(2009) 10 BOM CK 0103

In the Bombay High Court

Case No : Criminal Appeal No. 35 of 2009

Goa State Co-op. Bank Ltd. APPELLANT

Vs

Kurtarkar Traders RESPONDENT

Date of Decision : 15-10-2009

Acts Referred:

Constitution Act — Section 176
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2010) CriLJ 734 : (2010) 3 MhLj 297

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : S.R. Rivonkar, for the Appellant; G.K. Sardessai and V.A. Palekar, for the Respondent

Final Decision : Dismissed

Judgement

N.A. Britto, J.—Heard learned Counsel on behalf of both the parties.

2. These appeals can be conveniently disposed of by this common judgment.

3. Some facts are required to be stated to dispose of the same.

4. The appellant-complainant is a Multi State Co-operative Society, governed by the Multi State Co-operative Societies Act, 2002. The complainant had prosecuted the accused in three complaint cases namely CC Nos. 366/OA/05, 486/OA/05/ and 487/OA/05 for dishonour of certain cheques issued by the respondent/accused towards the payment of its liability towards the complainant on account of certain loans taken by the respondent/accused.

5. In first case, the cheque is for Rs. 10,00,000/- dated 7.6.2005. In the second case the cheque is for Rs. 15,00,000/- dated 23.8.2005 and in the third case the cheque is for Rs. 15,00,000/- dated 07.09.2005.

6. There is no dispute that the complaints were filed by the complainant which is a Multi State Co-operative Society and all the three complaints were filed through

Shashikant R. Sawaikar, the acting manager of Curti Branch of the said complainant who had also filed an affidavit of verification. The said Shashikant Sawaikar was examined on behalf of the complainant in the first and third case. Pramod Kavlekar was examined on behalf of the complainant in the second case. In the second case, the said Shashikant Sawaikar was examined as PW2. In all the three cases, the authority of the said Shashikant Sawaikar as well as of the said Pramod Kavlekar who filed the complaints and/or deposed on behalf of the complainant was questioned by the accused.

7. There is no dispute that the subject cheques when presented for payment were returned dishonoured for want of sufficient funds in the account of the accused and the . complainant having sent the statutory notices, the accused replied the same and, at least in one case admitting the liability of the complainant and seeking time to make the payment. However, the main question in these appeals is whether the said Shashikant Sawaikar, or for that matter the said Pramod Kavlekar had sufficient authority to file the complaints and/or to depose on behalf of the complainant. At this very juncture, reference could be made to the decision of the Apex Court in the case of Shankar Finance & Investments v. State of A.P. and Ors. 2009 (4) All MR 480 : AIR 2009 SC 422, wherein the Apex Court has stated that once the complaint is in the name of the payee and is in writing, the requirement of Section 142 of the Act are complied with and the question as to who should represent the payee, where payee is a company, or how payee should be represented, where payee is sole proprietory concern, is not a matter which is governed by Section 142, but by the general law.

8. The said Shashikant Sawaikar as well as the said Pramod Kavlekar who were examined in the respective cases, in support of their authority, produced two letters of authority dated 25.8.2005 and 10.1.2008. By the first letter of authority Shri Anant Vithal Shinde, the Managing Director (Incharge) of the complainant gave authority to Shashikant Sawaikar and by the second letter of authority dated 10.1.2008 Shit Ladu Raya Gaonkar, again the Managing Director (Incharge) of the complainant gave authority to Pramod Krishna Kavlekar. The said authority letters read as follows:

I, SHRI ANANT VITHAL SHINDE, major of age, the Managing Director (In-Charge) of the Goa State Co-op. Bank Ltd., Head Office, "SAHAKAR SANKUL", Patto Plaza, EDC Complex, Patto, Panaji Goa, on behalf of the Bank hereby authorise SHRI SHASHIKANT SAWAIKAR, Branch Manager of Curti (Ponda) Goa Branch of the Bank to represent me in the Court of Judicial Magistrate, First Class, Civil Courts in Goa, to sign and execute documents such as Complaints, Plaints, Affidavits, Written Statements, Vakalatnama and depose on behalf of the Bank and On behalf of me in cases filed by the Bank and in cases filed by the Bank and in cases filed against the Bank by any party.

