

(2015) 06 BOM CK 0223

In the Bombay High Court

Case No : Criminal Application No. 813 of 2014

Manisha Koushik Bhowmik

APPELLANT

Vs

Carol Petroleum Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 30-06-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 30 Rule 1, Order 30 Rule 10, Order 30 Rule 4
Companies Act, 1956 — Section 34
Criminal Procedure Code, 1973 (CrPC) — Section 204, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 141
Partnership Act, 1932 — Section 4
Penal Code, 1860 (IPC) — Section 120-B, 418, 420

Citation : (2016) ALLMR(Cri) 647

Hon'ble Judges : V.L. Achliya, J

Bench : Single Bench

Advocate : Amit P. Ghag, for the Appellant

Judgement

V.L. Achliya, J—By consent of the parties taken up for final hearing at the stage of admission.

2. By this application filed u/s. 482 of Criminal Procedure Code ("Cr.P.C." for short), the applicant/original accused No. 2 has approached this Court with relief to quash and set aside the order dated 9/9/2011 passed by Metropolitan Magistrate 63rd Court at Andheri, Mumbai.

3. The applicant/original accused No. 2 ("the applicant" for convenience) has approached with the case that on the face of the averments made in the complaint, the learned Magistrate should not have issued process u/s. 138 of Negotiable Instruments Act against the applicant. According to the applicant, the complaint itself discloses in uncertain terms that the complainant has filed the complaint against accused No. 1, as "proprietary concern. The complainant has alleged that the applicant/original accused No. 2, is the Manager of the said proprietary concern and manage and control the business of the said proprietary

concern. In view of the facts averred in the complaint and cheque in question admittedly issued by accused No. 1 under his signature as a proprietor of M/s. Petroline Corporation, the proprietary concern, the complaint discloses no cause of action to file the complaint u/s. 138 a/w 141 of Negotiable Instruments Act, as against the applicant. According to the applicant, it is settled position in law that a proprietary concern is not juristic person and it has no distinct entity in law and as such provision of Section 141 of Negotiable Instruments Act, is not applicable in case of proprietary concern. It is, therefore, the contention of the applicant that the order passed by the learned Magistrate to issue process against the applicant and continuation of such proceeding amounts to a gross abuse of process of law and in order to meet the ends of justice, it is necessary to set aside the order of issuance of process and criminal proceeding to the extent of applicant in exercise of inherent jurisdiction of this Court u/s. 482 of Cr.P.C.

4. I have heard the submissions advanced by learned counsel appearing for the applicant and learned AGP. Respondent No. 1, though served, failed to record his appearance.

5. Mr. Ghag, the learned counsel for the applicant by referring the contents of copy of the complaint, contended that the complaint discloses in clear terms that the cheque in question was issued by accused No. 1 with his signature as a proprietor of M/s. Petroline Corporation, the proprietary concern. The averments made in the complaint also reflect that the cheque in question of Rs. 25,000/- which is allegedly dishonoured and leads to filing of complaint, was issued by accused No. 1 towards amount which is claimed to be due against the said proprietary concern. The learned counsel has further submitted that the complaint in question has not been filed alleging commission of offence u/s. 420 of IPC. The complainant has stated in complaint that the complainant reserves their right to prosecute u/s. 420,418/120-B of IPC, separately. It is further pointed out that the process issued by the Magistrate is u/s. 138 of Negotiable Instruments Act. In the order passed by learned Magistrate, there is no reference of issuance of process u/s. 138 r/w 141 of Negotiable Instruments Act. In the light of the averments made in the complaint and the order passed by the learned Magistrate, the learned counsel has submitted that the order impugned is per se illegal and not sustainable in law as the same has been passed without proper application of mind and in a most casual manner. It is submitted that order of issuance of process is not sustainable in law as the complaint discloses no cause of action for issuance of process u/s. 138 of Negotiable Instruments Act, as against the applicant. The learned counsel has submitted that it is a well settled position in law that the vicarious liability as contemplated u/s. 141 of Negotiable Instruments Act, the concept have no applicability to the complaint filed against the proprietary concern. In support of the contention that the concept of vicarious liability is not attracted in the case of proprietary concern, the learned counsel has relied upon the decision of the Apex Court in the case of Raghu Lakshminarayanan Vs. Fine Tubes, AIR 2007 SC 1634 : (2007) 2 BC 490 : (2007) CriLJ 2436 : (2007) 215 ELT 19 : (2007) 5 JT 552 : (2007) 146 PLR 457 :

