

(2013) 09 BOM CK 0106

In the Bombay High Court

Case No : Criminal Appeal No's. 1008, 1009, 1010, 1011, 1012, 1013 and 1014 of 2008

M/S. Hindustan Computers

APPELLANT

Vs

M/s. Dart Computers Ltd., Shri Rajesh @ Baldev, Rina @ Rita
Baldev Hirani and The State of Maharashtra

RESPONDENT

Date of Decision : 19-09-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 2(d), 258, 259, 311, 313

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

Powers of Attorney Act, 1882 — Section 2

Citation : (2013) 6 ABR 131 : (2013) ALLMR(Cri) 4031 : (2014) 1 BC 647 :
(2013) 4 BomCR(Cri) 774 : (2014) 1 MhLj 400

Hon'ble Judges : Sadhana S. Jadhav, J

Bench : Single Bench

Advocate : Sai Chougule, Mr. S.S. Deshmukh instructed by and Mr. Uday Malte, for the Appellant; Meghnath Navlani instructed by , A. Kumar Associates for Respondent Nos. 1 to 3 and Ms. P.P. Shinde, APP, for the Respondent

Final Decision : Dismissed

Judgement

Sadhana S. Jadhav, J.—The appellant herein is the original complainant in SCC No. 1419 of 2004. The appellant had filed a complaint u/s 138 of the Negotiable Instruments Act against the present respondents. The learned JMFC, Malegaon, had issued process against the accused. The complainant Upendra Lad is the complainant, (1) Santosh Marathe, employee of State Bank of India, (2) Paresh Borker, employee of Bank of India and (3) Ram Jadhav working in Nashik Mahila Vikas Sahakari Bank. The statement of the accused was recorded u/s 313 of Cr.P.C. The accused No. 2 examined himself on oath. Hindustan computers is a proprietary concern. The accused had executed the agreements with Upendra Lad. Accused No. 2 i.e. Rajesh Hirani filed an application below Exhibit 171 seeking relief of dismissal of complaint on account of the fact that Upendra Lad was not the proprietor of Hindustan Computers. The proprietor was Mrs. Neeta

Lad. It was further urged that throughout the proceedings, Upendra Lad had posed himself as the proprietor of the firm of Hindustan Computers. In the verification statement also the complainant i.e. the present appellant has categorically stated that he is the proprietor of the firm. It is stated thus

In the examination-in-chief as well as in the cross-examination, Upendra Lad had solemnly stated that he was the proprietor of Hindustan Computers. A separate notice was also issued by Upendra Land as the proprietor. The accused had further demonstrated that the proceedings u/s 138 of Negotiable Instruments Act are necessarily to be filed by the holder in due course or the power of attorney holder. The complainant in the present case was neither the holder in due course nor was the authorized power of attorney holder of the proprietor of Hindustan Computers. According to the accused, the proceedings conducted by the learned Magistrate were not summary proceedings since the evidence was recorded in detail and contrary to Chapter XX of the Cr.P.C.

The complainant thereafter filed an application for amendment below Exhibit 176 for amendment in the complaint and also sought liberty for production of documents. The learned JMFC Court No. 3 delivered a common judgment below Exhibits 171 and 176. The Court dismissed the complaint and acquitted the accused of the offences punishable u/s 138 of the Negotiable Instruments Act. Being aggrieved by the said judgment and order, the original complainant has filed the present appeals and has prayed for dismissal of the order passed below Exhibits 171 and 176 by a common judgment and order dated 22.1.2008.

2. It is the contention of the appellant that the agreement dated 19.2.2003 was in fact executed between the complainant and the accused. Thereafter, the accused had issued cheques in favour of Hindustan Computers. The agreement for cancellation was entered into by the complainant and the accused on 11.7.2003. Both the agreements are signed by Upendra Lad on behalf of Hindustan Computers. It is further stated that in fact, the power of attorney was executed on 16.10.2002 i.e. prior to entering into the agreements and therefore according to the appellant, there is no ambiguity in the complaint and the proposed amendment would not cause any prejudice to the accused. According to the Counsel for the appellant, the power of attorney which was executed in favour of the appellant by Smt. Lad is in consonance with Section 2 of the Power of Attorney Act. It is further submitted that the Court has passed the judgment and order on technical grounds and has cast a doubt on the genuineness of power of attorney.

3. The second ground of challenge is that the magistrate has exercised powers under Sec. 258 of the Criminal procedure Code. According to the Counsel, the learned Magistrate has committed a grave error by dropping the proceedings in the midst of the trial and dismissed the complaint. According to the Counsel, the accused No. 2 had stepped into the witness box. He had furnished a list of witnesses whom he proposed to examine as defence witnesses. However, before examining all the witnesses, the accused had filed an application seeking

dismissal of the complaint on the ground that the complainant had no authority/ power to either file the complaint or to prosecute the said complaint.