I, SHRI LADU RAYA GAONKAR, major of age, the Managing Director (In-Charge) of the Goa State Co-operative Bank Ltd., Head Office, "SAHAKAR SANKUL", Patto

Plaza, EDC Complex, Patto, Panaji -Goa, on behalf of the Bank hereby authorise SHRI PRAMOD KRISHNA KAVLEKAR, Branch Manager of Curti Branch of the Bank to represent the Bank in the Court of Judicial Magistrate, First Class, Consumer Disputes Redressal Forum, Lok Adalat, Civil Courts in Goa, to sign and execute documents such as Complaints, Plaints, Affidavits, Written Statements, Vakalatnama and depose on behalf of the Bank in cases filed by the Bank and in cases filed against the Bank by any party.

9. The said Pramod K. Kavlekar (in CC No. 366/OA/2005/B) stated that besides the authority letter dated 10.1.2008 there was no other document given to him. He further stated that besides the letter of authority which he had produced, he had no other power, as branch manager. He also stated that by the said letter of authority, he was given power to represent the bank and depose on its behalf and besides that he did not have any other document. In further cross-examination he stated that be did not know whether the Managing Director Shri Ladu Raya Gaonkar or previous Managing Director Shri Anant Vithal Shinde had any power given by board of directors to issue letter of authority to them and further stated that be did not know whether any resolution was passed in order to file the complaint.

10. The complainant''s witness Shri Shashikant Sawaikar (in CC No. 486/OA/05) stated that besides the letter of authority dated 25.8.2005 no power was given to him by the complainant. He further stated that he did not know whether any power of attorney was given to Shri Anant Vithal Shinde by the complainant. In further cross -rexamination he stated that he was not aware if the board of directors of the complainant had passed any resolution regarding any power of attorney to the Managing Director Shri Anant Vithal. Shinde or himself.

11. Complainant''s witness. Shri Pramod K. Kavlekar (in CC No. 487/OA/2005/C) was cross-examined, on behalf of the accused on 15.2.2008 and he stated that he was deposing on behalf of the complainant by virtue of being a branch manager and also on basis of letter dated 10.1.2008 which was issued in his favour and signed by Shri Ladu Raya Gaonkar. He stated that the said Ladu Raya Gaonkar was holding power of attorney on behalf of the complainant and had further stated that the board of directors had passed a resolution issuing power of attorney in favour of the said Gaonkar. He was directed to produce the power of attorney, but on the next day i.e. to say on 7.3.2008 the said Pramod K. Kavlekar was unable to produce any power of attorney and all that he produced was the extract of bye-laws of the bank, and in further cross-examination, he stated that he was not aware whether the said bye-laws, gave him powers to institute criminal proceedings. He further stated that in terms of bye-laws No. 22 he was authorized to file civil as well as criminal cases.

12. In CC No. 486/OA/2005, the learned Trial Court concluded that the complaint was not filed by the proper person and/or authorized person of the complainant - bank and as such was liable to be dismissed. The learned Trial Court noted that the original complaint was filed by Shri Shashikant Sawaikar, the branch

