

2004 PLRonline 0009

Bombay High Court

K.J. Rohee, J.

**Maan Agro Centre vs Eid Parry (India) Ltd.
And Anr.**

23.12.2004

NIA S. 138, 141 - Typographical mistakes should have been rectified by the trial Court, as trial Court has inherent power to rectify such typographical mistakes to do justice between the parties - XYZ through its proprietor was described as an accused and initially the name of the proprietor viz. AK was not mentioned in the complaint - XYZ is the sole proprietary concern and AK is the only proprietor thereof - Whether the accused was described as XYZ through its proprietor AK or whether he is described AK proprietor of XYZ will make no difference - It would not cause any prejudice whatsoever to the petitioner/accused - Revisional Court was fully justified in permitting the complainant to insert the name of AK as the proprietor thereof. [Para 12, 14]

JUDGMENT

1. The petitioner/original accused preferred this revision petition against the order dated 29-3-2004 passed by Additional Sessions Judge, Akola in Criminal Revision No. 73/2003 and for restoring the order dated 14-2-2003 passed by Judicial Magistrate, First Class, 3rd Court, Akola in Summary Criminal Case No. 9192/99.

2. Respondent No. 1 (hereinafter referred to as the "complainant") filed Complaint under Sections 138 and 141 of the Negotiable Instruments Act against the petitioner on the ground that the two cheques dated 31-7-1999 for Rs. 1,00,000/- and Rs. 62,051/- issued by the petitioner in favour of the complainant were dishonoured and despite demand notice issued by the complainant to the petitioner, no payment was made.

3. By order dated 3-1-2000, process was issued against the petitioner. In response to the process, the petitioner appeared before the concerned Magistrate. On 2-5-2001 the complainant moved an application (Exh.31) for permission to correct the description of the petitioner. The complainant described the accused as Maan Agro Centre through its proprietor. By the said application, the complainant wanted to insert the name of the proprietor viz. Aminullah Khan. The said application was opposed by the petitioner.

4. On. 31-10-2001, the petitioner moved an application (Exh.34) for dismissing the complaint on the ground that the accused described in the complaint viz. Maan Agro Centre which is a proprietary concern, is not a juristic person. No complaint can be filed against such non legal person. Thus the complaint was not tenable and should be dismissed.

5. The complainant opposed the application by stating that the name of the proprietor was not known to the complainant, that it was the duty of the Magistrate to find out the real offender and that the complaint was maintainable even in the absence of the name of the accused.

6. By the common order dated 14-2-2003 below Exh.31 and Exh.34 the learned Magistrate decided both the applications. He dismissed the complainants application for correction in the

description of the accused and allowed the application of the petitioner dismissing the complaint.

7. The complainant challenged the said order by preferring revision against it. By order dated 29-3-2004, the Revisional Court allowed the revision, set aside the order below Exh.31 and 34 and reversed the orders below Exh.31 and 34. The Revisional Court allowed the application moved by the complainant for correction in the description of the accused and rejected the application of the petitioner for dismissal of the complaint. The Revisional Court directed the Magistrate to proceed to decide the complaint in accordance with law. The petitioner has challenged the said order by this revision petition.

8. The learned counsel for the petitioner submitted that the complainant was aware of the name of the proprietor of Maan Agro Centre because it is nowhere mentioned in the application (Exh.31) that he was not aware of the name. He pointed out that on the contrary the application shows that due to oversight the name of the proprietor Aminullah Khan remained to be mentioned in the complaint and in order to avoid technical complications, correction in the description of the accused was sought. The learned counsel for the petitioner pointed out that it was only in reply to the application (Exh.34) wherein it was contended by the complainant that the name of the proprietor was not known to the complainant. He, therefore, submitted that though the complainant was aware of the name of the proprietor, he chose to describe the accused as Maan Agro Centre through its proprietor without mentioning the name of the proprietor. He submitted that proprietary concern is not a juristic person and it cannot be prosecuted in its name. The person who is the proprietor of the proprietary concern, alone can be prosecuted. However, in the absence of the name of the proprietor, the complaint was liable to be dismissed and the trial Court rightly dismissed the same.

9. The learned counsel for the petitioner further submitted that amendment of complaint by way of correction in the name of the accused is not permissible. The Revisional Court was not within its jurisdiction to allow the application of the complainant for correction in the description of the accused by inserting the name of Aminullah Khan. The learned counsel for the petitioner further submitted that even if the alleged amendment is allowed, that would not cure the defect in the complaint because the accused in that case would be Maan Agro Centre through its proprietor Shri Aminullah Khan and not Aminullah Khan in his capacity as the proprietor of the Maan Agro Centre. He further submitted that in that case also, the complaint is liable to be dismissed and the Revisional Court committed an error in rejecting the application of the petitioner for dismissal of the complaint.

