
(2013) 06 OHC CK 0011

In the Orissa High Court

Case No : Writ Petition (Criminal) No. 739 of 2011

L.P. Electronics (Orissa) Pvt. Ltd. and Others

APPELLANT

Vs

Tirupati Electro Marketing Pvt. Ltd.

RESPONDENT

Date of Decision : 18-06-2013

Acts Referred:

Companies Act, 1956 — Section 291, 292

Criminal Procedure Code, 1973 (CrPC) — Section 192, 200, 202, 482

Negotiable Instruments Act, 1881 (NI) — Section 138, 142(a)

Citation : (2013) 116 CLT 776 : (2014) 1 ILR (Ori) 136 : (2013) 2 OLR 318

Hon'ble Judges : B.K. Nayak, J

Bench : Single Bench

Advocate : Jagannath Patnaik, Jaydeep Pal and Md. G. Madani, for the Appellant; S.P. Mishra , S. Nanda, S.K. Mohanty, B. Mohanty, S.S. Kashyap and S.K. Sahoo, for the Respondent

Judgement

B.K. Nayak, J.—In this writ application the petitioners have challenged the maintainability of the criminal proceeding in ICC No. 847 of 2008 initiated by the opposite party-company u/s 138 of the N.I. Act and prayed for quashing the said complaint case. Petitioner No. 1 is a company registered under the Companies Act, 1956 having its registered office at College Square, Cuttack and petitioner No. 2 is its Managing Director. The opposite party is also a company registered under the Indian Companies Act having its registered office at Bapujinagar, Bhubaneswar. The opposite party filed a complaint u/s 138 of the N.I. Act in the Court of learned S.D.J.M., Bhubaneswar, which was registered as ICC No. 847 of 2008. In the complaint petition, the opposite party-company has been represented by its constituent attorney, Sri Mahendra Kumar Pradhan, Law Officer of the Company. The complaint was filed against the petitioners and five other Directors of the petitioners-company for dishonour of a cheque for Rs. 6,20,637/- which was purportedly issued towards discharge of debt. The five Directors, who were arrayed as accused Nos. 3 to 7, moved the High Court u/s 482, Cr.P.C. for quashing the complaint case filed against them, and the High

Court after hearing the parties quashed the proceeding against those Directors of the accused-company.

2. The present writ petition (Criminal) has been filed by the accused-company and its Managing Director challenging the maintainability of the complaint case on the ground that the Law Officer of the complainant-company, Sri Mahendra Kumar Pradhan has not been authorized by the Board of Directors of the company u/s 291 of the Companies Act, 1956 to represent the company in presenting and prosecuting the complaint on behalf of the company and that before the Court below no document with regard to any authorization has been filed. It is also stated that the vakalatnama on behalf of the complainant filed in the Court below has been executed by one of the Directors of the complainant-company, but the complaint has been verified and presented by the Law Officer claiming to be the constituent attorney of the company, which is not permissible/under law and, therefore, the complaint is not maintainable. It is further urged that the learned S.D.J.M. took cognizance of the offence u/s 138 of the N.I. Act and issued process against the petitioners without conducting enquiry u/s 202 of the Cr.P.C., which is mandatory as because the accused-petitioners reside beyond the jurisdiction of the Court of the learned S.D.J.M., Bhubaneswar.

3. The opposite party has filed counter affidavit contending that the petitioners earlier filed an application u/s 482, Cr.P.C. before this Court in CRLMC No. 1977 of 2008 with a prayer to quash the proceeding in the complaint case, which has been dismissed vide order dated 23.12.2009, and the petitioners having filed this writ petition (criminal) by suppressing the dismissal of the previous criminal misc. case, the present writ petition (criminal) for the same cause of action is riot maintainable. It is also contended in the counter affidavit that the complainant-company duly appointed its Law Officer as its power of attorney by the Board Resolutions dated 05.10.1999 and 02.01.2008 and a general power of attorney has been executed in favour of the Law Officer, Sri Mahendra Kumar Pradhan on 28.04.2007 and it is further stated that the complainant can be represented through power of attorney holder in a complaint u/s 138 of the N.I. Act. The xerox copies of the Minutes of the meeting of the complainant-company dated 05.10.1999 and 02.01.2008 are annexed to the counter affidavit.

