IN THE HIGH COURT AT CALCUTTA

CRIMINAL REVISIONAL JURISDICTION

Appellate Side

Present:

The Hon'ble Justice Ajay Kumar Gupta

C.R.R. 839 of 2017

Diptendu Banerjee

Versus

The State of West Bengal & Another

For the Petitioner	:	Mr. Sourav Chatterjee, Adv. Ms. Namrata Chatterjee, Adv.
Heard on	:	04.11.2024
Judgment on	:	04.12.2024

Ajay Kumar Gupta, J:

1. By filing this Criminal Revisional application, the petitioner seeking quashing of proceedings being Complaint Case No. 752C/2014 pending before the Learned Judicial Magistrate, 3rd

Court, Krishnanagar, Nadia under Sections 138/142 of the Negotiable Instruments Act and amendment thereto.

2. The brief facts, leading to filing of this instant Criminal Revisional application, are as under:

2a. The petitioner received a summon from the Court of the Learned Judicial Magistrate, 3rd Court, Krishnanagar, Nadia in connection with Complaint Case No. 752C/2014 under Sections 138/142 of the Negotiable Instruments Act, 1881 directing the petitioner to appear before the Learned Judicial Magistrate, 3rd Court, Krishnanagar, Nadia on 22.07.2016. Petitioner entered appearance and filed an application under Section 205 of the Code of Criminal Procedure, 1973. The said application was allowed by the Learned Judicial Magistrate, 3rd Court, Krishnanagar, Nadia on 09.11.2016. Upon reviewing the record, to his utter surprise, the petitioner was shocked to discover that his name was not initially mentioned in the petition of complaint.

2b. It appears that initially a summon was issued against the Chief Managing Director of the Company, namely, M/s Rahul Hi Rise Limited, but it could not be served. Subsequently, the Learned Magistrate allowed an amendment to be carried out in the petition of complaint vide order dated 22.03.2016 by adding the petitioner's name and address as an accused. This amendment was made unlawfully and without fulfilling the necessary legal requirements for the commencement of proceedings and the process was issued against the petitioner without taking cognizance.

2c. It is contention of the petitioner that he was a Director of the said company but resigned on 27.01.2012. Therefore, he was neither involved in any offence alleged by the complainant nor he was a signatory of the cheque in question. Despite these facts, the impugned proceedings have been initiated against the petitioner under Sections 138/142 of the Negotiable Instruments Act, 1881.

2d. The Learned Judicial Magistrate issued summon mechanically, without applying judicious mind even it is evident from the petition of complaint that the essential ingredients of the offence punishable under Sections 138/142 have not been fulfilled and no specific allegations were made against the Petitioner in the petition of complaint. Furthermore, the complainant also suppressed the actual material facts before the Learned Judicial Magistrate. Therefore, the instant proceeding has turned into an instrument of harassment and in the interest of justice, the same is liable to be quashed. Hence, this instant Criminal Revisional application.

SUBMISSIONS ON BEHALF OF THE PETITIONER:

3. Learned counsel appearing on behalf of the petitioner submitted that the petitioner is not at all involved in the alleged offence punishable under Sections 138/142 of the Negotiable Instruments Act, 1881 as he was not a Director of the Company on and from his date of resignation i.e. on 27.01.2012. The petitioner ceased to be a Director of the said company after his resignation. Therefore, the question of in-charge and/or responsible for the day-to-day affairs of the business of the said company does not arise and as to how and what manner, the present petitioner is liable of the offence. The addition of petitioner's name and address in the petition of complaint by way of an amendment cannot be considered as fulfilling the necessary legal requirements for commencing proceedings. However, the Learned Magistrate, by way of amending his name as an accused, issued process without applying his judicious mind. As such, the proceeding is a sheer abuse of process of law and to secure the end of justice, the said proceeding is liable to be quashed.