10. In support of these submissions, the learned counsel for the petitioner relied on the following cases :

i) Behram S. Doctor v. State of Maharashtra, 2003(4) Mh.L.J. 505 wherein it is observed as under:

"There is no provision in Criminal Procedure Code by which a complainant can make a prayer to the Magistrate for permitting him to amend the complaint by changing the name of the accused and substituting one accused by another and alleging that the substituted accused had committed the alleged offence."

ii) Anas Industries v. Suresh Bafna, 2000 All.M.R. (Cri) Journal 13 wherein it is held as under:

"Anas Industries is the accused, and it is being represented by Ram Mohan. When Anas

Industries is not a juridical person, it cannot be said that Ram Mohan can represent a non-juridical entity."

Thus the complaint against Anas Industries which is not a juridical person was held to be not maintainable.

iii) Sri Sivasakthi Industries v. Arihant Metal Corporation, 1992 Company Cases Vol. 74 page 749 wherein it is held:

"There is a basic fundamental difference between a firm and a proprietary concern, where the proprietor and the concern are one and the same for the purposes of Section 141. Where a cheque is issued by the proprietor of a concern, he is the drawer of the cheque, and he alone can be prosecuted. No prosecution is maintainable against the proprietary concern."

11. The learned counsel for the complainant on the other hand justified the impugned order passed by the Revisional Court. He submitted that before arriving at any decision, the scope and object of Section 138 incorporated in the Negotiable Instruments Act will have to be considered. He submitted that Section 138 creates strict liability involving mercantile instrument. He submitted that mere technical approach to the facts of the case would defeat the very object of Section 138. He submitted that in the present case, Maan Agro Centre is the proprietary concern which is having only one proprietor viz. Aminullah Khan. He pointed out that it was Aminullah Khan who drew the cheques in question in favour of the complainant; it was Aminullah Khan who accepted the demand notice on behalf of Maan Agro Centre; it was Aminullah Khan who received the summons; it was Aminullah Khan who appeared before the Court as an accused and took part in the trial. Thus since beginning Aminullah Khan was aware of his own liability. No prejudice is likely to be caused even if his name was not described as the

proprietor and the name of the proprietary concern only was mentioned as an accused. In support of this submission, the learned counsel for the complainant relied on the following cases :

i) 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 wherein 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) *Plywood House v. Wood Craft Products Ltd.*, 1994 Cri.L.J. 543 wherein 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 in its very constitution, all such powers as are necessary in the course of the 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. Thus all the criminal Courts are having such an auxiliary power subject to restriction which justice, equity, good conscience and legal provisions demand provided it will not unnecessarily prejudice somebody else."

12. The Court therein held that the typographical mistakes which have been pointed out by the complainant-petitioner, should have been rectified by the trial Court, as trial Court has inherent power to rectify such typographical mistakes to do justice between the parties.

13. I prefer the views expressed in *Dodla Daily Limited Case* and *Bhim Singh's case (supra)*. The learned counsel for the petitioner did not refer to any larger Bench decisions of the High Courts or that of the Apex Court in this regard. Hence I rely on the *Dodla* and *Bhim Singh's* cases.

14. If the principles laid down in the above two cases are taken into consideration, it would be seen that in the present case no doubt Maan Agro Centre through its proprietor was described as an accused and initially the name of the proprietor viz. Aminullah Khan was not mentioned in the complaint. However, one thing is certain that Maan Agro Centre is the sole proprietary concern and Aminullah Khan is the only proprietor thereof. In this view of the matter whether the accused was described as Maan Agro Centre through its proprietor Aminullah Khan or whether he is described Aminullah Khan proprietor of Maan Agro Centre will make no difference. It would not cause any prejudice whatsoever to the petitioner/accused. As such the Revisional Court was fully justified in permitting the complainant to insert the name of Aminullah Khan as the proprietor thereof. As observed by me earlier, whether Aminullah Khan is shown as accused in his capacity as proprietor of Maan Agro Centre or whether he is shown as Maan Agro Centre through proprietor Aminullah Khan would make no difference and as such the complaint would be tenable. In this view of the matter, it cannot be said that the Revisional Court exceeded its jurisdiction. In fact the Revisional Court was fully justified in reversing the order of the Magistrate. Thus I find no reason to interfere with the impugned order. I, therefore, pass the following order :

- i) The revision application is dismissed.
- ii) The observations made in this judgment are limited to the order below Exh.31 and 34 and they may not be taken into consideration while deciding the complaint on merits.
- iii) Needless to say that the stay granted stands vacated.

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