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(2014) 09 KAR CK 0126

In the Karnataka High Court

Case No : Criminal Appeal No. 1048 of 2012

Alhind Tours and Travels Private Limited — APPELLANT

Vs

Hasan Addoor — RESPONDENT

Date of Decision : 09-09-2014

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 3 Rule 1, Order 3 Rule 2
Criminal Procedure Code, 1973 (CrPC) — Section 2(q), 200, 205, 30, 302
Negotiable Instruments Act, 1881 (NI) — Section 138, 142(a), 145

Citation : (2014) 09 KAR CK 0126

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : Sachin B.S, Advocate for the Appellant; J.I. Kittur, Advocate and S.P. Kulkarni, Advocate for the Respondent

Final Decision : Allowed

Judgement

Anand Byrareddy, J.—This appeal is filed by the complainant before the trial court and the proceedings instituted against the respondent was for an offence punishable u/s 138 of the Negotiable Instruments Act, 1881 (Hereinafter referred to as the ''NI Act'', for brevity).

2. The complainant was a private limited company, incorporated under the Companies Act, 1956. There was a resolution passed by the Board of Directors of the complainant company duly authorizing the appointment of its Assistant Sales Manager, one Ashley Danian Fernandez, as the Power of Attorney holder of the company, for the purpose of representing the company in the particular criminal case that was instituted. The said Power of Attorney holder had presented the complaint on behalf of the company, through its counsel and had represented the complainant at all stages of the proceedings. The respondent had hardly contested the proceedings, though represented by counsel. A contention however, was raised that the Power of Attorney holder could not have tendered evidence on behalf of the Principal, without leave of the court. The Trial Court has

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dismissed the complaint and acquitted the accused, while holding that though the Power of Attorney holder was competent to present the complaint on behalf of the complainant company, he ought to have sought permission of the Court u/s 302 of the Code of Criminal Procedure, 1973 (Hereinafter referred to as the ''CrPC, for brevity), to tender evidence on behalf of the complainant and that not having been complied with, the proceedings were vitiated.

The Trial Court has held that this is the opinion expressed in the case of Chandrashekharappa Koujageri Vs. Sharanabasappa Kamblyal reptd. by P.A. Holder Sri Veeresh Kamblyal, . Hence the present appeal.

3. The learned counsel for the parties were heard at length. Several authorities are cited by both counsel.

4. The point that arises for consideration is, whether in a complaint of commission of an offence punishable u/s 138 of the NI Act, a power of attorney holder, duly authorized to represent the complainant in the case, would require the permission of the Court u/s 302 of the CrPC, to tender evidence on behalf of the complainant.

5. In answering the above point for consideration, we, may usefully refer to the following authorities which, however, have been rendered in particular contexts.

Jimmy Jahangir Madan Vs. Bolly Cariyappa Hindley (Dead) by LRs.,

The facts of this case were that one Mrs. Bolly Cariyappa Hindley is said to have filed two complaints for prosecution of the appellant, for an offence punishable u/s 138 of the NI Act. She is said to have died during the pendency of the case. Her legal heirs, a son and a daughter, who were living abroad, acting through their General power of attorney holders, sought permission of the Court u/s 302 of the CrPC, to continue the prosecution of the complaint. The accused is said to have opposed the application in that regard. The Magistrate having granted the permission, the said order was said to have been challenged before the High court, and the said petitions having been dismissed, the accused had approached the Apex court.

The Apex court has expressed that upon the death of a complainant, his or her legal heirs, could be allowed to file an application u/s 302 CrPC (corresponding to Section 495 of the Code of Criminal Procedure, 1898), following Ashwin Nanubhai Vyas Vs. State of Maharashtra and Another, . The court, however, observed that though a legal heir could approach the Court, personally or through a pleader, seeking such permission, in the case before it, the legal heirs themselves had not filed the application seeking permission to continue the prosecution, but that the same had been filed by their power of attorney holders. Therefore, the question whether a power of attorney holder could be treated as a ''pleader of the legal heirs of the complainant, was considered by the Apex court.

It was held as follows:

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"The language of Sections 205 and 302 of the Code is similar. u/s 302 of the Code, a party can make an application himself to continue the prosecution or the same can be made by a pleader. As provided u/s 2(q) of the Code, the prayer to continue the prosecution can be made either by a legally qualified person, who is authorised to practise in the Court under the Advocates Act; or by any other person which would obviously include a power of attorney holder in which eventuality such permission can be granted by the Court where the prosecution is pending only if it is sought by the person who is entitled to continue the prosecution and not by the power of attorney holder. u/s 205 of the Code, an accused is required to appear in person but his personal appearance can be dispensed with and he can be allowed to be represented by a pleader. Likewise, u/s 302 of the Code, a person, who is entitled to continue the prosecution, is required to make an application himself but under both the provisions aforesaid, instead of taking steps personally, a party can be represented through a pleader. Power of attorney holder can represent the concerned party under both the provisions of the Code, in case permission for such representation is sought from the Court by the concerned person and granted by it. But, where no such permission is sought by the concerned person, meaning thereby, in the case of Section 205 of the Code-an accused and in the case of Section 302 of the code-a party who has right to continue the prosecution, power of attorney holder cannot be allowed to represent the concerned person in the proceeding."

