
(2017) 04 RAJ CK 0148
In the Rajasthan High Court
Case No : 4331 of 2016

Rajesh Sharma & Anr.

APPELLANT

Vs

State of Rajasthan & Anr.

RESPONDENT

Date of Decision : 21-04-2017

Acts Referred:

[Limitation Act, 1908](#), [Section 14](#) -
[Code of Criminal Procedure, 1973](#), [Section 482](#) -
[Section 204](#) - Saving of inherent powers of High Court - Issues

Citation : (2017) 04 RAJ CK 0148

Hon'ble Judges : Deepak Maheshwari

Bench : SINGLE BENCH

Advocate : Samay Singh, Rishiraj Singh, S.P. Dhanera

Judgement

1. This criminal misc. petition has been preferred on behalf of the accused petitioners challenging the order dated 4.12.2015 passed by learned trial Court by which the application filed on behalf of the accused petitioners for recalling the summons issued to them while taking cognizance of the offence punishable under Section 138 of Negotiable Instruments Act was rejected. Further, the order dated 5.8.2016 passed by learned Addl. Sessions Judge No.1, Kishangarhbas, Alwar has also been assailed whereby the learned revisional Court rejected the revision petition preferred by the accused petitioners against the order dated 4.12.2015.

2. Heard learned counsel for the petitioners and learned counsel appearing on behalf of complainant respondent No.2 as also learned Public Prosecutor.

3. Briefly stated the relevant facts are that complainant respondent No.2 Samarat filed a complaint against accused petitioners Rajesh Sharma and Shikha alleging therein that accused persons are working in the name of Ms. Pranavi Decorators, which is a partnership firm. The firm took a loan of Rs.20,50,000/- from complainant on three occasions and including a sum of Rs.3733/- falling

due to them issued a cheque of Rs.20,53,733/- in favour of the complainant, which on being submitted before the Bank was dishonoured. On the assurance given by the accused persons, cheque was again presented before the Bank but was again dishonoured for insufficiency of the funds. The complainant got notice issued to the accused persons through his counsel but the payment of the amount of cheque was not made by them, hence, the complaint was filed.

4. On the basis of the complaint, cognizance was taken by learned trial Court against accused petitioners for the offence under Section 138 of NI Act. An application was moved on 24.11.2015 on behalf of the accused petitioners seeking

exemption for personal attendance as also for recalling the summons issued against them, which came to be rejected by learned trial Court observing that it has got no powers to review the order passed and to recall the summons. Being aggrieved by the order, accused petitioners preferred a criminal revision, which was also rejected by learned revisional Court.

5. Some observations regarding the facts, vital for decision of this criminal misc. petition from the order passed by learned revisional Court are quoted below :
"VERNACULAR MATTER OMITTED"

6. Learned counsel appearing for the accused petitioners has vehemently argued that it is an admitted factual matrix that the cheque in question was issued by the Firm M/s Pranavi Decorators in discharge of the debt payable to the complainant/ respondent No.2. But admittedly, no notice as required under Section 138 (b) of Negotiable Instruments Act was issued to the said firm - drawer of the cheque. Further, the firm was not even arrayed as an accused in the complaint filed by the complainant. The complaint filed against accused petitioners Rajesh Sharma and Shikha is not at all maintainable in view of the admitted factual position mentioned above. Learned counsel has thus, argued that the summons issued to the accused petitioners are required to be recalled while quashing and setting aside the order to prevent the abuse of process of the Court and to secure the ends of justice. He has relied upon the following judgments in support of his arguments - 1. Aneeta Hada Vs. Godfather Travels & Tours Private Limited, reported in (2012) 5 SCC p.661 ;

2. Philip J Vs. Ashapura Minechem Ltd. & Anr., decided on 29.01.2016 by Bombay High Court in Criminal Writ Petition No.2909/2013.

7. Learned counsel appearing for the complainant - respondent No.2 has strongly opposed the prayer while arguing that the order by which the cognizance was taken by the trial Court has not been challenged by the accused petitioners. He has also argued that the trial Court was not having any jurisdiction to recall the order taking cognizance and to recall the summons issued against the accused persons. Thus, the order passed by learned trial Court as also by learned revisional Court are perfectly legal and no miscarriage of justice is caused on account of these orders. He has also relied upon the following judgments in

support of his arguments :

1. Mainuddin Abdul Sattar Shaikh Vs. Vijay D. Salvi, reported in 2015 R.Cr.D. 824 (SC);
2. Kirshna Texport & Capital Markets Ltd. Vs. Ila A. Agrawal & Ors., reported in 2015 Cr.L.R. (SC) p.560;
3. Devendra Kishanlal Dagalia Vs. Dwarkesh Diamonds Pvt. Ltd., & Ors., reported in AIR 2014 SC p.655;
4. Rallis India Ltd. Vs. Puduru Vidya Bhusan & Ors., reported in 2011 (2) WLC p.183 and ;
5. Adalat Prasad Vs. Rooplal Jindal & Ors., reported in AIR 2004 SC p. 4674.