3a. It was further submitted that the amendment of the name of the accused in the petition of complaint, without a specific allegation against him, ought not to have been allowed. Furthermore, the petitioner is highly prejudiced when such an amendment is allowed without any sufficient justification and with issuance of the process. The complainant failed to establish the petitioner's role in commission of offence as alleged. Furthermore, no essential ingredients have been fulfilled against the present petitioner for taking cognizance. But, without following the legal procedure, the Learned Magistrate took cognizance under Sections 138/142 of the Negotiable Instruments Act, 1881 and issued process against the present petitioner. Though, there was no justified reason to continue the proceeding against the petitioner. Therefore, it is expedient in the interest of justice that impugned proceeding should be quashed and order of issuance of process is also liable to be set aside to prevent the abuse of process of law and to secure the ends of justice.

3b. It was further submitted that if any prejudice is caused to the petitioner by way of amendment in a criminal proceeding, then such an amendment should not be allowed. There is no specific provision in the Code of Criminal Procedure to amend a complaint or a petition filed under Code of Criminal Procedure. Only simple infirmities that are curable by means of a former amendment can be allowed if such amendment would not be caused prejudice to the other side. Learned counsel has placed a reliance of a judgment rendered in the case of ***S.R. Sukumar Vs. S. Sunaad Raghuram***[1].

4. In spite of service of summons and giving several opportunities to represent the opposite party no. 2, none represented the opposite party no. 2. Accordingly, the matter was heard ex parte and taken up for disposal.

DISCUSSIONS, ANALYSIS AND CONCLUSION OF THIS COURT:

5. Considering the submission made by the learned counsel appearing on behalf of the petitioner and upon perusal of the record, it appears that earlier a petition of complaint was filed by Sri Debabrata Sihi against the sole accused, the Chief Managing Director of Rahul Hi Rise Limited. After examining the complainant under Section 200 of the Code of Criminal Procedure, 1973, the Learned Judicial Magistrate found a prima facie case against the accused under Sections 138/142 of the Negotiable Instruments Act, 1881 and issued a summon against the sole accused. However, subsequently the said petition of complaint was amended vide order dated 22nd March, 2016 by virtue of the order passed by the Learned Judicial Magistrate by incorporating the petitioner's name and address despite there being no specific allegation against him. The petitioner,

[1] (2015) 9 Supreme Court Cases 609

however, duly appeared and, filed an application under Section 205 of the Code of Criminal Procedure, 1973 praying for exemption from personal appearance and the said application was allowed by the Learned Magistrate.

6. It further appears from the documents including the Letter of Resignation dated 27th January, 2012 and Form 32 submitted by the company in compliance of Sections 303(2), 264(2), 266(1)(a) and 266 (1)(b)(iii) of the Companies Act, 1956 that the petitioner was a Director of Rahul Hi Rise Limited and resigned from the said company with effect from 27.01.2012.

7. From the perusal of the petition of complaint, it appears that the accused company approached the complainant to access monthly incentive schemes. As a result, the complainant deposited 50 Lakhs and a certificate to that effect was issued in the name of the complainant on 22nd February, 2012 with the date of maturity was fixed on 22nd February, 2014. The accused company issued a post-dated cheque being No. 302169 dated 23rd March, 2014 amounting to Rs. 50 Lakhs drawn on Axis Bank, Rash Bihari Avenue Branch in favour of the complainant. The said cheque was returned unpaid by the bank with a remark "Insufficient Funds" on 25th March, 2014 and the intimation was received by the complainant by the bank on 25th March, 2014.

8. After receiving information from the bank, the complainant through his learned advocate issued a notice to the accused person informing them with regard to the dishonour of cheque due to insufficient funds and requesting payment of the aforesaid amount within 15 days from the date of receipt of the notice. The said notice was received by the accused person on 05.04.2014 but the accused person failed to make any payment.

9. From the perusal of the entire petition, it appears that there is mentioned that the petitioner was a Director or in charge of or responsible for the daily affairs of the business of the said company. Nowhere, it was attributed about the specific role of the petitioner in the transaction or issuance of cheque. Furthermore, the petitioner was not a signatory of the cheque, which was issued to the complainant. The entire transaction was made between 22nd February, 2012 to 5th April, 2014. During the said period, he was neither a Director nor was in charge of or responsible for the day-to-day affairs of the business of the said company.

10. In addition, the amendment, allowed by the Learned Court below, was entirely mechanical and made without any application of judicious mind. Earlier, there was no name of the petitioner herein as an accused in the petition of complaint but subsequently, it was incorporated without examining the *prima facie* materials against the present petitioner.

