apex Court in case of **Aneeta Hada Vs. Godfather Travels and Tours (Pvt) Ltd.**, reported in **2012 (4) Mh.L.J.(SC) 527**, 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.

11. Having regard to the above legal position, complaint filed by the Sugar Factory under section 138 of the Negotiable Instruments Act, 1881 is not

maintainable in the eye of law in view of legal position made clear by the Hon'ble Supreme Court in the case of **Aneeta Hada Vs. Godfather Travels and Tours (Pvt) Ltd.** The very foundation of the complainant's case is defective. That legal defect cannot be cured, even by granting leave to file appeal. No purpose would be served in granting leave.

12. At this stage, Mr. Ghaotl Patil, learned counsel for the applicant seeks some time to place on record certain citations. I am not impressed by such submission when the legal position under section 141 of the Negotiable Instruments Act is very much clear. More so, in the case of **Aneeta Hada Vs. Godfather Travels and Tours (Pvt) Ltd** referred above, the Apex Court has held that partnership firm is a necessary party and needs to be arrayed as an accused.

13. Under these circumstances, no case is made out to grant leave.

O R D E R

i. Leave is refused.

ii. Application is disposed off.

(SHRIKANT D. KULKARNI, J.)

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