4. As against this, the learned Counsel for the respondent has submitted that the learned Judicial Magistrate, First Class, has not stopped the proceedings, that in fact the statement of the accused was recorded u/s 313 of Cr.P.C. That he has entered into the witness box. With this, it is the choice of the accused as to whether he should proceed to examine the rest of the witnesses as defence witnesses or not. Therefore, according to the Counsel for the respondent, the learned Judicial Magistrate has rejected the application below Exhibit 176 and has pronounced the judgment and order of acquittal in favour of the respondent.

5. Upon hearing the respective Counsel, and on perusal of the record and proceedings, the Court has observed the following facts:-

(i) The complainant in fact is not the proprietor of Hindustan Computers.

(ii) There is nothing on record to indicate that the complainant had at any point of time informed the accused that he was not the proprietor of Hindustan Computers and therefore, the accused had entered into the agreement with the complainant on a bonafide belief that he happens to be the proprietor of Hindustan Computers.

(iii) The cheques were issued in the name of Hindustan Computers.

Therefore, the complainant cannot be held as a holder in due course.

(iv) The complainant had issued the statutory notice to the accused in his own name.

(v) The complaint is also filed by the complainant as a proprietor of Hindustan Computers.

(vi) While recording of substantive evidence in the form of examination-in-chief as well as the cross-examination, it is not denied by the complainant that he is not the proprietor of Hindustan Computers. In the eventuality that the complainant was a power of attorney holder, there was no reason for him to prove the same and file the complaint in his own name or admit before the Court that he is the proprietor of the firm.

(vii) There is no plausible explanation as to why the power of attorney was not filed along with the complaint. The contents of the application below Exhibit 176 are as follows:-

The said Upendra Lad was shown as proprietor due to the simple typographical mistake. That typographical accidental mistake while drafting complaint occurred because all along the dealings in this case were made by Upendra Lad.

The accused No. 2 had also referred to the complainant as the proprietor.

It is because of such circumstance, that Respondent No. 2 bonafidely believed

that there was no mistake in the description of the complainant in the present form. The complainant had therefore proposed amendment in the description of the complaint and had prayed that the word "Proprietor" be read as "through General Power of Attorney". It cannot be believed that the description of the complainant would be a typographical mistake. More so, because the complainant has stated on oath that he is the proprietor of the said concern. The Magistrate has rightly held that the complainant had posed himself to be the proprietor. In the cross-examination, also the complainant has stated as under:-

It is not true to say that I am deposing falsely that I am the owner of M/s. Hindustan Computers.

6. The accused was aware that the complainant is a lecturer in a College and in all probability could not have legally run the business. The complainant was an income tax payee. The accountant of the accused Shri Anil Ingale had filed an application to the Sales Tax Department, Malegaon, under the Right to Information Act on 25.7.2007. The Sales Tax Department had furnished information that Smt. Neeta Upendra Lad was the sole proprietor/owner of M/s. Hindustan Computers. The registration certificate was issued on 20.10.1993. Under the column of:

iv) Any change in the ownership from the beginning No. v) Who is the present owner Smt. Nita Upendra Lad.

The said document issued by the Sales Tax Department was placed before the Court which clearly revealed that Upendra Lad had no concern with Hindustan Computers. There was no change in the proprietorship.

7. Section 142 of the Negotiable Instruments Act, 1881 reads thus:-

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

8. A proprietary concern is not a firm. A proprietary concern has no independent and legal entity. In the eventuality that the complainant had filed the general power of attorney while initiating the proceedings the said complaint would be

maintainable. In case it was filed through general power of attorney and he had not filed the deed of power of attorney or the affidavit of the complainant in proof of execution of power of attorney, the same could have been rectified by producing the same at a later stage of the proceedings. However, in the present case, the complainant has not filed the complaint through the general power of attorney. The evidence would show that the accused was also made to believe that the complainant is the proprietor of the said firm. It is pertinent to note that the stamp on which the deed of power of attorney was executed was not purchased in the name of the executant or executor and instead it appeared to be purchased in the name of Kamalakar Janardhan Shejwal. The learned Magistrate has therefore rightly cast doubt on the genuineness and authenticity of the said document. Moreover, Kamalakar Shejwal was a resident of Chalisgaon. The same was also notarized at Nashik. The purchaser of the stamp was from Chalisgaon, whereas the permanent resident of the complainant and his wife is of Malegaon. The magistrate has rightly held that the complainant is neither the owner nor the proprietor of M/s. Hindustan Computers. He has represented himself as a proprietor and prosecuted the accused only after his locus was challenged by the accused on the basis of the information of the Sales Tax Department. The complainant had sought amendment by filing an amendment application below Exhibit 176.

