

(2018) 03 GAU CK 0131
In the Gauhati High Court
Case No : Crl. Petition No. 20 of 2017

Mirnal Kumar Sarma

APPELLANT

Vs

M/S Jain Agencies

RESPONDENT

Date of Decision : 26-03-2018

Acts Referred:

Code of Criminal Procedure 1973 — Section 482
Negotiable Instruments Act, 1881 — Section 142, 138

Citation : (2018) 03 GAU CK 0131

Hon'ble Judges : RUMI KUMARI PHUKAN

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. The petitioner/accused preferred this petition under section 482 CrPC challenging the impugned order dated 12.08.2014 and the entire proceeding pertaining to CR Case No. 4144/2013 now pending in the Court of Addl. CJM, Kamrup (M).

2. The respondent No. 2 as complainant filed a complaint under section 138 N.I Act against the present petitioner on the ground that the cheque

amounting to Rs. 3,18,702/- issued by the petitioner's firm UFONIC in favour of the complainant was dishonoured and despite the demand notice

issued by the complainant to the petitioner no payment was made. By its order dated 6.12.2013 the learned trial court took cognizance of the offence

under section 138 N.I Act and issued summons to the accused named therein namely Gautam Das (accused No. 2) who is the proprietor of the said

firm and the firm (accused No. 1). Repeated summons issued to the said person Gautam Das was not served and returned with report that there is no

such person as Gautam Das.

3. On 30.07.2014 the complainant/ respondent moved an application before the court that there is an error in the name of the proprietor of the firm and it is wrongly typed Gautam Das instead of Minal Kumar Das and sought permission to correct the name of the proprietor by inserting the name of Sri Minal Kumar Sharma as Proprietor of the said firm. By the impugned order dated 12.08.2014, the learned trial court allowed the petition and by inserting the name of the present petitioner as prayed for issued summons to the present petitioner which is now challenged by the present petition on the ground that the said complaint as well as the order passed by the learned court is not tenable against the present petitioner and liable to be quashed and set aside on the ground that the no demand notice was sent to the present petitioner, rather it was sent to said Gautam Das, and NI Act being a special law certain procedure has to be followed to raise cause of action but the learned trial court has ignored the mandates of law prior to taking cognizance of the offence.

4. The learned counsel for the petitioner has submitted that section 142 of NI Act lays down certain procedure for taking cognizance and for making offence under section 138 a notice must be sent to the drawer of the cheque to make the payment within 15 days from the date of receipt of the notice, then only cause of action accrues. It contend that in the present case there cannot be any cause of action as against the present petitioner for not serving any legal notice upon him so the entire proceeding needs to be set aside.

5. The respondent/the complainant opposed the present application by stating that the name of the proprietor of the firm was wrongly typed as a Gautam Das in the complaint petition whereas one Minal Kumar Sarma looks after the business and management of the firm being the proprietor of the said firm and the cheque in question was issued by the said Minal Kumar Sarma himself in the capacity as a proprietor. The legal notice issued was served upon the firm and accused is none other than the proprietor of the said firm but however the name of the proprietor was wrongly written as Gautam Das and the aforesaid mistake was unintentional. The complainant/ respondent overlooked the same inadvertently and accordingly prayer was made before the court to insert the name of the proprietor as Minal Kumar Sarma in place of Gautam Das.

6. The learned court by order dated 12.08.2014, after hearing on the petition and on due consideration allowed the said prayer and by inserting the name of the present petitioner as proprietor, issued summons to him. The petitioner appeared before the court and went on bail but at present non-bailable warrant of arrest has been issued against him by the court fixing 2.2.2017 and at this stage he had come forward with the present petition with the submission that the said order as well as the entire proceeding is liable to be quashed.

7. The learned counsel for the respondent contended that as there is no dispute that the aforesaid firm is a proprietorship firm and the cheque in question was also issued by the present petitioner under his signature and in such eventuality the petitioner/accused cannot raise the question of prejudice or non-compliance of provision of 138 and 142 NI Act. It is also pointed out that the legal notice was served upon the firm and hence the petitioner was aware about such notice being the proprietor of the firm.

8. The learned counsel for the petitioner further submitted that the amendment of complaint by way of correction of name of accused is not maintainable and the trial court is not within jurisdiction to allow such application of the complainant for correction and insertion of the name of the accused.

9. In justifying the impugned order passed by the learned court, the learned counsel for the respondent made a submission that since the petitioner firm is a proprietary firm and he is aware of this liability, no prejudice is likely to be caused even if his name is not described in the complaint petition as the name of the proprietary firm can only indicate one and the same person. In support of his submission the learned counsel for the complainant relied on the following decisions:-

1. 2004 STPL 19044 Bombay Maan Agro Centre Vs. EID PARRY (India Ltd. and Another)

2. 2013 STPL 2104 Bombay Amol Sripal Seth Vs. Hariom Trading Company.

In the aforesaid decisions referring to certain earlier decisions like M/s Dalmiya Cement (Bharat Ltd.) Vs. M/s Galaxy Traders and Agencies Ltd.