4. In the present case, admittedly, the Law Officer of the complainant-company, who is representing the company in the complaint case as its constituent attorney, has not filed Vakalatnama and, on the other hand, one of the Directors, namely, Piyush Gupta has filed the Vakalatnama on behalf of the complainant-company, though he is not representing the complainant. Also neither any resolution of the Board of Directors of the complainant-company authorizing its Law Officer to represent the company or constituting him the Power of Attorney Holder of the company for filing the complaint nor any power of attorney has been filed before the learned S.D.J.M.

A Division Bench of this Court in W.P. (C) No. 2334 of 2010 (disposed of on 16.07.2010), while considering the maintainability of the writ application filed by

a company through its Sales Manager, who had been given a Power of Attorney by one of the Directors of the petitioner-company, dismissed the writ petition as not maintainable holding as follows:

6. This writ petition has been filed by a Company being represented by its Sales Manager on the basis of a Power of Attorney given by the Director. The Board of Directors of the petitioner-company passed resolution authorizing the Director to represent the company to institute the proceedings on behalf of the company. Therefore, the Director has no further authority to execute the power of attorney in favour of the Sales Manager to act on his behalf in the Court proceedings. The power can only be given by the Board of Directors of the Company in exercise of its statutory power by passing the resolution under the provisions of Section 291 of the Companies Act in favour of Director or Principal Officer of a Company who is well versed with facts to speak, sign and verify the same in the pleadings. Therefore, the documents, namely, power of Attorney and the Resolution passed by the Board of Directors of the company giving Authority to its Director to sue in the Court of Law on its behalf, produced by Mr. Das, learned Senior Counsel will not support the case of the petitioner. Hence, the contention urged in this regard by the learned counsel for the petitioner is wholly untenable in law. Further, the Constitution Bench decisions of the Supreme Court cited by the learned counsel for opposite party No. 4 in the case of Chiranjit Lal Chowdhury (supra); Madan Gopal Rungta (supra) & Calcutta Gas Company Ltd. (supra) are aptly applicable to the fact situation of the case.

5. Also a Division Bench of this Court in W.P.(Crl.) No. 138 of 2005 (Sri Kailash Chandra Mishra v. Shri Ajitsinh Ulhasrao Babar) disposed of on 22.02.2011, came to consider the maintainability of a complaint u/s 138 of the N.I. Act filed by a company through a Power of Attorney Holder of the Managing Director of the company and held that the complaint was not maintainable. In paragraphs 7 and 12 of the said decision which are relevant, the Court observed as under:

7. Mr. J. Patnaik, learned-Senior Counsel placing strong reliance upon Section 292 of the Companies Act submitted that the Managing Director of the company, who is a Principal Officer of the Company, and has been authorized by the Board of Directors to represent on behalf of the Company in the Court, he has no authority to redelegate his power by executing the Power of Attorney in favour of the opposite party No. 1 for filing the complaint under the N.I. Act. Therefore the complaint petition filed u/s 138 of the N.I. Act is incompetent for the reason that Section 138 and Section 142(a) of the N.I. Act states that 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. In the case in hand, the company is the payee and opposite party No. 1 is only the power of attorney holder of the Managing Director of the Company-opposite party No. 2, Therefore, the complaint petition filed against the petitioner at Daman cannot be maintained.

12. On the first point, we do not want to discuss in details for the reason that it

is well settled in law that the Principal Officer if the company who has been delegated with the Power by the Board of Directors cannot re-delegated his power to his subordinate to represent the company on his behalf.....

