

IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 477 of 2018

Jhantu Mahapatra

Vs.

Niranjan Deb & Ors.

For the Appellant : Mr. Srinjay Sengupta,
Mr. Arindam Jana,
Mr. Sourav Roy,
Mr. Narattam Acharyya.

For the Opposite Parties : Mr. Mani Sankar Chattopadhyay.

For the State : Ms. Faria Hossain,
Ms. Mausumi Sarkar.

Heard on : 14.07.2023

Judgment on : 03.08.2023

Shampa Dutt (Paul), J.:

1. The present appeal has been preferred against the judgment and order dated 27.04.2018 passed by the Learned Additional Chief Judicial Magistrate, Contai, Purba Medinipur, in C.R. Case No. 116 of 2017, thereby finding the respondent nos. 1 and 2 herein not guilty of the charge for commission of an offence punishable under Section 138 of the

Negotiable Instruments Act, 1881 and acquitting them from the instant case.

- 2.** The complainant/appellant's case is that M/s Maa Manasha Enterprise of which appellant is the proprietor, was appointed as Super Stockiest of Delicious Agro Pvt. Ltd. for the area of East Midnapore on 31.08.2016. The appellant advanced payment in favour of the company of which the private respondents are directors for supply of goods. But no goods were delivered to the appellant. The appellant issued a letter dated 20.02.2016 addressing the private respondents calling for refund of the money advanced. Under such circumstances, to discharge their legal liability, the private respondents in the capacity of Directors of Delicious Agro Pvt. Ltd. issued an Account Payee Cheque in favour of the appellant dated 31.01.2017 bearing No. 735627 drawn on UC Bank, Jodhpur Park Branch for an amount of Rs.10,80,270/-
- 3.** On 03.02.2017, the appellant deposited the said cheque bearing No. 735627 drawn on UC Bank, Jodhpur Park Branch for Rs.10,80,270/- with Canara Bank, Khar Branch in Account No.5822201000038, well within the validity period of the said Cheque. But the said cheque was dishonoured due to insufficient fund and the said cheque was returned to the appellant by Canara Bank on 03.03.2017 by way of Speed Post along with an attached Returned Memo.
- 4.** That through his learned Advocate the appellant issued a notice by way of Registered Post with Acknowledgment Due under Section 138(b) of the Negotiable Instruments Act dated 15.03.2017 upon the private respondents causing demand for payment of the cheque amount of

Rs.10,80,270/- in total in lieu of the dishonoured cheque within 15 days from the date of receipt of the said notice. But the said **notices were** reverted to the address of the learned Advocate of the appellant on 29.03.2017 with an endorsement **“Unclaimed”**.

5. In the light of non-acceptance of the notice dated 15.03.2017 by the appellant, finding no other alternative the appellant approached the Court of the Learned Additional Chief Judicial Magistrate at Contai by filing an application under Section 138 of the Negotiable Instruments Act, 1881 against the private respondents on 19.04.2017 being C.R. Case No. 116 of 2017.
6. On 17.02.2018, the private respondents moved a petition before the Learned Additional Chief Judicial Magistrate, Contai, Purba Medinipur praying for dismissal of the instant case on the ground of maintainability. The Learned Additional Chief Judicial Magistrate, Contai, Purba Medinipur, by his order dated 27.04.2018, after hearing the concerned parties in connection with the petition dated 17.02.2018, directed the instant case to be dropped thereby acquitting the private respondents on the ground of maintainability of the instant case in terms of Section 141 of the Negotiable Instruments Act.
7. Being aggrieved by and dissatisfied with the order dated 27.04.2018 passed by the Learned Additional Chief Judicial Magistrate, Contai, Purba Medinipur, in C.R. Case No. 116 of 2017, the appellant preferred Special Leave to Appeal before this Hon’ble Court being C.R.M.S.P.L. No. 60 of 2018 and His Lordship the Hon’ble Justice Shivakant Prasad on

20.08.2018 was pleased to grant leave to the appellant to prefer the present appeal.

- 8. Mr. Srinjay Sengupta, learned counsel for the appellant** has submitted that the Learned Magistrate while passing the impugned order erred in law by being oblivious to the fact that the petition dated 17.02.2018 moved by the private respondents was *per se* not maintainable *ab initio*. Thus, by dwelling on the same and passing the impugned order instead of dismissing it *in limine*, the Learned Magistrate has caused travesty of the established principles of law.
- 9.** It is further submitted that when a petition of complaint is filed before a Learned Magistrate, the Magistrate can examine the complainant on oath in terms of Section 200 of the Code of Criminal Procedure or if the Learned Magistrate fathoms the need to postpone the issuance of process and cause an inquiry either by himself or through the police, then the Learned Magistrate is empowered to do so by virtue of the powers conferred upon him in the provisions of Section 202 of the Code of Criminal Procedure. Upon adherence to the above referred procedure, on being satisfied that *prima facie* ingredients of an offence is present in the allegations, the Learned Magistrate may issue process against the accused persons or if the Learned Magistrate is not satisfied about *prima facie* presence of ingredients of any offence in the complaint, the Learned Magistrate may dismiss the same.
- 10.** The Learned Magistrate while acquitting the private respondents by passing the impugned order erred to concede with the legal position that from the stage of filing of a complaint, till issuance of process under

Section 204 of the Code of Criminal Procedure, there is no scope for hearing an accused person.

