

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M-6036-2018 (O&M)

Reserved on :20.12.2022

Pronounced on: 04.01.2023

Suman Devi

.....Petitioner(s)

VERSUS

Chhatarpal

..... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present: Mr.Bhag Singh, Advocate for the petitioner

Mr.SK Jindal, Advocate for the respondent

AMAN CHAUDHARY, J.

The present petition has been filed under Section 482 Cr.PC for setting aside the order dated 17.01.2018, Annexure P-4, passed by learned Judicial Magistrate, 1st Class, Kaithal, vide which the amendment application filed by the complainant-respondent was allowed.

Briefly put, the facts as per emerge from the complaint, Annexure P-1 are that on 15.06.2015, the petitioner had borrowed an amount of Rs.20 lakh for one month from the respondent for purchasing petrol and diesel, as she was running a petrol pump. To discharge the liability, she had issued a cheque dated 07.08.2015 of the aforesaid amount, which on presentation by the respondent with the bank, got dishonoured vide memo dated 08.08.2015 with remarks “funds insufficient”. Thereafter, the complainant-respondent served a legal demand notice dated 17.08.2015, at

the complete and correct address of the petitioner which was refused to be accepted by the petitioner. Hence, the present complaint was filed. During the pendency of the present complaint, the respondent filed an application for impleading the Proprietorship Aum Oil Kissan Sevak Kende Habri through its Proprietor Suman Devi by way of amendment of the complaint, which has been allowed vide impugned order dated 17.1.2018.

Learned counsel for the petitioner had submitted that the learned trial Court has committed a grave error in allowing the application, as there is no provision for amendment of the complaint under the Negotiable Instruments Act. The cheque in question was of the proprietorship firm, though signed by the petitioner but the complaint was filed against the petitioner in her personal capacity and not as a sole proprietor, as such the complaint is liable to be dismissed. Furthermore. He placed reliance of the judgments in the cases of **Himanshu vs. B. Shivamurthy and another**, Criminal Appeal No.1465-2009 decided on 17.01.2019, by Hon'ble The Supreme Court of India and **Ramesh Nagarkoti vs. Kedar Datt Purohit**, Criminal Appeal No. 426 of 2018, decided on 03.03.20221 by High Court of Uttrakhand, to contend that as per Section 141 of the Act, in the absence of the company being arraigned as an accused, it cannot be held to maintainable against the appellant, who had signed the cheque as a Director, for and on behalf of the company.

Conversely, learned Counsel for the respondent had submitted that the complaint was filed on 19.09.2015, wherein the summoning order was passed but the petitioner had not challenged the same on the ground as is now sought to be projected inasmuch as that the complaint was filed

against the petitioner in her individual capacity, for which reason it would be not maintainable. Submission raised was that this amounts to acquiescence by the petitioner, estopping the petitioner, in law to take such a plea at this stage when challenge is being made to the order of the trial court allowing the amendment and there being no challenge to the complaint and the summoning order, even in the present petition, this ground has not been taken specifically. Still further by the impugned order, no prejudice will be caused to the petitioner, as all pleas that she proposes to raise are still available to her during trial. He refers to the judgments passed by the Madhya Pradesh High Court in the case of **Bhupendra Singh Thakur vs. Umesh Sahu Misc. Criminal case No.35101 -2022, decided on 26.7.2022**, to contend that the complaint filed under Section 138 of the NI Act can be amended at any stage to cure infirmity.

Heard.

The admitted facts as emanate from perusal of the file as also the submissions of the learned counsel are that Suman Devi-petitioner is the sole proprietor of M/s Aum Oil Kisan Sewa Kendra, Habri and cheque had admittedly been signed by her for the aforesaid firm, as is also discernible from Annexure R-1.

