

Reserved

A.F.R.

Court No. - 53

Case :- MATTERS UNDER ARTICLE 227 No. - 2231 of 2020

Petitioner :- Dhirendra Singh

Respondent :- State of U.P. and Another

Counsel for Petitioner :- Deepak Kumar Kulshrestha

Counsel for Respondent :- G.A.

Hon'ble Suresh Kumar Gupta,J.

1. The matter under Section 227 of Constitution has been filed by petitioner to set aside the impugned orders dated 31.10.2018 passed by Additional Court No. 3, Agra in Complaint No. 1500 of 2011 (Nepal Singh Vs. Dhirendra Singh) under Section 138 of Negotiable Instruments Act, 1881 and the order dated 6.2.2020 passed by Additional Sessions Judge, Court No. 17, Agra in Criminal Revision No. 552 of 2018 (Dhirendra Vs. State of U.P. and Another) and to quash the summoning order dated 28.3.2012 as well as entire proceeding of Complaint Case No. 1500 of 2011 pending in the court of Additional Court No. 3, Agra.

2. Brief facts of this case are as follows:-

That respondent no. 2 stated that present petitioner borrowed Rs. 1,00,000/- from him and on 8.2.2011, the petitioner handed over two cheques bearing no. 850213 & 850214 dated 9.4.2011 and 15.4.2011, respectively. Cheques were presented before the Bank but the same were dishonoured due to insufficient amount in the account. ON 18.10.2011, respondent no. 2 sent a notice to the petitioner and same was served but all in vain. On 8.11.2011, respondent no. 2 filed a complaint case no. 1500 of 2011 (Nepal Singh Vs. Dhirendra Singh) under section 138 of Negotiable Instruments Act, 1881 against the petitioner in the court. Trial court

vide its order dated 28.3.2012 has taken cognizance and summoned the petitioner.

3. Learned counsel for the petitioner submitted that complainant / respondent is wholly incompetent to lodge the prosecution as cheques were issued by the firm M/s Rashmi Arosole & Chemicals and petitioner is proprietor of this firm but the firm is not arraign as an accused. Reliance has been placed on section 138 of Negotiable Instruments Act, 1881 (Hereinafter referred as N.I. Act) i.e. read as under:-

Section 138 in The Negotiable Instruments Act, 1881

“¹⁸ [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 ¹⁹ [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, ²⁰[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.”

4. It is further submitted that cheques issued by proprietorship firm after referring to Section 141 of the N.I. Act in relying the decision of the Hon'ble Supreme Court in the case of ***Aneeta Hada Vs. M/s Godfather Travels & Tours Pvt. Ltd.*** In this case Hon'ble Supreme Court has clearly held that if the cheques were issued by the firm or company, the firm / company must be arraign as an accused. So learned counsel for the petitioner submitted that until and unless company or firm is arraign as an accused director or the other officer of the company / firm cannot be prosecuted / punished in the complaint. The submission raised by learned counsel for the petitioner that proceeding of complaint is wholly illegal, hence petition is liable to be allowed on this sole ground.
5. Learned counsel for the petitioner also relied upon the judgment of this court in ***Devendra Kumar Garg Vs. State of U.P. and Another*** for maintaining prosecution in which it was held that for maintaining prosecution under section 141 of N.I. Act as above for arraining the company as an accused. Company was not arraign as a party in the notice or in complaint so cognizance order is liable to be quashed.
6. Dr. S.B. Maurya, the learned A.G.A. vehemently opposed the prayer and submits that cheques drawn by the petitioner in his personal capacity. It is further submitted that cheques were given by petitioner by way of security for payment of money. So in these circumstances, no need to arraign the firm as a party.
7. I have heard learned counsel for the petitioner, Dr. S.B. Maurya, the learned A.G.A. and perused the material available on record.
8. Perusal of cheques shows that it is drawn by the petitioner and petitioner admitted that impugned cheques bearing his signature. It

is also not disputed that the petitioner is proprietor of the firm M/s M/s Rashmi Arosole & Chemicals, main contention of the petitioner is that the prosecution could not launch unless and until the firm arraign as accused.

The provision of Section 141 in The Negotiable Instruments Act, 1881 read as under:-

²¹ [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: ²² [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.]”

