

was again presented before the bank on the advice of the applicant on 29.1.2021 but the same was dishonoured by the bank on 30.1.2021 with the endorsement "payment stop by drawer". Thereafter, that cheque was again presented (third time) before the bank on the advice of the applicant on 23.2.2021 but the same was again returned by the bank on 24.2.2021 with the endorsement "payment stopped". Thereafter, opposite party No.2 sent a registered demand notice to the applicant on 4.3.2021 which was delivered to the applicant on 9.3.2021, but despite expiry of 15 days, the cheque amount was not paid then the impugned complaint was filed in which the applicant was summoned by order dated 14.9.2021.

4. This matter was heard on 19.11.2024 and on that date learned counsel for the applicant has submitted that the cheque in question was issued on behalf of the proprietorship concern of the applicant (Mahadev Enterprises) but the applicant was summoned despite the fact that the applicant was not impleaded as accused in the complaint, therefore, the proceeding against the applicant is barred by Section 141(1) N.I. Act as the proprietor of business concern cannot be prosecuted unless he is made party in the complaint and specific averment is made in the complaint that the proprietor was incharge of and responsible for the day to day business of the proprietorship concern. After hearing the above argument, this Court framed a question whether a sole proprietorship concern will come within the definition of "company" in Explanation (a) to Section 141 N.I. Act.

5. Learned counsel for the applicant also submitted that in respect of the cheque in question of Rs.20,50,000/-, the

applicant has already paid Rs.4 Lakh through a cheque No. 000858 dated 12.7.2021. It is further submitted that on bouncing of the cheque of Rs.4 Lakh, which is a part payment of Rs.20,50,000/-, in respect of the cheque in question, another complaint No. 4501 of 2021 has been filed by the applicant, therefore, for one liability applicant is pursuing two cases; first the present impugned complaint and another being Complaint Case No. 4501 of 2021. Therefore, the proceeding deserves to be quashed.

6. One more submission was also advanced by the counsel for the applicant that admittedly as per the complaint, the demand notice was served upon the applicant on 9.3.2021 but the impugned complaint was filed on 22.3.2021 before 15 days from the date of service of the demand notice, therefore, the complaint is pre - mature.

7. Learned counsel for the applicant also fairly submits that in the case of *M.M. Lal vs. State of N.C.T. of Delhi and others; Criminal Leave Petition No. 290 of 2010* decided on 14.9.2012, the Single Bench of the Delhi High Court has observed that the sole proprietorship firm would not fall within the meaning of partnership firm or association of individuals.

8. However, learned counsel for opposite party No.2 has submitted that it is undisputed that the cheque in question as well as the cheque of another complaint has been issued by the applicant, therefore, presumption under Section 139 NI. Act is attracted and this ground can be raised by the applicant during trial. But the learned counsel for the applicant could not dispute the fact that the impugned complaint has

been filed on 22.3.2021, after the notice sent by him was delivered upon the applicant on 9.3.2021.

9. Learned A.G.A. has also relied upon the judgements of the Apex Court in the cases of **Ashok Transport Agency vs Awadhesh Kumar and another; (1998) 5 SCC 567, Raghu Laxminarayanan vs. Fine Tube; (2007) 5 SCC 103 as well as Alka Khandu Avhad vs. Amar Shyamprasad Mishra and another; (2021) 4 SCC 675** and he vehemently contends that the Explanation (a) to Section 141 N.I. Act clearly prescribed company, firm or other association of individuals, therefore, if any body of individuals is registered that would fall under Section 141 N.I. Act not the proprietorship firm.

10. After hearing the submissions of learned counsel for the parties, it would be pertinent to refer Section 141 N.I. Act which is being quoted as under:-

"Section-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:

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."*

11. From the Explanation (a) to Section 141 N.I. Act, it is clear that for the purpose of Section 141 N.I. Act company means any body corporate, including a firm and other association of individuals. Therefore, applying the principle of maxim ejusdem generis other association of individuals will be interpreted as per the meaning of firm which is formed by two or more persons. The proprietorship concerned is always run by a person. Therefore, that cannot be said to be a firm or other association of individuals as mentioned in the Explanation (a) to Section 141 of N.I. Act.