Pertinently, in the case of **Raghu Lakshminarayanan vs. M/s. Fine Tubes** (2007) 5 SCC 103, Hon'ble The Supreme Court of India elucidatedly held that in case of proprietorship concern, it is only the proprietor who can be held liable under Section 138 of NI Act, on account of the fact that proprietorship concern has no separate legal identity. A sole proprietorship firm would therefore not fall within the scope and ambit

of Section 141 of NI Act. The para as relevant to the present case reads thus:-

"It is settled position in law that the concept of vicarious liability introduced in Negotiable Instruments Act is attracted only against the Directors, partners or other persons in charge and control of the business of the company, or otherwise responsible for its affairs. Section 141 of NI Act not covers within its ambit, the proprietary concern. The proprietary concern is not a juristic person so as to attract the concept of vicarious liability. The concept of vicarious liability is attracted only in the case of juristic person, such as the company registered under the provisions of the Companies Act, 1956 or the partnership firm registered under the provisions of Partnership Act, 1932 or association of persons which ordinarily would mean a body of persons which is not incorporated under any statute. The proprietary concern stands absolutely on different footing. A person may carry on a business in the name of the business concern being proprietor of such proprietary concern. In such case the proprietor of proprietary concern alone can be held responsible for the conduct of business carried in the name of such proprietary concern. Therefore, Section 141 of the Negotiable Instruments Act have no applicability in a case involving the offence committed by a proprietary concern."

High Court of Delhi in the case of **M. M. Lal vs. State NCT of Delhi** 2012 (4) JCC 284, held thus:-

"It is well settled that a sole proprietorship firm has no separate legal identity and in fact is a business name of the sole proprietor. Thus, any reference to sole

proprietorship firm means and includes sole proprietor thereof and vice versa. Sole proprietorship firm would not fall within the ambit and scope of Section 141 of the Act, which envisages that if the person committing an offence under Section 138 is a company, every person who, at the time of offence was committed, was in-charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Company includes a partnership firm and any other association of individuals. The sole proprietorship firm would not fall within the meaning of partnership firm or association of individual. Thus, in the case of a proprietorship concern, only the proprietor can be held liable under Section 138 NI Act as the proprietorship concern and the proprietor are one and the same.”

In so far as the amendment of the complaint is concerned, it would be worthwhile to refer to the law laid down by Hon’ble The Supreme Court of India in the case **U.P. Pollution Control Board vs. Modi Distilleries**, (1987) 3 SCC 684 and **S.R. Sukumar vs. S.Sunaad Raghurav**, (2015) 9 SCC 609 holding that, “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.”

Reverting to the facts of the case at hand, it may be accentuated that the petitioner is concededly the signatory to the cheque, which is drawn on the account of her proprietorship concern, that came to be dishonoured, prompting issuance of a legal notice of demand, which was refused to be accepted by her.

Going further, the application for amendment to arraign the proprietorship concern was filed right at the initial stage itself, as such, thus not as an afterthought that too without any objection raised by the petitioner, as she chose not to challenge the complaint and summoning order on the ground which is now being sought to be projected by seeking to press into service the analogy based on the judgments in the cases of **Himanshu** and **Ramesh Nagarkoti** (supra). Even in the present petition, there is no challenge to the complaint and the summoning order.

Nowhere has it even been remotely raised in the petition or demonstrated during the course of arguments as to the prejudice that the amendment may cause to the petitioner.

Indeed the amendment to arraign the proprietorship concern having so been rightly allowed by the trial Court, is in conformity with the law laid down in the cases of **UP Pollution** and **SR Sukumar** (supra) upholding permissibility of curing infirmities through amendment at any

stage before the pronouncement of the judgment. Moreover the trial Court in the present case has allowed the application right at the threshold of the proceedings.

Be that as it may, amendment for arraignment of the proprietorship firm alongside the present petitioner, who is the sole proprietor of the firm, cannot be said by any stretch of imagination to cause any prejudice to her, in view of the exposition of law as settled in **Raghu Lakshminarayan** and **M.M. Lal** (supra), wherein it was held that in the case of a proprietorship concern, only the proprietor can be held liable under Section 138 NI Act as the proprietorship concern and the proprietor are one and the same. A sole proprietorship firm has no separate legal identity and in fact is a business in the name of the sole proprietor. Section 141 of NI Act does not cover within its ambit, the proprietary concern, it not being a juristic person so as to attract the concept of vicarious liability.

