
Before R.C. Kathuria, J.

M/S BEDI SONS STEELS AND WIRES,—*Petitioner*

versus

M/S B.G. BROTHERS,—*Respondent*

CrI. M. No. 50086/M of 2001

22nd January, 2002

Negotiable Instruments Act, 1881—Ss. 138 and 142—Code of Criminal Procedure, 1973—S. 245—Indian Penal Code, 1860—S. 11—General Clauses Act, 1897—S. 3(42)—Dishonour of cheque—A proprietary concern filing complaint against a proprietorship concern—Whether maintainability of such a complaint can be construed to be barred—Held, no—Proprietary concern being the payee or holder of the cheque competent to institute the complaint—However, defects, if any, in the format of complaint can be permitted to be rectified by the Court—Petition dismissed.

Held, that maintainability of the complaint filed by the respondent through proprietary concern as such cannot be construed to be barred keeping in view the provisions of Sections 138 and 142 of the 1881 Act. If any defect in the format of the complaint is brought to the notice then the Court can allow permission to rectify the same and in this case the Court can even allow the respondent in his individual capacity to prosecute the complaint. Consequently, it has to be taken that the eligibility criteria prescribed under Section 142 of the 1881 Act have been fulfilled by the respondent because he being the payee or holder of the cheque in due course was competent to institute the complaint.

(Paras 13 and 15)

Sanjay Majithia, Counsel, for the Petitioner.

JUDGMENT

R.C. Kathuria, J.

(1) In this petition, the petitioner seeks quashing of complaint (Annexue-P.1), summoning order, dated 20th April, 1998, copy of

which is Annexure-P.2, whereby the petitioner had been directed to appear in the Court to face trial in complaint filed under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the Act) read with Section 420 of the Indian Penal Code and the order, dated 20th August, 2001 (Annexure-P.5) whereby application filed by the petitioner under section 245 of the Code of Criminal procedure, 1973 (hereinafter referred to as 'the Code') seeking dismissal of the complaint was rejected.

(2) The essential facts to focus the controversy involved in the present petition need to be noticed. M/s B.G. Brothers, Link Road, Ludhiana through its Proprietor, Bharat Bhushan, respondent in the present petition, filed a complaint under section 138 of the Act read with section 420 I.P.C. on the allegation that the petitioner had issued a cheque, dated 25th August, 1997, for Rs. 22,000 in favour of the complainant-respondent. When the cheque was presented to the bank, the same was returned unpaid with the remarks that funds were insufficient to honour the cheque. Thereafter, the cheque was again presented on the assurance of the petitioner but it was again dishonoured on the ground of insufficiency of funds. In support of the allegations made in the complaint. Bharat Bhushan appeared as PW-1. He produced on record cheque Ex. P.1, memos Ex. P.2 and Ex. P.3, copy of notice Ex. P.4, postal receipt Ex. P.5 and A.D. Ex. P.6. In addition, Prem Nath, Recordkeeper, State Bank of India (PW-2), was examined, who proved the certified copy of messenger book Ex. PW2/A, copy of dishonouring of cheque register Ex. PW2/B and certified copy of statement of accused Ex. PW2/C. On the basis of above evidence, the Additional Chief Judicial Magistrate, Ludhiana, as per order, dated 20th April, 1998, found sufficient ground against the petitioner-accused to face trial in respect of the offences stated in the complaint.

(3) On appearance before the Court, the petitioner moved an application under Section 245 of the Code on the ground that the petitioner, which is a proprietorship concern, has no legal entity nor it is a juristic person and for that reason proceedings could not be initiated against its name in terms of the provisions of Section 11 of the Indian Penal Code read with Section 3(42) of the General Clauses Act and for that reason complaint being not maintainable was liable to be dismissed. This application was contested by the respondent on

the ground that the complaint has been filed by M/s B.G. Brothers as proprietors of the respondent and for that reason it was maintainable. The application was dismissed,—vide, order dated 20th August, 2001. Aggrieved by these orders, the present petition has been filed.

(4) I have heard learned counsel for the petitioner at length.