11. The Learned Magistrate failed to appreciate that in the event of the contingency of erroneous issuance of process against an accused person, the accused cannot move before the Learned Magistrate praying for dismissal of the complaint in terms of Section 203 of the Code of Criminal Procedure as the accused is not ascribed with any right of audience before the Learned Magistrate at the stage of 203 of the Code of Criminal Procedure.
12. The impugned order passed by the Learned Magistrate thereby acquitting the private respondents is contrary to the settled principles of law and has occasioned miscarriage of justice.
13. It is imperative in the interest of justice that the impugned order of acquittal be set aside and the private respondents be brought to justice.
14. The impugned order is otherwise bad in law and the same is liable to be set aside.
15. **Mr. Mani Sankar Chattopadhyay, learned counsel for the opposite parties** submits that the complaint is not tenable against the accused as the complainant has not implicated the said company in the case. Moreover there is no averment in the said complaint about the role of the directors whom the complainant has named as accused. Without such averment accused cannot be made responsible for the misdeeds of the company. The complaint is rightly dismissed acquitting the accused. He has cited a decision in support of his contention which is reported in

2017(4) AICLR 1 (SC) (N. Harihara Krishnan v. J. Thomas, dated 30.08.2017)

16. From the materials on record, it is seen that:-

The final part of the judgment **under appeal** is as follows:-

Ordered

Compl. Case No. 116 of 2017

Dated:- 27.04.2018

“.....that the said application is allowed on contest without any costs and the complaint is dropped being not maintainable as per provision of Section 141 of the Negotiable Instrument Act and the accused are acquitted and they are released from their respective bail bonds.

Hence the case is disposed of and be dropped from its original file.”

Sd/-

A.C.J.M.’s Court, Contai

17. The appellant has prayed for amendment of the petition of complaint to incorporate the name of the company, relying upon the judgment of the Hon’ble Supreme Court in **S.R. Sukumar vs. S. Sunaad Raghuram** reported in **(2015) 9 SCC 609**.

18. The trial Court held as follows:-

“.....it is abundantly clear that Company should be arrayed as an accused to make its Directors liable. Further it be mentioned herein that complainant was well aware about the existence of the Company Delicious Agro Food Pvt. Ltd. and the status of accused. The transaction had taken place with Delicious Agro Food Pvt. Ltd.....”

19. The amount of the cheque in this case is Rs.10,80,270/-.

20. In *U.P. Pollution Control Board v. Modi Distilleries*, (1987) 3 SCC 684. Therein, the name of the accused company was wrongly mentioned in the complaint as Modi Distilleries instead of Modi Industries Limited, which was sought to be amended. **The Hon'ble Supreme Court, considering the same as a mere curable legal infirmity observed, "....furthermore the legal infirmity is of such nature which could be easily cured.....".**

21. The court further held:-

"This is an instance where due to the Sheer negligence on the part of the legal advisors in drafting the complaint, a large business house is allowed to escape the consequences of the breaches committed by it of the provisions of the Act....."

The Court directed the learned Chief Judicial Magistrate to proceed with the trial.

22. In *S.R. Sukumar v. S. Sunaad Raghuram*, (2015) 9 SCC 609, the Supreme Court held:-

"17. Insofar as merits of the contention regarding allowing of amendment application, it is true that there is no specific provision in the Code to amend either a complaint or a petition filed under the provisions of the Code, but the Courts have held that the petitions seeking such amendment to correct curable infirmities can be allowed even in respect of complaints. In *U.P. Pollution Control Board vs. Modi Distillery And Ors.*, (1987) 3 SCC 684, wherein the name of the company was wrongly mentioned in the complaint that is, instead of Modi Industries Ltd. the name of the company was mentioned as Modi Distillery and the name was sought to be amended. In such factual background, this Court has held as follows:-

"...The learned Single Judge has focussed his attention only on the [pic]technical flaw in the complaint and has failed to comprehend that the flaw had occurred due to

the recalcitrant attitude of Modi Distillery and furthermore the infirmity is one which could be easily removed by having the matter remitted to the Chief Judicial Magistrate with a direction to call upon the appellant to make the formal amendments to the averments contained in para 2 of the complaint so as to make the controlling company of the industrial unit figure as the concerned accused in the complaint. All that has to be done is the making of a formal application for amendment by the appellant for leave to amend by substituting the name of Modi Industries Limited, the company owning the industrial unit, in place of Modi Distillery.... Furthermore, the legal infirmity is of such a nature which could be easily cured..."