In fact even a slight objection to the amendment by the petitioner can also be construed as an attempt to either evade the liability or delay the culmination of proceedings, thus this petition would also come in the teeth of the judgment in the case of **Surinder Singh Deswal vs. Virender Gandhi** by Hon'ble The Supreme Court of India, (2019) 3 SCC (CrI.) 461, wherein it was observed that if such tactics are permitted, the very object and purpose of the enactment of Section 138 of NI Act would be frustrated.

The judgment in the case of **Himanshu** (supra) as was relied upon by counsel for the petitioner is not applicable to the facts of the present case, inasmuch as the same relates to the issue wherein it was held that in

absence of the arraignment of the company, the complaint would not be maintainable against the Director even though, he had signed the cheque for and on behalf of the company. In so far as, the judgment in the case of **Ramesh Nagarkoti** (supra) is concerned, the same is also distinguishable. A perusal thereof would reveal that the accused was acquitted by the trial Court on a technical ground that without the firm being arraigned as an accused, the prosecution of the accused-proprietor would not be maintainable, which was challenged on the ground that there was in fact no requirement to implead the firm as per law laid down in case of **Raghu Lakshminarayan** (supra). However, the plea of the accused before the High Court was that 'Purohit Agency' was not being run as a proprietorship concern of the respondent but was infact a partnership firm, therefore, would come within the ambit of Section 141 of the NI Act. It is thus that the High Court, while relying on the judgment of Hon'ble The Supreme Court of India in the case of **Aneeta Hada vs. Godfather Travels and Tours Pvt. Ltd.** 2012(2) RCR (Cr.) 854 and **Himanshu** (supra) held that the partner of the partnership firm would not be liable under Section 138 NI Act without the partnership firm being arraigned an accused. The present case relates to the proprietorship concern, which as per the law laid down in **Raghu Lakshminarayan** and **M.M. Lal** (supra) would not fall within the ambit of Section 141 of NI Act.

Summing it all up - *firstly*; the very factum of the petitioner not having even raised any objection or challenge to the complaint or the summoning order on the ground, either that petitioner was arraigned in individual capacity or that the proprietorship firm was not arraigned as an

accused; *secondly*, the application for impleading the proprietorship firm as an accused was soon after the summoning order was passed; *thirdly*, the petitioner does not dispute her signatures on the cheque, Annexure R-1, as are also discernible therefrom, were on behalf of the proprietorship firm itself, raising the presumption under Sections 118 and 138 NI Act, though rebuttable by preponderance of probabilities; *fourthly*, curable infirmities, can be cured by filing for amendment at any stage, which in the present case was right at the very outset of the proceedings. *Fifthly*, and above all, the settled law being that in case of a proprietorship concern, the same would not come within the ambit of Section 141 of NI Act as it is only the sole proprietor, who is liable. Taken from any which way this petition would not succeed.

This Court is therefore not inclined in favour of the petitioner after having considered the peculiarity of facts and circumstances of the present case, as also in view of the law, as elaborately enunciated by Hon'ble The Supreme Court of India referred to hereinabove.

Consequently, finding there to be no illegality or perversity in the impugned order, the present petition being *sans* merit, is hereby dismissed.

Before parting, it is made clear that the observations made hereinabove are limited only for the purpose of adjudication of the present petition and in no manner be construed as an expression of opinion on the merits of the case. The same shall thus not stand in the way of the trial Court while adjudication the case on merits. It goes without saying that the trial

Court shall make an endeavour for an early disposal of the complaint, as it relates to the year 2015.

04.01.2023
gsv

(AMAN CHAUDHARY)
JUDGE

Whether speaking/reasoned :

Yes / No

Whether reportable :

Yes / No