(5) Learned counsel for the petitioner sought quashing of the complaint on the grounds stated in the application filed under section 245 of the Code which have been noticed earlier. In support of the stand taken, reliance was placed on the observations made in *Sri Sivasakthi Industries versus Arihant Metal Corporation (1)*, wherein it was observed as under :—

“Proprietor concern is not a firm. A firm is a partnership firm consisting of partners. In this case, the first-accused is not a firm. It is only a proprietary concern. As such Section 141 of the Negotiable Instruments Act, which enables prosecution against the company as well as other person who at the time of the offence was committed was incharge of and was responsible to the company, cannot be pressed into service. The learned counsel for the respondent was totally under an erroneous impression that the first accused is a firm. There is basic and fundamental difference between a firm and a proprietary concern. The first accused is only a proprietary concern, its proprietor being Raman. Accused 1 and 2 are one and the same person. In para 3 of the complaint, it is stated that the second accused issued the cheque. Only the drawer of the cheque can be prosecuted. As such, the proceedings against the first accused viz., M/s Sri Sivasakthi Industries, represented by its proprietor are to be quashed. I would like to make it absolutely clear that both the accused are one and the same person viz., Raman. The issuance of the cheque by Raman as Proprietor of M/s Sri Sivasakthi Industries would amount to issuance of the cheque by the second accused. He is the drawer of the cheque. I am making it clear for the specific purpose

that at the time of trial of the case, no prejudice should be caused by the observations made in the course of this order to the complaint. Also contention that cheque was issued by Raman as Proprietor of M/s Sri Sivasakthi Industries and Raman cannot be proceeded with for offence under Section 138, Negotiable instruments Act should not be countenanced by the trial court. The complaint is maintainable against the second accused. On the ground that accused 1 and 2 are same persons and that accused No. 1 is not a "firm" as per Section 141, Negotiable Instruments Act, I am quashing the proceedings as against Accused No. 1".

(6) Further reference was made to *P. Muthuraman versus Shree Padmavathi Finance (Regd.) (2)*, wherein it was laid down as under :—

"It is clear that 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. In this connection, it is pertinent to point out the Explanation under section 141 of the Negotiable Instruments Act. The term 'company' is defined in the Explanation to section 141 to mean (1) any body corporate and (2) includes a firm or (3) other associations of individuals; and 'director' in relation to a firm, means a partner in the firm. There is, thus, no mention of any sole proprietary concern under the definition of 'company'. Further, other associations of individuals will not include a sole proprietary concern as there is only one person and not an association of persons. As the sole proprietary concern is not a company within the meaning of company as defined under the Explanation to section 141 of the Negotiable Instruments Act, 1881, the sole proprietary concern need not be

made a party in the complaint apart from the sole proprietor. In view of the above, the petition is dismissed.”

(7) The same question was again raised in *N. Vaidyanathan Deepika Milk Marketing versus M/s Dodia Dairy Limited* (3). It would be appropriate to refer to the detailed discussion in paras 14 to 23 of the judgment regarding the controversy raised which read as under :—

“14. There is no dispute with regard to the fact that section 141 of the Act is not applicable in this case as the said section would involve only companies. As per the decision of this Court and the Apex Court, the company as well as the partners of the company can be jointly or separately prosecuted. But, as agreed by the counsel for both the parties, there cannot be any separate complaint against a proprietary concern, as it does not come within the definition of firm or company as per Section 141 of the Act. It cannot also be debated that a firm has no separate legal entity apart from its proprietor. In other words, a proprietary concern cannot fit in with the explanation of the company appended to section 141 of the Act.

15. But, the question that arises for consideration in the instant case is, whether a prosecution could be launched against a proprietary concern by putting the cause title as proprietary concern represented by its proprietor.

16. In this context, it shall be noticed that the proprietary concern found in the cause title in the instant case has been separately prosecuted. Therefore, it cannot be contended that the prosecution is not maintainable merely on the ground that the proprietorship has no legal entity.

