(2005) 09 BOM CK 0142

In the Bombay High Court

Case No : Criminal Application No. 95 of 2005

G.J. Packaging Private Ltd. and Another — APPELLANT

Vs

S.S. Sales and Another — RESPONDENT

Date of Decision : 27-09-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 2
Criminal Procedure Code, 1973 (CrPC) — Section 302, 482, 5
Negotiable Instruments Act, 1881 (NI) — Section 138, 142
Powers of Attorney Act, 1882 — Section 2

Citation : (2006) 1 ALD(Cri) 58 : (2007) 2 BC 472 : (2006) 3 CivCC 366 : (2006) CriLJ 214 : (2006) 1 RCR(Civil) 722 : (2006) 2 RCR(Criminal) 34

Hon'ble Judges : S.P. Kukday, J

Bench : Single Bench

Advocate : Madhweshwari Mhase, for the Appellant; S.K. Barlota and A.R. Kakade for Respondent 1 and B.J. Sonwane, APP, for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

S.P. Kukday, J.—Heard.

2. This application filed u/s 482 of Cr. P.C. impugns order dated 17-3-2005 passed by the learned Chief Judicial Magistrate, Aurangabad in SCC No. 344/2003 issuing process against the applicant for offence punishable u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter to be referred to as N.I. Act).

3. Briefly stated the relevant facts are that Respondent No. 1 M/s S.S. Sales is a proprietary concern. Mrs. Swati Dilip Gandhi is the sole proprietress of the firm. The firm deals in craft papers and was supplying goods to petitioner No. 1 company - M/s G.J. Packaging Pvt. Ltd. situated at Sendhawa. Petitioner No. 2 and Shri. Ganesh Soni are the Directors of the petitioner No. 1 Resp. No. 1 was selling the goods to petitioner No. 1 on credit from time to time. On 4-12-2002, petitioners issued a cheque bearing No. 603865 drawn on State Bank of India,

Indore branch for Rs. 13,52,132/- in favour of the Resp. No. 1 for payment of the dues. Resp. No. 1 presented this cheque for collection through Cosmos Bank Ltd. Aurangabad. The cheque was dishonored and returned by the banker on 10-12-2002, as the payment was not arranged for. An intimation regarding dishonor of cheque was given to Resp. No. 1 on 13-12-2002. A notice was, therefore, issued to the petitioners. However, as the petitioners did not make payment, Resp. No. 1 filed a complaint in the court of Chief Judicial Magistrate, Aurangabad on 18-1-2003 against the petitioners through Power of Attorney holder Mr. Deelip Gandhi. Statement of power of attorney holder for, the purpose of verification of the complaint was recorded by Chief Judicial Magistrate on 17-3-2003. On being satisfied that there are sufficient grounds for proceeding learned Chief Judicial Magistrate issued process against the petitioners for offence punishable u/s 138 of the N.I. Act.

4. Petitioners appeared before the Court and filed application, Exh. 24 on 17-8-2003 praying for re-call of process on various grounds, one of the grounds for re-call of the process was that the complaint was not filed by payee or holder of the cheque in due course, as required by Section 142 of the N.I. Act.

5. Relying on the ruling of Kerala High Court, reported in 1994 (1) CrI 395, learned C.J.M. came to the conclusion that power of attorney holder can file a complaint on behalf of the payee. In this view of the matter, he rejected the application by order dated 29-6-2004.

6. Petitioners preferred a revision against this order being Criminal Revision No. 122/ 2004 before the Sessions Judge at Aurangabad. The Revision was dismissed in view of the judgment of the Apex Court in the matter of Adalat Prasad v. Rooplal Jindal, reported in 2004 (4) Mah. LJ 274: AIR 2004 SC. 4674 as the Chief Judicial Magistrate, had no power to review his earlier order of issue of process and the only remedy available to the petitioners is to challenge the order of issue of process by filing a petition u/s 482 of Cr. P.C. The petitioners are, therefore, impugning the order passed by Chief Judicial Magistrate dated 17-3-2005, issuing process against the petitioners for the offence punishable u/s 138 of N.I. Act, in this petition.

7. Code of Criminal Procedure prescribes a procedure for trial of all criminal cases except the cases filed under any special or local law for the time being in force. Section 5 of Cr. P.C. carves an exception to the rule.