(2007) 5 SCALE 353 : (2007) 5 SCC 103 : (2007) 76 SCL 25 : (2007) 4 SCR 885 : (2007) AIRSCW 2460 : (2007) 3 Supreme 887 .

6. In order to appreciate the submissions advanced, I have thoroughly perused the copy of the complaint filed by the complainant. Perusal of the complaint discloses that the complainant has filed the complaint in which accused No. 1, i.e. Mr. Koushik Bhowmik, is described as a proprietor of M/s. Petroline Corporation. The applicant is described as Manager of M/s. Petroline Corporation i.e. the proprietary concern. In the averments made in the complaint, the applicant has described the role of accused No. 1 and 2 as under:

"02) I say that the accused Mr. Koushik Bhowmik is the sole Proprietor and Ms. Manisha Koushik Bhowmik is the Manager of M/s. Petroline Corporation, managing and controlling its business.

4) I say that Accused No. 2 & 3 approached the Factory premises of the Complainant Company and represented themselves as Proprietor & Manager of M/s. Petroline Corporation, having their premises at 141/1, C, Lenine Sarani, Kolkatta - 700013. They told us that their firm is a leading firm and they have annual turnover in Crores of Rupees. They also told us that they have good financial status. They told us that they are making payment of all consignments on receipt of the Invoices and as such there would not be any difficulty of sending goods to them. The further assured us that since they are enjoying sound financial status and good bank limits in State Bank of India, C.I.T. Road Branch, Kolkatta - 700014, West Bengal, there would not be any difficulty of payment on receipt of invoices.

10) I say that at the time of taking goods they assured us that they would be able to pay the value of Invoices on delivery of goods within period of 30 days as they were having goods Bank limits and is having good financial status. We would not have supplied them any goods, had we knew that they have been dishonestly and malafidely misrepresenting them to obtain goods. They have therefore committed offence U/s. 420 IPC for which we reserve our right to prosecute them at the appropriate time.

13) I say that Accused were required to arrange funds for the encashment of the above mentioned Cheque when they were presented in their account, but accused malafidely and dishonestly did not arrange funds for such encashment. By this Act of the Accused, the Complainant Company has suffered wrongful loss to the tune of Rs. 25,000/- and thus the Accused have committed an Offence punishable U/s. 138/141 of Negotiable Instrument Act. I therefore submit that the Accused may be dealt with in accordance with law".

7. The order passed by the Magistrate to issue process against the accused reads as under:

"Perused complaint, read verification. As the accused is residing beyond the jurisdiction of this court, issuance of process was postponed. Complainant filed

its pursis and informed that it is mostly relying upon documents and copies of said documents are already produced on record. So it does not want to examine any witness during inquiry.

On perusal of documents produced on record, it reveals that complainant has its registered office at Jogeshwari (East) i.e. within the jurisdiction of this Court. The cheques were deposited in ICICI Bank, Andheri (West).

So this Court has jurisdiction to try this offence.

Prima facie there are sufficient materials to proceed against the accused. Hence issue process against accused No. 1 and 2 for the offence punishable under section 138 of N.I. Act. R/O 13/10/2011."

8. Perusal of the order passed by the learned Magistrate, in the light of the averments made in the complaint, clearly make out a case of non application of mind by the learned Magistrate while passing order of issuance of process against applicant.