9. The learned Counsel for the appellant has relied upon the following Judgments:-

- (1) Criminal Revision Application No. 10 of 2011 & Anr. (Golden Chance Beer Cold Ltd. & Ors. vs. Kirtikumar P. Patil & Ors) dated 11.1.2011.
- (2) U.P. Pollution Control Board Vs. Modi Distillery and Others, ;
- (3) Iddar and Others Vs. Aabida and Another,
- (4) Waterbase Ltd. Vs. Karuturu Ravendra, Proprietor, Butterfly Aquatech, .
- (5) K.M. Maregowda Vs. Seven Hills Ex-Import Corporation, .
- (6) Vilas Baliram Sawant constituted Attorney Mr. Bhaskar Sakharam Vs. Smt. Mayuri Y. Shah Sole Proprietress of Marco Plast Corporation and The State of Maharashtra, ;
- (7) Maan Kaur vs. Hartar (2010 10
- (8) Prakash Bankatlal Ostawal Vs. The State of Maharashtra, Karyakari Sanchalak, Jai Mahesh Sakhar Karkhana Maryadit Pawarwadi, Jugalkishor Rampalji Lohiya and Dr. Ramprasadji Ganeshlalji Bajaj
- (9) Mr. Amol Shripal Sheth Vs. M/s. Hari Om Trading Co. and Others,
- (10) Krishnakumar Vithalrao Jamadar Vs. Kamalkishore Balkisan Malani and Another, .
- (11) G. Chandrasekaran Vs. C.R. Umapathy, .

(12) Sethuraman @ Sethuramachandran vs. Subbiah Madras High Court Cri. Ori. Petition (MD) No. 1693/2010.

(13) United Credit Corporation and Another Vs. Palaniandi Pillai, .

In the present case, it is difficult to hold that the Magistrate has exercised any power under Sec. 258 of the Criminal Procedure Code. Section 258 reads thus:-

258 Power to stop proceedings in certain cases - In any summons-case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge.

The opening line of Section 258 is "in any summons-case instituted otherwise than upon complaint". In the present case, the proceedings are instituted upon a complaint as defined u/s 2(d) of the Code of Criminal Procedure which reads thus:-

2(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

In fact, no further discussion is required to hold that the learned Magistrate has not exercised the powers under Sec. 258 of the Cr.P.C.

10. It is true that the accused had filed an application below Exhibit 171 and the prayer was to dismiss the complaint. It could at the most be said that since the learned Magistrate has passed a common judgment and the order below Exhibits 171 and 176, the operative order shows that the complaint is dismissed. The order is based upon the prayer below Exhibit 171. However, he has recorded the findings for acquitting the accused u/s 138 of the Negotiable Instruments Act and has allowed the application below Exhibit 171. It is not necessary to remand the matter on that count.

11. After concluding the hearing of the Appeals, the Counsel appearing for the appellant has passed on a Purshis stating therein that the appellant thinks it appropriate to file applications under Sections 311, 386, 391 and 259 of Cr.P.C. before the trial Court. Any application filed u/s 259 of Cr.P.C. would not be maintainable since Sec. 259 of Cr.P.C. contemplates the power of a Court to convert summons-case into warrant-case. Moreover, such an application has to be filed in the course of the trial of a summons case relating to an offence punishable with imprisonment for a term exceeding six months. In the present case, the proceedings are concluded and the Magistrate has delivered a judgment u/s 353 of the Cr.P.C.

12. The appellant in the present case has filed Special Civil Suit No. 76 of 2004 for recovery of Rs. 44,81,820/-. In the said Civil Suit, the plaintiff had filed an application for amendment of the plaint which was rejected by the Civil Judge, Senior Division, Malegaon. Being aggrieved by the said order, the appellant herein had filed Writ Petition No. 3130 of 2010. The said application seeking amendment was filed prior to the commencement of the trial. The said Writ Petition is allowed by this Hon''ble Court (Coram: R.G. Ketkar, J.) vide order dated 28.1.2013. It is specifically held as follows:-

The suit instituted by M/s. Hindustan Computers and the prayers are also one and the same. The only amendment about description of plaintiff and paragraph 1(a), in my opinion, is of classificatory in nature.

The Hon''ble Court has held that the proposed amendment would not change the nature of the suit. It is clear that the said suit is filed for the recovery of the same amount for which the disputed cheques were issued in favour of the complainant. The scope in a civil suit is much more larger than the scope of Sec. 138 of Negotiable Instruments Act, which is a statutory provision for recovery of the amount and entails substantive sentence in the nature of imprisonment for a term which may be extended to two years or with fine which may extend to twice the amount of the cheque, or with both. The findings recorded by the learned Magistrate are in consonance with the oral and documentary evidence on record and do not call for any interference.

13. Hence, the Appeals are dismissed with no order as to costs. It is made clear that the observations and the reasons assigned for dismissal of the Appeals would not operate as an embargo in the civil proceedings i.e. in Civil Suit No. 76 of 2004 pending before the Civil Judge, Senior Division, Malegaon.