9. A plain reading of the provision makes it clear, if the person committing the offence is a "company", in that event every natural person responsible for such commission as also the artificial person namely the company shall be deemed to be guilty of the offence and be liable to be proceeded against and punished accordingly. Also, certain other natural persons may be held guilty, if so proved.
10. Perusal of the registration of firm, Annexure no. 1, it transpires that the petitioner is the proprietor of the firm namely M/S Rashmi Arosale & Chemical Avas Vikas Colony, Sector 10, Sikandara Agra. Perusal of registration certificate of firm, petitioner Dhirendra Singh, is the proprietor of the firm and it is clear that this is the sole proprietorship firm. Thus, the main question arises whether in sole proprietorship firm indictment of firm arraign as parties is necessary or not.
11. Thus, the phrase "association of individuals" necessarily requires such entity to be constituted by two or more individuals i.e. natural persons. On the contrary a sole-proprietorship concern, by very description does not allow for ownership to be shared or be joint and it defines, restricts and dictates the ownership to remain with one person only. Thus, "associations of individuals" are absolutely opposed to sole-proprietorship concerns, in that sense and aspect.
12. A 'partnership' on the other hand is a relationship formed between persons who willfully form such relationship with each other. Individually, in the context of that relationship, they are called 'partners' and collectively, they are called the 'firm', while the name in which they set up and conduct their business/activity (under such relationship), is called their 'firm name'.
13. While a partnership results in the collective identity of a firm coming into existence, a proprietorship is nothing more than a cloak or a trade name acquired by an individual or a person for the purpose of conducting a particular activity. With or without such

trade name, it (sole proprietary concern) remains identified to the individual who owns it. It does not bring to life any new or other legal identity or entity. No rights or liabilities arise or are incurred, by any person (whether natural or artificial), except that otherwise attach to the natural person who owns it. Thus it is only a 'concern' of the individual who owns it. The trade name remains the shadow of the natural person or a mere projection or an identity that springs from and vanishes with the individual. It has no independent existence or continuity.

14. In the context of an offence under section 138 of the Act, by virtue of Explanation (b) to section 141 of the Act, only a partner of a 'firm' has been artificially equated to a 'director' of a 'company'. Its a legal fiction created in a penal statute. It must be confined to the limited to the purpose for which it has been created. Thus a partner of a 'firm' entails the same vicarious liability towards his 'firm' as 'director' does towards his 'company', though a partnership is not an artificial person. So also, upon being thus equated, the partnership 'firm' and its partner/s has/have to be impleaded as an accused person in any criminal complaint, that may be filed alleging offence committed by the firm. However, there is no indication in the statute to stretch that legal fiction to a sole proprietary concern.

15. Besides, in the case of a sole proprietary concern, there are no two persons in existence. Therefore, no vicarious liability may ever arise on any other person. The identity of the sole proprietor and that of his 'concern' remain one, even though the sole proprietor may adopt a trade name different from his own, for such 'concern'. Thus, even otherwise, conceptually, the principle contained in section 141 of the Act is not applicable to a sole-proprietary concern.

16. Accordingly, there is no defect in the complaint lodged against the applicant, in his capacity as the sole proprietor of the concern M/s

Rashmi Arosole & Chemicals. There was no requirement to implead his sole proprietary concern as an accused person nor there was any need to additionally implead the applicant by his trade name.

17. On perusal of the averment of the parties, it is crystal clear that petitioner taken the money in advance by way of loan and petitioner handed over the cheques bearing no. 850213 & 850214 amount of Rs. 50,000/- each only for the security for payment of money advance by way of loan. So the transaction of money and cheques not in the prosecution of business of firm but cheques handed over by petitioner to Nepal Singh in individual capacity. So due to aforesaid reason too no need to implead the sole proprietor firm by his firm name.

18. So the reason aforesaid, there is no illegality or irregularity in the orders dated 31.10.2018 passed by Additional Court No. 3, Agra and the order dated 6.2.2020 passed by Additional Sessions Judge, Court No. 17, Agra against the petitioner, hence no interference warranted.

19. The petition lacks merit and is, accordingly, **dismissed**.

Order Date:- 13.10.2020

Vibha Singh