9. It is settled position in law that while issuing process, the Magistrate is supposed to act cautiously and diligently. The process cannot be issued in a criminal case merely on asking of the complainant. Person who approaches the court of law to take cognizance of the complaint and to issue process he has to make out a prima facie, case for issuance of process. Prima facie, case presupposes the case of the nature that the averments made in the complaint together with the evidence, if any, relied in support of complaint, if proved the accused will be liable for the offence for which the complainant has filed complaint and call for issuance of process. Although the detail inquiry is not expected at the stage of issuance of process but the limited inquiry to satisfy itself that a prima facie case is made out or not for issuance of process as contemplated u/s. 204 of Cr.P.C., certainly falls in domain of learned Magistrate and expected to be made before passing order of issuance of process. While issuing the process, the Magistrate is expected to look into the allegations made in the complaint together with the documents, if any, relied as evidence and then to consider as to whether any prima facie case for commission of alleged offence has been made out or not.

10. In the instant case the learned Magistrate appears to have acted in very casual manner in issuance of process. The cause title of the complaint itself discloses that the complainant has filed complaint disclosing that the cheque in question was issued by respondent No. 1 as a proprietor of the proprietary concern. Not only the cause title of the complaint, but the averments made in the complaint also discloses that the complaint of the complainant is basically directed against the proprietor of proprietary concern. Although the complainant has described the applicant/accused No. 2 as a Manager of the proprietary concern, it is nowhere stated in the complaint that the cheque in question was issued by the applicant/accused No. 2. The complainant has averred that the applicant/accused No. 2 is managing and controlling business of proprietary

concern and she has also approached the complainant for supply of the goods and assured the payment towards goods purchased within stipulated time.

11. The complainant has further alleged that accused No. 1 and 2 have acted dishonestly and deliberately made false misrepresentation. However, it is pertinent to note that though such averments are made in the complaint filed by the complainant but no prayer to issue process for offence u/s. 420 of IPC made in the complaint. The cause title of the complaint itself mentions that the complaint is filed u/s. 138 r/w 141 of Negotiable Instruments Act. The complainant in very clear and categorical words stated that the complainant reserves his right to prosecute both the accused for offence u/s. 420, 418/120-B of IPC separately. Thus it can be safely stated that the complaint filed by the complainant restricts to commission of offence u/s. 138 r/w 141 of Negotiable Instruments Act and the complaint was not filed for taking cognizance for offence u/s. 420 of IPC. The complaint discloses that the complaint was filed seeking cognizance of offence u/s. 138 r/w of Negotiable Instruments Act. The learned Magistrate has also issued process only u/s. 138 of Negotiable Instruments Act. The order makes no reference of issuance of process u/s. 138 r/w 141 of Negotiable Instruments Act.

12. 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 Negotiable Instruments 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. In this context it is useful to refer Section 141 of Negotiable Instruments Act, which reads as under:

"S.141. Offences by companies. -(1) If the person committing an offence under section 138 is a company, every person who, at the time the 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:

Provided that nothing contained in this sub-section shall render any person liable

to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in Sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.--For the purposes of this section,-

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

13. The plain reading of above quoted provision itself spell out that the provision of Section 141 of Negotiable Instruments Act is applicable only if person committing an offence u/s. 138 of Negotiable Instruments Act, is a company, or the partnership firm or association of individuals. It has no applicability to cases relating to dishonour of cheques issued by proprietor of proprietary concern.

14. In this context, the learned counsel for the applicant has rightly placed reliance on the decision of the Apex Court in the case of Raghu Lakshminarayanan (supra), wherein the Apex Court has dealt the issue and held in uncertain terms that the proprietary concern is not covered within the ambit of Explanation to Section 141 of Negotiable Instruments Act, and, therefore, the question of vicarious liability of a person other than the proprietor does not arise, in relation to the commission of offence u/s. 138 of Negotiable Instruments Act, wherein the complaint is as against the proprietary concern. In this context, it is useful to refer paras 8, 9, 10, 13, 14 and 15 of the said judgment, which read as under:

"8. The concept of vicarious liability was introduced in penal statutes like the Negotiable Instruments Act to make the Directors, partners or other persons, in charge of and control of the business of the Company or otherwise responsible for its affairs; the Company itself being a juristic person.