AIR 2001 SC; Vaidyanatham Deepika Milk Marketing Vs. Dodla Dairy Limited 2000 All (MR) Criminal General; Ms. Plywood House Vs. Ms.

Woodcraft Products Limited 1994 Criminal General 543 and Bhim Singh Vs. kan

Singh 2004 (2) DCR 158 Rajasthan, it has been held that the type of typographical mistake in the complaint should have been rectified by the trial court and it has inherent power to rectify such type of typographical mistake to do justice between the parties. Following the principle laid down in the aforesaid cases it has been held that when the firm is a sole proprietary concern and the accused person is the only proprietor thereof no prejudice whatsoever can be caused to the accused petitioner by permitting the complainant to insert the name of the person as the proprietor thereof.

10. For better appreciation of the matter let us reproduce the relevant portion of the above decision which would be useful for the purpose of determining the issue before the court.

11. (i) M/s Dalmia Cement (Bharat) Ltd. v. Galaxy Traders and Agencies Ltd., AIR 2001 SC 676 wherein it is held as under :--

The act was enacted and Section 138 thereof incorporated with a specified object of making a special provision by incorporating a strict liability so far

as the cheque, a negotiable instrument, is concerned. The law relating to negotiable instrument is the law of commercial world legislated to facilitate

the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into

money and easily passable from one person to another. In the absence of such instruments, including a cheque, the trade and commerce activities, in

the present day would, are likely to be adversely affected as it is impracticable for the trading community to carry on with it the bulk of the currency in

force. The negotiable instruments are in fact the instruments of credit being convertible on account of legality of being negotiated and are easily

passable from one hand to another. To achieve the objectives of the Act, the legislature has, in its wisdom thought it proper to make such provisions in

the Act for conferring such privileges to the mercantile instruments contemplated under it and provide special penalties and procedure in case the

obligations under the instruments are not discharged. The laws relating to the Act are, therefore, required to be interpreted in the light of the objects

intended to be achieved by it despite there being deviations from the general law and the procedure provided for the redressal of the grievances to the

litigants. Efforts to defeat the objectives of law by resorting to innovative

measures and methods are to be discouraged, lest it may affect the commercial and mercantile activities in a smooth and healthy manner, ultimately affecting the economy of the country.

(ii) N. Vaidyanathan/Deepika Milk Marketing v. Dodla Daily Limited, 2000 All MR (Cri) Journal 9 it is held as under: ""Section 138 of the

Act contemplates that prosecution could be launched against the drawer..... It is a settled position of law that the

proprietorship concern by itself is not a legal entity apart from its proprietor, the proprietary concern and the Proprietrix are one and the same person.

To put it differently, the prosecution against the Proprietrix representing proprietorship concern or proprietorship concern represented by Proprietrix

are one and the same as both these things sink, sail and merge with only entity.

(iii) M/s Plywood House v. Wood Craft Products Ltd., 1994 Cri.L.J. 543 it is held that : ""A Court takes cognizance only of the offence and not the

offender. Thus, when once cognizance of an offence is taken, subsequent impleadment of any other person as accused would not affect the judicial

process adopted in taking cognizance of the offence.

(iv) In Bhim Singh v. Kan Singh, 2004 (2) D.C.R. 158 (Rajasthan) a specific question was formulated by the Court as to whether mistakes can be

rectified by the subordinates Court or not and while answering this question held as under :-- ""It is an established proposition of law that Court of

justice must possess inherent powers apart from the express provisions of law, which are necessary to their existence and the proper discharge of

duties imposed upon them by law. The Criminal Procedure Code or for the matter of that no procedural law is ever exhaustive and in cases where

circumstances required it, the Courts have acted on the assumption that they possess inherent powers (as of right) to do justice for which they really

exist. At the same time it must be remembered that a Court has no inherent power to do that which is prohibited by the Code. In this view of the

matter every Court whether civil or criminal in the absence of any express provision to the contrary, shall be deemed to possess an inherent power in

its very constitution, all such powers are necessary in discharging administration of justice. The Courts exist for dispensation of justice and not for its

denial for technical reasons when law and justice otherwise demand. Even though inherent power saved under Section 482, Criminal Procedure Code

is only in favour of High Courts, the subordinates criminal Courts are also not powerless 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 or justice is involved.

12. In view of the principle laid down as discussed above the trial court have such inherent power to allow to insert the name of the proper person

representing the firm for the interest of justice and the petitioner being the proprietor of the said firm cannot be permitted to take the shield of no

service of notice under section 138 NI Act in the given background of the case. It is also noted that the accused petitioner immediately after appearing

before the court could have assailed the aforesaid aspect, as indicated in the order itself that the matter may be reviewed on appearance of the

accused person, if the situation so warranted. But the accused petitioner neither take the opportunity to assail the order nor he denied that he is not the

proprietor of the said firm.

13. Resultantly, I found no any merit in the petition and hence dismissed.