17. As stated earlier, the cause title shows that Deepika Milk Marketing is represented by its Proprietrix Mrs. Ravathi Vaidyanathan. It is true that in Sri. Sivasakthi

Industries versus Arihant Metal Corporation, 1992 L.W. (CrI.) 347, the prosecution was quashed by this Court (Partap Singh, J.) as against the proprietary concern, as it was separately prosecuted holding that the proprietary concern is not a firm or a company.

18. But, in the said case it was made clear that both the proprietorship concern as well as the proprietor are one and the same person and so, the prosecution as against the proprietor of the said concern can be continued and that during the course of trial the said proprietor could not raise the contention that as a proprietor he cannot be proceeded with.
19. It is also clearly observed in the said decision that both the proprietary concern and the proprietor are one and the same person. It is observed by Hon'ble Arunachalam, J. (as he then was) in *Raja versus State by DSP/APRS Vigilance TNEB Madras*, 1990 L.W. (CrI.) 203, that a proprietary firm has no separate legal entity apart from its proprietor, the firm name being another name of the proprietor himself.
20. In yet another decision in *Raman versus Krishna Pharmaceutical Distributors* [1994(III) C.C.R. 1601], Hon'ble Pratap Singh, J. (as he then was) pleased to quash the proceedings as against Sri Janaki Pharmacy, represented by proprietor since the proprietorship concern is not the legal entity holding that one Raman alone issued the cheque as a drawer of the cheque.
21. If the same analogy is applied to this case, it is clear that section 138 of the Act contemplates that prosecution could be launched against the drawer. According to the counsel for the respondent/complainant, the drawer, who issued the cheque in the instant case is the Deepika Milk Marketing by its Proprietrix Mrs. Revathi Vaidyanathan and as such, the complaint against the said drawer is maintainable.

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22. As discussed above, the name of the drawer cannot be dissected and there cannot be any prosecution against the proprietary concern alone. Had there been prosecution against proprietorship separately or had there been prosecution against Revathy Vaidyanathan individually, then there is a point in urging that the drawer is not the accused.
23. As indicated above, it is 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 the entity.”

(8) The controversy raised stands settled in the latest pronouncement of the Apex Court in *Anil Hada versus Indian Acrylic Ltd. (4)*, wherein the brief facts were that a cheque was issued by the company and the directors and other persons falling within section 141 of the Act were prosecuted. It was held that it is not necessary that the company should also be prosecuted along with them. It was specifically observed in para 10 of the judgment as under :—

“Normally an offence can be committed by human being who are natural persons. Such offence can be tried according to the procedure established by law. But there are offences which could be attributed to juristic persons also. If the drawer of a cheque happens to be a juristic person like a body corporate it can be prosecuted for the offence under section 138 of the Act. Now there is no scope for doubt regarding that aspect in view of the clear language employed in section 141 of the Act. In the expanded ambit of the word “company” even firms or any other associations of persons are included and as a necessary adjunct thereof a partner of the firm is treated as director of that company.”

(9) The same decision was reiterated in *R. Rajagopal versus S. S. Venkat* (5).

(10) It is apparent that in *Sri Sivasakthi Industries versus Arihant Metal Corporation* (supra) and *P. Muthuraman versus Shree Padmavathi Finance (Regd.)* (supra) the Madras High Court proceeded on the basis that where the sole proprietorship concern is to be sued it need not be made a party as it is not a company and the proceedings were quashed *qua* sole proprietorship concern. It flows from the decisions in these cases that even where prosecution is lodged against a proprietorship concern through the proprietor, it has to be considered as against the proprietor as the proprietorship concern itself has no legal entity. The view taken in the above mentioned two cases of the Madras High Court as such would tantamount to ignoring the factual situation. As per requirement of section 141 of the Act, in terms of the construction put to these provisions by the Hon'ble Supreme Court in *Anil Hada versus Indian Acrylic Ltd.* (supra) the stand taken by the petitioner during the course of arguments cannot be sustained.