It was concluded that the legal heirs themselves should have approached the court, seeking permission to continue the prosecution and could have even sought permission to continue the proceedings through their power of attorney holders, but the power of attorney holders themselves could not seek such permission. The appeal was accordingly allowed.

Mrs. Janki Vashdeo Bhojwani and Another Vs. The Indusind Bank Limited and Others,

The facts of the case were, that the two appellants before the court were the wives of respondents no. 2 and 5, respectively, who were managing the two business enterprises, arraigned as respondents 6 and 7. A bank which had extended loan facilities, to the said business enterprises was respondent no. 1.

Properties belonging to the parties was offered as security for the loan facilities. The parties having defaulted in servicing the loan, recovery proceedings had been initiated. An item of property having been brought to sale, pursuant to a Recovery Certificate having been issued by the Debt Recovery Tribunal, before which the recovery proceedings had been instituted. The appellants had challenged the same on the ground that they had remained unaware of the recovery proceedings till then. It was their case that they were co-owners of the property in question and since they were neither debtors nor guarantors for the loan transactions, their share in the property could not be brought to sale.

Incidentally, the matter had earlier reached the Apex court and the matter had

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been remanded to the Tribunal with certain specific directions to address particular issues and to return the findings.

On remand, the Tribunal had permitted the husband of appellant no. 2, as her power of attorney holder, to tender evidence on her behalf. Neither of the appellants had graced the witness box. It was in that context, the apex court had addressed the propriety of the said circumstance and held thus:

"Order III, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view, the word "acts" employed in Order III, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal In other words, if the power of attorney holder had rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined."

It was held that the question whether the appellants had any independent source of income, from which they had contributed towards the purchase of the property in question could have been answered only by the appellants and not by a mere power of attorney holder acting on their behalf, when he could not claim to have personal knowledge of matters pertaining to the appellants.

Man Kaur (dead) by LRS. Vs. Hartar Singh Sangha,

In this case, the apex court has further elaborated the circumstances, in which a power of attorney would or would not be competent to tender evidence on behalf of the principal and has summarized the legal position thus:

"18. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

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(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his "bona fide" need and a purchaser seeking specific performance who has to show his "readiness and willingness" fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or "readiness and willingness". Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

A.C. Narayanan Vs. State of Maharashtra and Another,

In view of a Division bench of the apex court having found that there was a variance of opinion in the interpretation of Section 142(a) of the NI Act, among various High Courts and that the decision in M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, , was not noticed by the bench which decided the case in Janki Vashdeo Bhojwani, supra, and having regard to the seeming conflict of opinions therein, had expressed that the matter should be considered by a larger bench and hence the case was considered by a three judge bench.

The questions that were addressed were:

"(i) Whether a Power of Attorney holder can sign and file a complaint petition on behalf of the complainant?/Whether the eligibility criteria prescribed by Section 142(a) of NI Act would stand satisfied if the complaint petition itself is filed in the name of the payee or the holder in due course of the cheque?

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(ii) Whether a Power of Attorney holder can be verified on oath u/s 200 of the Code?

(iii) Whether specific averments as to the knowledge of the Power of Attorney holder in the impugned transaction must be explicitly asserted in the complaint?

(iv) If the Power of Attorney holder fails to assert explicitly his knowledge in the complaint then can the Power of Attorney holder verify the complaint on oath on such presumption of knowledge?

(v) Whether the proceedings contemplated u/s 200 of the Code can be dispensed with in the light of Section 145 of the N.I. Act which was introduced by an amendment in the year 2002?"

In answering the above questions, it was held that there was no serious conflict between the decisions in MMTC, supra, and Janki Vashdeo Bhojwani, supra and the opinion of the court was summarized thus:

"(i) Filing of complaint petition u/s 138 of N.I. Act through power of attorney is perfectly legal and competent.

(ii) The Power of Attorney holder can depose and verify on oath before the Court in order to prove the contents of the complaint. However, the power of attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.

(iii) It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power of attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

(iv) In the light of section 145 of N.I. Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint u/s 138 of the N.I. Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant of his witness upon oath for taking the decision whether or not to issue process on the complaint u/s 138 of the N.I. Act.

(v) The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person."

An incidental question, namely, whether a person authorized by a company or other institution could sub-delegate power to another, to file a criminal complaint? It was answered thus:

"25..... The issue raised is in reference to validity of sub-delegation of functions of the power of attorney. We have already clarified to the extent that the attorney holder can sign and file a complaint on behalf of the complainant-payee.

