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IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 95 OF 2022

BHIKAJI ARJUN GAWADE ... PETITIONER
VS
NITIN UPADHAYAY AND 2 ORS. ... RESPONDENTS

Mr. Chirag Angle, Advocate for the Petitioner.
Mr. Gaurish Agni with Mr. M. Kenkre and Mr. Yitshwane
Keluskar, Advocates for Respondent Nos. 1 and 2.
Mr. Gaurish Nagvenker, Additional Public Prosecutor for
Respondent No. 3.

CORAM: G.S. KULKARNI, J.

DATED: 19 SEPTEMBER 2022

ORAL ORDER.

1. This Petition has been filed assailing an order dated 31 March 2021 passed by the learned Additional Sessions Judge (FTC-1), South Goa, Margao in Criminal Revision Application No. 66/2019, whereby the petitioner's challenge to an order dated 31 July 2020 passed by the learned Judicial Magistrate First Class (JMFC) on an application filed by the petitioner/accused under Section 258 of the Cr.P.C. praying for his discharge in the

proceedings of criminal case filed by respondent nos. 1 and 2 under Section 138 of the Negotiable Instruments Act, 1881 (for short, N.I. Act) stands dismissed.

2. The learned JMFC passed an order dated 31 July 2020 dismissing the petitioner's/accused's application praying for a discharge. Against such order passed by the learned JMFC, the petitioner/accused had approached the Court of learned Sessions Judge, who dismissed the petitioner's revision application observing that Section 258 of the Cr.P.C. applies only to summons cases instituted otherwise than on complaints when it permits the Court to discharge/acquit the accused prematurely. It was observed that Section 258 of the Cr.P.C. has no application to cases instituted upon complaints. It was also observed that Section 258 of the Cr.P.C. is of no avail to the petitioner as the proceedings in question were instituted by respondent nos. 1 and 2 upon a complaint.

3. Learned Counsel for Respondent nos. 1 and 2 has placed on record a recent order dated 16 April 2021 passed by the Supreme Court in *Suo Motu Writ Petition (Crl.) No. 2/2020 in Re: Expeditious Trial of Cases under Section 138 of the Negotiable Instruments Act, 1881 (for short, N.I. Act)*. He submits that the Supreme Court has categorically held that Section 258 of the

Cr.P.C. is not applicable to the summons cases instituted on a complaint under Section 138 of the N.I. Act and therefore, Section 258 of the Cr.P.C. would not come into play. The observation in that regard can be seen in paragraphs 20 and 24(7), which read thus:

*“20. Section 143 of the Act mandates that the provisions of summary trial of the Code shall apply “as far as may be” to trials of complaints under Section 138. Section 258 of the Code empowers the Magistrate to stop the proceedings at any stage for reasons to be recorded in writing and pronounce a judgment of acquittal in any summons case instituted otherwise than upon complaint. Section 258 of the Code is not applicable to a summons case instituted on a complaint. Therefore, Section 258 cannot come into play in respect of the complaints filed under Section 138 of the Act. The judgment of this Court in **Meters and Instruments Pvt. Ltd. & Another Vs. Kanchan Mehta, (2018) 1 SCC 560** insofar as it conferred power on the Trial Court to discharge an accused is not good law. Support taken from the words “as far as may be” in Section 143 of the Act is inappropriate. The words “as far as may be” in Section 143 are used only in respect of applicability of Sections 262 to 265 of the Code and the summary procedure to be followed for trials under Chapter XVII. Conferring power on the court by reading certain words into provisions is impermissible. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction*

must eschew interpolation and evisceration. He must not read in by way of creation. The Judge's duty is to interpret and apply the law, not to change it to meet the Judge's idea of what justice requires. The court cannot add words to a statute or read words into it which are not there."

"24. The upshot of the above discussion leads us to the following conclusions.

...

*7) Section 258 of the Code is not applicable to complaints under Section 138 of the Act and findings to the contrary in **Meters and Instruments** (supra) do not lay down correct law. To conclusively deal with this aspect, amendment to the Act empowering the Trial Courts to reconsider/recall summons in respect of complaints under Section 138 shall be considered by the Committee constituted by an order of this Court dated 10.03.2021."*

4. The present proceedings which arise from an application made by the petitioner/accused under Section 258 of the Cr.P.C. praying for discharge, which came to be rejected by the learned JMFC and the same has been rightly confirmed by the learned Sessions Judge observing that recourse to such provisions cannot be taken by the petitioner/accused in a complaint instituted under Section 138 of the N.I. Act. Thus, there is no perversity in Court's

exercise of jurisdiction in dismissing the petitioner's application under Section 258 of the Cr.P.C.

