

(2011) 10 KL CK 0004
In the High Court Of Kerala
Case No : Criminal M.C. No. 618 of 2011

Linda John Abraham

APPELLANT

Vs

Business India Group Company and Others

RESPONDENT

Date of Decision : 04-10-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 200, 482
Muslim Women (Protection of Rights on Divorce) Act, 1986 — Section 3
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 142

Citation : (2012) 2 BC 457 : (2012) 1 CivCC 220 : (2012) 171 CompCas 409 :
(2012) 2 Crimes 431 : (2011) 4 KLJ 714 : (2011) 4 KLT 787 : (2012) 1
RCR(Civil) 567 : (2012) 1 RCR(Civil) 567 : (2012) 1 RCR(Criminal) 368

Hon'ble Judges : N.K. Balakrishnan, J

Bench : Single Bench

Advocate : Asha Elizabeth Mathew, for the Appellant; M.R. Sudheendran, for the Respondent

Final Decision : Dismissed

Judgement

N.K. Balakrishnan, J.—The complainant in CC.692/09 renumbered as CC. 52/2010 which is now pending before JFCM - III, Mavelikkara, is the petitioner. The complaint was filed against four persons namely; against the company, its chairman, Managing Director and another Director. The complainant filed a petition for amendment to introduce a plea to the effect that accused Nos. 2 to 4 were/are persons in charge of and responsible for the conduct of the business of the company. That plea was not raised in the original complaint filed by him. The second and third accused are the Chairman and Managing Director. The cheques were signed by those persons. Hence there would be no difficulty to sustain the prosecution, provided the case is otherwise acceptable. So far as the 4th accused is concerned, it was not specifically stated in the complaint that at the time the offence was committed he was in charge of and was responsible for the conduct of the business of the company. According to the learned counsel for the petitioner though the words employed in Section 141 of the N.I. Act are not

specifically mentioned in the complaint, on going through the complaint in entirety, the role of the 4th accused can also be discerned but it is only to introduce the specific words as employed in Section 141 the amendment petition was filed. The learned Magistrate dismissed the application on a wrong understanding of the amendment sought to be introduced, the learned counsel submits. It was found by the learned Magistrate that there is no enabling provision in the Code permitting the party to amend the pleadings unlike in Civil Procedure Code. It was also observed by the learned Magistrate that in the complaint originally filed there is no allegation against accused No. 4 and from the documents produced, it can only be found that the Chairman and Managing Director alone had signed the two cheques produced in the case.

2. The learned counsel for the petitioner/complainant would submit that though there is no specific provision in the Code of Criminal Procedure enabling the amendment of the complaint, the Court has inherent power to rectify the mistakes. The learned counsel has relied upon certain decisions which are referred to here. In the decision in *Madhavi and Others Vs. Thupran*, it was held:

Even though inherent power saved under S. 482 of the Cr.P.C. is only in favour of High Courts., the subordinate criminal courts are also not powerless in cases like this to do what is absolutely necessary for dispensation of justice in the absence of a specific enabling provision provided there is no prohibition and no illegality or miscarriage of justice is involved. Under such circumstances in order to do what is absolutely necessary in the ends of justice or prevent prejudice or miscarriage of justice what is not prohibited could be taken as permitted because the Code of Criminal Procedure cannot be taken to have contemplated and provided for every contingency by making exhaustive provisions to meet the situations. All the criminal courts are having such an auxiliary power subject to restrictions which justice, equity, good conscience and legal provisions demand provided it will not unnecessarily prejudice somebody else.

3. That was a case which was filed claiming maintenance u/s 125 of Cr.P.C. There a clerical mistake was sought to be corrected namely the name of the lady as "Malathi" instead of "Madhavi". Therefore, the learned counsel for the respondents would submit that the aforesaid decision has no application since in this case a new plea, which was conspicuously absent in the complaint is sought to be introduced to fasten the criminal liability on the 4th accused also. Therefore, even though the court may have inherent power to rectify certain patent clerical mistakes, it cannot be said that His complaint can be amended incorporating new pleas.

4. *Sainulabdeen Vs. Beena*, has also been cited by the learned counsel to fortify his submission that since the proceedings u/s 138 of the N.I. Act is quasi civil in nature, the amendment sought for can certainly be allowed. The decision in *Sainulabdeen* cited supra was rendered in a case dealt with u/s 3 of the Muslim Women (Protection of Rights on Divorce) Act In that case, the wife filed a petition to amend the petition stating that out of the 28 grams of gold promised as mahr

only, 14 grams were received and the averment in the petition that the entire mehar promised was paid was a bona fide mistake. That amendment was allowed by the Magistrate. The facts dealt with therein are also not identical to the facts of this case. The amendment was allowed in that case by the trial court. The proceedings there in was held to be quasi criminal or quasi civil and hence this court declined to invoke jurisdiction u/s 482 Cr.P.C. It was held therein that there was no abuse of the process of the court so as to invoke the power u/s 482 Cr.P.C. Even though the amendment introduced therein was not a mere clerical error, still that decision has to be distinguished on facts, because in that case no criminal liability was sought to be fastened by the amendment. It was affecting only a civil liability; a liability to pay the amount. Therefore, the learned counsel for the respondents submits that the aforesaid decision also has no application to the facts of this case.