(11) I have dealt with the submissions made on behalf of the petitioner at the first instance without going into the stand taken by the petitioner in the application filed under section 245 of the Code relating to the maintainability of the complaint filed by the respondent. This position is clearly brought out in paras 3 to 5 of the application dated 26th October, 1998 which read as under :—

“3. The perusal of the complaint shows that it has been filed by a proprietorship concern against the proprietorship concern. Under the law proprietorship concern has no legal entity or juristic person. Neither it can initiate any proceedings nor proceedings can be initiated against it. The word person has been defined under section 11 of the Indian Penal Code as well as under section 3(42) of the General Clauses Act. According to this definition any company or associate or body of persons is recognised as legal entity but it does not include the proprietorship concern and the same has no recognition in the eyes of law.

4. The framing of the complaint as such is not maintainable at all.

5. The dismissal of the complaint for the reasons referred to above is warranted by law and equity and is also in the interest of justice.”

(12) Dealing with the question raised, the learned Magistrate in his order dated 20th August, 2001, while rejecting the prayer made on behalf of the petitioner, observed as under :—

“Ld. counsel for complainant relied upon 1994(1) Civil Court Cases 91 Kerala wherein it has been held by Hon’ble Kerala High Court that no form is prescribed for drafting complaint. If facts set out in the complaint constitute offence alleged to have committed by some person, the Magistrate has power to take cognizance of the offence under section 138 of the Act. He further relied upon 2000(1) Civil Court Cases 182 Madras, wherein the Hon’ble Madras High Court has held that prosecution can be launched against proprietary concern by putting cause title as proprietorship concern represented by its proprietor. It is held that proprietary concern of the proprietor any one and the same person. In 1990 L.W. (Criminal) 203 Madras, it has been held that proprietary firm has no separate legal entity from its proprietor, the firm name being another name of the proprietor himself.

It is well settled that proprietorship concern by its proprietorship concern is not legal entity from its proprietor. Proprietary concern of the proprietor are one of the same person to put it differently, prosecution against proprietor representing proprietorship concern or proprietorship concern represented by proprietor are one of the same as both these needs to be merged with only entity”.

(13) Maintainability of the complaint filed by the respondent through proprietary concern as such cannot be construed to be barred keeping in view the provisions of sections 138 and 142 of the Act. It was observed in *M/s M.M.T.C. Ltd. and another versus M/s Medchl Chemicals and Pharma (P.) Ltd. and another* (6), as under :—

“If any special statute prescribes offences and makes any special provision for taking cognizance of such offences

under the statute, then the complaint requesting the Magistrate to take cognizance of the offence must satisfy the eligibility criterion prescribed by the statute. The only eligibility criterion prescribed by section 142 is that the complaint under section 138 must be by the payee or the holder in due course of said cheque. This criterion is satisfied as the complaint is in the name and on behalf of the appellant-company who is the payee of the cheque. Merely because complaint is signed and presented by a person, who is neither an authorised agent nor a person empowered under the Articles of Association or by any resolution of the Board to do so is no ground to quash the complaint. It is open to the *de jure* complainant company to seek permission of the Court for sending any other person to represent the company in the Court. Thus, even presuming, that initially there was no authority, still the company can, at any stage, rectify that defect. At a subsequent stage the company can send a person who is competent to represent the company.”

(14) In the above mentioned case reliance was placed on *Vishwa Mitter versus O.P. Poddar (7)*, wherein it was held that any one can set the criminal law in motion by filing a complaint of facts constituting an offence before the Magistrate entitled to take cognizance. It was further laid down that no Court can decline to take cognizance on the sole ground that the complainant was not competent to file the complaint.

(15) The mandate of the above judicial pronouncements appears to be that if any defect in the format of the complaint is brought to the notice then the Court can allow permission to rectify the same and in this case the Court can even allow the respondent in his individual capacity to prosecute the complaint. Consequently, it has to be taken that the eligibility criteria prescribed under section 142 of the Act have been fulfilled by the respondent because he being the payee or holder of the cheque in due course was competent to institute the complaint. Thus, from whatever angle the question is examined, there is no merit in the petition and the same is accordingly dismissed.

R.N.R.