5. The limited grievance raised on behalf of the petitioner/accused is in regard to the observations as made by the learned JMFC in order dated 31 July 2019, by which, the learned JMFC directed that respondent no. 2 be deleted. The observations read thus:

“Perused the application and the reply filed objecting the same. From the records it is revealed that there is no privity of contract or any cause against the accused vis-a-vis the complainant no. 2 is concerned. The offence against the accused has been made out by the complainant no. 1 he being the holder of the cheque in question and there is no privity of contract between the accused and the complainant no. 2 as far as the complaint under section 138 of N.I. Act is concerned. Therefore, the error committed by the complainant can be corrected by dropping the complainant no. 2 from the cause title of the complaint, instead of dismissal of the complaint on the ground which is purely technical in nature. Hence order, application dismissed. Complainant is directed to carry out correction to the cause title.”

6. It is contended that such direction ought not to have been issued, particularly when, cognizance of the complaint was taken by the learned JMFC. In support of this contention, the learned

Counsel for the petitioner has placed reliance on the decision of the Supreme Court in **S.R. Sukumar Vs. S. Sunaad Raghuram**¹ on the context of whether, amendment can be carried out in a criminal complaint on the premise that the amendment was made prior to taking cognizance of the offence, the Supreme Court in paragraphs 18 and 19 held as under:

“18. What is discernible from the U.P. Pollution Control Board’s 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, 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.”

19. In the instant case, the amendment application was filed on 24.05.2007 to carry out the amendment by adding paras 11(a) and 11 (b). Though, the proposed amendment was not a formal amendment, but a substantial one, the Magistrate allowed the amendment application mainly on the

¹ (2015) 5 SCC 695

ground that no cognizance was taken of the complaint before the disposal of amendment application. Firstly, Magistrate was yet to apply the judicial mind to the contents of the complaint and had not taken cognizance of the matter. Secondly, since summons was yet to be ordered to be issued to the accused, no prejudice would be caused to the accused. Thirdly, the amendment did not change the original nature of the complaint being one for defamation. Fourthly, the publication of poem 'Khalnayakaru' being in the nature of subsequent event created a new cause of action in favour of the respondent which could have been prosecuted by the respondent by filing a separate complaint and therefore to avoid multiplicity of proceedings, the trial court allowed the amendment application. Considering these factors which weighed in the mind of the courts below, in our view, the High Court rightly declined to interfere with the order passed by the Magistrate allowing the amendment application and the impugned order does not suffer from any serious infirmity warranting interference in exercise of jurisdiction under Article 136 of the Constitution of India.

(emphasis added)

7. It is clearly seen from the above observations of the Supreme Court that there is no enabling provision to allow such an amendment in a private criminal case, however, the Court may permit such an amendment to be made. It is certainly not held that the Court is not powerless in the proceedings of the present

nature under Section 138 of the N.I. Act and that such a course of action would be barred and more particularly, considering the nature of the amendment. Moreover, it is clear from the order passed by the learned JMFC that the amendment was permitted considering the objection raised by the petitioner/ accused in regard to the presence of respondent no. 2, who is the wife of respondent no. 1 being the original complainant. The petitioner cannot blow hot and cold in the same breath. In any event, it cannot be overlooked that the proceedings in question being proceedings under Section 138 of the N.I. Act, are quasi-criminal in nature. It is held by the Supreme Court that the proceedings can be called a "*civil sheep*" in a "*criminal wolf's*" clothing and there is a departure from the procedure under the Cr.P.C. for cheque cases (see **P. Mohanraj & Others Vs. M/s Shah Brothers Ispat Pvt. Ltd.**²). Thus, in my considered opinion, the contentions raised on behalf of the petitioner hence are wholly untenable.

8. Accordingly, the Petition is dismissed. No costs.

G.S. KULKARNI, J.

² (2021) 6 SCC 258