9. The description of the accused in the complaint petition is absolutely vague. A juristic person can be a Company within the meaning of the provisions of the

Companies Act, 1956 or a partnership within the meaning of the provisions of the Indian Partnership Act, 1932 or an association of persons which ordinarily would mean a body of persons which is not incorporated under any statute. A proprietary concern, however, stands absolutely on a different footing. A person may carry on business in the name of a business concern, but he being proprietor thereof, would be solely responsible for conduct of its affairs. A proprietary concern is not a Company. Company in terms of the explanation appended to Section 141 of the Negotiable Instruments Act, means any body corporate and includes a firm or other association of individuals. Director has been defined to mean in relation to a firm, a partner in the firm. Thus, whereas in relation to a Company, incorporated and registered under the Companies Act, 1956 or any other statute, a person as a Director must come within the purview of the said description, so far as a firm is concerned, the same would carry the same meaning as contained in the Indian Partnership Act.

10. It is interesting to note that the term "Director" has been defined. It is of some significance to note that in view of the said description of "Director", other than a person who comes within the purview thereof, nobody else can be prosecuted by way of his vicarious liability in such a capacity. If the offence has not been committed by a Company, the question of there being a Director or his being vicariously liable, therefore, would not arise.

13. The distinction between partnership firm and a proprietary concern is well known. It is evident from Order XXX Rule 1 and Order XXX Rule 10 of the Code of Civil Procedure. The question came up for consideration also before this Court in M/s. Ashok Transport Agency v. Awadhesh Kumar wherein this Court stated the law in the following terms:--

"6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person but Order XXX, Rule 1, CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 of Order XXX, which make applicable the provisions of Order XXX to a proprietary concern enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order XXX have no application to such a suit as by virtue of Order XXX, Rule 10 the other provisions of Order XXX are applicable to a suit against the proprietor of proprietary business "in so far as the nature of such case permits." This means

that only those provisions of Order XXX can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case."

14. We, keeping in view the allegations made in the complaint petition, need not dilate in regard to the definition of a "Company" or a "Partnership Firm" as envisaged under Section 34 of the Companies Act, 1956 and Section 4 of the Indian Partnership Act, 1932 respectively, but, we may only note that it is trite that a proprietary concern would not answer the description of either a Company incorporated under the Indian Companies Act or a firm within the meaning of the provisions of the Section 4 of the Indian Partnership Act.

15. A Constitution Bench of this Court in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla* further more categorically stated that the complaint petition must contain the requisite averments to bring about a case within the purview of Section 141 of the Act so as to make some persons other than the company vicariously liable therefore, (See also *Sabitha Ramamurthy v. R.B.S. Channabasavaradhya* and *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla*.)"

15. Thus in view of the undisputed position that the process was issued against the applicant/original accused No. 2, as a Manager of the proprietary concern, by taking recourse to Section 141 of Negotiable Instruments Act and accused No. 1 being a proprietary concern, the concept of vicarious liability cannot be attracted in the matter as against the applicant/original accused No. 2 on the face of the complaint filed by the complainant. The order passed by the learned Magistrate to the extent of process issued u/s. 138 of Negotiable Instruments Act, against the applicant/accused No. 2 is not sustainable in law. Since the continuation of such proceeding against the applicant would amount to gross abuse of process of law, the order deserves to be quashed in exercise of powers u/s. 482 of Cr.P.C.

16. In the result;

"i) the application is allowed to the extent of applicant/original accused No. 2, in terms of prayer clause (a) of application;

ii) The order dated 9/9/2011 passed by learned Metropolitan Magistrate 63rd Court at Andheri, Mumbai, in CC No. 1755/SS/2011 to issue process u/s. 138 of Negotiable Instruments Act, as against the applicant/original accused No. 2 (Ms. Manisha Koushik Bhowmik) is hereby set aside.

iii) The trial Court shall proceed against accused No. 1.

iv) The copy of this order be sent to the Metropolitan Magistrate 63rd Court at Andheri, Mumbai."