(2013) 01 BOM CK 0207

In the Bombay High Court

Case No : Writ Petition No. 1091 of 2008

Mr. Dawoodali N. Israni — APPELLANT

Vs

State of Maharashtra and Others — RESPONDENT

Date of Decision : 16-01-2013

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 138, 200, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 142, 142(a)

Citation : (2013) ALLMR(Cri) 1579

Hon'ble Judges : Ranjit More, J

Bench : Single Bench

Advocate : Sutapa Saha, for the Appellant; A.R. Patil, APP for State and Ms. P.J. Kanani, Advocate for R. Nos. 2 to 4, for the Respondent

Judgement

Ranjit More, J.—Petitioner has filed above petition under Article 227 of the Constitution of India read with Section 482 of the Criminal Procedure Code, 1908 challenging the legality and validity of the impugned order dated 18th March, 2008 passed in Criminal Revision Application No. 40 of 2008 by 9th Ad-hoc Additional Sessions Judge at Sewree, Gr. Bombay whereby the said revision filed by respondent Nos. 2 to 4 was allowed and the order of the learned Metropolitan Magistrate, 20th Court, Mazgaon, Mumbai in Criminal Case No. 3574/SS/2007 issuing process against the aforesaid respondents came to be set aside. Petitioner is sole proprietor of M/s. Eastern Enterprises, a proprietary firm. Petitioner filed Criminal Case No. 3574/SS/2007 in 20th Court of learned Metropolitan Magistrate, Mazgaon, Mumbai against respondent Nos. 2 to 4 (original accused) under the provisions of Section 138 read with Section 141 of the Negotiable Instruments Act, 1881. It is the case of petitioner that respondent No. 2 is partnership firm and respondent Nos. 3 and 4 are its partners and they are responsible for day-to-day affairs and business of the said firm. It is alleged by petitioner that respondent No. 2 (partnership firm) placed the order for supply of Alprol N32 of HPCL Oils of the contracted quality (hereinafter referred to as "the said goods"). Petitioner, accordingly, forwarded bills/invoices to respondent Nos. 2 to 4 for the delivery of said goods which were duly accepted without any protest or demur as to its quality, quantity or otherwise, the particulars of which are given in paragraph 6 of the complaint. It is the case of the petitioner that towards discharge of the legal debts and liabilities, respondent Nos. 3 and 4 issued a cheque on behalf of their partnership firm bearing No. 015801 dated 7th August, 2007 for the sum of Rs. 9,03,454/- drawn on Centurion Bank Ltd. in favour of it. Said cheque was deposited by petitioner through their bankers i.e. Development Credit Bank Ltd. However, the same was dishonoured on presentation with remarks "Funds Insufficient". Petitioner thereafter issued statutory notice dated 21st August, 2007 and demanded to pay the dishonoured cheque''s amount within 15 days from the date of receipt of the said legal notice. Since payment was not received, the petitioner filed a criminal complaint u/s 138 of the Negotiable Instruments Act, 1881 before 20th Metropolitan Magistrate Court at Mazgaon being Criminal Case No. 3574/SS/07 within the statutory period of limitation. The learned Magistrate after going through the complaint and verification statement was pleased to pass an order issuing process against respondent Nos. 2 to 4. This order was challenged by them in revision before the Sessions Court and Sessions Court by the impugned order allowed revision and set aside the order issuing process against respondent Nos. 2 to 4. Sessions Court relied upon decision of the learned Single Judge of this Court in Mr. Roy Joseph Creado, Mr. Anil Parshuram Sawant and Mr. Yogesh Jayantilal Mehata Vs. Sk. Tamisuddin, a Special Power of Attorney of deceased Smt. Sairabee, Mr. K.N. Tungar, IVth Additional Sessions Judge and State of Maharashtra, and held that the complaint is neither signed nor verified by the Sole Proprietor of M/s. Eastern Enterprises, a Sole Proprietorship Firm and the same is defective and untenable.

2. The learned counsel for the petitioner pointed out that the complaint is filed by M/s. Eastern Enterprises, a Sole Proprietorship Firm. She also invited my attention to the provisions of Section 141 of the Negotiable Instruments Act, 1881 and contended that the learned Sessions judge committed error in setting aside Magistrate''s order issuing process. She relied upon Apex Court''s decision in Shankar Finance and Investments Vs. State of Andhra Pradesh and Others, . Counsel for respondent Nos. 2 to 4 on the contrary, supported the impugned order. She submitted that the name of sole proprietor of M/s. Eastern Enterprise, a sole proprietary firm is not given in the cause title of the complaint. She has also submitted that the special power of attorney Mr. Haresh S. Kamdar has signed the complaint as complainant. Therefore, complaint is defective and is not maintainable and the learned Sessions Judge, therefore, rightly quashed and set aside the order issuing process against respondent Nos. 2 to 4.