5. The decision of the Karnataka High Court in *Sri K. Chandrasekhar and Another Vs. Mac Charles India Ltd.*, has been relied upon by the learned counsel for the petitioner in support of his submission that the proceedings u/s 138 of the N.I. Act is quasi civil in nature. In that case whether an amendment can be allowed or not was not the point in dispute. Since the summons and warrant could not be served or effected, it was found that notice can be effected by substituted service, i.e., by way of paper publication. Since that was only the procedure followed for effecting service of notice to the accused it cannot be said that it has anything to do with the amendment of the complaint which is the gravamen of the dispute in this case. Another decision of the Karnataka High Court in *G.N. Raju Vs. B.S. Jaiprakash and Another*, has also been relied upon by the learned counsel for the petitioner. That was a case where the contention raised by the accused was that since there was already a civil suit pending with regard to the cheque or the amount covered by the cheque in question, the contention advanced was that because of the pendency of the civil suit, proceedings under Sec. 138 could not have been launched at all. It was held in that decision:

Any cause of action which gives right to the party to approach the Court if under law he is entitled to prosecute, it is at his option he can do so. Merely because it opts out to proceed on the criminal side, it does not stop him from proceeding in the Civil Court. S. 138 of N.I. Act being quasi civil and criminal nature, definitely the Trial Court went wrong in saying that the 138 proceedings could not have been launched at all by the complainant because of the pendency of the civil suit. Ultimately at the most if the complainant is successful in getting the fruits of the decree in the civil suit, it would be helpful only as a mitigating circumstance while imposing sentence under S. 138 of the Negotiable Instruments Act.

6. What has been stated above in that decision is also in apposite to the fact in issue in this case. The learned counsel submits that the aforesaid decision is applicable to the extent that the proceedings u/s 138 of the N.I. Act is treated as quasi civil in nature and if so amendment of the complaint can certainly be permitted by the Court. The decision of the Bombay High Court in *Raosaheb*

Pandharinath Kamble and Others Vs. Shaila Raosaheb Kamble and Others, was a case dealt under PWDV Act. The learned counsel submits that it was held in that case that the proceedings under that Act are of quasi civil in nature and in such proceedings the court would have power to allow amendment of the application and the written statement. The decision of the Karnataka High Court in Sri K. Chandrasekhar and Another Vs. Mac Charles India Ltd., has also been relied upon by the learned counsel for the petitioner. It was held that a complaint filed alleging offence u/s 138 of the N.I. Act is akin to the First Information Report registered under Sec. 154 of Cr.P.C. but the complaint filed under the N.I. Act can be used for corroborating and contradicting the complainant. There it was held that a complaint presented under S. 200 of Cr.P.C. alleging offence under Sec. 138 of N.I. Act is akin to plaint or pleadings in civil proceedings since the proceeding under N.I. Act are practically admixture of civil and criminal in nature. But that decision, also according to the learned counsel for the respondents, has no bearing on the facts of this case. Relying upon the Supreme Court decisions in Bishwanath Prasad and Others Vs. Dwarka Prasad and Others, and Thiru John Vs. The Returning Officer and Others, it is argued that any admission made in the complaint is substantive evidence and any such admission if clearly and unequivocally made is the best evidence against the party. The fact that no pleading as required under Sec. 141 of the N.I. Act was made in the original complaint perforce strengthens the case of the 4th accused that he was not in-charge of or control over the affairs of the company the learned counsel for the respondents submits. Satyanarayana 's case referred to above does not in any way help the petitioner.

7. The decision of the Rajasthan High Court in Bhim Singh Vs. Kan Singh, is on the same principle as has been held by this Court in Madhavi v. Thupran 1987(1) KLT 488. Here also, the court was only dealing with the inherent power of the court to rectify the mistakes and not with regard to the right to amend the pleadings, so as to incorporate a new plea as is sought to be introduced in this case.