11. It is now settled law that even though, there is no specific provision in the Negotiable Instruments Act or in the Code of Criminal Procedure to amend a petition of complaint filed under Section CrPC and/or NI Act, an amendment sought to correct a simple infirmity, which is curable by a former amendment and by allowing such amendment, no prejudice would be caused to the other, the Court may permit such amendment. Amendment cannot be allowed if does not relate to a curable infirmity or if the infirmity cannot be corrected by a former amendment or if there is a likelihood of prejudice to the other side. However, in this instant case, an amendment was allowed by the Learned Court below without considering the material allegations against the Petitioner, his name was simply incorporated in the petition of complaint, which is clearly prejudicial to the petitioner.

12. In addition, this Court is of the view that the date of counting commission of offence started from the expiry of 15 days from the receipt of demand notice for payment of cheque amount. This proposition can be ascertained from the Sections itself. This Court would like to refer the Section 138 of the N.I. Act for ready reference and better understanding the legal position. The relevant part of the provisions is quoted as under: -

***"Section 138 of the N.I. Act reads as under**: —*

***138**. Dishonour of cheque for insufficiency, etc., of funds in the account. —Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both :*

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in

> *writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*
>
> *(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*
>
> *Explanation. — For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."*

13. Considering the aforesaid provision, it is clear that commission of an offence and imposition of punishment shall apply only after the satisfaction of three conditions as stipulated in Sub-Sections (a), (b) and (c) of Section 138 of the N.I. Act, 1881. Section 138 is the charging section that creates criminal liability in case of dishonour of a cheque and its main ingredients are:

i) Issuance of a cheque,

ii) Presentation of the cheque,

iii) Dishonour of the cheque,

iv) Service of statutory notice on the person sought to be made liable and

v) Non-compliance or non-payment in pursuance of the notice within 15 days of the receipt of the notice.

14. It has been further seen from the above provision that Section 138 of the N.I. Act casts criminal liability punishable with imprisonment or fine or with both on a person who issues a cheque towards discharge of a debt or liability either in whole or in part, and the cheque is dishonoured by the bank upon presentation.

15. The complainant deposited 50 Lakhs and a certificate to that effect was issued in the name of the complainant on 22nd February, 2012 by the company. The date of maturity was fixed on 22nd February, 2014. The accused company issued a post-dated cheque being No. 302169 dated 23rd March, 2014 amounting to Rs. 50 Lakhs drawn on Axis Bank, Rash Bihari Avenue Branch in favour of the complainant. However, during the aforesaid period, the Petitioner was not a Director of the Company, namely, M/s. Rahul Hi Rise Limited as is evident from the documents such as Letter of Resignation dated 27th January, 2012 and Form 32 submitted by the company in pursuance of Sections 303(2), 264(2), 266(1)(a) and 266 (1)(b)(iii) of the Companies Act, 1956. The petitioner resigned from the said company on and from 27.01.2012. Therefore, no ingredients for the offence as alleged have been fulfilled against the present Petitioner in any manner to constitute offence punishable under Sections 138/142 of the N.I. Act, 1881.

16. In the light of the above discussions, this Court is of the view that if such proceeding is continued in such a circumstance, it would amount to a sheer abuse of process of law. This Court can exercise its inherent power under Section 482 of the Cr.PC to prevent the abuse of the process of Court or otherwise to secure the ends of justice.

17. Consequentially, **CRR 839 of 2017** is, thus, **allowed**. Connected applications, if any, are also, thus, disposed of.

18. Accordingly, the proceedings being Complaint Case No. 752C/2014 pending before the Learned Judicial Magistrate, 3rd Court, Krishnanagar, Nadia under Sections 138/142 of the Negotiable Instruments Act, 1881 and amended thereto is quashed insofar as the Petitioner is concerned.

19. Let a copy of this Judgment be sent to the Learned Court below for information and taking necessary action.

20. Interim order, if any, stands vacated.

21. Parties shall act on the server copies of this Judgment uploaded on the website of this Court.

22. Urgent photostat certified copy of this Judgment, if applied for, is to be given as expeditiously to the parties on compliance of all formalities.

(Ajay Kumar Gupta, J)

P. Adak (P.A.)