Section 5: Saving - Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

8. Bare perusal of Sections 5 of the Code would make it clear that the procedure prescribed by the Code in absence of specific provisions contrary does not affect any special or local law for the time being in force or any special jurisdiction or power conferred or any power prescribed by any other law for the time being in

force. It is not dispute that N.I. Act is the special law. At this stage, it would be pertinent to reproduce Section 142 of N.I. Act, which prescribes special procedure for taking cognizance of offence punishable u/s 138 of N.I. Act.

142. Cognizance of offences, Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2) of 1974): -

(a) no court shall take cognizance of any offence punishable u/s 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138:

Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class shall try any offence punishable u/s 138.

It can be seen that Section 142 of N.I. Act excludes the provisions of the Code so far they it relate to taking of cognizance of the offence u/s 138 of N.I. Act. The conditions laid down by Section 142 for taking cognizance of offence punishable u/s 138 of N.I. Act are-1) that the complaint must be in writing; 2) It should be filed by the payee or the holder of the cheque in due course: and 3) such a complaint has to be made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138 of N.I. Act.

9. Relying on the ruling of Andhra Pradesh High Court, reported in 2002 (4) All. M.R. 6 in the matter of S.P, Sampathy v. Manju Gupta, learned Counsel for the petition contends that holder of power of attorney cannot maintain a complaint u/s 138 of N.I. Act. According to learned Counsel in view of the mandate of Section 142 of N.I. Act, the complaint has to be filed by the payee or holder in the due course. At this stage it may be pertinent to point out that every person, who is sui juris has a right to appoint power of attorney for any purpose whatsoever. The authority given by principal, who is an agent is an expressed authority to enable the latter to appoint former by the latter within the scope of that authority. In this behalf reference can be made to the ruling of the Apex Court in the matter of Ravula Subba Rao and Another Vs. The Commissioner of Income Tax, Madras, . In the said judgment, the Apex Court observed that a common law rule is that every person who is sui juris has a right to appoint an agent for any purpose whatever. However, this rule is subject to certain well-known exceptions, such as when the act to be performed is personal in character or when the act to be performed is annexed to a public office, or to an office involving any fiduciary obligation. Apart from these exceptions, the law is well settled that whatever person can do himself, he can do through an agent.

10. Section 2 of the Power of Attorney Act, 1882 empowers a donee of power of

attorney to do anything in and with his own name and signature by the authority of the donor of the power of attorney. By virtue of this section, anything so done by the power of attorney has to be regarded as done by the donee of the power of attorney in the name and with the signature of the donor thereof. Having regard to this well settled position, question which arises for consideration is whether power of attorney can file a complaint on behalf of payee or holder in due course. Section 142 does not lay down that the complaint has to be filed by the payee or holder in due course personally. To import such a restriction would not be in consonance with the object of the legislation. Similar view is taken by Kerala High Court in the matter of Hamsa v. Ibrahim. After referring to the ruling of the Apex Court in Ravulu Subbarao v. Income Tax Commissioner, it is observed in para 9 of the report that the principle enunciated in the said decision has no application to Section 142 of N.I. Act, since there is no requirement in it that the complaint should be made by the payee or holder in due course "personally". In para No. 10 of the report, K.T. Thomas, J. (as his Lordship then was) has observed that it would not be in the interest of justice to construe the provisions as containing restrictions that the complaint should be made by the payee or holder in due course (as the case may be) "personally" and proceeded to hold that the power of attorney of a payee or holder in due course (as the case may be) can make a complaint u/s 142 of N.I. Act, Relying on this judgment, this Court took the similar view while dealing with the case of Dr. Pradip Mohanbay v. Mr. Minguel Carlos Dias. After referring to various authorities, it is observed in para 12 of the report that "in so far as filing of complaint by power of attorney for offence u/s 138 of N.I. Act in terms of Section 142 of the said Act is concerned, there is unanimity in the views expressed by various High Courts that the complaint for offence u/s 138 of the N.I. Act can be filed by the power of attorney in terms of Section 142 of the said Act. I am in respectful agreement with this proposition. This view is again endorsed by this Court in the matter of Shri Sakharam Balu Bhosale, Shri Sitaram Narayan Bhosale and Shri Gangaram Sakharam Bhosale Vs. Vithal Manya Katkari and Yeshwant Raghunath Tilak, , where A.H. Joshi, J. observed in para 21 of the report that "power of attorney holder who is duly and properly authorized to do so can file a complaint in respect of offence punishable u/s 138 of N.I. Act. Therefore, in view of Section 142-(a) of N.I. Act, a complaint filed by the power of attorney in the name of the payee or holder in due course is maintainable.