8. Having considered the arguments advanced by the rival sides and taking into consideration the factual matrix, this Court is of the considered view that there can be no two opinions about the fact that the learned trial Court was not within its competence to recall the order by which the cognizance was taken against the accused petitioners. Once the summons were issued under Section 204 Cr.P.C. against the accused petitioners, those could not have been recalled by the trial Court. In Devendra Kishanlal Dagalia (supra), which has been relied upon by learned counsel for the respondents, the same legal proposition has been laid down by Hon''ble Supreme Court. The same principle was also enunciated by Hon''ble Supreme Court in Adalat Prasad (supra), which has also been relied upon by learned counsel for the respondents.

9. But the question before this Court is whether in the given factual matrix, is it warranted for this Court to exercise its jurisdiction under Section 482 Cr.P.C. to interfere in the orders passed by the learned Courts below in order to secure the ends of justice and to prevent abuse of process of the Court.

10. Adverting to the factual matrix of the matter in hand, which is apparently clear from the inference drawn by learned revisional Court as mentioned in the above quoted part of the order, it is clear that loan was taken from the complainant - respondent No.2 for the benefit and business of the firm M/s. Pranavi Decorators and in discharge of that legal debt, cheque was also issued by the firm itself, which was bounced. This is also an admitted factual position that the notice as required under clause (b) of proviso to Section 138 of Negotiable Instruments Act was not given on behalf of the complainant to the drawer of the cheque i.e. the firm M/s Pranavi Decorators. More so, M/s Pranavi Decorators was also not arraigned as an accused in the complaint filed by the complainant Samarat. Despite this, learned revisional Court has arrived at the conclusion that not issuing notice to the firm and not arraigning them as party in the complaint is a technical defect on the basis of which accused persons cannot be absolved of their vicarious liability and thus cognizance order passed by learned trial Court against the accused persons and calling them initially by way of summons and then by bailable warrants and finally by arrest warrants cannot be faulted with as

they did not attend the Court in compliance of the summons and bailable warrants.

11. In my considered view, the findings arrived at by learned revisional Court are not tenable in view of the pronouncement made by Hon"ble Supreme Court in case of Aneeta Hada (supra). While discussing the vicarious liability of the Directors of Company for the offence under Section 138 of Negotiable Instruments Act, Hon"ble Supreme Court has held as below :- "59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh which is a three-Judge Bench decision. Thus, the view expressed in Sheoratain Agarwal does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada is overruled with the qualifier as stated in para 51. The decision in Modi Distillery has to be treated to be restricted to its own facts as has been explained by us hereinabove."

12. It has, thus, been categorically held that without arraigning Company as an accused, the other offenders cannot be brought into the drag-net on the touch stone of vicarious liability with the help of Section 141 of N.I. Act.

13. The matter in hand is not pertaining to a Company but to a partnership firm. Though Section 141 of the NI Act speaks about vicarious liability of the persons in charge of and responsible for the conduct of business of the company besides criminal liability of the company itself, yet the explanation appended to this Section is relevant in case of the firm, which is as follows: (a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to la firm, means a partner in the firm. Thus, in case of a firm, vicarious liability can be imposed on its partners with the aid of Section 141 of the NI Act, and the principle laid down by Hon"ble Supreme Court in Aneeta Hada's case (supra) will apply to the firm and its partners. My view is fortified by the opinion expressed by Bombay High Court in case of Philip J (supra). In this regard, it will be useful to reproduce the relevant part of the aforesaid judgment :-

"15. Therefore, the ratio laid down in the case of Aneeta hada (supra) can be made equally applicable in the case of Partnership firm also. The partners are liable and sued in their vicarious liability. Whether the partnership firm is a juristic person or not is a different aspect. What is important is that a partner of the firm is arraigned as an accused in the dragnet on the touchstone of vicarious liability, as is done in the case of directors of the company. Therefore, there is no reason at all to make any distinction in respect of the law to be made applicable to partnership firm and the company."