6. In terms of Section 291 of the Companies Act, power to represent the company in a litigation can only be given by the Board of Directors of the Company by passing resolution to that effect in favour of the Directors or Principal Officer of company, who is well versed with the facts to speak, sign and verify the same in the pleadings. In the instant case, no resolution of the Board of Directors authorizing its Law Officer to file a complaint on behalf of the company has been produced before the learned S.D.J.M. or before this Court. As noted earlier, only xerox copies of excerpts of minutes of meeting held at the registered office of the complainant-company on 05.10.1999 and 02.01.2008 have been annexed to the counter affidavit which indicate that it was resolved to authorize Sri Mahendra Kumar Pradhan, the Law Officer of the company to sign and verify the complaint petition u/s 138 of the N.I. Act and to file suit and to sign and verify plaints and written statement on behalf of the company. The xerox copies of excerpts are certified to be true copy and the excerpts have been purportedly signed by the Chairman without the signature of the Chairman. The annexure does not indicate whether the resolutions were passed in a meeting of the Board of Directors of the company. Therefore, relying on the Division Bench of this Court referred to above, I am of the view that the Complaint petition filed through the Law Officer of the complaint-company, who has also not filed Vakalatnama is wholly incompetent and as such not maintainable.

7. The learned counsel for the opposite party has contended, relying upon the decision of the apex Court in Shankar Finance and Investments Vs. State of Andhra Pradesh and Others, that a complaint u/s 138 of the N.I. Act can be filed by the Power of Attorney Holder of the complainant. The decision has no application to the present case because that was a case where the payee of the cheque was a proprietary concern of an individual and not a company registered under the Companies Act.

8. The order directing issuance of process against the petitioner-company in the complaint case has also been assailed on the ground that the learned S.D.J.M. has not conducted enquiry u/s 202, Cr.P.C., which is mandatorily required as because the accused-petitioners reside beyond the jurisdiction of the learned S.D.J.M., Bhubaneswar. Admittedly, the accused-company (petitioner No. 1) has its registered office at College Squire, Cuttack and petitioner No. 2 is its Managing Director. Therefore, it is apparent that the petitioners reside beyond the territorial jurisdiction of the learned S.D.J.M., Bhubaneswar.

Sub-sections (1) and (2) of Section 202, Cr.P.C., which are relevant, are extracted hereunder:

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him u/s 192,

may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made -

(i) Where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath u/s 200.

(2) In an inquiry under Sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

The expression "and shall, in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction" appearing in Sub-section (1) of Section 202, Cr.P.C was inserted by way of amendment by Act 25 of 2005 (w.e.f. 23.6.2006). This Court in the case of Parshotam Lal Vadera Vs. Satyanarayan Sadangi, has held that the said expression makes it mandatory for the Magistrate for conducting enquiry before issuance of process where the accused is residing at a place beyond the territorial jurisdiction of the concerned Magistrate.

In a complaint u/s 138 of the N.I. Act there may not be more witnesses than the complainant himself to be examined during enquiry as because the case primarily rests on documentary evidence. Therefore, during enquiry u/s 202, Cr.P.C. the complainant may not chose to examine any other witness, in which event the enquiry may relate only to scrutiny or examination of the documents filed by the complainant along with the complaint petition. Whatever be the nature of enquiry, it is the mandate that the Magistrate must conduct an enquiry in order to find out a prima facie case for the purpose of issuance of process.

9. In the instant case, the complaint case records reveal that the complaint Was never posted for enquiry. Therefore, there has been an infraction of the mandatory provision of Sub-section (1) of Section 202, Cr.P.C. and, therefore, such infraction vitiates the order taking cognizance and directing issuance of process.

10. The petitioners have filed a memo indicating therein that earlier they had filed an application u/s 482, Cr.P.C. in CRLMC No. 1977 of 2008 which was dismissed vide order dated 23.12.2009. On going through the judgment passed

in the said CRLMC it is found that the grounds and points urged in the present writ petition had not been urged therein. Therefore, the dismissal of the earlier CRLMC filed by the petitioners cannot operate as a bar for filing of the present writ petition. In the light of the discussions made above, the W.P.(Crl.) is allowed and the proceeding in I.C.C. No. 847 of 2008 pending on the file of the learned S.D.J.M., Bhubaneswar is quashed.