8. Learned counsel for the respondents would rely upon the decision of the Supreme Court in Bindeshwari Prasad Singh Vs. Kali Singh, where it was held:

Criminal PC does contain a provision for inherent powers, namely, S. 561A which, however, confers these powers on the High Court and the High Court alone. Unlike S. 151 of Civil PC, the Subordinate Criminal Courts have no inherent powers,

9. The learned counsel has relied on the decision of the Punjab and Haryana High Court in V.K. Gupta Vs. Manjit Kaur, : V.K. Gupta Vs. Manjit Kaur, . The facts of that case are not identical to the facts of the case on hand. There evidence was given by the complainant based on the number of the cheques mentioned in the complainant. Thereafter it was sought to be amended to suit the case of the complainant. In that context, it was held:

So, when the very foundation has not been properly laid by giving the correct numbers of the cheque the complaint itself becomes not maintainable. Such a defect which goes to the root of the matter cannot be allowed to be amended and the complainant cannot be allowed to supplement the complaint by giving the number of fresh cheques as the basis of the complaint. The complainant cannot thus be made to suit the evidence introduced.

10. The learned counsel for the respondents submits that though the facts are not identical, the ratio decided in that case that a defect which goes to the root of the matter cannot be allowed to be amended is applicable here.

11. It was held by the Apex Court in *Pepsico India Holdings Pvt. Ltd. Vs. Food Inspector and Another*, as follows:

It is now well established that in a complaint against a Company and its Directors, the Complainant has to indicate in the complaint itself as to whether the Directors concerned were either in charge of or responsible to the Company for its day-to-day management, or whether they were responsible to the Company for the conduct of its business. A mere bald statement that a person was a Director of the Company against which certain allegations had been made is not sufficient to make such Director liable in the absence of any specific allegations regarding his role in the management of the Company.

12. The learned counsel for the 4th accused would submit that here also there is only a bald statement that R4 is the Director of the company. Though the learned counsel for the petitioner would submit that a reading of the complaint in its entirety would reveal that the 4th accused was also in charge of the business of the company on going through the complaint, it is clear that there is no averment to the effect that the 4th accused was in-charge of and was responsible to the company for its conduct of the business. In *Neeraj Cement Structurals Pvt. Ltd. and another v. Bombay J, C.B*, reported in 2009(2) KLD 56 the amendment sought for in a complaint filed under Sec. 138 and 142 of the N.I. Act. was for correcting the name of the bank as Punjab National Bank instead of Veershaiva Cooperative Bank. It was held that since the complainant averred in his complaint that the cheques were drawn on a particular bank and since the plea of the accused was recorded by the court, no amendment could have been allowed at a later stage. The learned counsel for the petitioner submits that, it may indicate that if the amendment application is filed before starting of the trial, no prejudice would be caused to the accused. First of all, it is not a case where certain clerical mistakes inadvertently occurred or crept in which are sought to be corrected by way of amendment. A new plea in order to fasten the criminal liability on the 4th accused is sought to be introduced by way of amendment. In *Pepsico India Holdings Pvt. Ltd. Vs. Food Inspector and Another*, cited supra it was also held:

There can be no doubt that an amendment of the nature sought by the respondent No. 1 herein cannot be permitted. The complainant had averred in

his complaint that the cheques were drawn on a particular bank. The verification has also been recorded and process has been issued. Further, the plea of the accused has also been recorded. No amendment could have been allowed in the complaint at this stage. Besides, the change of the name of bank in my opinion, results in a substantial change in the complaint and, therefore, such an amendment cannot be allowed.

As stated earlier in the complaint, as it stands now there is no specific averment to the effect that the 4th accused was in-charge of and responsible to the company for the conduct of its business. The two cheques in question were signed by the Chairman and Managing Director of the company. The first accused is the company itself. The learned counsel for the 4th respondent would submit that since A2 and A3 are stated to be not now available, the revision petitioner wanted to rope in the 4th accused and it is for that purpose now the petitioner has come forward with this amendment. Going by the complaint, no conviction can be had against the 4th accused in view of the conspicuous absence of the pleadings required under Sec. 141 of the Act, 4th respondent contends. If the present amendment is allowed, serious prejudice would be caused to the 4th accused. Even under the provisions of the CPC if there is an admission, it cannot be taken away by the amendment though it may be possible to be clarified by way of amendment, the learned counsel for respondent submits. Here, since the particulars required under Sec. 141 of the Act were not incorporated in the complaint, the accused would be entitled to get an order of acquittal. That position cannot be altered by causing amendment to introduce a new plea which was originally not there. It cannot be treated as a correction or a clerical mistake or any such defect that can be cured. The amendment would go to the core of the matter placing the 4th accused in a disadvantageous position which will cause serious prejudice to him. It is a criminal case where the 4th accused can be sentenced to imprisonment also if found guilty. Hence such an amendment cannot be permitted at all. If the amendment is allowed, it would result in a substantial change in the complaint. The contention that even after the amendment the 4th accused can raise all contentions before the trial court and so the amendment can be allowed does not appeal to me since the amendment will cause substantial change in the nature and character of the case causing serious prejudice to the 4th accused. That has got fundamental impact on the defence that can be raised by the 4th accused. In the light of what is stated above I find no reason to allow the amendment sought for. In the result this Criminal M.C. is dismissed.