12. Though as per Order XXX Rule 1 C.P.C. a suit can be filed on behalf of or against a partnership firm of two or more persons and the partner of that firm can also be sued but as per Order XXX Rule 10 C.P.C. a person running a business other than in his own name can also sue or be sued in the name of his business or proprietorship concern, but in case of proprietorship concern, it's proprietor has no separate identity from the proprietorship concern despite the fact that his proprietorship concern may be sued. For reference Order XXX Rules 1 to 10 are being quoted as under:-

"Order XXX-

1. Suing of partners in name of firm.—(1) *Any two or more persons claiming or being liable as partners and carrying on business in 641[India] may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the person who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.*

(2) *Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.*

2. Disclosure of partners' names.—(1) *Where a suit is instituted by partners in the name of their firm, the plaintiff or their pleader shall, on demand in writing by or on behalf of any defendant,*

forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

(2) *Where the plaintiff or their pleader fails to comply with any demand made under sub-rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.*

(3) *Where the names of the partners are declared in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint:*

642[Provided that all proceedings shall nevertheless continue in the name of the firm, but the name of the partners disclosed in the manner specified in sub-rule (1) shall be entered in the decree.]

3. Service.—*Where persons are sued as partners in the name of their firm, the summons shall be served either—*

(a) *upon any one or more of the partners, or*

(b) *at the principal place at which the partnership business is carried on within 643[India] upon any person having, at the time of service, the control or management of the partnership business there,*

as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without 644[India]:

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within 645[India] whom it is sought to make liable.

4. Right of suit on death of partner.—(1) Notwithstanding anything contained in Section 45 of the Indian Contract Act, 1872 (9 of 1872), where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.

5. Notice in what capacity served.—Where a summons is issued to a firm and is served in the manner provided by Rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.

6. Appearance of partners.—Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

7. No appearance except by partners.—Where a summons is served in the manner provided by Rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.

8. Appearance under protest.—(1) Any person served with summons as a partner under Rule 3 may enter an appearance under protest, denying that he was a partner at any material time.

(2) On such appearance being made, either the plaintiff or the person entering the appearance may, at any time before the date fixed for hearing and final disposal of the suit, apply to the Court for determining whether that person was a partner of the firm and liable as such.

(3) If, on such application, the Court holds that he was a partner at the material time, that shall not preclude the person from filing a defence denying the liability of the firm in respect of the claim against the defendant.

(4) If the Court, however, holds that such person was not a partner of the firm and was not liable as such, that shall not preclude the plaintiff from otherwise serving a summons on the firm and proceeding with the suit; but in that event, the plaintiff shall be precluded from alleging the liability of that person as a partner of the firm in execution of any decree that may be passed against the firm.]

9. Suits between co-partners.—This Order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just.

10. Suit against person carrying on business in name other than his own.—Any person carrying on business in a name or style other than his own name, or Hindu undivided family carrying on

business under any name, may be sued in such name or style as if it were a firm name, and, insofar as the nature of such case permits, all rules under this Order shall apply accordingly."

13. From the perusal of the Order XXX Rule 10, it is clear that legal fiction is created in favour of the proprietorship concerned of a person for suing the same as it is a firm name, but for the purpose of proceeding under the N.I. Act the proprietorship/business concern of a person has no different identity from its proprietor because proprietorship concerned is not the firm which can be formed by two or more persons.

14. The Apex Court, in paragraph No.6 of the judgement passed in *Ashok Transport Agency (supra)*, observed that partnership is governed by the Indian Partnership Act, 1932. Though partnership is not a juristic person like a company but even then as per Order XXX Rule 1 of C.P.C. partners can be sued in the name of the firm. So far as the proprietorship is concerned, it cannot be sued or to be sued individually but through its proprietor or in the name of proprietor himself. Paragraph No.6 of the *Ashok Transport Agency (supra)* is quoted as under:-

"6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person but Order XXX Rule 1 CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or

against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 of Order XXX which make applicable the provisions of Order XXX to a proprietary concern, enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order XXX have no application to such a suit as by virtue of Order XXX Rule 10 the other provisions of Order XXX are applicable to a suit against the proprietor of proprietary business "insofar as the nature of such case permits". This means that only those provisions of Order XXX can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case."

