(2009) 04 BOM CK 0036

In the Bombay High Court

Case No : Criminal A. No''s. 494, 496, 1971 and 2053 of 2008

Smt. Durgadevi — APPELLANT

Vs

Shalikram Vitthalrao Korde and Another — RESPONDENT

Date of Decision : 02-04-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 357
Negotiable Instruments Act, 1881 (NI) — Section 138, 142

Citation : (2009) 2 ALD(Cri) 29 : (2009) 3 CivCC 307 : (2009) CriLJ 2186 : (2010) 1 Crimes 566 : (2009) 4 MhLj 386 : (2010) 5 RCR(Criminal) 681

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : G.F. Bhagwani, for the Appellant; O.D. Kakde, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Chavan, J.—These applications, by complainants in complaints for offence punishable u/s 138 of the Negotiable Instruments Act, seeking leave to file appeal against judgments of acquittal rendered by Judicial Magistrates First Class in Criminal Case Nos. 833 of 2005 (new) 1988/2004(old) and 3321/2007 raise a common question and are, therefore, taken up for disposal by a common judgment.

2. Criminal Case No. 1988/2004 i.e. New No. 833/2005 had been filed by the payee through holder of her power of attorney one Kamalkishore, whereas Criminal Case No. 3321/2007 had been filed by Sk. Salam who was grandson and holder of power of attorney of Halimabee payee of the cheque.

3. The holders of Power of Attorney in both the cases tendered evidence on behalf of the complainants. After considering the evidence tendered, in light of judgment of 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, , the learned Magistrates proceeded to acquit both the accused. Aggrieved thereby the complainants have sought leave to file appeal by these two applications.

4. It was pointed out that there was a contrary judgment of another learned single Judge of this Court in Mamtadevi P. Bhansali v. Pushpadevi K. Agrawal reported at 2005 All MR (Cri) 3075.

In view of this, leave granted.

5. Both the appeals are, therefore, ADMITTED and by consent taken up for final hearing.

6. Both these appeals raise a small question of law, as to whether the complaint for the offence punishable u/s 138 of the Negotiable Instruments Act can be filed by holder of power of attorney.

7. I have heard learned Counsel for the parties. None appeared for Respondent No. 1 in Cri. Appeal No. 496 of 2008, though served through paper publication.

8. In Roy Joseph v. Sk. Tamisuddin reported at 2008 (3) Mh LJ 708 : 2008 (2) AIR Bom R 344 a complaint was originally shown to have been filed for and on behalf of one Sayarabee, who was payee. Sayarabee had not herself signed the complaint or verified it. The accused, therefore, sought to have the complaint dismissed. The learned Single Judge considered the requirements of law in this regard and observed in paragraph 11 as under:

11 ...The statutory provisions requires, therefore, that the complaint must be signed by the complainant and that it shall be verified by the complainant. In the other words, a complaint which is not signed by the complainant, is, therefore, incomplete and on the basis of such incomplete complaint, no cognizance can be taken u/s 142 of the Negotiable Instruments Act. As stated before, verification of the complainant is essential in order to ensure that in future nobody may be allowed to deny liability arising out of frivolous complaint, false charges, malicious prosecution or like unfounded criminal action. Corollary of the foregoing discussion is that for the purpose of a valid complaint the test is to examine whether identity of the person, who would be liable to pay compensation to the accused persons, may be u/s 357 of the Criminal Procedure Code or may be under the tortious liability, is clearly set out in the complaint. Looked from this angle, the complaint filed by the special power of attorney does not show that he accepted any liability for such adverse effects on the complaint being found frivolous or vexatious....

9. In paragraph 14 the learned Judge considered another judgment of this Court in Dr. Pradeep Mohanbay v. Mr. Minguel Carlos Dias reported at 2000 102 Bom LR 908 and in paragraph 15 observed as under:

15. There is no difficulty in accepting the proposition that a Power of Attorney may enter witness box in his own capacity so as to spell out the facts known to

him. In no case, however, he can substitute himself in place of the complainant right from the stage of verification of the complaint till end of the trial. In other words, the original complainant cannot be a mere name lender when the complaint is filed for the offence under the Negotiable Instruments Act. This is more so having regard to the purpose of the verification u/s 200 of the Criminal Procedure Code being one to fix identity of the person who may be made liable to pay compensation when the complaint is found to be false, frivolous or vexatious....

10. After considering several other judgments the learned Judge came to the conclusion that complaint was required to be signed by payee who was also required to be examined before issuance of process. He, therefore, proceeded to allow application of the accused and dismissed the complaint.

11. Another learned single Judge of this Court in Mamtadevi P. Bhansali v. Pushpadevi K. Agrawal reported at 2005 All MR (Cri) 3075 considered the question of tenability of complaint filed by Pushpa Agrawal in her own name, represented through holder of her power of attorney, Kailashkumar Ramraj Agrawal. In that case, the holder of power of attorney himself was examined. The complainant herself was not examined. The learned Magistrate directed issuance of process. Application of the accused for recalling order on the ground that the payee had not filed the complaint and had not been examined was rejected. Accused challenged the said order in revision. The Revisional Court also dismissed the revision. This order was challenged by the accused before this Court. After considering the several judgments, including that in Dr. Pradeep Mohanbay''s case the learned single Judge concluded as under, in paragraph 29 of the judgment:

29. The conclusions which this Court arrived at are as follows:

(i) filing of complaint by such person through power of attorney would be perfectly legal and competent.