manager of the complajnant at that time on the basis of authority letter dated 25.8.2005 issued by one Shri Anant Vithal Shinde, Managing Director (In-charge) which was a simple letter and which was not valid and as such he could not represent or depose on behalf of the complainant - bank. The Trial Court referred to the judgment of this Court in Mrs. Alka Toraskar Vs. The Vaishya Urban Co-op. Credit Society Ltd. and Another, as well as the judgment in Shri Ashok Bampto Pagui v. Agencia Real Canacona Pvt. Ltd. and Ors. 2007 (2) GLR 192 : (2007) 5 AIR Bom R 500 and came to the conclusion that the complainant''s witness had admitted that he got no power of attorney or resolution passed in the meeting of the board of directors of the complainant and as such proceeded to dismiss the complaint and acquit {he accused. In CC No. 487/OA/2005 the learned Trial Court (another Magistrate) concluded that it was a fundamental that the person who files the complaint ought to have powers to do so and it was open for the complainant, at any stage, to rectify the defect considering that the person who filed the complaint initially did not have the powers to do so, The Trial Court also referred to the case of Mrs. Alka Toraskar Vs. The Vaishya Urban Co-op. Credit Society Ltd. and Another, , and in terms thereof, held that such complaints could not have even been entertained. The learned Trial Court referred to the case of Ashok Bamto Pagui v. Agencia Real Canacona Pvt. Ltd. and Anr. 2007 All MR Cri 2238 : (2007) 5 AIR Bom R 560 as well as to the case of Om Shakti Scheduled Castes v. M. Venkatesh 2008 (66) AC 414 : AIR 2008 (NOC) 697 (Kant H.C.) and held that Exhibit 22 which was a simple letter could not be said to be valid and could not have authorized Shri Sawaikar to file the complaint. It appears that in the case of Om Shakti Scheduled Castes (supra) the Karnataka High Court has held that the complaint filed by the President of a co-operative society without there being a resolution authorizing him to file the complaint or without there being a power of attorney in his favour authorizing him to file the complaint, was found not to he maintainable.

13. Shri Rivonkar, learned Counsel appearing on behalf of the Appellant - complainant, has submitted that the Managing Director had issued the authority letters to the said Shri Shashikant Sawaikar who had filed all the three complaints and that was in accordance with his powers conferred upon him by Section 52 of the Multi State Co-operative Societies Act, 2002 as well as under bye-laws framed thereunder.

14. Section 52 of the said Multi State Cooperative Societies Act, 2002, inter alia, provides that the Chief Executive shall under the general superintendence, direction and control of the board, exercise the powers and discharge the functions specified below, namely:

(a)....

(b) ...

(c) Signing on the documents for and on behalf of the multi-State co-operative society;

(d) to (h)...

(i) Appoint the person to sue or be sued on behalf of the multi-State co-operative society.

Shri Rivonkar, therefore, submits that the said Shri Shashikant Sawaikar or for that matter Shri Pramod Kavlekar were the officers of the complainant who were appointed by the Managing Director in terms of Section 52(i) of the said Act to prosecute the accused u/s 138 of Negotiable Instruments Act, 1881. Shri Rivonkar has referred to Black''s Law Dictionary, page 1432, to contend that to sue also means to commence or to continue legal proceedings". Shri Rivonkar, next has referred to Wharton''s Law Lexicon, page 981, to say that legal proceedings means both civil and criminal proceedings. Learned Counsel has further submitted that the said authority letters show that the said two officers namely Shri Shashikant Sawaikar and Shri Pramod Kavlekar were also authorized by the Managing Director to file complaints. Learned Counsel has also pointed out to the bye-laws No. 38 (xiii) which makes Managing Director to be the officer to sue or be sued on behalf of the bank. Learned Counsel Shri Rivonkar has also placed reliance on the decision of this Court in the case of State v. Dadasaheb Rane 2006 (2) GLR 529 : (2007)2 AIR Bom R 564 as well as M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, . At the outset, it may be stated that the case of Dadasaheb Rane (supra) has only recognized the general principle of law that anyone can set the criminal law in motion by filing a compliant of facts constituting an offence before a Magistrate entitled to take cognizance. That principle is also reiterated by the Apex Court in para 11 of M/s. M.M.T.C. Ltd. (supra). Reliance on the case of M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, is misplaced because whatever observations were made by the Apex Court in that case were made at the early stage of filing of the complaint, and", it was observed by the Apex Court that even presuming that initially there was no authority, still the company can, at any stage, rectify that defect, by signing at a subsequent stage by a person who is competent to represent the company. That stage is now not available to the complainant in these cases since the complainant chose not to rectify the defect by filing appropriate powers of attorney in favour of the said two witnesses inspite of cross-examination, in that regard. Shri Rivonkar has also placed reliance on Thomas Dana Vs. The State of Punjab, wherein the Court had referred to Webster''s Dictionary for the meaning of the word to "prosecute" and which according to the said dictionary means "to seek to obtain, enforce, or the like.