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."*

23. In ***Aneeta Hada v. Godfather Travels and Tours Private Limited, (2012) 2 SCC 661***, the point for determination before the Hon'ble Supreme Court was whether a complaint under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 ("**NI Act**") was maintainable against a Director or Authorized signatory of a company, without joining the company as an accused?

24. The Court further held:-

"43. *In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution*

under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh (supra) which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal (supra) does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada (supra) is overruled with the qualifier as stated in paragraph 37. The decision in Modi Distilleries (supra) has to be treated to be restricted to its own facts as has been explained by us hereinabove.”

25. Thus the prosecution of other persons under Section 138 NI Act is permissible only when the Company is named as an accused in the complaint.

26. Where the Company due to, *inter alia*, inadvertence of the complainant may not have been named as one of the accused(s) in the cause title of complaint, however, from a perusal of such complaint, it can be observed that specific averments/ingredients for the commission of offence under Section 138 NI Act against the company are made out. Under such circumstances, considering the same as mere curable infirmity, Courts have permitted the complainant to amend the complaint by adding the name of Company as one of the accused(s) (***Manish Kalani & Another v. Housing and Urban Development Corporation Ltd. & Anr., M.Cr.C.No. 16282/2016, Madhya Pradesh High Court, dated 30.01.2018***).

27. In ***Manish Kalani & Another v. Housing and Urban Development Corporation Ltd. & Anr. (Supra)***, the Court further held:-

“31. So, in the peculiar facts and circumstances of the case the application filled by the applicants for taking cognizance against applicant No.2 company comes under the purview of Section 190 (1)(a) of the Cr.P.C. and not under Section 319 of Cr.P.C. Because the name of the

applicant No.2/company as an accused and the basis of its accusation were already mentioned in the complaint at the time of its filling. It is the fault of the trial Court which only took cognizance against the Director and did not take cognizance against the company, which can be cured by the trial Court at any time. There is no bar under Section 190 of the Cr.P.C. that once the process is issued against some accused, on the next date, the Magistrate cannot issue process to some other person against whom there is some material on record.”

28. In *Sunil Todi vs The State of Gujarat, Criminal Appeal No. 1446 of 2021, on 3 December, 2021*, held:-

“44. The test to determine if the Managing Director or a Director must be charged for the offence committed by the Company is to determine if the conditions in Section 141 of the NI Act have been fulfilled i.e., whether the individual was in-charge of and responsible for the affairs of the company during the commission of the offence. However, the determination of whether the conditions stipulated in Section 141 of the MMDR Act have been fulfilled is a matter of trial. There are sufficient averments in the complaint to raise a prima facie case against them. It is only at the trial that they could take recourse to the proviso to Section 141 and not at the stage of issuance of process.”

29. In *Sunita Palita vs M/s. Panchami Stone Quarry, Criminal Appeal No.of 2022 (arising out of SLP (Crl.) No. 10396 of 2019)*, on 1 August, 2022, the Supreme Court held:-

“43. Liability depends on the role one plays in the affairs of a company and not on designation or status alone as held by this Court in S.M.S. Pharmaceuticals Ltd. (supra).....”

30. In the present case, the petition of complaint itself starts with the statement “It is the case of the complainant that he as a proprietor of M/s. Maa Manasha Enterprise had made payment to Delicious Agro Food Pvt. Ltd. for food product, **but the said company had not delivered any such food**

item and accused being director of the said company had returned the money by issuing a cheque in favour of the complainant". The accused/petitioner had on application before the trial court also stated that the complainant had entered into the transaction with the company, "Delicious Agro Food Pvt. Ltd.". The petitioner as director of the company was the person who **issued the cheque in this case** and the transaction was carried out by the petitioner as director on behalf of the company. As such there is clear averments in the complaint itself, against the company and also its director.

31. The appeal being CRA 477 of 2018 is accordingly allowed.

32. The order dated 27.04.2018 passed by the Learned Additional Chief Judicial Magistrate, Contai, Purba Medinipur, in C.R. Case No. 116 of 2017 **is set aside.**

33. The trial court shall permit the complainant to amend the petition of complaint and then proceed with the case in accordance with law.

34. All connected applications, if any, stands disposed of.

35. Interim order, if any, stands vacated.

36. Copy of this judgment be sent to the learned Trial Court for necessary compliance.

37. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)