(ii) that the complainant alone being a witness of transaction has himself to depose in support of complaint either at the stage of issuance of process or whenever.

(iii) If the transactions are witnessed by the power of attorney himself as an agent of the payee, such power of attorney alone can be a witness and his being a power of attorney cannot disentitle him from being a witness.

(iv) When the transactions are witnessed by the complainant and power of attorney or any other witness or witnesses in the whole or in part, all such persons will have to be the witness of the case, and the power of attorney shall not be disentitled from being examined as witness just because he holds a power of attorney.

12. Advocate Shri Bhagwani for the appellant in Criminal Appeal No. 496 of 2008 submitted that this controversy has been set at rest by a recent judgment of the

Apex Court in Shankar Finance & Investments v. State of A.P. reported at (2008) 3 SCC (Cri) 558 : AIR 2009 SC 422. In that case, the question specifically considered by the Supreme Court was whether the complaint u/s 138 of the Negotiable Instruments Act signed by the holder of Power of Attorney is not maintainable. The Court held in paragraph 11 as under (Para 9 of AIR):

11. The next question is whether a proprietary concern carries on business through an attorney holder, whether the attorney holder can lodge the complaint ? The attorney holder is the agent of the grantor. When the grantor authorises the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder, and not by the attorney holder in his personal capacity. Therefore where the payee is a proprietary concern, the complaint can be filed : (i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the "payee"; (ii) the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor; and (iii) the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor....

13. As to the question as to who should be examined in place of the complainant before issuance of process, the observations of the Court in paragraphs 14 and 15 of the judgment may be usefully reproduced as under (Para 12 of AIR):

14. The High Court has referred to the fact that the sworn statement before the learned Magistrate was of the attorney holder of the payee and not by the payee in person. According to the tenor of the order of the High Court, this was also irregular. But we find nothing irregular in such a procedure. It is now well settled that the object of Section 200 of the Code in providing for examination of the complainant and his witnesses by the court is to satisfy itself about the existence of a prima facie case against the person accused of the offence and to ensure that such person is not harassed by false and vexatious complaints by issue of process (see Nirmaljit Singh Hoon Vs. The State of West Bengal and Another, .

15. Where the proprietor of the proprietary concern has personal knowledge of the transaction and the proprietor has signed the complaint, he has to be examined u/s 200 of the Code. A power of attorney holder of the complainant who does not have personal knowledge, cannot be examined. But where the attorney holder of the complainant is in charge of the business of the complainant payee and the attorney holder alone is personally aware of the transactions, and the complaint is signed by the attorney holder on behalf of the complainant payee, there is no reason why the attorney holder cannot be examined as the complainant....

The Court concluded in paragraph 16 as under:

16. In regard to business transactions of companies, partnerships or proprietary concerns, many a time the authorised agent or attorney holder may be the only

person having personal knowledge of the particular transaction; and if the authorised agent or attorney holder has signed the complaint, it will be absurd to say that he should not be examined u/s 200 of the Code, and only the secretary of the company or the partner of the firm or the proprietor of a concern, who did not have personal knowledge of the transaction, should be examined. Of course, where the cheque is drawn in the name of the proprietor of a proprietary concern, but an employee of such concern (who is not an attorney holder) has knowledge of the transaction, the payee as complainant and the employee who has knowledge of the transaction, may both have to be examined. Be that as it may. In this case we find no infirmity.

13-A. In view of this authoritative pronouncement by the Apex Court, there can be no doubt that the complaint can be filed through the holder of power, of attorney and such power of attorney can also be examined in place of the complainant if he has personal knowledge of the transaction in question or the bills had been signed by him. This judgment of the Apex Court came to be delivered on 26-6-2008 and this was not available to the learned Single Judge deciding Roy Joseph, 2008 (2) Bom R 344 on 1-2-2008. In view of this, later pronouncement by Apex Court in Roy Joseph may no longer be held as good law. It seems that in Criminal Case No. 833 of 2005 (Durgadevi v. Shalikram) the holder Of Power of Attorney was brother-in-law of the proprietor of the business and was looking after the business on her behalf. Since the said holder of power of attorney had personal knowledge of the transaction, he was rightly examined in place of the complainant. Hence, on this ground the accused could not have been acquitted.

14. In view of this, the judgment impugned in Criminal Appeal No. 496 of 2008 is set aside. The matter is remanded back to the trial Court for fresh decision on merits.

15. As to Criminal Appeal No. 494 of 2008, the complaint in this case was not filed in the name of payee. The holder of power of attorney had projected himself as the complaint. Therefore, in view of observations of the Supreme Court in Shankar Finance & Investments v. State of A.P. AIR 2009 SC 422 such complaint could not have been entertained.

16. In view of this, the judgment, impugned in Criminal Appeal No. 494 of 2008 cannot be faulted.

17. Criminal Appeal No. 494 of 2008 is consequently dismissed.