203 IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-M No.32597 of 2019 (O&M)
Date of decision : 15.11.2022

M/s Escorts Limited ...... Petitioner

versus

M/s Nagpal Auto Sales & anr. ...... Respondents

CORAM : HON'BLE MR.JUSTICE PANKAJ JAIN

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Present :- Mr. Kunal Dawar, Advocate for the petitioner.

Mr. Suresh Kumar Kaushik, Advocate for respondent No.2.

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PANKAJ JAIN, J. (ORAL)

Present petition has been filed at the behest of complainant against the order dated 12.07.2019 (Annexure P-1) passed by Judicial Magistrate First Class, Faridabad whereby an application seeking amendment of the complaint No.NACT/4906/16 dated 07.12.2016 under Section 138 of the Negotiable Instruments Act, 1881 (for short the 'Act') has been rejected.

As per the averments made in the petition, the petitioner had business relations with respondent No.1 which is a proprietorship concern. On the basis of accounts regularly maintained qua the business relationship between the parties complainant claims that respondent No.1 issued a cheque of Rs.8,00,065/- dated 12.09.2016 which was dishonored on presentation vide memo dated 01.11.2016 for the reason 'Funds Insufficient'. The petitioner served respondents No.1 & 2 with the statutory notice. The same was replied vide communication dated 28.11.2016 whereby respondent No.1 denied its liability. The petitioner filed complaint under Section 138 of the Negotiable Instruments Act, 1881 (for short the 'Act') on 07.12.2016. During the course of trial an application was moved by respondent No.2 seeking discharge claiming that he is neither the proprietor nor signatory to the cheque. The said application was dismissed vide order dated 22.11.2018. As a matter of abundant caution petitioner filed present application wherein respondent No.1 was sought to be impleaded through its proprietor 'Sh.Sachin Nagpal' by carrying out amendment in the memo of parties, since earlier the accused firm was being impleaded through respondent No.2 as its sole proprietor. The said application stands rejected by the trial Court vide impugned order observing that since no notice has been issued to Sh.Sachin Nagpal and therefore, ingredients of Section 138 of the Act *qua* him cannot be said to have been satisfied.

Learned counsel for the petitioner submits that in fact Sh.Sachin Nagpal and respondent No.2 i.e. Sh.Rohit Nagpal both are brothers and through a novel way they are trying to hoodwink process of law. He has drawn attention of this Court to the reply to the legal notice wherein respondent No.1 replied to the legal notice through its proprietor- Sh.Rohit Nagpal. At the same time Sh.Rohit Nagpal filed an application claiming that he was not the proprietor of the firm. He thus submits that the amendment sought to be brought in the complaint is within an object to weed out possibility of such smart play at the hands of respondent No.1. He further relies upon ***M/s Bangi Linganna Rep. By its Prop : U.B.Mallikarjuna, Yemmiganur Vs. State of A.P. Rep. By the Public Prosecutor & ors., 2020 SCC OnLine AP 23, Kanwar Lal Vs. National Seeds Process through its Partner Kishore @ Ganshyam, 2019(2) CivCC***

541, Manish Kalani & anr. Vs. Housing & Urban Development Corporation Ltd., 2018 SCC OnLine MP 1864, S.R.Sukumar Vs. S.Sunaad Raghuram, 2015(3) RCR (Criminal) 570 and Rajneesh Aggarwal Vs. Amit J.Bhalla, 2001(1) RCR (Criminal) 605 to claim that the amendment in the complaint filed under Section 138 of the Act can well be carried out in the exceptional circumstances wherein by allowing so it will advance the interest of justice.

Learned counsel for respondent at the out set submits that he is not representing respondent No.1 and is representing respondent No.2 only. On a pointed query being asked to the learned counsel representing respondent No.2 as to how he was mentioned as proprietor of respondent No.1 accused-firm in communication dated 28.11.2016. His reply is too innocent. It has been stated that it was owing to mistake by the counsel that Sh.Rohit Nagpal was mentioned as proprietor. He further submits that there is overwhelming evidence on record produced by Sh.Rohit Nagpal along with his application seeking discharge showing that it is Sh.Sachin Nagpal who is the proprietor of the firm. He further claims that in absence of any notice to Sh.Sachin Nagpal and with non-impleading of Sh.Sachin Nagpal at the inception, the amendment if allowed at this stage would amount to travesty of justice.

I have heard learned counsel for the parties and have gone through the records of the case.

