

(2007) 07 MAD CK 0090

In the Madras High Court

Case No : Criminal R.C. No. 739 of 2007 and M.P. No's. 1 and 2 of 2007

Vijayakumar

APPELLANT

Vs

Amirthavalli

RESPONDENT

Date of Decision : 25-07-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 302
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2007) CriLJ 4475

Hon'ble Judges : K.N. Basha, J

Bench : Single Bench

Advocate : M.C. Swamy, for the Appellant; K.V. Sridharan, for the Respondent

Judgement

K.N. Basha, J.—Mr. M.C. Swamy, learned Counsel appearing for the petitioner submits that the petitioner has come forward with this

petition seeking for the relief of setting aside the order passed by the learned Judicial Magistrate No. II, Chidambaram in C.M.P. No. 462 of 2007

in C.C. No. 655 of 2006 allowing the petition filed u/s 302 Cr.P.C seeking permission to the complainant's husband to conduct the prosecution

on behalf of the complainant.

2. Learned Counsel for the petitioner submits that the learned Magistrate has passed the order without considering the infirmities involved in this

matter in respect of power of attorney given in favour of the husband of the complainant. It is contended by the learned Counsel for the petitioner

that any appointment of power of attorney should be processed by an appropriate order of the Court. Therefore, it is contended by the learned

Counsel for the petitioner in this case the power of attorney was executed prior to the filing of the complaint and the respondent/complainant has

not obtained any Court order for execution of such power of attorney. Learned Counsel for the petitioner also placed reliance on the decision of

the Honourable Supreme Court reported in 2005 SAR (Cri) 8 (Jimmy Jahangir Madan v. Bolly Cariyappa Hindle (D) By Lrs.).

3. Per contra, learned Counsel appearing for the respondent contended that there is no infirmity or illegality in the order passed by the learned

Magistrate allowing the respondent/complainant to be represented by her husband. Learned Counsel for the respondent submits that irrespective

of the power of attorney executed in favour of the husband of the respondent/complainant, the respondent/complainant filed a petition u/s 302

Cr.P.C. to permit the respondent's/complainant's husband to conduct the prosecution on behalf her. It is also submitted by the learned Counsel

for the respondent that the respondent/complainant also executed the power of attorney document on 08.02.2007 authorising her husband to

prosecute the complaint on her behalf, as she has to go to Canada to assist her pregnant daughter for delivery. Learned Counsel for the respondent

also placed reliance on the very same decision relied by the learned Counsel for the petitioner cited above and yet another decision of the

Honourable Supreme Court reported in (2007) 2 SCC (Cri) 63 (Rashida Kamaluddin Syed v. Sk. Saheblal mardan) in support of his contention.

Learned Counsel for the respondent contended that in the latest decision namely, (2007) 2 SCC (Cri) 63, the Honourable Apex Court has made a

reference about the decision relied on by the learned Counsel for the petitioner i.e. 2005 SAR (Cri) 8 (Jimmy Jahangir Madan v. Bolly Cariyappa

Hindle (D) By Lrs.).

4. I have carefully considered the rival contentions put forward by either side and also perused the impugned order and other materials available on

record. It is seen that the petitioner is facing trial for the alleged offence u/s 138 Negotiable Instruments Act. The only grievance of the petitioner is

that the respondent/complainant representing through her husband to the effect that the power of attorney, said to have been executed by the

respondent/complainant in favour of her husband authorising him, to pursue the complaint in this case is not registered after obtaining permission

from the competent Court. At the out set, it is to be stated that such contention of the learned Counsel for the petitioner is unacceptable and

unsustainable in law in view of the provision u/s 302 Cr.P.C. under which provision, the respondent/complainant has filed a petition and sought for permitting her to be represented by her husband. The provision u/s 302 Cr.P.C. reads here under;

302. Permission to conduct prosecution:-(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission;

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader.

A reading of the above said provision namely 302 Cr.P.C makes it crystal clear that the said provisions does not contemplate about authorising

any person by way of any power of attorney document, but on the other hand, enables a person to represent the complainant after seeking permission from the concerned Court u/s 302 Cr.P.C.

5. It is pertinent to note that even the decision relied on by the learned Counsel for the petitioner namely, 2005 SAR (Cri) 8 (Jimmy Jahangir

Madan v. Bolly Cariyappa Hindle (D) By Lrs.) is also not helpful to advance his contention. On the other hand, it is very much in favour of the

contention put forward by the learned Counsel for the respondent. The Honourable Supreme Court has held in the said decision that u/s 302

Cr.P.C a party can make an application himself to continue the prosecution or the same can be made by a pleader; Power of attorney holder can

represent the concerned party. It is also made very clear by the Honourable Supreme Court in the very same decision that the condition precedent

for appointment of a person should have been preceded by grant of permission of the Court u/s 302 Cr.P.C. The exact finding of the Apex Court

in the said decision is extracted hereunder;

6....

What seems to be a condition precedent is that his appointment should have been preceded to grant of permission of the Court. It is for the Court

to consider whether such permission is necessary in the given case.

6. In yet another latest decision of the Honourable Supreme Court relied on by the learned Counsel for the respondent namely, (2007) 2 SCC

(Cri) 63 (Rashida Kamaluddin Syed v. Sk. Saheblal mardan), the Honourable Apex Court has categorically held in paragraphs 19 and 20 as

follows;

19. Our attention has also been invited by the learned Counsel for the respondents to a recent case in Jimmy Jahangir Madan Vs. Bolly Cariyappa

Hindley (Dead) by LRs., a complaint was filed by one B against the accused u/s 138 of the Negotiable Instruments Act in which cognizance had

been taken. During trial, however, the complainant died leaving behind her son and daughter who executed general power of attorney in favour of

two persons. The power-of-attorney holders filed applications u/s 302 of the Code permitting them to continue the prosecution. The prayer was

contested, but the Magistrate allowed the application granting permission to continue prosecution. The High Court confirmed the order of the trial

Court which was challenged by the accused in this Court.

20. Though this Court allowed the appeal holding that the Courts below were not justified in granting such permission since it was made by the

power of attorney, it was held that a person other than a complainant could continue prosecution. The Court, therefore, while setting aside the

orders granted liberty to the heirs of the complainant to file fresh application u/s 302 of the Code.

In the above said two paragraphs the Honourable Supreme court has made a reference to its earlier decision in Jimmy Jahangir Mada v. Bolly

Cariyappa Hindley and finally the Honourable Supreme Court has held that there is absolutely no illegality has been committed by the Courts

below after permitting the legal heir of the complainant to continue the proceedings by referring to Section 302 Cr.P.C. The well settled principle of

law laid down by the Honourable Apex Court is squarely applicable to the facts of the instant case. In this case also the wife is the complainant and

she has filed a complaint for the alleged offence u/s 138 Negotiable Instrument Act against the petitioner/accused. It is seen that the

respondent/complainant has to go to Canada to assist her pregnant daughter for delivery. Therefore, the respondent/complainant has rightly filed a

petition, as contemplated u/s 302 Cr.P.C, seeking permission of the Court to permit the respondent/complainant to be represented by her husband to conduct the prosecution on her behalf. This Court is unable to find any illegality or infirmity in the impugned order passed by the learned Magistrate allowing the petition filed u/s 302 Cr.P.C. warranting the interference of this Court. Therefore, this Court is constrained to dismiss the revision as devoid of merits. It is also seen that the case is pending right from the year 2005 and therefore, this Court is also constrained to direct the learned trial Magistrate to complete the trial as expeditiously as possible and more particularly within a period of two months from the date of receipt of a copy of this order. Consequently, connected miscellaneous petitions are closed.