11. It is true that different view is taken in the matter of S.P. Sampathy (cited supra). However, in view of the decisions of the Supreme Court, other High courts and of this Court, the view taken by the A.P. High Court in S.P. Sampathy (supra) cannot be accepted. The settled position of law in this behalf is that power of attorney holder can file a complaint on behalf of the payee. In this view of the matter, contention of learned Counsel for the petitioner that power of attorney holder cannot maintain the complaint on behalf of payee or holder in due course, cannot be sustained.

12. Referring to other aspect of the controversy, learned Counsel for the

petitioners contends that power of attorney holder cannot verify the complaint on behalf of payee or holder in due course. In support of her contention, learned Counsel has made reference to the ruling of the Apex Court, reported in AIR 2004 SCW 6248: AIR 2004 SC 48 in the matter of Jimmy Jahangir Madan v. Bolly Cariyappa Hindley. In this case point for determination was whether heir of complainant can delete his authority to the power of attorney holder for making an application to continue the prosecution on the demise of the complainant. It is held that power of attorney holder cannot file an application u/s 302 of Cr. P.C. on behalf of the heirs unless permission is obtained from the Court as he cannot be treated as a pleader. Some other authorities are also referred to by learned Counsel for the petitioners in support of her contentions that examination of the payee or holder in due course is essential for the purpose of ascertaining truth of the facts mentioned in the complaint. In Ratish Rai Vs. Mohesh Singh, , while dealing with the importance of the verification of complaint, Gauhati High Court took a view that the complaint being foundation of the entire proceedings, there should be a test of credibility by examining complainant on oath as regards facts of the complaint. In the matter of Corporation of Calcutta Vs. Calcutta Wholesale Consumers Co-operative Society Ltd. and Others, , the Court observed that a person not duly authorized, cannot maintained a complaint on behalf of the local authority or the Government. While dealing with the importance of verification of a complaint, this Court, in the matter of Vasant Waman Pradhan v. Dattatraya Vithal Salvi and Anr., reported in 2004 (1) Mah. LJ. 487 observed that examination of a complaint is not an Idle formality and has to be personally conducted by the Magistrate as the said examination enables him to decide whether process should be issued or not. In Gurudas Balkrishna Vs. Chief Judicial Magistrate, Panaji-goa, , while considering the effect of deletion of the word at once this Court came to the conclusion that verification cannot be unduly postponed, but has to be conducted as soon as possible. Reference is also made to the ruling of Kerala High Court in the matter of N. Harihara Iyer Vs. State of Kerala, . This authority deals with prosecution initiated for the offence punishable u/s 138 of N.I. Act. In this case, the point sought to be canvassed on behalf of petitioner was that the case is entirely based on the documentary evidence, therefore, it is not necessary to record statement of the complaint for verification of the complaint. A process can be issued on scrutiny of the documents. Repelling this contention, it was held that examination of the complainant was essential as it enables the Magistrate to satisfy himself as to the veracity of the complaint for the purpose of justifying decision regarding issue of process.

13. All these authorities lay down a principle that for deciding whether the allegations incorporated in the complaint are well founded and whether process can be issued on the basis of such allegations, it is necessary that Magistrate should personally examine the complaint before taking a decision whether or not to issue process against the accused. This is one of the checks introduced by the legislation to ensure that adversary is not unduly harassed. There can be no dispute about this principle.

14. For resolving the controversy whether power of attorney holder can depose on behalf of the principal. It is pertinent to bear in mind that in Ravulu Subbarao''s case (supra) the Apex Court has observed that every person, who is sui juris has a right to appoint an agent for any purpose whatever, and that he can do so when he is exercising a statutory right not less than when he is exercising any other right is subject to certain well known exceptions. One of the exceptions is that this cannot be done with the act to be performed is personal in character. In this context reference can be made to Order III, Rule 2 of CPC, which provides for the acts, which can be performed by the power of attorney. These acts do not include power to depose on behalf of the donee. The rule reads as under:

2. Recognized agents -

The recognized agents of parties by whom such appearances, applications and acts may be made or done are :

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in makers connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.

15. This court, in the case of Dr. Pradip Mohanbay (supra) made reference to ruling of Rajasthan High Court, reported in Ram Prasad Vs. Hari Narain and Others, quoting the following observations of Rajasthan High Court:

A general power of attorney holder can appear, plead and act on behalf of the party, but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness-box on behalf of himself. To appear in a witness-box is altogether is a different act. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff.