By now it is well settled that but for the criminal contour the proceedings under Section 138 of the Act are civil in nature. Reliance can be placed upon ***M/s Meters Instruments Pvt. Ltd. & Anr. Vs. Kanchan Mehta, 2018(1) SCC 560.*** Further reliance can be placed upon ***M/s Best***

Deal Housing and Construction Pvt. Ltd., Vs. M/s JMK Land Solution Pvt. Ltd., & another 2017 SCC OnLine P&H 2083 wherein it has been held as under :-

> *"4. The learned trial court rejected the application by the impugned order on the ground that there is no such provision in the Cr.P.C. or NI Act. However, the said reason is clearly illegal as the law is well settled that there is no bar from allowing the amendment even in a criminal complaint. Secondly, the complaint under Section 138 NI Act is not strictly a criminal case but NI Act was brought into force for making the commercial and business transactions easy. The proceedings are therefore in the nature of quasi criminal proceedings."*

In ***P.Mohanraj & ors., Vs. M/s Shah Brothers Ispat Pvt. Ltd., 2021(6) SCC 258*** it was held that :-

> *"43. With this analysis of Chapter XVII, let us look at some of the decided cases. In Commissioner of Income Tax v. Ishwarlal Bhagwandas, (1966) 1 SCR 190, this Court distinguished between civil proceedings and criminal proceedings in the context of Article 132 of the Constitution thus:*
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> > *"... The expression "civil proceeding" is not defined in the Constitution, nor in the General Clauses Act. The expression in our judgment covers all proceedings in which a party asserts the existence of a civil right conferred by the civil law or by statute, and claims relief for breach thereof. A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property. It also includes proceedings in which in the larger interest of the State, orders to prevent apprehended breach of the peace, orders to bind down persons who are a danger to the maintenance of peace and order, or orders aimed at preventing vagrancy are contemplated to be passed. But the whole area of proceedings, which reach the High Courts is not exhausted by classifying the proceedings as civil and criminal. There are certain proceedings which may be regarded as neither civil nor criminal. For instance, proceeding for contempt of court, and for exercise of disciplinary jurisdiction against lawyers or other professionals, such as Chartered Accountants may not fall*

within the classification of proceedings, civil or criminal. But there is no warrant for the view that from the category of civil proceedings, it was intended to exclude proceedings relating to or which seek relief against enforcement of taxation laws of the State. The primary object of a taxation statute is to collect revenue for the governance of the State or for providing specific services and such laws directly affect the civil rights of the tax-payer. If a person is called upon to pay tax which the State is not competent to levy, or which is not imposed in accordance with the law which permits imposition of the tax, or in the levy, assessment and collection of which rights of the tax-payer are infringed in a manner not warranted by the statute, a proceeding to obtain relief whether it is from the tribunal set up by the taxing statute, or from the civil court would be regarded as a civil proceeding. The character of the proceeding, in our judgment, depends not upon the nature of the tribunal which is invested with authority to grant relief, but upon the nature of the right violated and the appropriate relief which may be claimed. A civil proceeding is, therefore, one in which a person seeks to enforce by appropriate relief the alleged infringement of his civil rights against another person or the State, and which if the claim is proved would result in the declaration express or implied of the right claimed and relief such as payment of debt, damages, compensation, delivery of specific property, enforcement of personal rights, determination of status etc."

(at pages 196-197)

"A large number of cases have arisen before the High Courts in India in which conflicting views about the meaning of the expression "civil proceeding" were pressed. In some cases it was held that the expression "civil proceeding excludes a proceeding instituted in the High Court for the issue of a writ whatever may be the nature of the right infringed and the relief claimed in other cases it has been held that a proceeding resulting from an application for a writ under Article 226 of the Constitution may in certain cases be deemed to be a "civil proceeding", if the claim made, the right infringed and the relief sought warrant that inference: in still another set of cases it has been held that even if a proceeding commenced by a petition for a writ be generally categorised as a civil proceeding, where the jurisdiction which the High Court exercises relates to revenue, the proceeding is not civil. A perusal of the reasons given in the cases prompt the following

observations. There are two preliminary conditions to the exercise of the power to grant certificate: (a) there must be a judgment, decree or final order, and that judgment, decree or final order must be made in a civil proceeding. An advisory opinion in a tax reference may not be appealed from with certificate under Article 133 because the opinion is not a judgment, decree or final order, and (b) a proceeding does not cease to be civil, when relief is claimed for enforcement of civil rights merely because the proceeding is not tried as a civil suit. In a large majority of the cases in which the jurisdiction of the High Court to certify a case under Article 133(1) was negatived it appears to have been assumed that the expression "other proceeding" used in Article 132 of the Constitution is or includes a proceeding of the nature of a revenue proceeding, and therefore the expression "civil proceeding" in Article 133(1) does not include a revenue proceeding. This assumption for reasons already set out is erroneous."