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However, whether the power of attorney holder will have the power to further delegate the functions to another person will completely depend on the terms of the general power of attorney. As a result, the authority to sub-delegate the functions must be explicitly mentioned in the general power of attorney. Otherwise, the sub-delegation will be inconsistent with the general power of attorney and thereby will be invalid in law. Nevertheless, the general power of attorney itself can be cancelled and be given to another person."

(i) Om Shakthi SC/ST and Minority Credit Co-Operative Society Ltd. Vs. M. Venkatesh, ,

(ii) Chandrashekharappa Koujageri Vs. Sharanabasappa Kamblyal reptd. by P.A. Holder Sri Veeresh Kamblyal,

These two cases are decided by the same learned single judge of this court wherein it is laid down, in the first of the above cases, that a President of a registered Society could not file and prosecute a complaint for an offence punishable u/s 138 of the NI Act, without an authorization or a Power of Attorney in his favour.

In the second of the above cases, it was held, following the decision of the Apex court in Jimmy Jahangir, supra, that the complainant could make an application seeking permission to authorize his representative or power of attorney holder to prosecute the complaint after presentation of the complaint, presented either by himself personally or through his agent. If such permission is refused, he can opt to prosecute the case personally in his individual capacity, as such presentation of the complaint by agent or power of attorney does not vitiate the proceedings.

Vaijnath v. Savitha, Criminal Petition 15635/2012 dated 20.9.2012

The petitioner was the accused in a complaint filed by the respondent alleging an offence punishable u/s 138 of the NI Act. He had questioned the maintainability of the complaint sought to be filed and prosecuted by the complainant through her husband, who also held a power of attorney executed by his wife, authorizing to represent her in the case, as no prior permission had been obtained u/s 302 of the CrPC to conduct the case on behalf of the complainant.

The learned single judge, in distinguishing the decision in Chandrashekarappa v. Sharanabasappa, supra, and expressing a different opinion, has drawn attention to the language of Section 302 of CrPC. The same is reproduced hereunder for ready reference:

"302. Permission to conduct prosecution.-(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than police officer below the rank of Inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

Provided that no police officer shall be permitted to conduct the prosecution if he

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has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader."

It is held that permission of the Magistrate, conducting an inquiry or a trial, is required by a person other than those Officers mentioned in Sub-section (1) of Section 30 CrPC, to conduct the prosecution of a case. Whereas under Sub-section (2) thereof, a pleader is also authorized to conduct the case on behalf of the complainant and the pleader need not seek the permission of the court to conduct the prosecution. It is opined that proceedings in respect of a complaint for an offence punishable u/s 138 of the NI Act would fall within the purview of Sub-section (2) of Section 302 CrPC, especially if the complainant is prosecuting the case through a pleader. It is observed that in Chandrashekarappa''s case, the learned single judge was dealing with a case where the power of attorney holder himself was seeking to prosecute the case and not through a pleader.

6. In the light of the above authorities, it is seen that in the instant case on hand, the power of attorney holder was an officer of the complainant company and he was duly authorized to act as the power of attorney holder by a resolution passed by the Board of Directors of the company. The power of attorney specifically authorized him to engage counsel and to prefer a complaint and to tender evidence in the case and generally to represent the company for all purposes, in so far as the complaint was concerned. The complaint was being prosecuted through counsel appearing on behalf of the complainant. It is obvious that the power of attorney holder was aware of the transaction or would have been completely briefed in respect of the particulars. He had not filed the complaint in his own name. The question of seeking the permission of the court to prosecute the complaint in terms of Section 302 of the Cr.PC did not arise. The view expressed in Vaijinath v. Sevita, supra, is fully endorsed by this bench. The legal principles firmly settled by the Supreme Court in the above cases leave no doubt that the court below was in error in dismissing the complaint.

Accordingly, the appeal is allowed, the judgment of the court below is set aside, and the matter is remanded for a fresh consideration. Since the proceedings had been completed in all respects, the court below is only required to address the material evidence already on record and pronounce judgment, at the earliest.

Incidentally, while this court is fully conscious of the need to employ our beloved Kannada language at all levels in the State of Karnataka-the trial court which had rendered the impugned judgment in the Kannada language, may keep in view, in dealing with this case, that there is no official translation into the Kannada language, of the Negotiable Instruments Act, 1881; The Code of Criminal Procedure, 1973; or any other Central Act, let alone the oceanic body of case law. Hence, caution would have to be exercised in proceeding to interpret provisions of law or in addressing the nuances of involved interpretation of principles of law-and pronouncing the same in Kannada, which may not be

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accurately reflected therein The higher courts may not be able to appreciate the correctness or otherwise of the views and opinions so expressed, which incidentally would be a seminal and personal view of the trial court judge, in Kannada, especially if the judges of the higher court are not as well versed as the trial court judge in the nascent and laboured legalese, in the Kannada language. The undersigned is one example in that regard.

The Registry is directed to remit the case papers to the trial court, forthwith.

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