15. Shri Sardessai, learned Counsel on behalf of the respondent/accused has submitted that the complainant is a Multi State Cooperative Society and the witnesses examined on its behalf were not sufficiently authorized by a resolution of its board of directors and in that regard the learned Counsel has placed reliance on the case of Goa Plast (P) Ltd. Vs. Chico Ursula D''Souza, .

16. The case of Alka Toraskar (2007) 1 AIR Bom R 399 was also caste relating to

cooperative society and it was observed as follows:

A complaint u/s 142 of the Act can be filed either by the payee or the holder in due course. The complainant co-operative society was the payee in this case and the complaint was filed in its name. The authority produced did not sufficiently authorize person filing complaint either to file the complaint or to depose in support thereof. The complainant was not sufficiently represented before the Court. Therefore, it could not be said that the complaint filed or the evidence given in support thereof was in accordance with Section 142 of the Act, which requires that the complaint has to be made by the payee or, as the case may be, by the holder in due course of the cheque. In the absence of any power of attorney or a valid authority by the society in question in favour of the said Recovery Officer, the complaint itself could not have been entertained and conviction based on such a complaint, is liable to be set aside.

17. The case of Chico Ursula D''Souza AIR 2004 SC 408 pertains to Private Limited company. This Court has observed as follows:

There is another aspect which needs to be looked into. Shri Diniz learned Counsel on behalf of the accused has contended that the said power of attorney in favour of Mulchandi/P.W. 1 does not authorize him to file a complaint. Learned Counsel particularly refers to Clause 3 of the said power of attorney which authorizes "to make, sign, execute and affirm, present and file any application, written statement, plaint, reply complaints, affidavits, representations, declarations, cross-objections, memos of appeal, revision, etc. and to make any statements, defences and to verify the same and further to give statements on oath or to depose on behalf of the said company in any Court of law and/or before the public authorities or authority". Shri Usgaonkaron the other hand submits that the plaint referred to in the said clause could be understood only as a plaint as defined under the CPC and the complaint referred to therein could be understood with reference to the Code of Criminal Procedure, 1973 and there-fore the expression "reply complaints" could be understood only as a complaint as contemplated under the Code of Criminal Procedure, 1973. A bare reading of the said Clause 3 shows that it refers to "reply complaints" and not to any complaints. One does not know what the principal exactly meant by the said expression. Nevertheless, in (Capt. Harcharanjit Singh Thind v. Deeksha Thind and Ors.) unreported judgment of this Court dated 22-2-2008 in Appeal From Order No. 89/2006) this Court had referred to Halsbury''s Lawk of England wherein it was stated that:

An instrument conferring authority by deed is termed a power of attorney. The per-son conferring the authority is termed the donor of the power, and the recipient of the authority, the donee. A power of attorney is construed strictly by the Courts, according to well-recognised rules, regard first being had to any recitals which, showing the general object, control the general terms in the operative part of the deed.

That the power of attorney must be strictly construed to confer an authority given. expressly or by necessary implications is a view which can also be found at page 75 of Bow-stead on Agency and at page 2118 of Pullock & Mulla. Viewed in that light, since the power of attorney confers power both of filing the plaint and written statement, as well as the complaint and reply, it could be understood that it does by necessary implication authorized the said Mulchandi to file a complaint as well. Nevertheless the matter cannot be allowed to end there.