(at page 199)

A perusal of this judgment would show that a civil proceeding is not necessarily a proceeding which begins with the filing of a suit and culminates in execution of a decree. It would include a revenue proceeding as well as a writ petition filed under Article 226 of the Constitution, if the reliefs therein are to enforce rights of a civil nature. Interestingly. criminal proceedings are stated to be proceedings in which the larger interest of the State is concerned. <u>Given these tests, it is clear that a Section 138 proceeding can be said to be a "civil sheep" in a "criminal wolf's clothing, as it is the interest of the victim that is sought to be protected, the larger interest of the State being subsumed in the victim alone moving a court in cheque bouncing cases, as has been seen by us in the analysis made herein above of Chapter XVII of the Negotiable Instruments Act."</u>

(emphasis supplied)

In the present case it will be apposite to reproduce the Memo of Parties in the complaint :-

<u>"IN THE MATTER OF:-</u>
M/s Escorts Limited
A Company Having Its Registered Office
At 15/5, Mathura Road,
Faridabad, Haryana- 121003
Through Its Authorised Representative

Sh. Jai Prakash Sharma ....Complainant

VERSUS

1. M/s Nagpal Auto Sales
1-J-35, Arya Samaj Road,
NIT, Faridabad
Through its proprietor
Mr Rohit Nagpal

2. Mr Rohit Nagpal
Proprietor/ Signatory
M/s Nagpal Auto Sales
1-J-35, Arya Samaj Road,
NIT, Faridabad

Both Also at,
M/s Nagpal Auto Sales
Through, Mr Rohit Nagpal
Proprietor/Signatory
17 BATA, A-Colony
NIT, Faridabad ....Accused"

The amendment that the complainant seeks is to amend details of respondent No.1 and the proposed amended details read as under :-

"IN THE MATTER OF:-
M/s Escorts Limited
A Company Having Its Registered Office
At 15/5, Mathura Road,
Faridabad, Haryana- 121003
Through Its Authorised Representative
Sh. Jai Prakash Sharma ....Complainant

VERSUS

1. M/s Nagpal Auto Sales
1-J-35, Arya Samaj Road,
NIT, Faridabad
Through its proprietor
Mr Sachin Nagpal

2. Mr Rohit Nagpal
Proprietor/ Signatory
M/s Nagpal Auto Sales
1-J-35, Arya Samaj Road,
NIT, Faridabad

Both Also at,
M/s Nagpal Auto Sales
Through, Mr Rohit Nagpal
Proprietor/Signatory
17 BATA, A-Colony
NIT, Faridabad ....Accused"

The relation between Sh.Rohit Nagpal and Sh.Sachin Nagpal is admitted. The fact that the reply to legal notice was also sent on the instructions of Sh.Rohit Nagpal is evident from the record and thus this Court can well ta ke notice of the fact that the affairs of the firm are being well managed by both the brothers i.e. Sh.Sachin Nagpal and Sh.Rohit Nagpal. The application filed seeking discharge of Sh.Rohit Nagpal seems to be a ploy to defeat the process of law. The explanation offered by the learned counsel for respondent No.2 in the light of communication dated 28.11.2016 is too fallacious to be accepted.

The very objective of making offence qua dishonour of cheques punishable, is to maintain the trust on the banking system and the objective of such law cannot be allowed to be defeated at the hands of a dishonest litigant. In ***MSR Leathers Vs. S.Palaniappan & Anr., 2013 (1) SCC 177 it has been held as under :-***