15. Above issue again came into consideration before the Apex Court in the case of *Raghu Laxminarayanan (supra)* in which the Apex Court discussed in detail and observed that the company being juristic person is governed by the provision of the Companies Act, 1956 and the partnership is governed by the provision of the Indian Partnership Act, 1932. It is further mentioned in that judgement that association of persons though is not incorporated under the statute but it comes within the definition of company for the purpose of Section 141 N.I. Act. However, the proprietorship concern stands absolutely on a different footing and, therefore, the proprietorship will not come

within the definition of Explanation (a) to Section 141 N.I. Act. Paragraphs No. 8, 9, 12, 13, 14 of **Raghu Laxminarayanan (supra)** are quoted as under:-

"8. The concept of vicarious liability was introduced in penal statutes like the Negotiable Instruments Act to make the Directors, partners or other persons, in charge of and control of the business of the company or otherwise responsible for its affairs; the company itself being a juristic person.

9. The description of the accused in the complaint petition is absolutely vague. A juristic person can be a company within the meaning of the provisions of the Companies Act, 1956 or a partnership within the meaning of the provisions of the Partnership Act, 1932 or an association of persons which ordinarily would mean a body of persons which is not incorporated under any statute. A proprietary concern, however, stands absolutely on a different footing. A person may carry on business in the name of a business concern, but he being proprietor thereof, would be solely responsible for conduct of its affairs. A proprietary concern is not a company. Company in terms of the Explanation appended to Section 141 of the Negotiable Instruments Act, means any body corporate and includes a firm or other association of individuals. Director has been defined to mean in relation to a firm, a partner in the firm. Thus, whereas in relation to a company, incorporated and registered under the Companies Act, 1956 or any other statute, a person as a Director must come within the purview of the said description, so far as a firm is concerned, the same would carry the same meaning as contained in the Partnership Act.

12. If Accused 1 was not a company within the meaning of Section 141

of the Negotiable Instruments Act, the question of an employee being proceeded against in terms thereof would not arise. The respondent was aware of the difference between a "partnership firm" and a "business concern" as would be evident from the fact that it described itself as a partnership firm and Accused 1, as a business concern. Significantly, the respondent deliberately or otherwise did not state as to in which capacity the appellant had been serving the said business concern. It, as noticed hereinbefore, described him as in-charge, Manager and Director of Accused 1. A person ordinarily cannot serve both in the capacity of a Manager and a Director of a company.

13. The distinction between partnership firm and a proprietary concern is well known. It is evident from Order 30 Rule 1 and Order 30 Rule 10 of the Code of Civil Procedure. The question came up for consideration also before this Court in *Ashok Transport Agency v. Awadhesh Kumar* [(1998) 5 SCC 567] wherein this Court stated the law in the following terms : (SCC pp. 569-70, para 6)

"6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Partnership Act, 1932. Though a partnership is not a juristic person but Order 30 Rule 1 CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the

dealings of the proprietary business. The provisions of Rule 10 of Order 30 which make applicable the provisions of Order 30 to a proprietary concern, enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order 30 have no application to such a suit as by virtue of Order 30 Rule 10 the other provisions of Order 30 are applicable to a suit against the proprietor of proprietary business 'insofar as the nature of such case permits'. This means that only those provisions of Order 30 can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case."

14. We, keeping in view the allegations made in the complaint petition, need not dilate in regard to the definition of a "company" or a "partnership firm" as envisaged under Section 34 of the Companies Act, 1956 and Section 4 of the Partnership Act, 1932 respectively, but, we may only note that it is trite that a proprietary concern would not answer the description of either a company incorporated under the Companies Act or a firm within the meaning of the provisions of Section 4 of the Partnership Act."