Applying this principle to criminal law, this Court took a view that power of attorney holder of a party can file a complaint on behalf of the payee or holder in due course. However, neither the Cr. P.C. nor Negotiable Instruments Act contemplates that anyone can depose for and on behalf of the complainant. Therefore, power of attorney can-not depose on behalf of the complainant, but he can appear as a witness on behalf of complainant. This view is upheld by the Apex court in the matter of Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others,

16. Considering the scheme of N.I. Act and established legal position that holder of power of attorney can file a complaint on behalf of the payee or holder in due course. This court in Mamtadevi Prafullakumar Bhansali (supra) after noticing

relevant provisions came to the conclusion that in cases where power of attorney holder can depose on behalf of the principal if he transacts business from the beginning to the exclusion of the principal, as his capacity as a witness and as power of attorney merges in such a case. The object of recording statement of complainant at the time of verification is to ascertain the truth of the allegations which enables the Magistrate to decide whether process should be issued or not. In cases where the payee or holder in due course does not have personal knowledge of the transaction. Statement of power of attorney can be recorded for verification of the complaint as he is in position to provide information necessary for the verification basis on his personal knowledge. In cases where the complainant is a juridical person such a company or a firm has to be represented by a natural person. In this behalf, reference can be made to the ruling of the Apex Court in Associated Cement Co. Ltd. Vs. Keshvanand, wherein it is held that the complainant has to be a corporal person who is capable of making physical presence in the Court. It has been held that if a complaint is made in the name of incorporeal person (like a company or corporation), it is necessary that a natural person represents such juristic person in the Court. The court looks upon the natural person to be complainant for all practical purposes. When the complainant is a body corporate it is the de jure complainant, and it must necessarily associate a human being as de facto complainant to represent the former in court proceedings. It is further held that the Magistrate shall not insist that particular person whose statement was taken on oath at the first instance alone can continue to represent the company till the end of the proceedings as the company can authorize different persons to appear before the Court at the different stages with the permission of the court. At this stage, reference can also be made to the decision of the Apex Court in the matter of M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, , wherein after referring to various decisions it is held that even if the corn-plaint is signed and presented by a person, who is neither authorized as an agent, nor a person empowered under the Articles of Association or by any resolution of the Board to do so will not be ground to quash the complaint. It is open to the de jure complainant 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 the subsequent stage the company can send a person who is competent to represent the company.

17. The conspectus of judicial opinion, therefore, establish a principle that complaint in respect of offence punishable u/s 138 of N.I. Act need not be personally filed by the payee or holder in due course. It can be filed by power of attorney of the payee. Where the complainant is a juridical person it can be represented by a natural person to act as a de facto complainant. Where a power of attorney has full knowledge of the transaction, his statement can be recorded by the Magistrate for verification of the complaint, for ascertaining the truth of the allegations and to enable him to take a proper decision as to whether the

process should be issued or not. Even if the complaint is signed by a person, who is not properly authorized this defect can be subsequently rectified. The complaint cannot be quashed merely on this ground. In view of this Settled position, contention of learned Counsel for petitioner that power of attorney cannot maintain a complaint and statement of the power of attorney holder cannot be recorded for the verification of the complaint cannot be sustained. In a case where the power of attorney holder has full knowledge of the transaction, his statement can be recorded by the Magistrate for ascertaining the truth or otherwise of the statements made in the complaint to enable him to decide whether or not process should be issued.

18. Referring to these principles, learned Counsel for the respondents has rightly submitted that in the present case the complaint is filed in the name of the payee by the holder of power of attorney. Power of attorney holder has full knowledge of the transaction. Not only that the application filed by the petitioners for re-call of process shows that the power of attorney holder (who happens to be husband of sole proprietress of the payee) was dealing with this transaction from the beginning. He had been to Sendhawa for collection through Cosmos bank. Thus, in the present case, the Magistrate was justified in recording the statement of the power of attorney holder. On being satisfied that there are sufficient grounds for proceeding, learned Magistrate has issued process against the petitioners u/s 138 of N.I. Act. Therefore, no fault can be found with the impugned order.

19. In the result, the petition fails and is accordingly dismissed. Rule discharged. However, in the circumstances of the present case, the parties shall bear their own cost.