

(2004) 10 MAD CK 0125

In the Madras High Court

Case No : Criminal Revision Case No. 610 of 2004 and Criminal M.P. No. 3850 of 2004

IIT Capital Services Limited

APPELLANT

Vs

S and S Industries and Enterprises Limited

RESPONDENT

Date of Decision : 26-10-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 401

Citation : (2005) 2 BC 215 : (2004) 5 CTC 491 : (2005) 1 RCR(Criminal) 373

Hon'ble Judges : S. Sardar Zackria Hussain, J

Bench : Single Bench

Advocate : G.M. Ramasubramanian, for the Appellant; B. Natarajan, for the Respondent

Final Decision : Allowed

Judgement

S. Sardar Zackria Hussain, J.—This revision is directed by the complainant in C.C.No.2546 of 1999 on the file of XVII Metropolitan Magistrate Court, Saidapet, Chennai against the dismissal of CrI.M.P.No.1637 of 2004 filed to recall and examine P.W.3 to mark documents in the above criminal case.

2. The case in C.C.No.2546 of 1999 is a private complaint filed by the revision petitioner for the offence u/s 138 of Negotiable Instruments Act. The value of the cheques involved is Rs.27/- Lakhs. The direction was issued by this Court in CrI.R.C.No.1633 of 2003 on 20.1.2004 to dispose the case within four weeks from the date of receipt of that order. The complainant was cross-examined on 25.2.2004. During the cross-examination, it was suggested that the complaint has been filed without authorisation of the complainant company, which made the complainant to file Criminal M.P.No.1637 of 2004 u/s 311 Cr.P.C. to recall the complainant, viz., P.W.3 and mark the documents relating to the authorisation for filing complaint.

3. The petition was opposed by the accused by filing counter that the accused

filed CrI.M.P.No.13773 of 1999 disputing the authority of S.Madhu, who filed the complaint on behalf of the complainant company, that he has not been properly authorised. The complainant company had sought to substitute the said S.Madhu with N.Singaravelan, which made the accused to file CrI.R.C.No.615 of 2000 challenging the substitution. This Court dismissed the Criminal Original petition and the Criminal Revision directing the accused to raise the issues during the enquiry in the criminal case. The substituted representative of the company Singaravelan was examined as P.W.3 on 19.2.2003 and was cross-examined on 25.2.2004. The injustice will be caused to the accused, if permission is granted to the complainant company to mark the documents other than the memorandum and articles of association of the complainant company. After filing the petition u/s 91 Cr.P.C. by the accused and after cross-examination of P.W.3, the complainant has filed this CrI.M.P.No.1637 of 2004 subject matter of this Criminal Revision Case.

4. The learned XVII Metropolitan Magistrate after hearing both parties dismissed the petition stating that since the accused have no objection, the memorandum and articles of association alone can be marked. It is also stated in the order that since direction had been issued by this Court in CrI.O.P.No.13773 of 1999 and CrI.R.C.No.615 of 2000 dated 20.1.2004 to dispose the matter as early as possible and since the evidence on the side of the complainant is almost over, the complainant cannot be allowed to fill up the lacuna in respect of the defects pointed out by the accused and since the C.C.No.2546 of 1999 is filed as early as in 1999.

5. The learned counsel for the revision petitioner submitted that besides the memorandum and articles of association of the complainant company, the other documents being extract of the Board Resolution dated 26.11.1997 to execute a power of attorney in favour of Mr.Yogesh Kapadia, the Managing Director of the complainant company; Power of attorney dated 16.2.1998 executed by the Directors in favour of Mr.Yogesh Kapadi; Power of attorney executed by the Managing Director in favour of Mr.Madhu dated 15.6.1998 and Extract of Board Resolution authorising Mr.Madhu to represent the company dated 21.7.1999 are necessarily required to be marked in this case. In this regard the learned counsel also submitted that during the cross-examination of P.W.3 on 25.2.2004 it was suggested that the complaint had been filed without authorisation to which P.W.3 replied that there are documents and so the complainant may be permitted to produce the same. The petition CrI.M.P.No.1637 of 2004 has been filed to recall P.W.3 and mark the said documents. The learned counsel further contended that there is no lacuna and to fill up such lacuna, the documents sought for, have not been filed.

6. The learned counsel for the respondents/accused argued that despite the fact, objection was raised as set out above by filing CrI.O.P.No.13773 of 1999 and CrI.R.C.No.615 of 2000 in this Court that the complaint filed by S.Madhu has no authority to represent the complainant company, and challenged the substitution

of Singaravelan, P.W.3 in the place of Madhu, the documents sought to be marked now and which are opposed to be marked and which were not filed in the chief-examination of P.W.3 and have been filed only now to fill up the lacuna, cannot be allowed to be marked by recalling P.W.3.

7. The private complaint was filed on 2.2.21999 by the revision petitioner company that four cheques drawn on Indian Bank, Vadapalani Branch, Chennai as referred to in the complaint issued by the fourth accused, Vice President-Operations and the fifth accused, Manager-Treasury on behalf of the first accused company, when presented for collection in the bank, returned with an endorsement "Funds Insufficient". Therefore, the complainant caused lawyer notice on 2.1.1999 and the notice sent to the first accused alone was received and the notice sent to the accused 2 to 5 were returned with endorsement "Unclaimed", which made the complainant to file the private complaint which was taken on file u/s 138 of the Negotiable Instruments Act.