> *"27. It is trite that the object underlying Section 138 of the Act is to promote and inculcate faith in the efficacy of banking system and its operations, giving credibility to Negotiable Instruments in business transactions and to create an atmosphere of faith and reliance by discouraging people from dishonouring their commitments which are implicit when they pay their dues through cheques. The provision was intended to punish those unscrupulous persons who issued cheques for discharging their liabilities without really intending to honour the promise that goes with the drawing up of such a negotiable instrument. It was intended to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case the cheque was dishonoured and to safeguard and prevent harassment of honest drawers. (See Mosaraf Hossain Khan v. Bhagheeratha Engg. Ltd. 2006(2) RCR (Criminal) 137: 2006(1) Apex Criminal 504: (2006) 3 SCC 658, C.C. Alavi Haji v. Palapetty Muhammed & Anr. 2007(3) RCR (Criminal) 185 2007(3) Recent Apex Judgments (R.A.J.) 177 (2007) 6 SCC 555 and Damodar S. Prabhu v. Sayed Babulal H. 2010(2) RCR (Criminal) 851 2010(3) R.A.J. 180: (2010) 5 SCC 663). Having said that, we must add*

that one of the salutary principles of interpretation of statutes is to adopt an interpretation which promotes and advances the object sought to be achieved by the legislation, in preference to an interpretation which defeats such object. This Court has in a long line of decisions recognised purposive interpretation as a sound principle for the Courts to adopt while interpreting statutory provisions. We may only refer to the decisions of this Court in New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar (AIR 1963 Supreme Court 1207). where this Court observed:

> *"It is a recognised rule of interpretation of statutes that expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature. If an expression is susceptible of a narrow or technical meaning, as well as a popular meaning, the Court would be justified in assuming that the Legislature used the expression in the sense which would carry out its object and reject that which renders the exercise of its power invalid."*

24. Absolution is, at any rate, a theological concept which implies an act of forgiving the sinner of his sins upon confession. The expression has no doubt been used in some judicial pronouncements, but the same stop short of recognising absolution as a juristic concept. It has always been used or understood in common parlance to convey "setting free from guilt" or "release from a penalty.

Thus keeping in view the aforesaid facts and the legal position the proposed amendment which is formal in nature deserves to be allowed.

I may hastenly add here that the reasoning recorded by the trial Court while declining the amendment also sounds ill. Trial Court while rejecting the prayer missed the fact that accused No.1 is not Sh.Sachin Nagpal but the firm. It is evident from Annexure P-2 that the firm was well served with the statutory notice and therefore, to say that the demand notice was not served on Sh. Sachin Nagpal and therefore, ingredients of Section 138 of the Act will not stand fulfilled cannot be sustained. Once the firm is the accused and admittedly has been served with the statutory notice, prima-facie the ingredients of Section 138 of the Act *qua* respondent No.1 will not be affected by effectuating the proposed amendment.

At this stage, counsel for respondent No.2 submits that the complainant cannot have both ways. In case it is a case of the complainant that Sh.Sachin Nagpal is the proprietor of the accused No.1, Sh. Rohit Nagpal deserves to be discharged. Further he submits that after taking of cognizance the amendment cannot be effected. Both the contentions need to be noticed to be rejected. So far as the plea with respect to the cognizance is concerned, the cognizance has been taken against the firm and therefore, the amendment qua details of its proprietor will not affect the process. Likewise the plea with respect to discharge of Sh.Rohit Nagpal also sans merit. It has come on record that Sh.Rohit Nagpal dealt with the affairs of the firm. As per the provision contained in Section 186 of the Indian Contract Act, 1872 agency can be created expressly or impliedly. Illustration attached to Section 208 of the Indian Contract Act, 1872 very aptly explains the situation in hand :-

> *"**208. When termination of agent's authority takes effect as to agent, and as to third persons.-** The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.*
>
> *Illustrations*
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> *(a) A directs B to sell goods for him, and agrees to give B five per cent. commission on the price fetched by the goods. A afterwards by letter, revokes B's authority. B after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on A, and B is entitled to five rupees as his commission.*
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> <u>*(b)A, at Madras, by letter directs B to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter revokes his authority to sell, and directs B to send the cotton to Madras. B after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second for the sale to him of the cotton. C pays B the money,*</u>

with which B absconds. C's payment is good as against A.

(c) A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor."

It has come on record that on the instructions of Sh.Rohit Nagpal the liability was denied by the firm. Thus at this stage it is too late in the day for Sh.Rohit Nagpal to claim ignorance and innocence qua matters and affairs of the firm.

Consequently, the petition is allowed. The impugned order passed by the trial Court is set aside. The trial Court is directed to permit the petitioner to carry out necessary amendments, as prayed for and thereafter proceed with the complaint, in accordance with law.

(PANKAJ JAIN)
JUDGE

15.11.2022
Pooja sharma-I

Whether speaking/reasoned Yes
Whether Reportable : No