16. The above controversy was again came into consideration before the Apex Court in the case of *Alka Khandu Avhad (supra)* in which the Apex Court, while considering the provision of Section 141 N.I. Act, observed that Section 141 N.I. Act is relating to the offence by the companies and it cannot be made applicable to the individuals or

proprietorship firm. Paragraph No. 12 of *Alka Khandu Avhad (supra)* is quoted as under:-

"12. Section 141 of the NI Act is relating to the offence by companies and it cannot be made applicable to the individuals. The learned counsel appearing on behalf of the original complainant has submitted that "company" means any body corporate and includes, a firm or other association of individuals and therefore in case of a joint liability of two or more persons it will fall within "other association of individuals" and therefore with the aid of Section 141 of the NI Act, the appellant who is jointly liable to pay the debt, can be prosecuted. The aforesaid cannot be accepted. Two private individuals cannot be said to be "other association of individuals". Therefore, there is no question of invoking Section 141 of the NI Act against the appellant, as the liability is the individual liability (may be a joint liabilities), but cannot be said to be the offence committed by a company or by it corporate or firm or other associations of individuals. The appellant herein is neither a Director nor a partner in any firm who has issued the cheque. Therefore, even the appellant cannot be convicted with the aid of Section 141 of the NI Act. Therefore, the High Court has committed a grave error in not quashing the complaint against the appellant for the offence punishable under Section 138 read with Section 141 of the NI Act. The criminal complaint filed against the appellant for the offence punishable under Section 138 read with Section 141 of the NI Act, therefore, can be said to be abuse of process of law and therefore the same is required to be quashed and set aside."

17. From the perusal of the above analysis, it is clear that proprietorship

firm has no individual identity. It is always associated with its proprietor and in case of proprietorship concern, question of vicarious liability does not arise and only proprietor of the proprietorship concern will be liable, whether proprietorship concern is arrayed as accused through it proprietor or proprietor himself is arrayed as a party. In both the cases there will be individual liability of the proprietor and proprietorship concern has no different identity. It is used only for the business purposes; the real identity is its proprietor.

18. In view of the reason mentioned in the forgoing paragraph, it is not necessary to implead the applicant separately as accused. He can be prosecuted by impleading his firm on whose behalf the cheque in question was issued. Therefore, the first submission of the applicant that the impugned proceeding is bad in the eyes of law as **he was not impleaded as party is misconceived, hence, rejected.**

19. So far as the second issue raised by counsel for the applicant that on bouncing of the cheque of part of liability of Rs.4 Lakh, the applicant has filed the complaint No. 4501 of 2021 and for entire amount of Rs.29,50,000/-, the impugned proceeding has been initiated is concerned, the applicant appears to be correct, but this ground can be raised by the applicant **before the trial court and on that ground the present proceeding cannot be quashed.**

20. So far as the third issue raised by the counsel for the applicant that admittedly the demand notice was served upon the applicant on 9.3.2021, but the complaint was filed on 22.3.2021 is

concerned, that appears to be correct because for taking cognizance the complaint should have been filed after expiry of 15 days from the service of demand notice. In the present case admittedly the demand notice was served upon the applicant on 9.3.2021. Therefore, the complaint could have been filed after 24.3.2021 but the complaint was filed on 22.3.2021. Therefore, the complaint is premature.

21. In view of the above, the present application is partly allowed only on the ground that the complaint is premature, **therefore, the proceeding of Complaint Case No. 4501 of 2021 is hereby quashed.**

22. However, opposite party No.2 is at liberty to file fresh complaint in accordance with law.

23. With the aforesaid observation, the application is **disposed of.**

(2024) 12 ILRA 13

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 11.12.2024

BEFORE

THE HON'BLE MANISH KUMAR NIGAM, J.

Application U/S 482 No. 10823 of 2024

Shyam Lal Dhadhaniya ...Applicant

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:

Abhishek Tripathi

Counsel for the Opposite Parties:

G.A.