3. Having considered the rival submissions and having gone through the impugned order alongwith the ratio of the decision of the learned Single Judge of this Court in Mr. Roy Joseph Creado, Mr. Anil Parshuram Sawant and Mr. Yogesh Jayantilal Mehata Vs. Sk. Tamisuddin, a Special Power of Attorney of deceased Smt. Sairabee, Mr. K.N. Tungar, IVth Additional Sessions Judge and State of

Maharashtra, and the decision of the Apex Court in M/s. Shankar Finance & Investments (Supra), I find merit in the above petition. Section 142(a) of the Negotiable Instruments Act, 1881 maintains that no Court shall take cognizance of any offence punishable u/s 138 except on a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque where the payee has endorsed the cheque in favour of someone else. Perusal of the complaint shows that the same is filed by said M/s. Eastern Enterprise, a sole proprietary firm. which is payee within the meaning of Section 142(a) of the Negotiable Instruments Act, 1881. In this regard, the Supreme Court in Shankar Finance and Investments (Supra) made following observations in paragraph 7 which areas follows:

7. The payee of the cheque is M/s. Shankar Finance & Investments. The complaint is filed by "M/s. Shankar Finance & Investments, a proprietary concern of Sri Atmakuri Sankara Rao, represented by its power of Attorney Holder Sri Thamada Satyanarayana". It is therefore evident that the complaint is in the name of and on behalf of the payee. Section 142(a) of the Act requires that no Court shall take cognizance of any offence punishable u/s 138 except upon a complaint made in writing by the payee. Thus the two requirements are that (a) the complaint should be made in writing (in contradistinction from an oral complaint); and (b) the complainant should be the payee (or the holder in due course, where the payee has endorsed the cheque in favour of someone else). The payee, as noticed above, is M/s. Shankar Finance & Investments. Once the complaint is in the name of the ''payee'' and is in writing, the requirements of section 142 are fulfilled. Who should represent the payee where the payee is a company, or how the payee should be represented where payee is a sole proprietary concern, is not a matter that is governed by section 142, but by the general law.

Perusal of the above observations of the Supreme Court shows that in order to take cognizance of an offence u/s 138, two requirements are required to be complied with namely, the complaint should be made in writing and the complainant should be the payee. Apex Court further observed that who should represent the payee where the payee is a sole proprietary concern, is not a matter that is governed by Section 142, but by the general law.

4. This decision of the Apex Court is squarely applicable to the facts and circumstances of the present case and, therefore, complaint in present form is maintainable. The learned Single Judge of this Court in Mr. Roy Joseph Creado, Mr. Anil Parshuram Sawant and Mr. Yogesh Jayantilal Mehata Vs. Sk. Tamisuddin, a Special Power of Attorney of deceased Smt. Sairabee, Mr. K.N. Tungar, IVth Additional Sessions Judge and State of Maharashtra, relying upon the provisions of Section 200 of Code of Criminal Procedure, 1973 held that complaint u/s 138 of the Negotiable Instruments Act, 1881 must be signed and verified by the complainant. In view of the Apex Court''s decision in Shankar Finance and Investments (Supra), decision of the learned Single Judge of this Court in Roy

Joseph is no longer a good law. Another learned Single Judge of this Court in Smt. Durgadevi Vs. Shalikram Vitthalrao Korde and Another, also held that the decision of the learned Single Judge of this Court in Mr. Roy Joseph Creado, Mr. Anil Parshuram Sawant and Mr. Yogesh Jayantilal Mehata Vs. Sk. Tamisuddin, a Special Power of Attorney of deceased Smt. Sairabee, Mr. K.N. Tungar, IVth Additional Sessions Judge and State of Maharashtra, in view of the subsequent judgment of the Supreme Court in Shankar Finance and Investments (Supra), is no longer a good law.

5. Counsel for respondent Nos. 2 to 4 submitted that in the cause title of the complaint, complainant M/s. Eastern Enterprises is not described as a sole proprietorship firm. She also stated that the special power of attorney holder Mr. Haresh S. Kamdar has signed the complaint as complainant. Submission has no merit in view of the fact that complainant in paragraph 1 of the complaint has stated that the complainant M/s. Eastern Enterprises is sole proprietorship firm having its registered office at 21. Aliabad, Aga Hall, Nesbit, Mumbai-400 010. In paragraph 2, averment is made that the present complaint is filed by Mr. Haresh S. Kamdar, the constituted attorney of the complainant firm, who has personal knowledge of facts of the case and is able to depose the same before this Court. Copy of the Special Power of Attorney is annexed with the complaint. Special Power of Attorney shows that Dawoodali N. Israni is the sole proprietor of the complainant M/s. Eastern Enterprises, a Sole Proprietorship Firm and he has given power of attorney to Mr. Haresh S. Kamdar to engage or appoint counsel/ advocate to conduct the case and to appear and/or prosecute the above legal proceedings against respondent Nos. 2 to 4. Verification of the complaint is done by Mr. Haresh S. Kamdar and he has described himself as the Constituted Attorney of the complainant. In these circumstances, I do not find any merit in the submissions of the learned counsel for respondent Nos. 2 to 4 that the complaint is defective. Order of the Magistrate issuing process in the petitioner''s complaint was set aside by the revisional Court on the sole ground that the complaint is not signed and verified by the complainant. The Sessions Judge while setting aside the order of issue of process solely relied upon judgment of the learned Single Judge of this Court in Mr. Roy Joseph Creado, Mr. Anil Parshuram Sawant and Mr. Yogesh Jayantilal Mehata Vs. Sk. Tamisuddin, a Special Power of Attorney of deceased Smt. Sairabee, Mr. K.N. Tungar, IVth Additional Sessions Judge and State of Maharashtra, , which is no longer a good law in view of the Apex Court''s decision in Shankar Finance and Investments (Supra). The impugned order, therefore, deserves to be quashed and set aside. Petition is, therefore, disposed of by passing the following order:

6. Rule is made absolute in terms of prayer clause (a). The concerned learned Metropolitan Magistrate now shall proceed with the complaint filed by the petitioner and dispose of the same on merits. Since criminal case is filed as long as back in 2007, the learned Magistrate is directed to dispose of the same expeditiously.