14. It has further been held in the above judgment as under : "16. Moreover, the

Legislature has already made it clear that the company includes any body corporate which includes firm or other association of individuals and director in relation to a firm means a partner in the firm. On this count also, when section 141 of the NI Act and explanation thereto does not make any distinction between the company and the partnership firm, there is absolutely no reason to make such distinction while making applicable the law laid down by the Apex Court in Aneeta Hada (supra) to the partnership firm merely because in that judgment the Apex Court was considering the eventuality of non-joining of the Company. The basic premise of holding either the director or the partner liable for prosecution being the same that of the vicarious liability. Therefore, once the company is held to be essential party and that arraigning of a company as an accused is imperative for prosecution under section 141 of the NI Act, it necessarily follows that arraigning of a partnership firm is also imperative for prosecution against the partners under 141 of the NI Act. The prosecution launched against only one of the partners of the partnership firm, without joining the partnership firm, cannot be maintainable and on this very ground, the process issued against the petitioner is liable to be quashed and set aside."

15. Taking these legal proposition into consideration, there cannot be any two opinion that the firm M/s Pranavi Decorators was essentially required to be arraigned as an accused in the complaint filed by the complainant - respondent No.2 after serving upon him the notice as per proviso (b) to Section 138 (b) of NI Act, in absence of which proceedings initiated against its partners alone cannot survive.

16. The judgments relied upon by learned counsel for the respondent No.2 are distinguishable in the facts and circumstances of the case in hand. In Mainuddin Abdul Sattar Shaikh (supra), respondent who was Managing Director of M/s Salvi Infrastructure Pvt. Ltd. has issued a cheque for discharging dues of the said Company on his personal bank account, which was dishonoured. Thus, he himself was drawer of the cheque and not the Company. For this reason, Hon''ble Supreme Court opined that the person, who draws a cheque on the account maintained by him alone attracts the criminal liability for the offence under Section 138 NI Act. On the contrary, in the case in hand, drawer of the cheque is the firm and not accused petitioners.

17. In case of Krishna Texport & Capital Markets Ltd. (supra), Hon''ble Supreme Court again observed that notices are required to be given to the drawer of the cheque only. In this matter, cheque was drawn by the Company itself and it was held that issuance of notice to the Company being drawer of the cheque is sufficient and it is not necessary to issue notice to every director

of the Company for bringing them in the dragnet on account of their vicarious liability.

18. Other judgment relied upon by learned counsel for the respondent No.2 is Rallis India Ltd. (supra) which speaks that various aspects involving several

disputed questions of fact i.e. who were the partners of the firm at the relevant point of time when the cheque in question was issued in favour of the complainant are required to be proved by way of adducing evidence. In this aspect of the matter, it was held that the order passed by Single Judge of the High Court under Section 482 Cr.P.C. was not sustainable in law. On the contrary in the matter in hand, this factual matrix is not in dispute that the cheque in question has been issued by M/s Pranavi Decorators and not by the accused persons who happened to be partners of the said firm. In this situation, in my considered view, the judgments relied upon by learned counsel for the complainant - respondent No.2 do not come to his rescue. Legal proposition laid down by Hon''ble Supreme Court in Aneeta Hada's case (supra) is very much clear, in view of which, vicarious liability cannot be fastened upon the accused petitioners who are partners of the firm, in the absence of arraigning the partnership firm as an accused in the complaint.

19. As regards the objection raised by learned counsel for the respondent No.2 that the cognizance order itself has not been challenged, is found to be wrong in light of the prayer clause wherein it has been prayed that the cognizance order dated 23.08.2015 passed by the Court of Judicial Magistrate, First Class, Kishangarhbas, District Alwar may be quashed and set aside. Learned counsel for the respondent No.2 has also submitted that the date of the cognizance order has been wrongly mentioned but it appears to be a too technical objection and does not make any material difference on the merits of the case.

20. In the facts and situation of the case, it is amply clear that the cognizance order passed by learned trial Court only against the partners of the firm in absence of arraigning the firm itself as an accused, if allowed to exist, will certainly cause an abuse of process of law, which is not at all warranted. Hence, in order to prevent such abuse of process of law and to seek the ends of justice, this Court is of the considered opinion that while exercising jurisdiction under Section 482 Cr.P.C., the cognizance taken by trial Court against the accused petitioners alone is required to be quashed and set aside and is accordingly quashed and set aside. Further, the interest of justice also requires that the liberty be given to the complainant - respondent No.2 to move before the competent Court having jurisdiction for appropriate relief by filing an application under Section 14 of the Limitation Act, seeking exclusion of the period during which he was prosecuting this complaint against the accused petitioners alone while filing a fresh complaint, if so advised.

21. This criminal misc. petition is accordingly allowed and the order taking cognizance against the accused petitioners Rajesh Sharma and Shikha is quashed and set aside. Consequently, the order dated 5.8.2016 passed by learned Addl. Sessions Judge No.1, Kishangarhbas, Alwar is also quashed and set aside and the non-bailable warrants issued against the petitioners stand cancelled.