8. It appears, challenging the substitution of Singaravelan in the place of S.Madhu in C.C.2546 of 1999, Crl.R.C.No.615 of 2000 was filed and the said Criminal revision and the Criminal O.P.No.13773 of 1999 filed by the accused were dismissed on 12.2.2001 with a liberty to the accused to raise all the points before the learned Metropolitan Magistrate at the time of enquiry and the trial Court was directed to consider the same uninfluenced by any of the observations and to dispose case as early as possible in C.C.No.2546 of 1999. Thereafter, it appears, P.Ws.1 and 2, the bankers, were examined by the complainant on 19.6.2000 and after the transfer application was dismissed as not pressed, the complainant examined Singaravelan substituted in the place of S.Madhu as P.W.3 on 19.2.2003 and the accused were questioned in February, 2004 u/s 313 Cr.P.C. The petition Crl.M.P.No.2722 of 2003 filed u/s 305 Cr.P.C. seeking permission that the accused 4 and 5 to represent the first accused company, they being the signatory of the cheques, was allowed. This Court ordered as per order dated 30.9.2003 directing the trial Court to complete the trial within three months. The fourth accused filed Revision Petition challenging his nomination to represent the first accused company since he did not give his consent which was dismissed on 20.1.2004 by this Court and only thereafter questioning u/s 313 Cr.P.C. was completed. P.W.3 was cross-examined on 25.2.2004. The accused filed petition u/s 91 Cr.P.C. seeking the complainant to produce the memorandum and articles of association of the company in March, 2004, in which no objection was endorsed by the complainant company. The complainant company filed petition u/s 311 Cr.P.C. to recall P.W.3 for further cross-examination and to mark documents.

9. It is the evidence of P.W.3, that the then Managing Director of the complainant company, viz., Yogesh Kapadia was authorised to execute the power of attorney in favour of Madhu who filed the complaint and accordingly executed the power of attorney dated 16.2.1998 referred to above. As per the resolution dated 21.7.1999, the said Madhu was authorised to represent the complainant company. It is stated that since the complainant was not allowed to produce or

mark the documents now sought for to be marked, at the time of cross-examination of P.W.3, the complainant company filed the Crl.M.P.No.1637 of 2004 to recall P.W.3 for the purpose of marking the said documents. By marking such documents it cannot be said, lacuna is filled up, inasmuch as the power of attorney executed by the Managing Director in favour of Madhu dated 15.6.1998 has been referred to in the complaint. The resolution of the Board dated 26.11.1997 gave power to the Managing Director to execute power of attorney in favour of Madhu. It is stated that the resolution of the Board dated 26.11.1997 and the power of attorney executed in favour of Yogesh Pagadia, Managing Director of the company are also necessary documents and these documents by oversight could not be marked during the chief examination of P.W.3.

10. The learned counsel for the revision petitioner relied on the following decisions:-

(1) Rajandra Prasad case reported in 1999 SCC (Crl.)1062, in which the Apex Court ruled in paragraph 7 and 8:-

"7. It is a common experience in Criminal Courts that defense counsel would raise objections whenever Courts exercise powers u/s 311 of the Code or u/s 165 of the Evidence Act, 1872 by saying that the Court could not, "fill up the lacuna in the prosecution case". A lacuna in the prosecution is not to be equated with a fall out of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err inhuman" is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna, which a Court cannot fill up.

8.Lacuna in the prosecution must be understood as a inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record, due to any inadvertence, the court should be magnanimous in permitting such a mistakes to be rectified. After all, function of criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

(2) M.M.T.C. LTD. AND ANOTHER - vs. - MEDCHL CHEMICALS AND PHARMA (P) LTD., AND ANOTHER reported in 2002 Supreme Court Cases(Criminal) 121, in which the Supreme Court in paragraph 12 has ruled:-

"Thus, even presuming, that initially there was no authority, still the company can, at any stage, rectify that defect. At a subsequent stage the company can send a person who is competent to represent the company. The complaints could

thus not have been quashed on this ground."

In paragraph 11 it is observed:-

"The only eligibility criteria prescribed by Section 142 is that the complaint must be by the payee or the holder in due course."

11. Therefore as held by the Supreme Court, it is clear that the complaint filed in the name and on behalf of the company by its employee without necessary authorisation can be rectified by marking necessary documents at a later stage. In that view, the documents which were sought to be marked as referred to above, can be marked by recalling P.W.3. The order of the learned Metropolitan Magistrate being erroneous is to be set aside.

12. In the result, the Criminal Revision Case is allowed setting aside the order dated 25.3.2004 and made in Crl.M.P.No.1637 of 2004 in C.C.No.2546 of 1999 on the file of the XVII Metropolitan Magistrate Court, Saidapet, Chennai. Consequently, the petition Crl.M.P.No.3850 of 2004 is closed.