18. Learned Counsel Shri Sardessai has further submitted that the expression "to sue or be sued" in Clause (i) of Section 52 of the said Multi State Cooperative Societies Act, 2002 cannot refer to criminal proceedings at all. Learned Counsel further submits that the said expression is always understood in terms of civil action, and not a criminal prosecution and in this regard learned Counsel has referred to the definition of the word ''sue'' given in K.J. Ayyar''s judicial dictionary, page. 1039, which means "to take any legal proceedings, against one". It is a word used most exclusively to prosecute a civil action against one. It further states that the word ''sued'' means "not only the filing of a suit or a civil proceeding but also their pursuit through Courts. A person is sued not only when the plaint is filed, but is sued also when the suit remains pending against him. The word ''sued'' covers the entire proceeding in an action and the person proceeded against is sued throughout the duration of the action". Learned Counsel also referred to Black''s Law Dictionary and emphasised that the word ''sue'' also means to proceed with as an action, and follow it up to its proper termination; to gain by legal process. To commence and carry out legal action against another. Word includes a proceeding instituted by confession of judgment. Here, it may also be stated that the word ''sue'' as per Black''s Law Dictionary means to commence or to continue legal proceedings for recovery of a right.

19. Shri Sardessai has also placed reliance on a judgment of the Apex Court in the case of Province of Bombay v. Khushaldas S. Advani AIR (37) 1950 SC 222 wherein it has been observed that the expression "sue" means "the enforcement of a claim or a civil right by means of legal proceedings". The same view appears in the minority judgment of that case wherein it is stated that the expression "sue" in its plain grammatical sense connotes the "enforcement of a claim or civil right by means of legal proceedings." The proceedings may be initiated by a plaint or by a petition of motion, and it cannot be said that what Section 176 of the Constitution Act contemplates is a proceeding which must begin with a plaint and end in a decree as laid down in Civil Procedure Code.

20. Although the complainant might have had good cases on merits, the complainant''s cases were bound to fail in the absence of the proper authority having been given to the said two officers of the complainant, the complainant being a Multi State Co-operative Society. Going back to the Black''s Law Dictionary again, expression ''sue'' means to commence or to continue legal proceedings for recovery of a right, and, it does not refer to any legal

proceedings simpliciter so as to say that legal proceedings could also means a prosecution. It is common knowledge that ''to sue'' generally means to initiate a civil action in law and this view is in conformity with what the Apex Court has stated in the case of Province of Bombay (supra) as well as Strand''s Judicial Dictionary and K. J. Ayyar''s Judicial Dictionary, as well. It is also to be noted that one does not know whether Chief Executive Officers who issued letters of authority were regularly appointed by the bank and who have been referred to as acting Managing Director/s. That apart in terms of Section 52 of the Act and bye-laws framed thereunder the Managing Director as Chief Executive could have only appointed persons to sue or to be sued on behalf of the complainant i.e. to initiate civil action and not to prosecute anyone by filing complaint/s. If the Managing Director as Chief Executive had no authority under the Act, or the bye-laws framed thereunder to file complaints, he certainly could not have given any authority to file the complaints. In other words, he could not give to any officer or person anything which he himself did not have. The contention that the authority letters authorized to file complaints has no meaning. The complainant as a body corporate can act only by resolutions passed by the directors at its meeting. There was no resolution passed by the complainant in favour of its Managing Director authorising him to appoint any person to prosecute the defaulters, whose cheques, bounced. There was no resolution passed by the Bank in favour of the said Sawaikar and the said Kavlekar, authorising the former to file complaints and/or depose in support of the same. Power to lodge complaints in their favour could have been given only by a resolution of the Board of Directors. There was none given and none was produced. It was clearly held in Ashok B. Pagui (2007) 5 AIR Bom R 560 (supra) that a complaint even by a director of a company was not maintainable without there being a resolution by the Board of Directors. Section 52(i) of the said Act only authorizes a Managing Director to sue or be sued i.e. to initiate or defend a civil action only. The cases at hand were clearly covered by the decisions of this Court in the case of Alka Toraskar (2007) 1 AIR Bom R 399 (supra), Ashok B. Pagui (2007 All MR (Cri.) 2238, Goa Plast (P) Ltd. Vs. Chico Ursula D''Souza, , as well as Om Shakti Schedule Castes (AIR 2008 (NOC) 697) (supra). The view held by the Courts below that both the said witnesses were sufficiently not authorized by the complainant either to lodge complaint/s and/or depose on behalf of the complainant cannot be faulted.

21. In the circumstances, therefore, I find that there is no merits in these appeals, and, consequently the same are hereby dismissed, leaving the parties to bear their own costs.